



15 January 2021

Victorian Law Reform Commission
GPO Box 4637
Melbourne VIC 3001

Via email: law.reform@lawreform.vic.gov.au

Dear Commissioner

Improving the Response of the Justice System to Sexual Offences

Introduction

1. Rape & Domestic Violence Services Australia ("RDVSA") welcomes the opportunity to participate in the Victorian Law Reform Commission's review, "Improving the Response of the Justice System to Sexual Offences." We appreciate the extension of the due date for our submission from 23 December 2020 to 22 January 2021.
2. RDVSA is a non-government organisation that provides a range of trauma specialised counselling services for those who have experienced sexual, domestic or family violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; the counselling service and support for people experiencing domestic and family violence across Australia and the LGBTIQ+ violence counselling service. In the 2019/20 financial year, RDVSA provided 27,793 occasions of service to 10,218 clients nationally. 88% of callers identified as female, and 90% identified as someone who had experienced sexual, domestic and/or family violence.
3. In the 2019-2020 financial year, there were 877 first time contacts to our services from Victoria (10% of new clients). Although a higher proportion of our clients make contact from within NSW, we appreciate the opportunity to draw upon our experience and advocacy to make a contribution to this crucial review of the justice system's response to sexual offences in Victoria. We do not propose to address all Issues Papers, nor all aspects of the Issues Papers we do address.

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Counselling Services

24/7 NSW Rape Crisis:	1800 424 017
Domestic Violence Services:	1800 943 539
Sexual Assault Counselling Australia:	1800 211 028
LGBTIQ+ Violence Service:	1800 497 212
rape-dvservices.org.au	

Language and terminology

4. In this submission, RDVSA uses the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is designed to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury.
5. RDVSA uses the term *people who have experienced sexual violence* rather than the terms victims or survivors. This language acknowledges that, although experiences of violence are often very significant in a person's life, they nevertheless do not define that person. Moreover, the process of recovery from trauma is complex, multifaceted and non-linear and will often involve experiences of survival in combination with experiences of victimisation. However, when addressing issues relating to criminal proceedings, RDVSA will use the terms, "complainant" or "victim-survivor" where appropriate.
6. RDVSA uses gendered language when discussing sexual, family and domestic violence. This reflects the fact that sexual, family and domestic violence are predominantly perpetrated by men against women. However, we acknowledge that:
 - sexual, domestic and family violence is also perpetrated against men and boys¹
 - women can also be perpetrators of sexual, domestic and family violence
 - sexual violence occurs within LGBTIQ+ relationships at a similar rate to sexual violence within heterosexual relationships²
 - sexual violence is perpetrated against transgender and gender-diverse people at a higher rate than against cis gender people.³

Issues Paper B – Sexual Offences: Key Issues in the Criminal Justice System

Question 1: Attitudes towards victim-survivors and understandings of sexual harm

7. There is a pressing need to address attitudes towards people who experience sexual violence and to challenge "rape myths" within society. Rape myths are "descriptive or prescriptive beliefs about sexual aggression (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay

¹ P. Tidmarsh and G. Hamilton, 'Misconceptions of sexual crimes against adult victims: Barriers to justice', *Trends & Issues in Crime and Criminal Justice*, No. 611, Australian Institute of Criminology, November 2020, 9-10.

² B. Fileborn 'Accounting for space, place and identity: GLBTIQ young adults' experiences and understandings of unwanted sexual attention in clubs and pubs' (2013) 22(1) *Critical Criminology* 81.

³ K. O'Halloran, 'Family Violence in an LGBTIQ context' (2015) 2 *Royal Commission In Brief*, <https://www.dvrcv.org.au/sites/default/files/Family-violence-in-an-LGBTIQ-context-Kate-OHalloran.pdf>; Australian Human Rights Commission, *Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017), <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>.

or justify sexually aggressive behaviour that men commit against women.”⁴ Rape myths function to limit the public conception of what counts as “real rape”. The popular image of “real rape” involves a surprise attack by an unknown, often armed, sexual deviant. It occurs in an isolated but public location and the person who experiences the violence sustains serious physical injury, either as a result of the violence or her efforts to resist the attack. The reality is that most sexual violence does not conform to this template. Rather, sexual violence is commonly perpetrated by a friend or partner, in private spaces including the home, without significant physical injury.

8. Rape myths also dictate the expected response to sexual violence. For example, those who experience sexual violence are widely expected to physically resist or struggle, yell to draw the attention of others, terminate all contact with the perpetrator and immediately report the sexual violence. However, many people “freeze” during violence out of shock or self-protection, may not immediately identify the incident as sexual violence, and may not report the incident until weeks, months or years later.⁵
9. False allegations of sexual assault are extremely rare.⁶ The far greater and more persistent problem is that much sexual violence remains unreported and that those who experience this violence fear engaging with the criminal justice system. A recent study by the Australian Institute of Criminology noted that while reports of sexual offences in Australia have increased over recent years, attrition rates of sexual offences remained high and conviction rates low.⁷
10. Furthermore, extensive psychological and psychiatric research into the impact of sexual assault has demonstrated that many victim-survivors suffer highly adverse consequences as a result of the assault, leading to delay in complaint and the appearance of dissociation when recounting the events. It is not uncommon for accounts to be given in an apparently piecemeal manner.⁸
11. The laws in Victoria and other parts of Australia have undergone significant reform in recent decades in relation to sexual offences, jury directions and the admissibility of evidence in sexual assault proceedings. However, myths and misconceptions regarding sexual violence continue to exist and are alarmingly common in Australian society. In 2017, Australia’s National Research Organisation for Women’s Safety (“ANROWS”) published a report about the attitudes of Australians to violence against

⁴ H. Gerger, H. Kley, G. Bonner, F. Siebler, ‘The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English’ (2007) 33(5) *Aggressive Behaviour* 422, 423.

⁵ New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, Report 136 (December 2015), 25; P. Tidmarsh and G. Hamilton, above n 1, 3, 5-9.

⁶ NSW Law Reform Commission, *Report 148: Consent in relation to sexual offences* (September 2020) at [2.7]-[2.43], [2.68]; P. Tidmarsh and G. Hamilton above n 1, 4.

⁷ P. Tidmarsh and G. Hamilton above n 1, 1, 3; NSW Law Reform Commission, above n 6 at [2.7]-[2.43], [2.68].

⁸ J. Temkin, ‘“And always keep a-hold of nurse, for fear of finding something worse”: Challenging rape myths in the courtroom’ (2010) 13(4) *New Criminal Law Review* 710, 716-717.

women and gender equality.⁹ The report was based on responses of more than 17,500 Australians aged 16 years or over who participated in a telephone survey. There were a number of findings of concern:

- 7% of respondents were unaware that a woman's physical resistance is not required to satisfy a claim of sexual violence and a further 4% said they did not know,¹⁰
- one in six (16%) believed that many allegations of sexual assault are false and a further 9% said they did not know,¹¹
- nearly one in five (19%) were unaware that non-consensual sex in marriage is against the law, while 12% said they did not think it is illegal and 7% said they did not know,¹²
- nearly one in five (18%) disagreed with the proposition that women are more likely to be sexually assaulted by a man known to them than by a stranger,¹³
- 11% agreed that women who wait weeks or months to report sexual assault are probably lying,¹⁴
- 42% agreed that it is common for sexual assault accusations to be made as a form of revenge,¹⁵
- there was a high level of support for propositions that attribute responsibility to women for men's sexual aggression.¹⁶

12. Public perceptions of sexual violence may influence those who have experienced violence in their assessment of whether their experience of unwanted sexual contact amounts to a criminal offence. They may influence the decision about whether to make a complaint, since women may be reluctant to report where they believe that the prospects of conviction are low.¹⁷ Research demonstrates that a person who has experienced sexual violence will be less likely to report where they fear their account may not be believed or treated seriously by authorities, that the events would not meet the criminal standard, or that their chance of "finding fairness" in the justice system is poor.¹⁸ Importantly, they may also influence the decisions of police and prosecutors who act as gatekeepers to the justice system, either because of their personal biases or

⁹ K Webster et al, *Australians' attitudes to violence against women and gender equality: findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research Report 03/2018, Australia's National Research Organisation for Women's Safety ('ANROWS') (2017).

¹⁰ Ibid 48.

¹¹ Ibid 48.

¹² Ibid 51.

¹³ Ibid 52.

¹⁴ Ibid 84.

¹⁵ Ibid 86.

¹⁶ Ibid 89.

¹⁷ W. Larcombe, B. Fileborn, A. Powell, N. Hanley, N. Henry, "'I think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (un) Reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 613; NSW Law Reform Commission, above n 6 [2.44]-[2.46].

¹⁸ Ibid.

their tendency to pre-empt jury bias when assessing the prospects of successful prosecution.¹⁹

13. The ANROWS report identified a number of consequences associated with erroneous views about the veracity of sexual assault complaints, including negatively influencing the responses of police, prosecutors, judicial personnel and juries.²⁰ If myths about sexual assault are evident in society, "it is a reasonable assumption that they would also be evident within the courtroom."²¹ There is a well-established body of literature providing evidence of these attitudes and their influence. Mock jury research reveals that the assessment of a complainant's credibility can be adversely affected by inaccurate pre-existing attitudes about how a "real victim" would react.²²
14. Broad community education about the realities of sexual violence and the law of sexual assault is therefore critical both as a primary prevention strategy and to improve criminal justice outcomes.²³ In their 2010 report on family violence, the Australian and NSW Law Reform Commissions proposed that education and training about myths, facts and law in relation to sexual assault could be delivered to school students, teachers, parents and carers, social workers, guidance officers, nurses, doctors, police recruits and journalists.²⁴ RDVSA strongly supports this proposal. We deliver a number of training programs, including:²⁵
 - training on sex and ethics for young people aged 16 – 25 years
 - training to prevent sexual violence in universities, including respectful supervisory relationships
 - training for staff in licensed venues to support them in preventing, and responding to, sexual harassment and assault
 - responding with compassion to someone who has experienced sexual assault or domestic violence.

¹⁹ See for example, J. Temkin and B. Krahé, *Sexual assault and the justice gap: A question of attitude* (Oxford and Portland, Oregon: Hart Publishing, 2008), 178; W. Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27, 32; P. Tidmarsh and G. Hamilton, above n 1, 2; NSW Law Reform Commission, above n 6, [2.41].

²⁰ ANROWS, above n 9, 50; see also K. Peterson, 'Victim or villain?: The effects of rape culture and rape myths on justice for rape victims' (2019) 53 *Valparaiso University Law Review* 467, 489-490

²¹ R. Bain, 'Jury Directions under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016: A Long-Needed Success for Tackling Rape Myths or Another Measure Falling Short' (2018) 8 *Aberdeen Student Review* 39, 45, 58; NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals* (October 2019) at [8.2]; N. Taylor 'Juror attitudes and biases in sexual assault cases', *Trends and Issues in Crime and Criminal Justice*, No. 344, Australian Institute of Criminology, 2007, 2.

²² I. Callander, 'Jury Directions in Rape Trials in Scotland' (2016) 20 *Edinburgh Law Review* 76, 77; K. Peterson, above n 20, 485-486.

²³ NSW Law Reform Commission, above n 6, recommendation 10.4.

²⁴ Australian Law Reform Commission, NSW Law Reform Commission, *Family Violence – A National Legal Response, Final Report*, Volume 2, ALRC Report 114, NSWLRC Report 128 (October 2010) [26.104]-[26.105]-[26-108], recommendation 26-3; see also NSW Law Reform Commission, above n 6, recommendation 10.2.

²⁵ See RDVSA website at <https://www.rape-dvservices.org.au/training-and-professional-services>.

15. RDVSA believes that community education is vital to shift community standards and encourage ethical sexual practices.

Questions 2 & 3: Introducing a specialist court for sexual offences

16. RDVSA supports the establishment of specialist sexual violence courts that would bring together specialist legal actors and a coordinated system of support in order to facilitate a trauma-informed response to sexual violence.
17. A specialised approach would respond to the distinctive features of sexual offences and improve the responsiveness of the criminal justice system to the needs of those who have experienced sexual violence. Court specialisation involves “applying a specialist approach to a particular area of law, to be able to better address the complexities or sensitivities that area of law raises.”²⁶ As stated in the report of the NSW Criminal Justice Sexual Offences Taskforce:

Specialisation is considered desirable as it may lead to greater efficiency in the administration of justice, specialised knowledge, effective processing of cases, sharpening the skills of people concerned, consistency in decision making, specialists on the bench and in the legal profession.²⁷

18. The specific goals of specialisation differ according to the subject matter. For example, specialist drug courts, mental health courts and Indigenous sentencing courts each aim to improve the responsiveness of the criminal justice system to the needs of perpetrators. They adopt a problem-solving approach that invokes the principles of therapeutic justice.²⁸ In the context of sexual violence, specialist sexual violence courts aim to improve the responsiveness of the criminal justice system to the needs of the complainant, adopting a trauma-informed approach while upholding the right of the accused to a fair trial.
19. According to the New Zealand Law Commission (“NZLC”), specialisation in the context of sexual violence should be guided by two key objectives:
- to bring specialist judges and counsel together in a venue that enables robust fact-finding while reducing the risk of re-traumatisation of the complainant as much as possible; and
 - to facilitate a coordinated and integrated approach among the various organisations and people who deal with complainants in sexual violence cases.²⁹
20. The NZLC identified six “defining characteristics” that distinguish sexual violence from many other forms of criminal offending, summarised as follows:³⁰

²⁶ New Zealand Law Commission, above n 5, 12.

²⁷ NSW Attorney General’s Department, *Responding to sexual assault: The way forward*, (December 2005), 146.

²⁸ Ibid.

²⁹ New Zealand Law Commission, above n 5, 12.

³⁰ Ibid 23.

- Sexual violence usually occurs in private, without witnesses and often without evidence of physical harm or force. Evidentiary limitations may make it especially difficult to prove sexual offences to the criminal standard of proof.³¹
 - Sexual violence involves the violation of intimate physical and psychological boundaries. As a result, those who have experienced sexual violence may be especially reluctant to undergo invasive criminal justice processes that further violate their privacy, such as forensic medical examinations, police questioning and cross-examination.³²
 - Sexual violence is most commonly perpetrated by someone known to the victim-survivor, such as an acquaintance, partner or ex-partner. The existence of a prior relationship creates additional barriers to accessing the criminal justice system – both psychological and practical.³³
 - Sexual violence may result in complex psychological impacts. These impacts may reduce the capacity and willingness of people who have experienced sexual violence to access the criminal justice system. They may also lead legal actors, including police, prosecutors, judges and jurors, to form inaccurate judgments about the credibility of the complainant.³⁴
 - Those who experience sexual violence often have distinct needs that are incompatible with the criminal trial process.³⁵
 - The experience of sexual violence is frequently misunderstood by people without training or education in the area, primarily due to the prevalence of rape myths.³⁶
21. The fundamental problem is that the criminal justice system largely fails to take account of those distinguishing characteristics.³⁷
22. A specialist approach may improve the responsiveness of the criminal justice system to sexual offences in several ways. The Victorian Law Reform Commission ("VLRC") identified numerous advantages of a specialist approach in its 2004 report on sexual offences, including:
- enabling recognition of the unique features of sexual offences cases and the difficulties faced by complainants in such cases
 - providing an opportunity to develop case management procedures that are more sensitive to the needs of complainants
 - making it easier to provide physical facilities (for example separate waiting rooms) and technology (for example closed circuit television) to ensure that complainants feel safe
 - making it easier to identify barriers to participation in the criminal justice system by children, people with a cognitive impairment and people from Indigenous and

³¹ Ibid.

³² Ibid 23-24.

³³ Ibid 24.

³⁴ Ibid.

³⁵ Ibid 24-25.

³⁶ Ibid 25.

³⁷ Ibid 23-25.

- non-English-speaking backgrounds, and to develop systems for meeting their needs
- reducing delays
- providing an opportunity to develop support services for complainants alongside the criminal justice process
- facilitating exchange of information and resources between agencies that support court users
- symbolising the fact that sexual offences are taken seriously by the criminal law.³⁸

A trauma-informed approach

23. The most critical feature of any specialised sexual violence court is a trauma-informed approach that centres the needs of the complainant, while upholding the accused's right to a fair trial. Feminist scholarship has long recognised the criminal trial as analogous to a "second rape" – a secondary trauma that inhibits rather than facilitates healing.³⁹ Criminal trials for sexual offences are particularly distressing for complainants because of the nature of the crime, the role of consent with its focus on the credibility of the complainant, and the likelihood that the complainant and the accused knew each other before the alleged assault.⁴⁰ As Judith Herman describes, "[t]he wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings":⁴¹

Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative ... Indeed, if one sets out intentionally to design a system for proving symptoms of traumatic stress, it might look very much like a court of law.⁴²

24. A specialist sexual violence court should adopt a trauma-informed approach that modifies traditional criminal trial processes in order to better meet the distinct needs of complainants. At a minimum, a trauma-informed approach should aim to ensure that the requirements of participation in the criminal trial do not actively exacerbate trauma by again compromising the complainant's autonomy, privacy and sense of security.⁴³

³⁸ Victorian Law Reform Commission, *Sexual Offences, Final Report* (July 2004), 249-250.

³⁹ N. Henry, A. Flynn and A. Powell, 'The Promise and Paradox of Justice: Rape Justice Beyond the Criminal Law' in N. Henry, A. Flynn and A. Powell (eds) *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan: London, 2015) 1, 6.

⁴⁰ NSW Law Reform Commission, *Questioning of complainants by unrepresented accused in sexual offence trials*, Report 101 (June 2003), 10.

⁴¹ J. L. Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 574.

⁴² *Ibid.*

⁴³ W. Larcombe, above n 19, 34.

Re-traumatisation should not be accepted as the 'price' of seeking legal redress.⁴⁴ We acknowledge that the risk of re-traumatisation cannot be altogether eliminated. However, every effort should be made to reduce this risk as much as possible. This includes giving complainants the right to give evidence remotely or by way of other alternative means, in all cases.

25. Ideally, a trauma-informed approach should actively seek to meet the needs of those who have experienced sexual violence in a way that facilitates healing and recovery. This requires a shift in institutional attitudes and practices to ensure that complainants are treated with respect at every stage of the process and are assisted to access the information and support that they need in order to advance their recovery.⁴⁵

Wrap-around support

26. Effective support is a necessary precondition for those who have experienced sexual violence to access the criminal justice system. This may include practical, therapeutic, medical and legal support, received both directly after the act of sexual violence and on an ongoing basis.
27. A specialist court model may facilitate a case managed approach to service delivery that ensures community and government agencies "wrap-around" the complainant in order to address their specific needs.

Selection and training of judicial officers

28. The implementation of sexual offence legislation is significantly affected by the personal attitudes, knowledge and expertise of judicial officers. It is therefore critical that judicial officers are subject to appropriate selection criteria and training.
29. Specialisation may overcome inconsistencies and arbitrariness in the application of the law by encouraging the development of expertise in both substantive law and procedures relevant to sexual offences, including:
 - the rules of evidence that apply in sexual offence matters, such as those restricting questions about the complainant's sexual experience or reputation
 - provisions allowing for the use of alternative methods of giving evidence
 - dealing with child witnesses, for example determining competence and restricting cross-examination
 - the distinctive jury directions that may or must be given in sexual offence trials.⁴⁶

⁴⁴ Ibid 35.

⁴⁵ Ibid 34, 40-42.

⁴⁶ Victorian Law Reform Commission, above n 38, 172.

30. All personnel involved in sexual offence trials including judicial officers should be required to undertake thorough and ongoing training in relation to sexual, domestic and family violence. This training should cover:
- the dynamics, complexities and impacts of sexual violence, including sexual violence perpetrated within the context of domestic or family violence
 - the impacts and presentations of complex trauma
 - the principles of trauma practice
 - cultural competency when working with Aboriginal and Torres Strait Islander people, people from a culturally and linguistically diverse background, people with a disability, and lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) people.
31. In addition to holding the necessary qualifications, judicial officers presiding over sexual assault matters should be considered a suitable person to deal with matters of sexual violence by reason of their training, experience and character.⁴⁷

Vicarious trauma management

32. A specialised court for sexual violence matters may increase the risk of vicarious trauma for professionals working within this system.⁴⁸ This risk is real and significant and must be directly addressed if a specialist sexual violence court is adopted.
33. Vicarious trauma describes the negative psychological impacts experienced by people not directly affected by traumatic events but nevertheless exposed to them in some way.⁴⁹ Vicarious trauma is common amongst professionals working with people who have experienced sexual violence. The most reliable predictor of whether or not a person will experience vicarious trauma is their exposure to traumatic material.⁵⁰ Given that any work within a specialist sexual violence court will inevitably involve significant

⁴⁷ See for example, s.22(2)(b), *Family Law Act 1975* (Cth), which provides that Family Court judges are to be appointed on the basis that, "by reason of training, experience and personality, the person is a suitable person to deal with matters of family law."

⁴⁸ See for example, NSW Attorney General's Department, above n 27, 170; Australian and NSW Law Reform Commissions, above n 24, Chapter 32.

⁴⁹ See for example, C. R. Figley, 'Compassion fatigue as secondary traumatic stress disorder: An overview' in C.R. Figley (Ed.) *Compassion fatigue: Coping with secondary traumatic stress disorder in those who treat the traumatized* (New York, NY: Brunner/Mazel, 1995); L. A. Pearlman, 'Self-care for trauma therapists: Ameliorating vicarious traumatisation' in B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researcher, and educators* (2nd ed., Lutherville, MD: Sidran Press, 1995); Z. Morrison, 'Feeling heavy: Vicarious trauma and other issues facing those who work in the sexual assault field', *Australian Centre for the Study of Sexual Assault Wrap* (Melbourne: Australian Institute of Family Studies, 2007), 4.

⁵⁰ See, for example: N. Kassam-Adams, 'The risks of treating sexual trauma: Stress and secondary trauma in psychotherapists' in B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researchers, and educators* (2nd ed., Lutherville, MD: The Sidran Press, 1995); M. D. Salston and C. R. Figley, 'Secondary traumatic stress effects of working with survivors of criminal victimisation' (2003) 16(2) *Journal of Traumatic Stress* 167; L. J. Schauben, and P. A. Frazier 'Vicarious trauma: The effects on female counsellors of working with sexual abuse survivors' (1995) 19 *Psychology of Women Quarterly* 49.

contact with traumatic material, vicarious trauma should be understood as a work health and safety issue within this environment.

34. Although the risk of vicarious trauma cannot be altogether eliminated, research suggests that vicarious trauma effects may be ameliorated if proactively addressed at an organisational level.⁵¹ This requires a comprehensive program of strategies aimed to provide support at both an individual and organisational level.
35. On the basis of extensive research and clinical expertise, RDVSA has developed a best practice Vicarious Trauma Management Program⁵² that has been implemented internally for over ten years. The program has also been implemented externally through training and consultation undertaken with other organisations and individuals working with people who have experienced, or are at risk of experiencing, trauma. In 2007, the program won the WorkCover NSW Safety Work Award for its approach.
36. The RDVSA program includes five key components: education, risk reduction, monitoring, early intervention and offsetting symptoms:
 - **Education** includes strategies to ensure that workers are aware of the risk of vicarious trauma and have the knowledge and skills necessary to identify it early in themselves and in their subordinate staff. Education is critical to establishing a culture in which staff feel they can discuss vicarious trauma impacts without fear that it will impact their performance appraisal.
 - **Risk reduction** includes strategies to ensure that vicarious trauma symptoms do not escalate to become maximal impact symptoms. This may include strategies to encourage ongoing communication with peers through opportunities to debrief, varying workers' caseloads and facilitating trauma-free areas and activities.
 - **Monitoring** involves regular monitoring strategies designed to provide a reflection of the severity and type of vicarious trauma symptoms present for individual workers and the collective workforce. This may be achieved through psychometric testing, monitoring associated factors such as unplanned absence and retention rates, and comprehensive supervision practices.
 - **Early intervention** includes the use of strategies to intervene in vicarious traumatisation immediately upon the discovery of symptoms. This may include making on-call counselling support available for professionals who notice vicarious trauma impacts.
 - **Offsetting symptoms** involves longer term proactive strategies that seek to offset the particular symptoms that each individual is most likely to experience. This may

⁵¹ M. S. Cerney, 'Treating the "heroic treaters"' in C. R. Figley (Ed.), *Compassion Fatigue* (New York: Brunner/Mazel 1995); B. S. Sansbury, K. Graves, and W. Scott 'Managing traumatic stress responses among clinicians: Individual and organizational tools for self-care' (2015) 17(2) *Trauma* 114; L. Sexton 'Vicarious traumatisation of counsellors and effects on their workplace' (1999) 27(3) *British Journal of Guidance and Counselling* 393.

⁵² See <https://www.rape-dvservices.org.au/resources/for-psychologists-and-counsellors/vicarious-trauma>

involve developing individual self-care plans with staff and providing financial support for activities that may offset vicarious trauma symptoms.

37. Although implementing a vicarious trauma management program inevitably involves significant up-front expenditure, our experience is that a proactive approach has the capacity to reduce both human and financial costs over time, resulting in lowered insurance premiums, fewer insurance claims, and reduced costs associated with sick leave, staff attrition and responding to maximal vicarious trauma impacts.
38. If the jury system continues to operate in sexual violence matters (discussed below), jurors should also be given access to a comprehensive program of vicarious trauma management.

Question 4: The role or nature of the jury in trials for sexual offences

39. RDVSA recognises that trial by jury is a pivotal feature of our criminal justice system. Juries perform many valuable functions including representing community values in the criminal justice system, safeguarding against arbitrary or oppressive government and promoting public confidence and understanding of the criminal justice system.⁵³
40. However, RDVSA also agrees with the observation of the NZLC in its review of the justice system's response to sexual violence that "[t]he nature of sexual violence is such that, as a form of criminal offending, it is not well-suited to fact-finding by a jury comprised of 12 laypersons."⁵⁴

Concerns about jury trials in sexual offence proceedings

41. Our key concerns about the role of juries in sexual assault proceedings are:
 - myths and misconceptions surrounding sexual violence impede the ability of juries to make accurate and informed decisions about the credibility of sexual violence allegations
 - the presence of a jury may have a harmful impact on the complainant and increase the risks of re-traumatisation
 - the lack of transparency around juror decision-making means that misapplications of the law may go unchallenged
 - jurors who sit in sexual violence matters are at significant risk of vicarious trauma.
42. Concerns about the soundness of jury decision-making are not specific to sexual violence matters.⁵⁵ Critics of the jury system have long questioned the capacity of

⁵³ NSW Law Reform Commission, *Jury Directions*, Report 136 (November 2012), 3.

⁵⁴ New Zealand Law Commission, above n 5, 9.

⁵⁵ NSW Law Reform Commission, above n 53, 4.

laypeople to negotiate the complexities of the modern criminal trial.⁵⁶ However, there are several distinct characteristics about sexual violence proceedings that mean the risk of poor decision-making is heightened in these matters.

43. First, "the field of sexual violence is one that is commonly misunderstood by people without training or education in the area."⁵⁷ RDVSA recognises that juries are not intended to be experts. Rather, their function is to apply combined common sense and life experience to ascertain the facts in a criminal case.⁵⁸ However, as the NZLC states⁵⁹:

... this function is inhibited when applied to an area of human conduct that is frequently subject to misconceptions and misunderstandings. As such, the role of fact-finder might be better filled by someone with prior training and education in the particularities of sexual violence.

44. The prevalence of "rape myths" means that sexual violence is more likely to be subject to misconceptions than other types of crime. These myths promote a narrow conception of what constitutes "real rape" and of the expected response of those who have experienced the sexual violence. Individual complaints that depart from this prescribed template are less likely to be accepted by jurors as genuine. As a result, rape myths "deny, downplay or justify" most complaints of sexual violence and thereby reduce the likelihood that genuine complaints will result in conviction.⁶⁰

45. A significant body of research demonstrates that jurors commonly rely on myths and biased assumptions when determining guilt in sexual violence matters.⁶¹ For example, a 2007 study conducted by the Australian Institute of Criminology revealed that:

... pre-existing juror attitudes about sexual assault not only influence their judgements about the credibility of the complainant and guilt of the accused, but also influence judgements *more than the facts of the case presented* and the manner in which the testimony is given.⁶²

46. Two studies conducted by Ellison and Munro in 2009 also demonstrate the dominant influence of rape myths on juror deliberations. In assessing the credibility of an "acquaintance rape", Ellison and Munro found that jurors commonly relied on the perception that acquaintance rapes arise because of "miscommunication" and that responsibility for avoiding such miscommunication lies asymmetrically with the

⁵⁶ Ibid.

⁵⁷ New Zealand Law Commission, above n 5, 111.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Gerger et al, above n 4, 423.

⁶¹ See, for example, Larcombe, above n 19, 32; L. Ellison and V. Munro, 'Of "Normal Sex" and "real rape": Exploring the use of socio-sexual scripts in (mock) jury deliberation' (2009) 18 *Social Legal Studies* 291; N. Taylor, above n 21.

⁶² Taylor, above n 21, 2, emphasis added.

woman.⁶³ Jurors also exhibited a widespread belief that false rape allegations are common.⁶⁴

47. In addition, Ellison and Munro found that "common reactions to rape lie outside the knowledge and experience of the average juror".⁶⁵ Their study showed that jurors often drew negative inferences from a complainant's failure to appear obviously distressed while testifying, to report the offence immediately or to fight back physically during the course of the assault – despite the fact that these are common responses among genuine victim-survivors of sexual violence.⁶⁶ These misconceptions were encouraged by defence lawyers who had a tendency to portray the ordinary responses of sexual offence complainants as unusual or abnormal in order to discredit complainant testimony.⁶⁷
48. The capacity of jurors to make accurate and informed decisions in sexual violence matters is further impacted by the "CSI effect". This effect describes a phenomenon that has emerged as a result of the influence of crime television shows, whereby jurors are increasingly reluctant to convict in absence of "hard" scientific evidence.⁶⁸ This trend is especially problematic in the context of sexual violence. As stated by the NZLC⁶⁹

While "hard" evidence can quite legitimately be expected to make a case more robust, that has ramifications for sexual violence cases where there is often no conclusive evidence of physical harm or injury resulting from the incident.

49. When consent is the key issue, as is often the case in adult sexual assault proceedings, there is often little evidence that may traditionally be regarded as corroborative of the complainant's account. A tendency to acquit in the absence of "hard" evidence is less likely among judicial officers who have more experience in weighing other forms of evidence, particularly if specialist sexual violence judicial officers are selected.
50. Another key problem is that the presence of a jury may amplify the harm experienced by sexual violence complainants when participating in the criminal justice system.⁷⁰ This is because:

⁶³ L. Ellison and V. Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Jury Study' (2010) 13(4) *New Criminal Law Review* 781, 792.

⁶⁴ *Ibid* 798.

⁶⁵ L. Ellison and V. Munro, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) *The British Journal of Criminology* 363, 363.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

⁶⁸ NSW Law Reform Commission, above n 53, 80.

⁶⁹ New Zealand Law Commission, above n 5, 112.

⁷⁰ New Zealand Law Commission, above n 5, 113.

- The need for a complainant to divulge details about their experience of sexual violence to a panel of 12 peers is likely to cause more distress than the requirement to give evidence before a single judge.⁷¹
 - The presence of a jury may incentivise defence lawyers to behave in ways that cause excessive harm to complainants, by drawing on rape myths to encourage juror misconceptions about sexual violence or adopting cross-examination techniques that amplify the "theatre" of the criminal trial.⁷²
 - Jury trials result in additional delay which may have negative impacts on the complainant's psychological wellbeing, on her domestic and social circumstances, and on the evidence itself.⁷³
51. The requirement to serve as a juror in a sexual assault case may also cause jurors to experience stress or vicarious trauma. A recent study found that approximately 70% of jurors in Australia experience some form of stress as a result of their experience.⁷⁴ The primary sources of juror stress include the routine aspects of jury duty, such as the disruption to jurors' daily lives, factors relating to the complexity of the evidence, elements of the decision-making task itself and the secrecy imposed on deliberations.⁷⁵ However, studies show that exposure to victim-survivor accounts of suffering and gruesome evidence may increase the risk of juror stress.⁷⁶
52. One 2009 British study found jurors who sat on "traumatic" trials (including murder, kidnapping and aggravated sexual assault) were at a higher risk of vicarious trauma.⁷⁷ Jurors in these trials experienced nearly three times as many PTSD-related symptoms as those in non-traumatic trials.⁷⁸ Common symptoms included restless sleep, sadness, feeling isolated, headaches, waking at night, and a constant feeling of tension.⁷⁹ Notably, the study also found that "[w]omen as a group appear to be more vulnerable than men, especially when the trial touches upon a past traumatic event that has been personally experienced."⁸⁰
53. These findings are concerning when applied to sexual violence trials, given the significant possibility that jurors may have been personally exposed to sexual violence. According to the 2016 Personal Safety Survey, one in five women (18% or 1.7 million)

⁷¹ Ibid.

⁷² Ibid.

⁷³ New Zealand Law Commission, above n 5, 63-64.

⁷⁴ L. Maher, 'Emotional toll of jury duty revealed by jurors sitting in judgment at criminal trials', ABC News Online, 13 July 2017, <http://www.abc.net.au/news/2017-07-13/jurors-reveal-emotion-toll-of-jury-duty/8701348>.

⁷⁵ J. Goodman-Delahunty et al, 'Practices, policies and procedures that influence juror satisfaction in Australia', *Research and public policy series No. 87* (Canberra: Australian Institute of Criminology, 2009), 3-4.

⁷⁶ Ibid 5.

⁷⁷ N. Robertson, G. Davies and A. Nettleingham, 'Vicarious Traumatization as a Consequence of Jury Service' (2009) 48(1) *The Howard Journal* 1.

⁷⁸ Ibid 4.

⁷⁹ Ibid 8.

⁸⁰ Ibid 9.

and one in twenty men (4.7% or 428,000) had experienced sexual violence.⁸¹ In addition, one in two women had experienced sexual harassment (53% or 5 million).⁸² An average random selection of 12 jurors would therefore in most cases include at least one person with personal exposure to sexual violence. The fact that a juror may be excused may assist an individual juror, but it also has the potential to skew the representation of the panel.

Benefits of judge alone trials in sexual offence proceedings

54. One of the benefits of trial by judge alone is the requirement that judges provide reasons for their verdicts.⁸³ By contrast, juries are not required to provide reasons for their decisions, making it difficult to detect misapplications of the law to the facts of the case. While this critique applies to all criminal matters, it is especially pertinent to sexual violence cases given the low conviction rates relative to other crimes⁸⁴ and the increased risk in these cases for fact-finders to make decisions with reference to extra-legal factors, including adherence to "rape myths". There is a significant public interest in understanding the reasons why sexual violence cases result either in conviction or acquittal.
55. Judgments on verdicts also have the capacity to educate the legal profession and the community generally about the realities of sexual violence and what does (and does not) amount to consent. For example, in the judgment on verdict in a judge-alone trial for sexual offences in the NSW District Court, the judge explained the fundamental principles applicable to the trial and the law regarding consent as well as his reasons for accepting the complainant's account and rejecting the accused's.⁸⁵ Among the trial judge's findings were that:
- it was not at all unusual that the complainant delayed reporting the sexual assault by a week
 - the complainant's credibility was not devalued by gaps in her memory regarding the complaint she made to police or by the fact that she did not describe the offences in the same way each time
 - the complainant's act of cuddling with the accused at a club earlier that night and later snuggling with him on a couch "could not be regarded as an invitation for a sexual encounter."

56. His Honour concluded:⁸⁶

⁸¹ Australian Bureau of Statistics, *Personal Safety Survey 2016*, Catalogue Number 4906.0, released 8 November 2017, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>.

⁸² *Ibid.*

⁸³ Section 420F, *Criminal Procedure Act 2009* (Vic), similar to s.133(2), *Criminal Procedure Act 1986* (NSW).

⁸⁴ P. Tidmarsh and G. Hamilton, above n 1, 1.

⁸⁵ *R v Shanmugam* [2020] NSWDC 482 per Haesler SC DCJ:

<https://www.caselaw.nsw.gov.au/decision/17429682d87c736bd433ebb5>

⁸⁶ *Ibid* [113]-[116].

The acts alleged occurred. The complainant did not consent. Being flirty or skanky, cuddling, wearing sparse summer clothes, drinking and smoking a bong⁸⁷ are not indicators of consent to sexual intercourse. In some situations cuddling and flirting or spooning can of course be indicators of consent to sexual touching but here I find nothing done by the complainant fell into that category.

At times on the night of the 6th and morning of the 7th January 2019 the accused thought the complainant was keen on him but then at other times it was clear she was not. He bought condoms expecting to use them. He went back to the complainant's home expecting to use them. He went upstairs and asked GH [the complainant's friend] not to sleep upstairs expecting to use them. But, at no time did he ask the complainant a direct consent question and at no time did she give him her consent to what occurred.

The sleeping arrangement was not an indication of consent, to the contrary. When he was alone with the complainant after GH went to the bathroom he took his opportunity. He did not heed the obvious signals given by the complainant moving and brushing him away.

He was, I accept tired, still drunk and affected by cannabis but alcohol and cannabis intoxication cannot at law be taken into account by me in assessing his state of mind. Even if tired and intoxicated and affected by cannabis it would have been obvious that she did not want him touching her let alone having sexual intercourse with him. He knew what consent was. He knew no consent was being given, he knew she was not consenting.

57. In the above example, his Honour's reasons validate the complainant's account and serve an educative function through an explanation of the law and its application to the facts of the case.
58. RDVSA acknowledges that generalist judges may be no less susceptible to inaccurate social world knowledge about sexual violence than potential jurors.⁸⁸ However, a system of *specialist* judges has the capacity to overcome several of the problems associated with juries. In particular:
 - Specialist judges could be provided with ongoing training and education in order to overcome the impact of "rape myths" and ensure decision-making is based on accurate and up-to-date social science research. It is more feasible to provide ongoing and in-depth training to a limited pool of judges than to do so afresh for each jury empanelled on a sexual violence case.⁸⁹
 - Judges may be less prone to the "CSI effect" since they are more experienced and less apprehensive about the evaluation of "soft" forms of evidence.

⁸⁷ The acts relied on by the accused in his defence.

⁸⁸ New Zealand Law Commission, above n 5, 115.

⁸⁹ Ibid.

- Specialist judges could be selected on the basis of their suitability to deal with matters of sexual violence.⁹⁰
 - Specialist judges could be provided with ongoing training in relation to trauma practice.
 - Judges are required to provide reasons for their decisions. This requirement may mitigate the risk of harm to the complainant by enhancing transparency, certainty, sensitivity and acknowledgement of the complainant's experience.
 - The requirement for judges to provide reasons for their decisions also means that misapplications of the law are more likely to be identified and challenged.
 - Greater transparency in the way the law is applied means that future law reform efforts may be informed by actual practice.
 - Judges could self-exclude from specialist sexual violence roles where they have been personally impacted by sexual violence and may be at greater risk of vicarious traumatisation.
 - Specialist judges could be provided with access to a best practice vicarious trauma management program. Ensuring that judges access comprehensive support is more feasible than providing this kind of support to jurors.
59. RDVSA understands that Victorian legislation recognises the role of the jury in criminal trials,⁹¹ and that judge-alone trials on indictment are relatively new to Victoria, with legislation being introduced in the context of the COVID-19 pandemic (currently due to expire on 26 April 2021).⁹² RDVSA also appreciates that the accused's consent is an essential prerequisite. However, extending the availability of judge-alone trials beyond the pandemic has the potential to reduce harm to complainants and lead to fairer outcomes in sexual assault proceedings.

Question 5: Reforms to address delays

60. It is widely recognised that excessive delay in criminal justice processes can have a significant impact on access to justice. The impact of delay may be especially acute in the context of sexual violence. As discussed in detail by the New Zealand Law Commission, delay may have a disproportionately negative impact in sexual violence matters due to the distinct characteristics of sexual violence:

Delay may worsen the psychological impact of sexual violence on the complainant, by forcing the complainant to engage with traumatic memories in a way that is counterproductive to their process of recovery.⁹³

61. Given that sexual violence is commonly perpetrated by someone known to the complainant, delay may have an especially negative impact on the domestic and social

⁹⁰ Akin to the eligibility requirement for Family Court judges in s 22(2)(b) of the *Family Law Act 1975* (Cth).

⁹¹ Section 5(1)(a), *Jury Directions Act 2015* (Vic).

⁹² Part 9.2, *Criminal Procedure Act 2009* (Vic); see s.420ZN regarding the date of repeal.

⁹³ New Zealand Law Commission, above n 5, 63-64.

circumstances of a complainant.⁹⁴ Delays cause fatigue in complainants, who may express a preference for proceedings to be terminated over having to bear lengthy and unpredictable adjournments prior to trial.

62. RDVSA recognises that there are already specific legislative provisions and practice directions in Victoria designed to improve case management of sexual assault trials.⁹⁵ However, a specialist court model may facilitate the implementation of time frames and case management practices by allowing for pro-active case management and a streamlined process.

Issues Paper C – Defining Sexual Offences

Question 2: Communicative consent and reasonable belief in consent

The definition of consent

63. RDVSA submits that the definition of consent as “free agreement” in s.36(1) of the *Crimes Act 1958* (Vic) would be improved by defining consent to mean free and voluntary agreement where this agreement is communicated through words or actions. This definition would:
- provide clear and unambiguous notice to the community generally about the positive standard of behaviour that is required at law, serving to shift public understandings of consent
 - make it clear that an act of communication is an essential feature of consent, rather than merely an evidentiary issue concerning the complainant’s state of mind
 - reflect a communicative, affirmative model of consent.
64. RDVSA supports the non-exhaustive listing of circumstances in which a person does not consent in s.36(2) of the *Crimes Act 1958* (Vic), including the provision that a person does not consent where “the person does not say or do anything to indicate consent.” However, we propose an amendment to the circumstances in which a person does not consent under s.36(2) to more appropriately reflect sexual violence arising in the context of a pattern of intimidatory or coercive conduct. Currently under s.36(2)(b), consent is not freely given where a person submits due to “fear of harm of any type, whether to that person or someone else or an animal.” RDVSA recommends an additional provision to explicitly recognise any pattern of coercive conduct that gives rise to a fear of harm, rather than focusing on the presence of an immediate threat. This would more accurately reflect the cumulative effect of a pattern of ongoing coercive and controlling behaviour used to engage in sexual violence in the context of domestic and family relationships.

⁹⁴ New Zealand Law Commission, above n 5, 64.

⁹⁵ *Criminal Procedure Act 2009* (Vic), ss.125, 212,

65. To establish the offence of rape, sexual assault and related offences, the prosecution must prove that the accused did not reasonably believe that the other person was consenting.⁹⁶ Section 36A of the *Crimes Act 1958* (Vic) provides:
- (1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.
 - (2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents ...
66. RDVSA submits that the legislation should be amended to provide that a belief that the other person is consenting is not reasonable if the accused did not take reasonable steps, in the circumstances known to them at the time of the offence, to ascertain that the complainant was consenting to the act, as per the Tasmanian legislation.⁹⁷ This would reflect an affirmative and communicative model of consent. Furthermore, the legislation should clarify that "any steps" must involve words or actions and is not satisfied merely by "a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives."⁹⁸ An additional provision could exclude consideration of any personal opinions, values or attitudes held by the accused that fail to meet community standards.

Question 3: Technology-facilitated sexual offences

67. Image-based sexual abuse is a serious crime with many of the same devastating, recurring, and lifelong consequences endured by others who experience sexual violence.⁹⁹ It has been described as "a pernicious and gendered form of sexual abuse, the prevalence of which has increased exponentially with the ubiquity of the smart phone."¹⁰⁰ It is commonly used within the context of domestic and family violence and forms a continuum with other forms of sexual violence.¹⁰¹ Apart from resulting in complex trauma impacts, the sharing of intimate images may also lead to adverse consequences for the victim-survivor in relation to their reputation, employment and relationships. When perpetrated within the context of an abusive relationship, a threat to distribute intimate images may create a significant barrier for the victim-survivor to escape violence and seek support. The seriousness of image-based sexual abuse has historically been minimised in public discourse, law and policy.¹⁰²

⁹⁶ See for example, ss. 38(1)(c) and 40(1)(d), *Crimes Act 1958* (Vic).

⁹⁷ Section 14A(1)(c), *Criminal Code Act 1924* (Tas).

⁹⁸ As suggested by Bellew J in *R v Lazarus* (2017) 270 A Crim R 378 at [147].

⁹⁹ See for example, C McGlynn, E. Rackley and R. Houghton, 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) *Feminist Legal Studies* 25.

¹⁰⁰ *Ibid* 26.

¹⁰¹ *Ibid* 26, 36-38.

¹⁰² *Ibid* 29, 39, 40.

68. Distributing or threatening to distribute an intimate image without consent are offences under ss. 41DA and 41DB under the *Summary Offences Act 1966* (Vic). Each of these offences has a maximum penalty of 2 years' imprisonment and proceedings for an offence must be commenced within 12 months.¹⁰³
69. It is our submission that Victorian law should be amended to adequately and appropriately reflect the community's condemnation of the conduct and the harm associated with image-based sexual abuse. Maximum penalties should be increased from 2 years' to at least 3 years' imprisonment for recording, distributing, or threatening to record or distribute an intimate image without consent.¹⁰⁴ The offences should be contained in the *Crimes Act 1958*, rather than the *Summary Offences Act 1966*, to reflect their seriousness and their position in the continuum of sexual offences. The 12-month statutory limitation period for prosecution should be removed.

Issues Paper E – The trial process

70. In its recent report, "Consent in relation to sexual offences", the NSW Law Reform Commission ("NSWLRC") highlighted the fact that participating in criminal proceedings is often extremely traumatic for people who have experienced sexual violence.¹⁰⁵ RDVSA submits that the proposals advanced in response to the questions in Issues Paper B would ameliorate some of these concerns. We provide the following additional submissions in relation to charging and prosecution decisions, jury directions and the admissibility of evidence.

Question 1: Charging and prosecution decisions

71. The Victorian Office of Public Prosecutions ("OPP") has recently updated its Prosecution Policy¹⁰⁶ and introduced a Discontinuance Review Framework.¹⁰⁷ The latter was introduced in response to a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission") to enable victim-survivors to seek internal merits review of key prosecution decisions.¹⁰⁸
72. RDVSA welcomes the introduction of a review policy but notes that it appears to apply only if all charges against a particular accused or in relation to a particular victim-survivor are withdrawn – not to decisions that involve the withdrawal of some charges only. We submit that the application of the review policy, particularly with respect to sexual

¹⁰³ Section 7, *Criminal Procedure Act 2009* (Vic).

¹⁰⁴ See ss. 91P, 91Q and 91R, *Crimes Act 1900* (NSW).

¹⁰⁵ NSW Law Reform Commission, above n 6, [2.50]-[2.54].

¹⁰⁶ Dated 17 September 2020: <https://www.opp.vic.gov.au/getattachment/a26fab55-0c8a-48a9-b4e5-71f3a898e6cb/DPP-Policy.aspx>

¹⁰⁷ <https://www.opp.vic.gov.au/getattachment/95b67060-1da7-4380-87e3-fcb65dafdba9/Discontinuance-Review-Framework.aspx>

¹⁰⁸ Royal Commission into Institutional Responses to Child Sexual Abuse (2017), *Criminal Justice: Part V: Prosecution Responses*, recommendation 41 and 43.

assault proceedings, should be monitored, to ensure that the review system is “robust and effective, both to protect the interests of individual victims and to reassure the broader community that key prosecution decisions are made in compliance with prosecution guidelines and policies.”¹⁰⁹ The Crown Prosecution Service (“CPS”) in England and Wales, for example, publishes data on an annual basis about the application of its review policy.¹¹⁰ In the period from April 2018 to March 2019, the CPS received 1,930 requests for review of its decisions, 448 of which were for sexual offences, with 27 of those reviews being upheld.¹¹¹

Question 4: Jury directions for sexual offences

73. There is some evidence to support the proposition that judicial directions are capable of addressing “rape myths”. For example, in one study, Ellison and Munro used jury education in two out of three trials, one taking the form of expert evidence, while the other involved a judicial direction.¹¹² The results revealed that the majority of jurors who had received the judicial directions were less inclined to be adversely influenced by a complainant’s late reporting or emotionally flat performance at trial, although the myth regarding a lack of resistance proved impossible to shift. Whether this study makes the case for judicial directions as a means of myth-busting has been questioned.¹¹³
74. Victoria has legislated a broad range of directions designed to counter myths and misconceptions in relation to sexual assault and child sexual assault in the *Jury Directions Act 2015* (Vic). The introduction of mandatory directions in certain sexual assault cases in Victoria¹¹⁴ has been criticised on the basis that the directions have introduced a further layer of complexity into trials, generating a significant number of successful appeals and retrials.¹¹⁵ Duncanson and Henderson observed that jury directions introduced in 2006 failed to increase the conviction rate in sexual assault proceedings in Victoria.¹¹⁶ They argued that the adversarial system forces the jury to make a choice, and, in the absence of clear directions on the meaning of ‘beyond reasonable doubt’, juries tend to place the burden of proof extremely high. The complexity of judicial directions, with the use of judicial prose and double negatives contribute to juror confusion.

¹⁰⁹ Ibid 407.

¹¹⁰ Crown Prosecution Services, *Victims' Right to Review data*, <https://www.cps.gov.uk/publication/victims-right-review-data>

¹¹¹ [Victims-Right-to-Review-Data-2018-19.pdf \(cps.gov.uk\)](https://www.cps.gov.uk/publication/victims-right-review-data-2018-19.pdf)

¹¹² L. Ellison and V. E Munro, above n 65.

¹¹³ J. Temkin, above n 8, 732.

¹¹⁴ Section 37, *Crimes Act 1958* (Vic), amended by the *Crimes (Sexual Offences) Act 2006* (Vic), s 37AAA, introduced by the *Crimes (Rape) Amendment Act 2007* (Vic).

¹¹⁵ J. Willis, ‘Legislatively mandated jury directions in sexual offence cases’ (2006) 30 *Criminal Law Journal* 357, 372; A. Flynn and N. Henry, ‘Disputing Consent: The Role of Jury Directions in Victoria’ (2012) 24(2) *Current Issues in Criminal Justice* 167, 168; M. McMahon and J. Willis, ‘Mandatory jury directions in sexual assault trials in Victoria: Less a model than a cautionary tale?’ (2014) 38 *Criminal Law Journal* 287.

¹¹⁶ K. Duncanson and E. Henderson, ‘Narrative, theatre, and the Disruptive Potential of Jury Directions in Rape Trials’ (2014) 22 *Feminist Legal Studies* 155.

75. After examining transcripts of ten rape trials in Melbourne between 2008 and 2011, Henderson and Duncanson suggested that the problem is that judicial directions are given at too late a stage in the trials to have a material impact on juries.¹¹⁷ They conclude providing the judicial direction "before the airing of evidence which may have the effect of triggering rape myth schemata, would be much more likely to reduce the impact of narratives found by the legislature to be irrelevant in contemporary Victorian trials."¹¹⁸
76. Concerns about the effectiveness of complex directions have been expressed by the NSW Law Reform Commission in its recent review of consent,¹¹⁹ as well as in other common law jurisdictions, including England and Wales¹²⁰ and Scotland.¹²¹ Temkin points out the risk that a direction will have the opposite effect to that intended and serve to entrench, rather than overcome, stereotypes and myths in the minds of the jury, by way of assimilation, or through the repetition of false information, even when the purpose of doing so is to discredit it.¹²² Temkin suggests that directions must be clear and simple, different myths need to be challenged in different ways, and directions need to avoid the pitfalls revealed by the science of attitude change so as not to become counter-productive.¹²³
77. In its recent report on consent, the NSWLRC recommended a number of features to enhance the effectiveness of the new directions it was recommending.¹²⁴ These include:
- a requirement that judges relate the directions to the evidence in the trial to assist juries in understanding and applying them
 - provision for directions to be repeated at any time to during the trial to aid juror understanding
 - expressing the directions positively, rather than reinforcing the misconception in jurors' minds.
78. RDVSA supports the adoption of these recommendations in Victoria to enhance the effectiveness of the directions being given in sexual assault proceedings.

¹¹⁷ E. Henderson and K. Duncanson, 'A Little Judicial Direction: Can the use of jury directions challenge traditional consent narratives in rape trial?' (2016) 39(2) *University of NSW Law Journal* 750.

¹¹⁸ *Ibid* 778.

¹¹⁹ NSW Law Reform Commission, above n 6, [8.37].

¹²⁰ J. Temkin, above n 8, 721.

¹²¹ R. Bain, above, n 21; I. Callander, above n 22.

¹²² J. Temkin, above n 8, 725-726.

¹²³ J. Temkin, above n 8, 733-734.

¹²⁴ NSW Law Reform Commission, above n 6, [8.39], recommendations 8.2.

Question 5: The laws on evidence or procedure for sexual offences

Tendency and coincidence evidence

79. The Royal Commission found that the probative value of tendency and coincidence evidence has been understated, particularly in child sexual abuse prosecutions where the complainant has identified the accused as the perpetrator of the abuse. At the same time, the risk of unfair prejudice to the accused has been overstated, leading to the wrongful exclusion of such evidence and unwarranted acquittals in prosecutions for child sexual abuse offences.¹²⁵
80. The Royal Commission recommended amending the laws of evidence to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials.¹²⁶ This recommendation was limited to child sexual abuse offences because of the Commission's limited Terms of Reference.¹²⁷ However, RDVSA submits that reforms to tendency and coincidence evidence should be introduced and extended beyond child sexual assault proceedings to include all proceedings for sexual offences. The Royal Commission itself acknowledged that "[a]s a matter of principle ... the reforms we recommend in relation to tendency and coincidence evidence and joint trials could safely be made in relation to all categories of offences."¹²⁸
81. New South Wales recently introduced amendments to the *Evidence Act 1995* (NSW) in relation to tendency and coincidence evidence.¹²⁹ New section 97A sets out particular rules for the admissibility of tendency evidence in child sexual offence proceedings, including a presumption that such evidence has significant probative value.
82. Section 94 has also been amended to expressly exclude any principle or rule of common law or equity that would prevent or restrict the admissibility of tendency or coincidence evidence.¹³⁰ In determining the probative value of tendency or coincidence evidence, regard is *not* to be had to the possibility that the evidence may be the result of collusion, concoction or contamination.¹³¹ Section 98 has been amended to clarify that coincidence evidence extends to evidence of similarities from two or more witnesses claiming to be victims of offences committed by a defendant. Section 101(2) has been amended to provide that tendency and coincidence evidence will not be admissible unless "the probative value of the evidence outweighs the danger of unfair prejudice to the defendant" (rather than requiring that the probative value of the evidence *substantially* outweighs any prejudicial effect it may have). The amendments

¹²⁵ Royal Commission into Institutional Responses to Child Sexual Abuse (2017), *Criminal Justice: Part VI: Tendency and Coincidence Evidence and Joint Trials*, 591-595, 603-624, 627-634.

¹²⁶ *Ibid*, recommendations 44-51.

¹²⁷ *Ibid* 591, 635.

¹²⁸ *Ibid* 636.

¹²⁹ *Evidence Amendment (Tendency and Coincidence) Act 2020*, which commenced on 1 July 2020.

¹³⁰ Section 94(4), *Evidence Act 1995* (NSW), based on Royal Commission recommendation 46.

¹³¹ Section 94(5), *Evidence Act 1995* (NSW), based on Royal Commission recommendation 47.

to ss. 94, 98 and 101(2) apply generally and are not limited to child sexual offence proceedings.

83. More recently, the NSW Government introduced further legislation to implement the Royal Commission's recommendations.¹³² The *Criminal Procedure Act 1986* (NSW) has been amended to provide a presumption in favour of joint trials in cases where reliance is placed on tendency and/or coincidence evidence.¹³³ A further amendment provides that a jury must not be directed that tendency or coincidence evidence must be proved beyond a reasonable doubt.¹³⁴
84. RDVSA supports the introduction of corresponding amendments to the *Evidence Act 2008* (Vic) and the *Criminal Procedure Act 2009* (Vic) in accordance with the Royal Commission's recommendations.

Evidence of sexual experience

85. Section 342 of the *Criminal Procedure Act 2009* (Vic) provides that evidence of the complainant's sexual activities (other than those relating to the charge before the court) are not admissible without the court's leave. Leave may only be granted if the court is satisfied that the evidence "has substantial relevance to a fact in issue and that it is in the interests of justice".¹³⁵
86. The legislation should be amended to provide greater protection for complainants from humiliating and irrelevant cross-examination about their sexual experiences. The corresponding NSW provision excludes evidence about sexual experience, subject to a limited set of circumstances, which are in turn subject to an additional consideration of whether the probative value of the evidence outweighs any distress, humiliation or embarrassment to the complainant.¹³⁶ RDVSA submits that this is preferable to the more discretionary regime currently operating in Victoria and is necessary to minimise the trauma experienced by complainants in giving evidence and to encourage reporting of sexual offences by victim-survivors.

Improper questions

87. Prosecution lawyers must be vigilant in objecting to the improper questioning of complainants in proceedings for sexual offences. Section 41 of the *Evidence Act 2008* (Vic) provides: "The court must disallow an improper question or improper questioning put to a witness in cross-examination, or inform the witness that it needs not be

¹³² *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020*.

¹³³ Section 29A, *Criminal Procedure Act 1986* (NSW).

¹³⁴ Section 161A, *Criminal Procedure Act 1986* (NSW), based on Royal Commission recommendation 48, to commence on 1 March 2021: s. 2(2), *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020*.

¹³⁵ Section 349, *Criminal Procedure Act 2009* (Vic).

¹³⁶ Section 293, *Criminal Procedure Act 1986* (NSW).

answered." An improper question or improper questioning is defined as a question or a sequence of questions put to a witness that:¹³⁷

- (a) is misleading or confusing; or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

88. Tactics and techniques used by defence lawyers to discredit complainants, such as drawing on rape myths to encourage misconceptions about sexual violence and repetitive and excessively lengthy cross-examination, fall within the scope of this provision. Even if no objection is raised by the prosecution, the court has a positive duty to disallow an improper question or improper questioning.¹³⁸ Training for prosecutors and judicial officers should incorporate the need to utilise s.41 when complainants are subject to improper cross-examination.

Conclusion

89. There is an urgent need for systemic reform to the response of the justice systems to sexual violence. To be effective, any statutory reform in relation to sexual offences, evidence and procedure must be accompanied by more fundamental structural reform to the criminal justice system and society. In particular, RDVSA advocates for:
- (a) **broad community education** about the law of sexual assault, the nature of sexual violence and the impact it has on those who experience it, challenging the myths and misconceptions surrounding sexual violence that discourage reporting and contribute to the high rate of attrition
 - (b) **specialist sexual violence courts** that adopt a trauma-informed approach to sexual violence, provide ongoing training and vicarious trauma support for selected personnel and provide adequately funded wrap-around support services for complainants
 - (c) extending the availability of **judge-alone trials** in proceedings for sexual assault offences
 - (d) amending the **definition of consent** to incorporate a free and voluntary agreement that is communicated through words or actions

¹³⁷ Section 41(3), *Evidence Act 2008* (Vic).

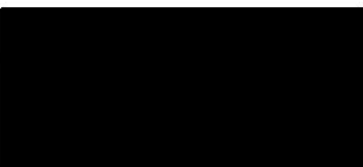
¹³⁸ Section 41(7), *Evidence Act 2008* (Vic).

- (e) providing that an **ongoing pattern of behaviour** is to be considered in determining whether a person did not consent due to fear of harm
- (f) amending the law regarding **reasonable belief in consent** to require an accused to take steps to ascertain consent, and excluding consideration of personal opinions, values or attitudes that do not meet community standards
- (g) strengthening the offences involving **image-based sexual abuse** to increase the maximum penalties, remove the limitation period for proceedings and recognise these offences as part of the continuum of sexual violence
- (h) **monitoring prosecutorial decision-making** through an assessment of the use and effectiveness of the Office of Public Prosecution's Policy and Discontinuance Review Framework
- (i) improving the **directions** given to juries in sexual offence proceedings
- (j) amending the law of evidence and procedure to facilitate greater admissibility and cross-admissibility of **tendency and coincidence evidence** and **joint trials** in proceedings for sexual offence proceedings
- (k) adopting a strict exclusionary rule with respect to **evidence of sexual experience**, with fixed exceptions, rather than permitting the admission of such evidence with the court's leave
- (l) utilising the power whenever it arises to **disallow improper questioning** of complainants in sexual offence proceedings.

90. Monitoring the amendments by way of regular statutory review is crucial to ensure their effectiveness. This should include research into the experience of complainants in the justice systems.¹³⁹

Yours faithfully,

Rape & Domestic Violence Services Australia



¹³⁹ See NSW Law Reform Commission, above n 6, Chapter 10, recommendation 10.3.

