

# Submission to the VLRC - Improving the Response of the Justice System to Sexual Offences

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## Introduction

Our submission is based on the following assumptions and principles about sexual violence, and legal and justice responses to sexual violence:

- For survivors who access the formal criminal legal system, this experience is often a highly traumatic one. Despite multiple rounds of sexual offences reform in Victoria, there is no evidence to suggest that survivors' experiences in accessing the system have substantially changed, particularly at trial.<sup>1</sup>
- The formal criminal legal system is not a site of justice for the vast majority of survivors, even when seemingly positive outcomes such as a successful conviction are achieved.<sup>2</sup> As such, the documented justice interests of survivors should underpin responses to sexual violence. 'Justice interests'<sup>3</sup> refers to what survivors need to happen to feel that a sense of justice has been achieved. Survivors have diverse justice interests, and responses to sexual violence must reflect this diversity.

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<sup>1</sup> Clark, H. (2013). "What is the justice system willing to offer?" Understanding sexual assault victims/survivors' criminal justice needs. *Family Matters* No. 85, 28-37; Henderson, E., & Duncanson, K. (2016). A little judicial discretion: can the use of jury directions change traditional consent narratives in rape trials? *UNSW Law Review* 39(2), 750-778; Burgin, R., & Flynn, A. (2019). Women's behaviour as impeded consent: make "reasonableness" an Australian rape law. *Criminology & Criminal Justice* ePub ahead of print, 1-19; Burgin, R. (2019). Persistent narratives of force and resistance: affirmative consent as law reform. *British Journal of Criminology* 59, 296-314.

<sup>2</sup> Clark, H. (2013). "What is the justice system willing to offer?" Understanding sexual assault victims/survivors' criminal justice needs. *Family Matters* No. 85, 28-37.

<sup>3</sup> We use the term 'justice interests' interchangeably with 'justice needs' in this submission.

- The vast majority of survivors do not report to the police. Of those who do, the vast majority of cases do not proceed to trial.<sup>4</sup>
- We recognise that sexual violence occurs along a continuum of behaviours,<sup>5</sup> not all of which meet the threshold for legal intervention. However, *all* forms of sexual violence are capable of causing harm and are deserving of some form of redress.
- In general, we do not endorse reforms that expand the reach of the criminal legal system. We recognise that such measures disproportionately impact on men and perpetrators from marginalised communities, perpetuating other forms of oppression and injustice. Rather, we support measures that minimise the harm caused to survivors in accessing the formal criminal legal system, and the adoption of alternative modes of justice that better reflect survivors' justice interests.
- Sexual violence must be understood using an intersectional lens. This recognises that experiences of sexual violence and the criminal legal system, as well as desired justice responses, are shaped by complex interactions between factors including but not limited to gender, race, disability, sexuality, age, and class.
- Responses to sexual violence in Indigenous communities should be led by these communities. Self-determination, autonomy and sovereignty are of utmost importance. We do not comment further on Indigenous communities in this submission, as this conversation should be led by First Nations peoples.
- Responses to sexual violence must be *evidence-based*, and informed by high-quality academic research, evaluation, and the voices and experiences of survivors.
- Preventative and transformative responses should be at the heart of all efforts to address and redress sexual violence.

We respond only to sexual offences occurring between adults in this submission.

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<sup>4</sup> M steed, M., & McDona d, C. (2017). *Attrition of sexual offence incidents across the Victorian Criminal Justice System*. Melbourne: Cr me Stat st cs Agency.

<sup>5</sup> Ke y, L. (1988). *Surviving sexual violence*. Cambridge: Po ty Press.

# Summary of Recommendations

We make the following key recommendations in this submission, the reasoning for which is outlined fully in the ensuing discussion.

## Educational recommendations

1. Ongoing cultural change, education and training of professionals within the criminal legal system is required in order to minimise the influence of rape myths and stereotypes, to shift the practices and attitudes of legal professionals, and to ensure the success of future reforms.
2. Comprehensive jury education should be used routinely in sexual offence trials to minimise the impacts of rape myths and stereotypes on juror decision-making.
3. Potential jurors in sexual offence trials should be screened for their belief in rape myths and stereotypes. Individuals who extensively adhere to false beliefs about sexual violence should be excluded from the jury for sexual offence trials.
4. The educative and communicative functions of law and law reform should be harnessed as a means to prevent sexual violence and promote social and cultural change.
5. These educative initiatives should provide a more fluid understanding of consent, avoid reinforcing heteronormative understandings of sexual communication, and be inclusive of diverse gender and sexualities.

## Substantive legal recommendations

6. Section 36(1) of the *Crimes Act 1958* should be amended to reflect a more robust definition of sexual consent. We recommend that this definition be expanded beyond 'free agreement' to indicate that consent is ongoing, actively communicated, prioritises mutual pleasure, and care for the self and others.
7. If an accused raises a defence of reasonable belief, they must be required to demonstrate tangible steps taken *during and throughout the sexual encounter* to ascertain the survivor was consenting. These steps must be in line with the communicative model of consent, and thus reflect an objective rather than subjective standard. Factors relating to the subjective beliefs and circumstances of the accused should be taken into account during sentencing, rather than as a component of the fault element.
8. Judicial and legislative guidance should be provided to establish boundaries around what can (or cannot) form the basis of 'reasonable steps' in order to avoid the accused mounting

a defence based on their subjective state of mind, or on 'steps' that are not reflective of a communicative model of consent.

9. Section 36A(2) of the *Crimes Act 1958* should be amended to reflect recommendations 7 and 8.
10. Section 36(2) of the *Crimes Act 1958* should be amended to include the removal of a condom without the knowledge or consent of the other party(ies) as a circumstance which vitiates consent.

## Introduction of new offences

11. We do not recommend the introduction of new criminal offences in this submission.
12. In light of recent calls to introduce criminal legislation on street harassment, we recommend that the introduction of such legislation is likely to be ineffective, if not counterproductive. We advocate for an approach similar to that adopted in Washington, D.C., which creates a legal definition of street harassment and an obligation for government bodies to engage in training, education, data gathering and prevention work without criminalising the actions of perpetrators.

## Reporting recommendations

13. A range of options for reporting sexual assault should be available to survivors if they choose to engage with the criminal legal system. Reporting options should be designed and implemented in consultation and collaboration with relevant support services and survivors themselves. This should include informal, digital reporting tools.
14. Survivors should be provided with access to appropriately designed and implemented alternative and informal reporting options that are confidential, and with the capacity to report anonymously. These reporting options should be aligned with best practice in cognitive interviewing techniques.
15. Both formal and informal reporting options should provide flexibility in how survivors record their experience (e.g., written options, verbal options), and be made available in a range of languages other than English. Reporting tools should be developed in collaboration with disability support groups to ensure they are universally accessible. Reporting tools should be inclusive of diverse gender, sex and sexuality.
16. All reporting options should seek to connect survivors with appropriate support services, and to medical and forensic services. This should include support services tailored to the needs of specific groups, such as LGBTIQ+ communities, Indigenous people, and people whose primary language is not English.

17. Survivors should be provided the opportunity to have a medical and forensic examination (where appropriate/relevant) regardless of whether they intend to report to police.
18. Informal reporting options developed by police should not be used to place pressure on survivors to make a formal statement.
19. Police and support services should work collaboratively in the development of informal reporting options.

### Procedural recommendations

20. In order to minimise the trauma associated with giving evidence at trial and during cross-examination, the routine use of video recording should be introduced. This may include the use of either a recorded police interview and/or a recording of the survivor's evidence-in-chief and cross examination for use in the advent of a re-trial.
21. An independent victim-advocate should be introduced to act as a key point of contact, support, and advocacy for the victim-survivor across the entire criminal legal process. The victim-advocate should have the capacity to intervene on behalf of the survivor at trial.
22. Mechanisms to support survivors at trial must be properly resourced and incorporated into courtroom design and processes.
23. There is currently insufficient evidence to support the use of judge only trials.

### Alternative justice response recommendations

24. There is an unequivocal need to introduce new, alternative measures for achieving justice in response to sexual violence.
25. In order to be responsive to the diversity of survivors' justice interests, a suite of formal and informal justice options is required.
26. Restorative justice should be available to survivors at any stage in the criminal legal process, for those survivors who choose to access this system.
27. A separate, independent restorative justice process should be available to survivors who do not want to access the formal criminal legal system.
28. Independent, community-led transformative justice responses should be developed.

29. Victim-survivors should have opportunities for truth- and story-telling as a central part of legal and justice processes. There should be formal and informal avenues to storytelling, and victim-survivors should have choice, agency and control over how they participate in storytelling.
30. Professionals and others involved in the delivery of alternative and informal justice responses require specialist knowledge and training on sexual violence.
31. Informal responses that operate outside of the formal legal system should be made available to all survivors, regardless of whether their experience would meet a legal threshold of harm.

## Research & evaluation recommendations

32. Ongoing monitoring, evaluation and research is required to ensure that any reforms are implemented appropriately, to assess their effectiveness, and to ensure they do not impair the safety and well-being of survivors.
33. When reform options have been identified, these should be proactively 'tested' through research to identify any potential problems, limitations, or loopholes that will render the reforms ineffective.<sup>6</sup>

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<sup>6</sup> Haney, N., Feborn, B., Larcombe, W., Henry, N., & Powe, A. (2016). Improving the law reform process: opportunities for empirical qualitative research? *Australian & New Zealand Journal of Criminology* 49(4), 546-563.

## B. Sexual Offences: Key Issues in the Criminal Justice System

### Jury education and judge-only trials

International research suggests that judge-only trials *may* be beneficial to survivors. As Temkin and Krahe (2008, p.178) note, potential benefits of judge-only trials include:

- Judges may be less susceptible to the arguments of defence counsel
- Judges are more familiar with patterns of sexual violence and offending techniques
- A judge-only trial may reduce the use of aggressive cross-examination and improve the experiences of survivors at trial.

However, overall, there is not a strong evidence-base to support these claims either way, and juries remain an important component of most Western legal systems. Due to the lack of evidence, we cannot strongly advocate for the use of judge-only trials.

Unfortunately, there is substantive evidence that members of the judiciary - and other legal professionals - adhere to rape myths and misconceptions,<sup>7</sup> perhaps most notoriously demonstrated in the case of Saxon Mullins. On appeal, Judge Tupman found that Luke Lazarus had “reasonable” grounds for belief in consent on the basis that Mullins did not say ‘stop’, ‘no’, or try to physically move away.<sup>8</sup> There is no legal requirement for a survivor to actively demonstrate their non-consent, and the approach taken by Judge Tupman does not align with a communicative model of consent. As such, we advocate for the ongoing education and training of professionals within the criminal justice system in relation to sexual violence.<sup>9</sup> Earlier Australian research<sup>10</sup> found that the culture of the criminal legal system was a significant barrier to the successful introduction of sexual offences law reforms, so an emphasis on education and cultural change within the system is vital to the success of future reforms.

We support the introduction of education for juries in sexual offence cases. It is well-established that a significant proportion of the Australian community holds problematic attitudes towards, and

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<sup>7</sup> Temkin, J., & Krahe, B. (2008). *Sexual assault and the justice gap: a question of attitude*. London: Hart Publishing; Tdmarsch, P., & Ham ton, G. (2020). Misconceptions of sexual crimes against adult victims: barristers to justice. *Trends & Issues in Crime and Criminal Justice* No.611. Australian Institute of Criminology; B uett Boyd, N. & F eborn, B. (2014). *Victim/survivor focused justice responses and reforms to criminal court practice: implementation current practice and future directions*. Research Report No.27. Melbourne: Australian Institute of Family Studies.

<sup>8</sup> Horan, J., & Goodman De ahunty, J. (2020). Expert evidence to counteract jury misconceptions about consent in sexual assault cases: failures and lessons learnt. *UNSW Law Journal* 43(2), 707-737.

<sup>9</sup> Temkin, J., & Krahe, B. (2008). *Sexual assault and the justice gap: a question of attitude*. London: Hart Publishing.

<sup>10</sup> B uett Boyd, N. & F eborn, B. (2014). *Victim/survivor focused justice responses and reforms to criminal court practice: implementation current practice and future directions*. Research Report No.27. Melbourne: Australian Institute of Family Studies.

inaccurate beliefs about, sexual violence mired in rape myths and stereotypes.<sup>11</sup> Moreover, a recent meta-analysis<sup>12</sup> of research strongly demonstrates that belief in rape myths and stereotypes influence how jurors make sense of evidence, who they view as responsible and blame-worthy for sexual violence, and how they determine the verdict. Specifically, individuals with high levels of rape myth acceptance are more likely to assign blame to the survivor, and to exonerate the accused for their actions. Rape myths also inform how jurors believe a 'real' victim of sexual violence would respond, for example by fighting back, despite the fact the fright, flight and freeze responses to sexual violence are well documented. The review<sup>13</sup> concludes:

“That there is *overwhelming* evidence that rape myths affect the way in which jurors evaluate evidence in rape cases” (p.256)

In short, this research evidence demonstrates that jurors' adherence to rape myths systematically disadvantages victim-survivors at trial. It also suggests that jurors' decision-making is based on a faulty understanding of the 'reality' of sexual violence. In light of this, we recommend that potential jurors who adhere to a substantial number of inaccurate beliefs about sexual violence should be excluded from the jury.

Evidence on the effectiveness of jury education - including in the form of expert testimony and judicial directions - is mixed.<sup>14</sup> However, there is some evidence to suggest that jury education can reduce the likelihood of jurors drawing on rape myths and misperceptions in their deliberations. In other cases, jury education makes no apparent difference. There is no evidence to suggest that jury education results in a disproportionate disadvantage to the accused in any way. Overall, the available evidence suggests that jury education has the potential to be beneficial, and at worst makes no difference to trial outcomes. The best available evidence indicates that:

- Jury education is more effective when it is specific to the facts of the case, rather than general in nature<sup>15</sup>
- Jury directions and education may be more effective when delivered earlier in a trial<sup>16</sup>
- Providing jurors with written material or summaries may assist with retention of information<sup>17</sup>

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<sup>11</sup> Webster, K., Dimer, K., Honey, N., Mannix, S., Mcke, J., Morgan, J., Parkes, A., Poff, V., Powell, A., Stubbs, J., & Ward, A. (2018). *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). Sydney, NSW: ANROWS.

<sup>12</sup> Leverick, F. (2020). What do we know about rape myths and juror decisions on making? *The International Journal of Evidence & Proof* 24(3), 255-279.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Horan, J., & Goodman Deahunty, J. (2020). Expert evidence to counteract juror misconceptions about consent in sexual assault cases: failures and lessons learnt. *UNSW Law Journal* 43(2), 707-737.

<sup>16</sup> Henderson, E., & Duncanson, K. (2016). A little judicial direction: can the use of jury directions change traditional consent narratives in rape trials? *UNSW Law Journal* 39(2), 750-778; Horan, J., & Goodman Deahunty, J. (2020). Expert evidence to counteract juror misconceptions about consent in sexual assault cases: failures and lessons learnt. *UNSW Law Journal* 43(2), 707-737; Temkin, J., & Krahe, B. (2008). *Sexual assault and the justice gap: a question of attitude*. London: Hart Publishing.

<sup>17</sup> Leverick, F. (2020). What do we know about rape myths and juror decisions on making? *The International Journal of Evidence & Proof* 24(3), 255-279.



Given the current weighting of the system *against* victim-survivors, we argue that the introduction of routine jury education is a fair and reasonable counter measure. However, we also recognise that jury education alone is unlikely to generate substantive change in community attitudes, and this must be accompanied by wider community education initiatives as well as efforts to shift the culture, practices and attitudes of professionals working in the legal system.

## C. Defining Sexual Offences

### The communicative and educative potential of sexual offences legislation

The operation of Victoria's sexual offences provisions suggests that current definitions are limited in their effectiveness and clarity. These limitations primarily affect victim-survivors, but also bear implications for alleged perpetrators and can limit the ways that the broader community understands what sexual offences are.

The criminal law has a communicative and symbolic function, and these functions are often overlooked when considering the role of law in preventing sexual violence.<sup>18</sup> Considering this, it is worth noting that the ways that Victoria's sexual offences work in practice are firstly to respond to sexual violence *after* it occurs, and neglect to prioritise prevention strategies. To this effect, sexual offences in Victoria could have an explicit educative role in society that bridges the gap between community understandings of sexual assault and legal definitions.<sup>19</sup>

In making changes to Victoria's sexual offences and their application, we recommend that:

- The educative and communicative functions of law be better utilised as a means to prevent sexual violence. For example, this might include the roll-out of community education campaigns, social media campaigns, an educative website and so-forth, communicating any changes in legislation, and using this as an opportunity to engage the broader public on issues of sexual consent and sexual ethics. Such efforts have been noticeably absent in the aftermath of previous reforms.
- Similarly, any reforms must be accompanied by extensive education, support and resources for legal professionals.

### Limitations of a communicative model of consent

Changes to legal definitions of consent have done little to reduce sexual violence, or to improve outcomes at trial. Communicative models of consent have been developed to take the onus away from the victim to have said 'no', and rather put the onus on the perpetrator to have taken steps to ensure consent (i.e., 'yes means yes').<sup>20</sup> However, some scholars have been critical about the

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<sup>18</sup> Larcombe, W. (2014). Limits of Criminal Law for Preventing Sexual Violence. In A. Powe & N. Henry (Eds.), *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (pp. 64–83). Palgrave Macmillan.

<sup>19</sup> Mason, G. (2020). Sexual assault law and community education: A case study of New South Wales, Australia. *Australian Journal of Social Issues*, 1–18. <https://doi.org/10.1002/ajs4.143>

<sup>20</sup> O'Leary, K. (2015). Party rape, "nonconsensual sex," and affirmative consent policies. *Americana: The Journal of American Popular Culture (1900 Present)* 14(2), 1–20.

development of communicative or affirmative models of consent models as they are still largely based on traditional gender roles where men are expected to obtain consent and women are the gatekeepers of consent. Not only does this ignore the vast array of other human genders and sexualities, but it may also reinforce these problematic gendered assumptions about sexual communication - essentially still reducing women's involvement in sex to saying 'yes' or 'no'. These models additionally cannot address the multidimensional nature of sexual violence that happens within a culture that has material inequalities, entrenched power disparities, relational dynamics and socio-sexual norms.<sup>21</sup> For example, communicative models of consent cannot address women's fear of violence if they say 'no', or sex being obtained under other coercive conditions.

Likewise, research has consistently shown that legal definitions of sexual violence are rigid and as a result do not capture experiences that fall within complex 'grey areas'.<sup>22</sup> These 'grey areas' of sexual violence refer to experiences that were, in some respects, coerced, unwanted or ethically problematic. At the same time, they would be unlikely to meet a legal threshold of criminal responsibility, for example because the survivor simultaneously actively participated in, or wanted some aspects of the encounter. Legal approaches to consent construct it in a binary way - consent is either given or not. In practice, consent is more complicated, and better thought of as occurring along a continuum.<sup>23</sup> Such complexity is not captured in current legal definitions or understandings of consent. It is clear that there are a range of harmful sexual experiences and practices which fall short of meeting legal definitions of sexual offences, and for which survivors currently have no recourse.

Rather than addressing the material inequalities that underpin sexual violence, communicative models represent a 'legal fiction' to help us navigate 'principled, proportionate, legal responses' to sexual violence, which simply does not reflect the complexities of sexual communication in everyday life (p.275).<sup>24</sup> Ideally, consent should be a fluid, rich and ongoing process that prioritises mutual pleasure and care for the self and others.<sup>25</sup> Such a framework may not sit neatly within legal definitions, and thus we recommend:

- That Section 36(1) of the *Crimes Act 1958* should be amended to reflect a more robust definition of sexual consent. We recommend that this definition be expanded beyond 'free agreement' to indicate that consent is ongoing, actively communicated, prioritises mutual pleasure, and care for the self and others.

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<sup>21</sup> Cense, M., Bay Cheng, L., & van Dijk, L. (2018). "Do I score points if I say no?": negotiating sexual boundaries in a changing normative landscape. *Journal of Gender Based Violence* 2(2), 277-291; O'Leary, K. (2015). Party rape, "nonconsensual sex," and affirmative consent policies. *American Journal of American Popular Culture (1900 Present)* 14(2), 1-20; Novack, S. (2017). Sex education higher ed: should we say yes to "affirmative consent"? *Studies in Gender and Sexuality* 18(4), 302-312; Hailey, J. (2016). The move to affirmative consent. *Signs* 42(1), 257-279.

<sup>22</sup> Gunnarsson, L. (2018). "Excuse Me, But Are You Raping Me Now?" Discourse and Experience in (the Grey Areas of) Sexual Violence. *NORA - Nordic Journal of Feminist and Gender Research*, 26(1), 4-18; Haines, S., & Feiborn, B. (2019). "Girl power gone wrong": #MeToo, Aziz Ansari, and media reporting of (grey area) sexual violence. *Feminist Media Studies*, 1-18.

<sup>23</sup> Whittington, E. (2020). Rethinking consent with continents: sex, ethics and young people. *Sex Education* epub ahead of print.

<sup>24</sup> Matthews, H. (2019). #MeToo as sexual panic. In Feiborn, B., & Loney Howes, R. (eds) *#MeToo and the politics of social change*. Palgrave Macmillan, pp. 267-283.

<sup>25</sup> Carmody, M. (2005). Ethical erotics: reconceptualising anti-rape education. *Sexualities* 8(4), 465-480.

- Alternative mechanisms for justice to include a wider range of situations where consent may have been violated, but the behaviour is unlikely to meet a criminal threshold of responsibility (we make some specific recommendations for this in the ‘alternative justice’ section).
- Educative initiatives (specified in other recommendations) should provide a more fluid understanding of consent that avoids reinforcing heteronormative understandings of sexual communication and is inclusive of diverse gender and sexualities.

## Communicative consent at trial

Studies have indicated that the use of a communicative model, and ‘reasonable’ belief in consent, at trial continues to reinforce problematic understandings of gender and consent. The limitations of ‘reasonable’ belief in consent were preempted in research by Associate Professor Wendy Larcombe and colleagues prior to the previous round of Victorian sexual offences reforms.<sup>26</sup> They noted that “absent strict legislative guidance or jury education, determinations of *reasonable* belief in consent will be informed by the same socio-sexual scripts of seduction or miscommunication”.<sup>27</sup> These predictions did indeed come to fruition in the case of Victoria.

While Victoria’s legislation enshrines a “communicative” model of consent, there is evidence to suggest that this model is routinely undermined at trial. Recent analysis of Victorian sexual offences trials demonstrates that defence continues to establish narratives of “implied consent” - where an accused’s belief in consent is established via their “subjective interpretation or *inference* of the woman’s actions” (p.1).<sup>28</sup> In other words, an accused’s subjective interpretation of the survivors’ “everyday” behaviour (such as clothing, tone of voice, being “friendly”, lack of resistance or not saying ‘no’) is used to establish that the accused held a “reasonable” belief in consent. This is at odds with a communicative model, under which consent is actively and continually conveyed by all parties involved in a sexual encounter. As we highlight elsewhere in this submission, understandings of sexual consent at trial continue to be shaped by a host of other myths and misconceptions about sexual violence.

In order to reduce the potential for the accused to construct a narrative of “reasonable” belief in the absence of taking any tangible steps to ascertain that the survivor was consenting, we recommend that:

- If an accused raises a defence of reasonable belief, they must be required to demonstrate tangible steps taken *during and throughout the sexual encounter* to ascertain the survivor was consenting. This approach is in line with that adopted in Tasmania and Canada, and

<sup>26</sup> Larcombe, W., Feborn, B., Powe, A., Henry, N., & Haney, N. (2015). Reforming the legal definition of rape in Victoria - what do stakeholders think? *QUT Law Review* 15(2), 30-49.

<sup>27</sup> Larcombe, W., Feborn, B., Powe, A., Haney, N., & Henry, N. (2016). “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. *Social & Legal Studies* 25(5), 611-629.

<sup>28</sup> Burgin, R., & Flynn, A. (2019). Women’s behaviour as impeded consent: make “reasonableness” in Australian rape law. *Criminology & Criminal Justice* ePub ahead of print, 1-19.

better reflects the intent and spirit of the “communicative model”, as it does not allow a belief in consent to be established through subjective and passive inference. Rather, according to the communicative model consent should be ongoing, specific to each sexual act, and actively communicated.

- The provision of judicial guidance to the jury in relation to reasonable steps is important, as the general community holds diverse views in terms of what ‘counts’ as a reasonable step.<sup>29</sup> A failure to provide guidance or directions delimiting what does/does not count as a reasonable step will almost certainly result in accused person’s mounting a defence of “reasonable belief” mired in rape myths, and which continue to undermine the spirit of communicative models of consent. For example, an accused should not be able to mount a defence of “reasonable belief” in circumstances where the survivor was asleep or incapacitated, on the basis that the survivor did not do or say anything to resist, or based on the survivor’s clothing or appearance. “Steps” should be limited to that occurring during the immediate sexual encounter.
- Together, these measures should create an *objective* standard of what constitutes a “reasonable step” in ascertaining consent.
- In light of evidence that the non-consensual removal of a condom (also known as ‘stealth’) is a common and distressing form of sexual violation which is not clearly addressed in current legislation,<sup>30</sup> we recommend that the removal of a condom without the knowledge or consent of the other party(ies) be specified in Section 36(2) of the *Crimes Act 1958* as a circumstance which vitiates consent.

## The need for new offences - public sexual harassment

There have been recent calls regarding the need to introduce criminal offences governing street-based or public sexual harassment. Activists groups in the UK, such as Our Streets Now, have been campaigning for the introduction of legislation addressing street-based harassment, such as catcalling. This is occurring alongside a national inquiry into the introduction of misogyny as a hate crime offence in the UK. Similar legislation has been introduced in a number of jurisdictions internationally, including France, Portugal and Belgium. While the issue of street harassment has received less prominent attention in Australia, activist groups such as Destroy The Joint<sup>31</sup> have recently asked whether similar legislation should be introduced in Australia.

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<sup>29</sup> Lacombe, W., Feborn, B., Powe, A., Haney, N., & Henry, N. (2016). “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. *Social & Legal Studies* 25(5), 611-629; Webster, K., Damer, K., Honey, N., Mannix, S., Mcke, J., Morgan, J., Parkes, A., Poff, V., Powe, A., Stubbs, J., & Ward, A. (2018). *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). Sydney, NSW: ANROWS.

<sup>30</sup> Chesser, B., & Zahra, A. (2019). Stealth: a criminal offence? *Current Issues in Criminal Justice* 31(2), 217-235.

<sup>31</sup> <https://www.facebook.com/DestroyTheJoint/posts/3611804728867245>

Street harassment includes a broad range of behaviours, and typically refers to actions such as catcalling, staring/leering, car horn honking, following someone, unwanted verbal comments, groping, indecent exposure and public masturbation. Street harassment includes sexual harassment, as well as harassment based on race, disability, homophobia and transphobia. Australian studies<sup>32</sup> show that as many as 87% of young women have experienced some form of street harassment.

We argue that the introduction of criminal legislation addressing street harassment is inappropriate, and unlikely to achieve its purported aims (such as increasing protection for women, encouraging reporting, and holding perpetrators to account). Some forms of harassment are already captured through existing sexual offences legislation, such as indecent exposure and public masturbation. Other forms, such as catcalling and staring/leering, are not captured in existing legislation, and criminal regulation is unlikely to be effective in responding to such behaviour. Australian research conducted by Dr Bianca Fileborn<sup>33</sup> suggests that:

- Some people who have experienced street harassment value the introduction of criminal legislation. However, legislation is valued because of its symbolic and communicative value, not because it is likely to be an effective response.
- The vast majority of participants believed that a criminal legal response would be ineffective or inappropriate, as:
  - Street harassment is often a fleeting occurrence. There is often no tangible evidence to bring to police, meaning that little can be done in response to individual incidents.
  - Many forms of street harassment can be ambiguous in nature, again making it difficult to respond to through the criminal legal system.
  - Some forms of harassment, such as staring or engaging someone in unwanted conversation, can also constitute normative behaviour in public space. Criminal regulation of these actions is likely to be undesirable, difficult to enact, and would raise considerable civil rights concerns.
  - The time and emotional labour involved in reporting to police often outweighed the harm of individual incidents.
  - Participants felt criminalisation was unlikely to change the attitudes and actions of perpetrators and did nothing to address the underlying causes of street harassment.
  - Responses such as on-the-spot fines were viewed as likely to contribute towards the over-policing of marginalised communities, particularly men of colour,

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<sup>32</sup> Johnson, M., & Bennett, E. (2015). *Everyday sexism: Australian women's experiences of street harassment*. Melbourne: The Australian Institute.

<sup>33</sup> Fileborn, B., & Vera Gray, F. (2017). "I want to be able to walk the street without fear": transforming justice for street harassment. *Feminist Law Journal* 25, 203-227; Dr Fileborn's currently undertaking research on victim centered responses to street harassment for the Australian Research Council DECRA Project (DE190100404) *Achieving justice in response to street and public sexual harassment: developing victim centred responses*.

Indigenous men, people experiencing homelessness, and people experiencing mental health concerns.

In light of these concerns, the introduction of criminal offence(s) for street harassment is likely to be ineffective, if not counterproductive. Participants in Dr Fileborn's research strongly advocated for the use of preventative and transformative measures, including comprehensive education on street harassment, and bystander intervention.

We advocate for an approach similar to that adopted in Washington, D.C.<sup>34</sup> In 2018, Washington D.C. introduced the *Street Harassment Prevention Act of 2018*. The Act created a legal definition of street harassment and created an onus for Government agencies to develop policies, public information campaigns, training, and to consider the development of reporting options for victims of street harassment.<sup>35</sup> Importantly, the Act does not criminalise the actions of perpetrators, and this approach was taken based on concerns similar to those outlined above.

We believe this approach strikes the appropriate balance between communicating the harms of street harassment, reflecting victims' documented justice interests - particularly through its focus on prevention - and avoiding contributing to the over-policing of marginalised communities.

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<sup>34</sup> DC Office of Human Rights (2020). *The state of street harassment in DC: a report on the first year of implementing the Street Harassment Prevention Act*.

<sup>35</sup> *Ib d.*

## D. Sexual Offences: Report to Charge

### Barriers to reporting

One in five women and one in twenty men have experienced or been threatened with sexual assault since the age of 15<sup>36</sup>. Data collated by the Australian Institute for Health and Welfare (AIHW) indicates that sexual assault is on the rise, with an estimated 30% increase in sexual victimisation between 2010 and 2018<sup>37</sup>. It is unclear, however, whether this increase represents a genuine rise in sexually violent crimes, an increase in reporting of contemporary sexual assault or if these figures speak to an increase in reporting historical violence. Significantly, many survivors who are reporting sexual offences did not seek support. For example, the AIHW found that over half of the women who reported their most recent sexual assault to police did not seek support, however, it is unclear to what extent support is being offered to survivors and whether this support is appropriate.

Making a report of sexual assault, whether it be formal or informal, can be an incredibly stressful and traumatic process for many survivors. The cultural and even legal expectation that 'real' experiences of sexual assault will be reported immediately resulting in a swift trial and conviction are false,<sup>38</sup> and there are a range of factors that contribute to delays in reporting - or decisions not to report. These include:

- Survivors may feel their experiences are not credible because they did not actively resist being assaulted, or they had consumed alcohol or other drugs potentially impacting their ability to recall the offence.<sup>39</sup>
- Belief that an experience was not 'serious' enough to report. Survivors may feel they are wasting police time, that they will not be believed or that the police are unwilling to help.<sup>40</sup>

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<sup>36</sup> Australian Bureau of Statistics (ABS). (2017). *Personal Safety Survey*, Catalogue No. 4533.3, Canberra, Australian Bureau of Statistics.

<sup>37</sup> Australian Institute of Health and Welfare (August 2020) *Sexual Assault in Australia* Accessed 17/12/2020. <https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>.

<sup>38</sup> Eastwood CJ, Kift SM & Grace R (2006) cited in Tdmarsch, P., & Hampton, G. (2020). Misconceptions of sexual crimes against adult victims: Barriers to justice. *Trends and Issues in Crime and Criminal Justice*, (611).

<sup>39</sup> Fisher, B.S., Dagne, L.E., Cullen, F.T., & Turner, M.G. (2003). Reporting sexual victimisation to the police and others: results from a national event study of college women. *Criminal Justice & Behavior* 30, 6-38.

<sup>40</sup> Weiss, K. (2010). Too ashamed to report: deconstructing the shame of sexual victimisation, *Feminist Criminology*, 5(3), 275-298. Weiss, K. (2011). Neutralising sexual victimisation: A typology of victims' non-reporting accounts, *Theoretical Criminology*, 15(4), 445-467. Kelly, L., Lovett, J. & Regan, L. (2005). Gap or chasm? Attrition in reported rape cases. London: Home Office. McMann, L. (2018). Police officers' perceptions of false allegations of rape. *Journal of Gender Studies*, 27(1), 9-21. Rich, K. & Seffrin, P. (2012). Police interviews of sexual assault reporters: Do attitudes matter?, *Violence and Victims*, 27(2), 263-279.



This is especially so when survivors feel their experience might not “fit” within normative assumptions about rape, specifically non-violent assaults;<sup>41</sup>

- Shame and humiliation following a sexual assault;
- Fear of revictimization owing to police failure to take reports seriously;
- Retaliation from the perpetrator.<sup>42</sup>

Given that the vast majority of sexual assaults are perpetrated by someone known to the survivor, the latter may significantly influence their decision to report to police.<sup>43</sup> As such, although it is unclear from the AIHW data what is driving the increase in sexual assaults, research indicates that between only 10-20 percent of survivors report to police.<sup>44</sup>

## Reporting options

When it comes to engaging with the criminal justice system, survivors want options.<sup>45</sup> This includes options in the reporting process. Although we are mindful of the limitations of and problems associated with the use of criminal legal processes for responding to sexual assault, we nonetheless advocate that a range of options for reporting sexual assault should be available to survivors who wish to engage with the criminal legal system. We make this recommendation on the provision that these reporting options are designed and implemented in consultation and collaboration with relevant support services and survivors themselves. These should include informal reporting options that are confidential and provide the capacity to remain anonymous. However, informal reporting options should not constitute formal statements but rather function as opportunities for crime mapping, intelligence gathering and connecting survivors with appropriate support services. An informal digital reporting tool would help make this process accessible to a broad range of people.

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<sup>41</sup> Du Mont, J., Mer, K., & Myhr, T. (2003). The role of ‘rape’ and ‘victim’ stereotypes in the police reporting practices of sexually assaulted women. *Violence Against Women* 9(4), 466-486.

<sup>42</sup> Jordan, J. (2001). Words apart? Women, rape and the police reporting process. *British Journal of Criminology*, 41(4), 679-706.  
Jordan, J. (2008). Perfect victims, perfect policing?: Improving rape complaints experiences of police investigations. *Public Administration*, 86, 699-719. Heenan, M. & Murray, S. (2006). Study of reported rapes in Victoria 2000-2003: Summary research report. Melbourne: Office of Women’s Policy, Department for Victorian Communities. Rich, K. & Seffern, P. (2012). Police interviews of sexual assault reporters: Do attitudes matter?, *Violence and Victims*, 27(2), 263-279.

<sup>43</sup> Levore, D. (2005). *No longer silent: a study of women’s help seeking decisions and service responses to sexual assault*. Australian Institute of Criminology for the Australian Government Department of Family and Community Services.

<sup>44</sup> Day, K. & Bouhours, B. (2010). Rape and attrition in the legal process: A comparative analysis of five countries. *Crime and Justice*, 39(1), 565-650. Johnson, H. (2012). Limits of a criminal justice response: Trends in police and court processing of sexual assault. *Sexual assault in Canada: Law, legal practice and women’s activism*, 640, 305-341. Rotenberg, C. (2017). Police reported sexual assaults in Canada, 2009 to 2014: A statistical profile, *Juristat: Canadian Centre for Justice Statistics*: <https://search.proquest.com/docview/1950013561?accountid=13552>.

<sup>45</sup> Clark, H. (2010). What is the justice system willing to offer? Understanding sexual assault victims/survivors’ criminal justice needs. *Family Matters*, 85, 28-37. McGynn, C. & Westmarland, N. (2019). Kaldoscopy justice: sexual violence and victim survivors’ perceptions of justice. *Social & Legal Studies*, 28(2), 179-201.

In-person reporting options that constitute informal and formal statements as presently available in all policing jurisdictions in Australia should also remain available to survivors, however as we outline below, additional reforms are required to make these more survivor-centric. All reporting options should seek to connect survivors with appropriate support services, and police need to maintain good working relationships with these services in order to demonstrate their commitment to survivors' well-being.

## Survivor experiences with police

The initial contact victim-survivors have with the criminal justice system is a key contributing factor as to whether or not they proceed with their case<sup>46</sup>, and many victim-survivors who do engage with police often have negative encounters that leave them feeling further victimised or blamed for the sexual assault.<sup>47</sup> Police interviewing techniques and processes for taking statements from victim-survivors of rape have been described by feminist criminologists as invasive, traumatising and inappropriate.<sup>48</sup> Although we acknowledge there have been changes made to interview processes by police, such as the “whole story approach” elaborated upon below, historically practices have typically focused on the demeanour and actions of the survivor rather than behaviour of the perpetrator,<sup>49</sup> with challenges arising for survivors in articulating deeply personal experiences that would normally not be told to a stranger.<sup>50</sup>

However, there are a number of positive or desired outcomes expressed by survivors that can result from making a formal report to the police. These include:

- Being listened to in a supportive environment that allows for both privacy and anonymity;
- The provision of accessible support services; and
- The timely follow-up of the report, including keeping the complainant informed about the development of the case.<sup>51</sup>

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<sup>46</sup> Jordan, J. (2008). Perfect victims, perfect policing?: Improving rape complainants experiences of police investigations. *Public Administration*, 86, 699–719.

<sup>47</sup> Campbell, R. (2006). Rape survivors' experiences with the legal and medical systems: Do rape victim advocates make a difference? *Violence Against Women*, 12(1), 30–45. Rich, K. (2014). *Interviewing rape victims: Practice and policy issues in an international context*. Basingstoke: Palgrave Macmillan.

<sup>48</sup> Jordan, J. (2004). Beyond belief? Police, rape and women's credibility, *Criminal Justice*, 4(1), 29–59. Campbell, R. (2005). What really happened? A validation study of rape survivors' help seeking experiences with the legal and medical systems, *Violence and Victims*, 20, 55–68. McMann, L. & Thomas, M. (2009). Police interviews of rape victims: Tensions and contradictions, in M. Horvath & J. Brown (eds.). *Rape: Challenging contemporary thinking* London: Routledge, 255–280.

<sup>49</sup> Tomlinson, D. (1999). *Police reporting decisions of sexual assault survivors: an exploration of influential factors*, Calgary: Calgary Communities Against Sexual Assault.

<sup>50</sup> McMann, L. & Thomas, M. (2009). Police interviews of rape victims: Tensions and contradictions, in M. Horvath & J. Brown (eds.). *Rape: Challenging contemporary thinking* London: Routledge, 255–280.

<sup>51</sup> Powe, M. & Caughy, R. (2013). Victims' perceptions of a new mode of sexual assault investigation adopted by Victoria police. *Police Practice and Research*, 14(3), 228–241.

Indeed, the desire to be heard and validated by police and support services, irrespective of the outcome of a report, is considered highly significant to many survivors.<sup>52</sup> As such, any informal reporting options developed by police should not place pressure on survivors to make a formal statement. Rather, informal reporting options should be recognised as having intrinsic value to many survivors.

## Police interviewing techniques

As stated above, some of the problems posed by formal reporting requirements have been addressed through reforms to interviewing techniques, such as the “whole story approach”.<sup>53</sup> This model has been adopted by policing jurisdictions in Australia, including Victoria. Derived from best-practice models in the United Kingdom, the “whole story approach” is considered the most appropriate format for collecting witness testimony because of the way it prioritises the interviewee’s free narration or description of the incident in their own words.<sup>54</sup> Importantly, the “whole story approach” encompasses the use of in-person interviews, self-administered questionnaires and written testimonies, and seeks to avoid shoehorning witness testimony into predetermined questions that might influence their responses in a negative way or retraumatise victim-survivors in a way that causes them to withdraw their statements.

The importance of having a detailed account from a witness to crime in their own words is increasingly recognised as best practice police interviewing, particularly in the context of sexual assault reporting.<sup>55</sup> Heydon and Powell thus argue that written-response reporting tools based on best-practice cognitive interview techniques have a strong potential to maximise the quality and quantity of information collected for police intelligence purposes<sup>56</sup>. However, we recognise that survivors may have different preferences and accessibility requirements. As such, reporting tools should be available in a range of different modes (e.g., written, verbal, digital), and designed in conjunction with disability support services to ensure they are universally accessible. Reporting options should be designed to be inclusive of diverse gender, sex and sexuality, and to accommodate a range of languages.

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<sup>52</sup> Clark, H. (2010). What is the justice system going to offer? Understanding sexual assault victims/survivors' criminal justice needs. *Family Matters*, 85, 28–37. Clark, H. (2015). A far way to go: Justice for victims/survivors of sexual violence, in A. Powell, N. Henry & A. Flynn (eds). *Rape justice: Beyond the criminal law*. Basingstoke: Palgrave Macmillan, 18–35. Day, K. (2014). Reconceptualising sexual victimisation and justice, in I. Vanfraechem, A. Pemberton & F. Mukwiza Ndahinda (eds.). *Justice for victims: Perspectives on rights transition and reconciliation*. London: Routledge, 378–396. Murphy, K. & Barkworth, J. (2014). Victim willingness to report crime to the police: does procedure justice or outcome matter most?, *Victims & Offenders*, 9(1), 172–184. Powell, M. & Cauch, R. (2013). Victims' perceptions of a new mode of sexual assault investigation adopted by Victoria police. *Police Practice and Research*, 14(3), 228–241. Taylor, S. & Norma, C. (2012). The 'symbolic protest' behind women's reporting of sexual assault crime to police. *Feminist Criminology* 7(1), 24–47.

<sup>53</sup> Tdmars, P., Powell, M. & Darwinke, E. (2012). 'Whole story': A new framework for conducting investigative interviews about sexual assault, *Journal of Investigative Interviewing: Research and Practice*, 4, 33–44. See also: Hope, J., Gabbert, F., Heaton Armstrong, A. & Wochover, D. (2013). Self-administered witness interview. *Criminal Law and Justice Weekly*, 177(4), n.p.

<sup>54</sup> Heydon, G. & Powell, A. (2018). Written response interview protocols: An innovative approach to confidential reporting and victim interview in sexual assault allegations. *Policing and Society*, 28(6), 631–646.

<sup>55</sup> b.d.

<sup>56</sup> b.d.

Moreover, if these tools are developed and implemented in collaboration with an appropriate support service, informal reporting options may better support survivors. The need for collaboration between support services and the criminal legal system is clear, and the implementation of Multidisciplinary Centres is a step in the right direction and demonstrable that although the criminal legal system and support services may have different objectives these need not be competing. We therefore advocate for police and support services to work collaboratively in the development of informal reporting options.

## Existing alternative reporting options in Australia

Currently, New South Wales, ACT and Queensland police have alternative informal reporting options for survivors, however the way these forms are designed are antiquated and problematic. These reporting options take the form of a self-administered questionnaire that can then be filled out at any point in time after a crime has occurred to be directly handed to, emailed or posted back to police. However, these informal reporting options have a number of limitations, including:

- Many of the questions asked in the SARO (NSW police), ARO (Queensland police) and informal ACT police reporting option are not survivor-centric;
- The forms are lengthy, and
- Personal communications with support services in these jurisdictions suggest that survivors are reluctant to use them because of the nature of the questions asked. For example, the SARO reporting option from NSW is 14 pages long and contains a range of invasive (and potentially traumatising) questions (63 in total) about the offence, offender and survivor.

Our understanding is that Victoria Police currently does not have an informal reporting protocol available for survivors, but until recently had access to data provided to an informal digital reporting tool administered by a rape crisis centre in Melbourne. Although this reporting tool is no longer in operation, research currently under review with a peer review academic journal indicates that this informal reporting tool may have the capacity to satisfy both criminal justice needs/outcomes and survivors' justice needs. Importantly, the reporting tool has been designed in such a way that privileges survivors' narratives of their experiences of sexual assault through the use of free text boxes in which they are able to provide as much or as little information as they like in their own words. This brings the tool in line with the "whole story approach". In doing so, survivors may feel validated and have a strong sense of voice and control. The questions in the reporting tool also focus on eliciting information about the offender and the offence rather than personal information about the survivor. All 21 questions (including a number of free-text boxes) were optional for reporters to respond to apart from the offence being reported. All reporters who leave their contact details are followed up with by the rape crisis centre to offer support.

For a summary of findings from the study, see submission from Heydon, Henry, Loney-Howes and O'Neill titled: *Report to Charge: Alternative reporting options can fulfil criminal justice and*

survivors' needs. Their findings suggest that informal reporting tools can offer a survivor-centred approach to reporting sexual assault, and this this does not have to be at the detriment of policing needs. The informal reporting tool discussed in their research has a demonstrable capacity to provide the police with information for collecting intelligence pertaining to crime mapping and recording, along with the potential for survivors to make formal reports, as well as supporting survivors by connecting them with service providers.

## Designing and implementing informal reporting options for survivors

World-wide, there has been very little evaluation or discussion about the efficacy of alternative, informal and anonymous reporting options for sexual assault survivors associated with police. However, Heffron and colleagues<sup>57</sup> have demonstrated that the use of a “non-report” option administered by sexual assault nurse examiners (SANE) in Texas, USA, saw great value in its benefit for survivors. In particular, participants expressed that many survivors in crisis do not feel emotionally and physically ready to make a formal report to police, and therefore having an alternative option to record their experience was valuable. In addition, the findings revealed that survivors valued the use of the non-report option if the offender was a family member or known to the victim, if drugs or alcohol had been consumed at the time of the offence, or if the victim-survivor had a disability.

More recently, Liu<sup>58</sup> evaluated a range of informal digital sexual assault reporting tools, most of which were based in the USA, and identified two key areas for consideration in balancing the needs of the criminal legal system and survivors: privacy and increasing uptake. In relation to privacy, Lui noted that anyone making a confidential report should be provided with clear information about who is collecting the data, where it will be stored, and who has control over the information. Individuals should also have the ability to access and amend any information provided to digital platforms in order to ensure what is being reported is correct, and that the data should be stored securely. With respect to increasing uptake, developers must be mindful that digital reporting tools may privilege certain survivor's narratives, and must therefore be designed in a way that is not only trauma informed in the questions being asked but also avoids asking questions that can reinforce stereotypes about sexual assault.

As such, we strongly advocate that any alternative reporting option considered or adopted by Police should take into account the following:

- a) Be developed according to best practice outlined above in ways that focus on survivors providing as much or as little information as they feel comfortable. The questions should

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<sup>57</sup> Heffron, L. C., Busch Armendarz, N. B., Vohra, S. S., Johnson, R. J. & Camp, V. (2014). Giving sexual assault survivors time to decide an exportation of the use and effects of the nonreport option. *The American Journal of Nursing*, (1143), 26-35.

<sup>58</sup> Liu, H. (2018). When whippers enter the crowd: Evaluating technology to prevent and report sexual assault. *Harvard Journal of Law & Technology*, 31(2), 939-963.

be open-ended to capture the “whole story” and should be written in clear, plain language and not be onerous for survivors to complete.

- b) Informal and anonymous reporting options should not take the format currently used by ARO, SARO or ACT’s reporting option. Alternative reporting options should not include questions about the survivor’s appearance, personality, what they were wearing when the offence occurred, whether they had been drinking or consumed other substances.
- c) Where possible, reporting options should be focused on collecting information about the offender and the offence, and reporting options should be mindful about the language used to describe sexual offending - research shows that many survivors may not classify their experiences in legal/criminal terms, such as “rape” and “sexual assault”; therefore providing space for survivors to tell their story in words that are meaningful to them is paramount.
- d) Informal reporting options should provide flexibility in how survivors record their experience (e.g., written options, verbal options), and be made available in a range of languages other than English. Reporting tools should be developed in collaboration with disability support groups to ensure they are universally accessible. Reporting tools should be inclusive of diverse gender, sex and sexuality.
- e) Alternative reporting options should contain a clear statement about what is involved in this particular reporting process, what questions they will be asked, how much personal/identifying information they will be asked to give, what will happen to their report, whether they will be able to access the report once it has been filed, to indicate if they would like a follow-up phone call/text/email from police and/or support services.
- f) In collaboration with support services - research from international and emerging Australian studies indicates that alternative reporting options work best when support services are involved in administering these processes. This ensures that survivors are provided with wrap-around-support in terms of their therapeutic and justice needs.
- g) All reporting options should seek to connect survivors with appropriate support services, and to medical and forensic services. This should include support services tailored to the needs of specific groups, such as LGBTIQ+ communities, Indigenous people, and people whose primary language is not English.
- h) Data security and integrity are essential - reports made via informal avenues should not be considered formal statements and there should be no capacity for defense councils to subpoena records. If survivors wish to pursue criminal justice, it is essential that informal reports are converted to formal statements prior to proceeding with a case.
- i) Informal reporting options developed by police should not be used to place pressure on survivors to make a formal statement.

## E. Sexual Offences: The Trial Process

While significant legislative and procedural reforms have been made in Victoria in relation to sexual offences, these have been limited overall in terms of impact. Research undertaken by Bluett-Boyd and Fileborn (2014) found that many victim-centered reforms to legislation and courtroom practice were not working as intended. For example, survivors have the option of using a physical shield while giving evidence and during cross-examination so they did not have to see the accused. In practice, the researchers observed this involved using a whiteboard, while tipstaff had to physically block the survivor's line of vision when the accused entered and exited the courtroom. Similarly, while the ability for survivors to give evidence remotely was a welcome reform, the quality of technology in the courtroom (such as having sufficiently sized screens and good quality audio) was often patchy at best. This research found that the adversarial nature of the trial means that it is not possible to fulfill survivors' justice needs in this setting, further illustrating the importance of developing alternative justice responses.

Despite 'rape shield' laws preventing the introduction of evidence relating to factors such as the complainant's sexual history and clothing being in place for some time, research suggests that these (and other forms of 'evidence' evoking rape myths) are still routinely introduced at trial, often in subtle ways.<sup>59</sup> Likewise, defence continue to build narratives relating to survivors' "failure" to say no or resist physically, despite the fact that there is no legal requirement for survivors to have done so.<sup>60</sup> Again, this defence strategy is also at odds with the communicative model of consent. As noted earlier, the trial process continues to be a highly re-traumatising one for many survivors as a result of the need to repeatedly tell one's story, significant delays in the criminal legal process, and brutal cross-examination practices.

In light of these ongoing challenges, we advocate for the following reforms:

- In order to minimise the trauma associated with giving evidence at trial, and during cross-examination, greater use of video-recording should be introduced. Ideally, this would include recording the survivor's initial statement to police for use as evidence at committal hearings and trial.<sup>61</sup> Alternatively and/or additionally, victim evidence and cross-examination could be recorded at trial. The recording should be used if there is a re-trial to avoid the survivor undergoing cross-examination again. This approach would greatly reduce the trauma of giving evidence and under-going cross-examination multiple times, as well as reducing the number of times the survivor is expected to retell their story.

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<sup>59</sup> Henderson, E., & Duncanson, K. (2016). A tte judca d rect on: can the use of jury d rect ons cha enge trad tona consent narrat ves n rape tr a s? *UNSW Law Journal* 39(2), 750-778; Temkn, J., & Krahe, B. (2008). *Sexual assault and the justice gap: a question of attitude*. London: Hart Pub sh ng; Burg n, R., & F ynn, A. (2019). Women's behav or as mp ed consent: ma e "reasonab eness" n Austra an rape aw. *Criminology & Criminal Justice* ePub ahead of pr nt, 1-19; Bluett Boyd, N. & F eborn, B. (2014). *Victim/survivor focused justice responses and reforms to criminal court practice: implementation current practice and future directions*. Research Report No.27. Melbourne: Australian Institute of Family Studies.

<sup>60</sup> Burg n, R. (2019). Persistent narratives of force and resistance: affirmative consent as law reform. *British Journal of Criminology* 59, 296-314.

<sup>61</sup> Bluett Boyd, N. & Fileborn, B. (2014). *Victim/survivor focused justice responses and reforms to criminal court practice: implementation current practice and future directions*. Research Report No.27. Melbourne: Australian Institute of Family Studies.

- The introduction of independent victim-advocates to act as a key point of contact, support, and advocacy for the victim-survivor across the entire criminal justice process.<sup>62</sup> At trial, this should include the ability to intervene or object to inappropriate lines of questioning (such as that based on rape myths and misperceptions) and introduction of sexual history evidence, and otherwise advocate for the rights and well-being of survivors.
- Ensuring that mechanisms to support survivors at trial are incorporated into courtroom design and processes. For example, having bespoke screens to shield the survivor from the accused, rather than the use of ad-hoc measures such as whiteboards, and ensuring that all technological aids are of high quality, are appropriately sized for the courtroom space, and in functioning order.
- Ensuring that the justice interests of diverse communities, such as people living with a disability, LGBTQ+ people, and people for whom English is an additional language, are built into the criminal justice process, rather than being treated as an additional extra. This should be done in consultation with these communities.
- Ensuring that reforms are properly resourced and accompanied by extensive education for all criminal justice personnel, so that reform measures are consistently used.

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<sup>62</sup> B uett Boyd, N. & F eborn, B. (2014). *Victim/survivor focused justice responses and reforms to criminal court practice: implementation current practice and future directions*. Research Report No.27. Melbourne: Australian Institute of Family Studies.



## G. Sexual Offences: Restorative and Alternative Justice Models

### Evidence supporting alternative justice models

We strongly support the adoption of restorative and alternative justice models for sexual offences. Research consistently shows that the overwhelming majority of survivors do not access the formal criminal legal system. For those who do, this experience continues to be a re-traumatising one. Despite multiple rounds of sexual offences reform in Victoria there has been no clear shift in the experiences of survivors in accessing the criminal legal system.<sup>63</sup> Likewise, criminal trials continue to be informed by myths and stereotypes about the nature of sexual violence. In other cases, experiences of sexual violence are unlikely to meet the threshold of criminal harm, leaving survivors with no recourse in terms of seeking justice. Given these deeply ingrained challenges in reforming the criminal legal system, there is an unequivocal need to introduce new, alternative measures for achieving justice in response to sexual violence.

Research consistently illustrates that survivors have a range of justice interests, typically including:<sup>64</sup>

- Voice: the ability to share one's story in a way that is meaningful, and in a context where your experience is heard.
- Belief and validation
- Control: this includes control over how, when and with whom survivors share details of their experience, as well as having input into key points of decision-making during a criminal investigation (or other justice response)
- Safety (both of the individual and the community)
- Perpetrator accountability: while this can involve formal punishment and undertaking rehabilitation, accountability is much broader than this. For example, for many survivors, actions such as the perpetrator acknowledging and understanding the impacts of what they have done is important, as is a formal apology.

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<sup>63</sup> And this is also the case internationally. See, e.g., Herman, J. (2005). Justice from the victim's perspective. *Violence Against Women* 11(5), 571-602.

<sup>64</sup> Clark, H. (2013). "What is the justice system going to offer?" Understanding sexual assault victim/survivors' criminal justice needs. *Family Matters* No. 85, 28-37; McGynn, C., Westmar and, N., & Godden, N. "I just wanted him to hear me": sexual violence and the possibilities of restorative justice. *Journal of Law & Society* 39(2), 213-240; McGynn, C., & Westmar and, N. (2018). Kāe whakapāka: sexual violence and victim/survivors' perceptions of justice. *Social & Legal Studies* online first, 1-23; Herman, J. (2005). Justice from the victim's perspective. *Violence Against Women* 11(5), 571-602; Júch, S. (2006). Views of justice among survivors of historical sexual abuse: implications for restorative justice in New Zealand. *Theoretical Criminology* 10(1), 125-138.

While the criminal legal system can help to fulfil some of these interests, more often than not the system is unable to respond to survivors' justice needs.<sup>65</sup> Indeed, as Judith Herman<sup>66</sup> argues:

*“The wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings”* (p.574)

It is also important to note that survivors' justice interests are fluid, and change over time.<sup>67</sup> Likewise, individual survivors will have different justice interests - not all of the interests mentioned above will be relevant to all survivors at all times. For this reason, it is essential to develop a suite of formal and informal justice options that are responsive to the diversity of survivors' interests.<sup>68</sup>

Alternative justice responses, including restorative justice, transformative justice, and truth-telling/story-telling forums have been shown to help survivors achieve at least some of their justice interests. For example, UK-based research<sup>69</sup> found that restorative justice processes can provide survivors the opportunity to give voice to their experience in a meaningful way, and to have their perpetrator understand and acknowledge the harms of their actions. This reflects international research demonstrating that alternative justice responses can, when implemented appropriately, provide a sense of justice for at least some victim-survivors.

However, overall, there remains only limited research on the implementation of alternative justice responses. Where alternative options are introduced, they should be accompanied by independent monitoring, research and evaluation to ensure they do not have unintended consequences, such as compromising the safety and well-being of survivors.

## Restorative justice

In relation to restorative justice, we support the following:

- Restorative justice should be available to survivors at any stage in the criminal legal process, for those survivors who choose to access this system. Access to restorative justice should not be limited to particular age groups or offence types.
  - Survivors should be made aware and reminded of this option at all points of the criminal legal process.

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<sup>65</sup> Clark, H. (2013). “What is the justice system going to offer?” Understanding sexual assault victim/survivors' criminal justice needs. *Family Matters* No. 85, 28-37; McGynn, C., Westmar and, N., & Godden, N. “I just wanted him to hear me”: sexual violence and the possibilities of restorative justice. *Journal of Law & Society* 39(2), 213-240; Júch, S. (2006). Views of justice among survivors of historical sexual abuse: implications for restorative justice in New Zealand. *Theoretical Criminology* 10(1), 125-138.

<sup>66</sup> Herman, J. (2005). Justice from the victim's perspective. *Violence Against Women* 11(5), 571-602.

<sup>67</sup> McGynn, C., & Westmar and, N. (2018). Kalescopic justice: sexual violence and victim survivors' perceptions of justice. *Social & Legal Studies* online first, 1-23.

<sup>68</sup> Ibid McGynn, C. (2011). Feminism, rape and the search for justice. *Oxford Journal of Legal Studies* 31(4), 825-842.

<sup>69</sup> McGynn, C., Westmar and, N., & Godden, N. “I just wanted him to hear me”: sexual violence and the possibilities of restorative justice. *Journal of Law & Society* 39(2), 213-240.

- Participation in restorative justice should not prevent survivors from continuing with a criminal trial.
  - Survivors should not be pressured to participate in restorative justice, or to do so *at the expense of* a criminal trial.
- A separate, independent restorative justice process should be available to survivors who do not want to access the formal criminal legal system. This should not be limited to particular age groups or offence types, or to cases where the offender has admitted guilt.
    - The independence of this option is central, as this recognises that many survivors (particularly those from marginalised or oppressed communities) cannot or do not wish to interact with the formal criminal legal system.
    - This independent process should be available to survivors regardless of whether their experience meets a criminal threshold of harm.
    - The decision to participate in an independent restorative process should not foreclose the possibility of accessing the formal criminal legal system at a later point (for those whose experience meets a criminal threshold for sexual offences). However, proceedings of this independent process should not be admissible at trial as this would disincentivize the perpetrator's participation.
- The use of restorative justice may not be appropriate for certain contexts of sexual violence, particularly that occurring in the context of family and domestic violence. Survivors should never be pressured to engage in restorative justice, and this approach should not be used if it directly compromises the survivor's safety.<sup>70</sup>
  - Survivors participating in restorative justice must have access to an independent advocate and support person.
  - Individuals involved in delivering restorative justice conferences must have specialist training in sexual violence, and possess a firm understanding of the gendered (and other) power relations that underpin this violence.<sup>71</sup>
  - Restorative justice processes should be developed in partnership with survivors, sexual assault advocates and sector workers, academics and others with expertise in this field.
  - Ongoing monitoring, evaluation and research is required to ensure that restorative justice is implemented appropriately, and without impairing the safety and well-being of survivors.

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<sup>70</sup> Day, K., & Stubbs, J. (2006). Feminist engagement with restorative justice. *Theoretical Criminology* 10(1), 9-28.

<sup>71</sup> McGynn, C., Westmar and, N., & Godden, N. "I just wanted him to hear me": sexual violence and the possibilities of restorative justice. *Journal of Law & Society* 39(2), 213-240.

## Transformative justice

Transformative justice responses aim to disrupt the underlying causes of sexual violence, and can occur at an individual, community, and structural level. While transformative responses typically include preventative efforts, transformative justice responses can also occur in the aftermath of sexual violence. For example, a transformative justice response can involve working intensively with a perpetrator to challenge and disrupt their understandings about masculinity and sexual interaction that underpinned their offending. The safety and healing of survivors is also prioritised in transformative approaches, and they can involve the perpetrator making reparations for the harm they have caused.

We strongly support the development of independent, community-led transformative justice responses:

- Transformative responses align strongly with survivors' justice interests, particularly in relation to the desire for prevention and to change the underlying structural drivers of sexual violence.
- Transformative justice responses should be entirely independent of the state.
- Transformative justice responses are community-led, and responsive to the needs of each community. There is no singular way of implementing transformative justice responses.
- Models of transformative justice have been employed in responding to sexual violence in the United States and Canada, such as the Philly Stands Up grassroots movement <https://phillystandsup.wordpress.com/>, and by Undercurrent in Victoria <https://www.undercurrentvic.com/>. These provide a starting point for developing further transformative responses.

## Truth-telling & story-telling approaches

As noted above, research concerned with the justice needs of victim-survivors has reported that story-telling, being heard and being believed are all crucial elements of justice from the victim's perspective.<sup>72</sup> Therefore, alternative justice processes such as restorative and transformative approaches are one significant avenue for victim-survivors to have these needs met, but there is also much to be learned from transitional justice proceedings and informal justice practices.

Transitional justice mechanisms are an important example of justice approaches that aim to center victim's truth-telling and story-telling in the justice process. Transitional justice often centres the testimony of victim-survivors to redress the harms of sexual violence. Emerging after World War II, transitional justice mechanisms were a response to human rights abuses occurring in Europe and Japan during the war. It is worth noting that transitional justice can be broad in

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<sup>72</sup> Clark, H. (2013). "What is the justice system going to offer?" Understanding sexual assault victim/survivors' criminal justice needs. *Family Matters* No. 85, 28-37; McGynn, C., Westmar and, N., & Godden, N. "I just wanted him to hear me": sexual violence and the possibilities of restorative justice. *Journal of Law & Society* 39(2), 213-240; McGynn, C., & Westmar and, N. (2018). Kāe whakapā ki te tikanga: sexual violence and victim/survivors' perceptions of justice. *Social & Legal Studies* online first, 1-23; Herman, J. (2005). Justice from the victim's perspective. *Violence Against Women* 11(5), 571-602; Jülich, S. (2006). Views of justice among survivors of historical sexual abuse: implications for restorative justice in New Zealand. *Theoretical Criminology* 10(1), 125-138.

scope and includes both legal and non-legal responses. As an 'alternative' response, transitional justice can encompass memorials, public apologies, truth and reconciliation commissions and tribunals, political reform and shifts towards peace, democracy, and equality.<sup>73</sup> Victim-survivors of sexual violence have taken part in international criminal tribunals, truth and reconciliation commissions, and civil society tribunals in Japan, South Africa, and the former Yugoslavia.<sup>74</sup> Importantly, these types of transitional justice procedures have attempted to prioritise victims in the process, providing an opportunity for storytelling in a formal setting and for the development of collective memory of harms that had occurred.

Further to this, victim-survivors are increasingly engaging in truth- and story-telling practices through more informal means, such as online disclosures and other forms of what scholars have termed 'online informal justice.' Research suggests that these modes of storytelling also have the capacity to meet the justice needs of victim-survivors, particularly when formal legal mechanisms fail to do so.<sup>75</sup>

Considering the role of truth- and story-telling in meeting victim-survivors justice needs, we recommend that:

- Victim-survivors should have opportunities for truth- and story-telling as a central part of the formal criminal legal process. These opportunities should also be embedded in alternative responses, such as restorative, transformative and transitional approaches, and as such, there should be opportunities for storytelling that exist within and completely independent of the state. There should be formal and informal avenues to storytelling, and victim-survivors should have choice, agency and control over how they participate in storytelling. To this effect, victim-survivors *should not be expected* to share their stories if they do not want to.
- Where storytelling is part of a formal legal process, for example, a Victim Impact Statement, it must be considered as a key element of the justice process and should be read aloud to the court in full. The content of Victim Impact Statements should not be limited by rules of evidence. Rather, they should provide an opportunity for survivors to speak about their experience and its impacts in a way that is meaningful to them.
- Opportunities for truth-telling and story-telling should centre the needs of victim-survivors in the process.

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<sup>73</sup> Henry, N. (2015). The Law of the People: Civil Society Tribunals and Wartime Sexual Violence. In A. Powe, N. Henry, & A. Flynn (Eds.), *Rape Justice: Beyond the Criminal Law* (pp. 200–217). Palgrave Macmillan UK; Crocker, D. (1998). Transitional Justice and International Civil Society: Toward a Normative Framework. *Constellations*, 5(4), 492–517.

<sup>74</sup> Henry, N. (2010). The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice. *Violence Against Women*, 16(10), 1098–1119.; Henry, N. (2013). Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial. *Asian Studies Review*, 37(3), 362–380.; Ross, F. C. (2003). On Having Voice and Being Heard. *Anthropological Theory*, 3(3), 325–341; Ross, F. C. (2003). *Bearing witness: women and the Truth and Reconciliation Commission in South Africa*. Pluto Press.

<sup>75</sup> Fobern, B. (2014). On the Act of Shame and Street Harassment: Dignity, Justice or Shouting into the Ether? *Griffith Journal of Law & Human Dignity*, 2(1), 32–51.; Fobern, B. (2017). Justice 2.0: Street harassment victims' use of social media and online activism as sites of informal justice. *British Journal of Criminology*, 57(6), 1482–1501.; Wänggren, L. (2016). Our stories matter: storytelling and social justice in the #MeToo movement. *Gender and Education*, 28(3), 401–415.; Powe, A. (2015). Seeking rape justice: Formal and informal responses to sexual violence through technosocial counterpublics. *Theoretical Criminology*, 19(4), 571–588.; Wood, M., Rose, E., & Thompson, C. (2018). Vra justice? Online justice seeking, intimate partner violence and affective contagion. *Theoretical Criminology*, 1–19.

- The need for online or digital truth-telling and story-telling platforms should be considered. However, it is vital that any digital options are hosted on secure platforms.
- Additionally, there is a need to be mindful of what happens to survivors' stories and how this information is used. Story and truth-telling options must be meaningful and ensure that what survivors have to say is heard and has impact. Tokenistic approaches to story and truth-telling will be counterproductive if not harmful to survivors.