Submission to the Australian Law Reform Commission Issues Paper 49:
Justice Responses to Sexual Violence

24 May 2024

Dear Commissioners,

Thank you for the opportunity to make a submission to the Issues Paper 49 in response to the Australian Law Reform Commission's Inquiry into Justice Responses to Sexual Violence. This submission represents a collaboration between academics, practitioners and advocates working in the areas of legal and non-legal regulation of domestic, family and sexual violence, as well as prevention, intervention and recovery. This submission has been prepared by Sarah Rosenberg, Executive Director and Co-Founder of With You We Can; Associate Professor of Criminology, Dr Mary Iliadis, Deakin University; Associate Professor of Psychology, Dr Lata Satyen, Deakin University; and, Michael O'Connell AM APM, consulting victimologist and former South Australian Victims' Rights Commissioner (2006-2018).

Sarah Rosenberg

Sarah Rosenberg is Executive Director and Co-Founder of With You We Can, a national online resource demystifying the police and legal systems for victims of sexual violence while working to improve them. She is a member of the National Women's Safety Alliance, the Independent Collective of Survivors and the Expert Advisory Group for this Inquiry.

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Associate Professor Mary Iliadis' research specialisms are in the areas of domestic, family and sexual violence. She is recognised, internationally, for her research on the rights, role and standing of victim-survivors of sexual violence in criminal justice systems.

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Introduction

In Australia, multiple national and state based commissions of inquiry have shed light on the gravity, nature and impacts of sexual violence, and the need to improve prevention, intervention and responses within and beyond the criminal justice system (see *The National Plans to End Violence Against Women and Children, 2010-2022, 2022-2032*; Victorian Law Reform Commission, 2016, 2021; Royal Commission into Family Violence, 2016; Independent Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence 2022). The resultant recommendations emerging from these inquiries emphasise the need for policy and practice shifts to centre and prioritise the voices and lived experiences of victim-survivors to enhance their safety, wellbeing and access to justice.

It is well documented that victim-survivors of sexual violence often do not report or delay reporting to the criminal justice system (Iliadis, 2020; Iliadis, Smith & Doak, 2021). For example, the Women's Safety and Justice Taskforce in Queensland found that women and girls who have experienced sexual violence are often reluctant to disclose their victimisation to support services or report formally to police (*Hear Her Voice*, Volume 2, 2022). In particular, the Taskforce found that First Nations women and women from multicultural communities face additional barriers to help-seeking and engaging the criminal justice system due to fearing further violence, not wanting to report the abuser, and not having confidence in police and criminal justice responses. Our research has also shown that women from minority ethnic backgrounds are more likely to seek assistance from informal sources than formal services due to fears of repercussions and a lack of knowledge and understanding of the different systems that can support them (Satyen et al., 2019; Satyen et al., 2021). The Taskforce also highlighted barriers in relation to older women, women with disabilities (who may be dependent on their abusers for care and support), and for members of the LGBTQIA+ communities who may be concerned about self-disclosure, stigma and power differentials. This is true for all jurisdictions in Australia.

The need for the introduction of independent legal representation (ILR) for victim-survivors of sexual violence during criminal justice processes has surfaced in Australian inquiries (Victorian Law Reform Commission, 2016, 2021; Royal Commission into Family Violence, 2016; Women's Safety and Justice Taskforce, 2022; Australian Law Reform Commission, 2024). These inquiries have considered the implications of introducing ILR in Australian jurisdictions, including the possible role of non-legal advocates which would not be seen to directly conflict with the requirements of adversarial court processes in the way that ILR could potentially be perceived to. While not traditionally a part of the adversarial approach, which sees crime as contested between the state prosecutor and accused person (who is usually represented by a defence lawyer), the use of ILR for victim-survivors of sexual violence already has precedence in Queensland through the Sexual Assault Counselling Privilege (Counselling Notes Protect): a service system operated by Legal Aid Queensland and Women's Legal Services Queensland. ILR also has precedence in New South Wales

(NSW) to prevent or restrict the disclosure of sexual assault victim-survivors' counselling notes that may contain confidential material, for example, in relation to previous sexual experiences (*Evidence Amendment (Confidential Communications) Act 1997* (NSW)). Under recent federal government pilots, the Australian Capital Territory (ACT), Western Australia and Victoria have received funding to pilot ILR.

Innovations through ILR can provide a roadmap to victim advocacy, support and representation, nationwide, to empower and protect victim-survivors of sexual violence, and address the ongoing social and cultural problems that prevent victim-survivors from engaging with the criminal justice system, or that lead to their attrition in the process once they have already engaged. It is within the context of these debates and the pivotal need to empower and protect victim-survivors that we provide a critical evidence base through our submission as to how criminal justice system improvements can be made through the introduction of publicly funded ILR nationwide.

Throughout this submission, we will draw upon our collective academic research (Associate Professors Mary Iliadis and Lata Satyen), advocacy, education and lived experience (Sarah Rosenberg), and practice where ILR was afforded through the functions and powers of the South Australian Commissioner for Victims' Rights (Michael O'Connell AM APM).

The advent of victim-survivors' rights and support mechanisms

In the 1980s, South Australia introduced the first declaration on crime victims' rights. The Attorneys-General endorsed a national declaration in approximately 1994, and every state and territory followed suit and now has a charter of rights for crime victims. Notwithstanding the shift towards better integration and inclusion of crime victims through victims' rights charters and other protections, such rights are not fulfilled for too many victims. Few victims' rights in Australia pass the test of a legal right (O'Connell, 2017), meaning that overwhelmingly, their rights are evaded, circumvented and resisted (Kelly et al., 2006; Iliadis, 2020).

Despite a litany of victim-oriented support mechanisms, victims continue to voice dissatisfaction with, and retraumatisation as a result of, their engagement with the criminal justice system (Iliadis, 2020). Many victims who report crime complain that their needs are often overlooked, and even ignored, by those they expect to help them. Indeed, victim-survivors are often shocked to discover that the prosecuting agency does not prioritise their rights and interests in criminal trials, but rather, prioritises the State's interests as central to the prosecution of a case (Iliadis, 2020). Some victim-survivors have stated that the criminal justice system is a site of secondary harm, and echoes the severity of the offences they have already endured and are attempting to recover from (Iliadis, 2020).

Reconceptualising the rights and role of victim-survivors of sexual offences: from witnesses to participants

Considering that the criminal justice system relies on victims' confidence to report crime and cooperate as a witness for the prosecution, prospects for reform must be centred on the unique needs of sexual offence victims and the provision of protections to minimise the likelihood of secondary harm and their withdrawal from the legal process. A crucial way in which sexual assault victims' experience of the criminal legal system could be improved is to transform their role and level of contribution in the system: to reconceive victim-survivors as 'integral players... rather than mere bystanders' in the prosecution process (O'Connell, 2012). This can be achieved through the implementation of victim independent legal representation (ILR), which already exists in Queensland and NSW, and is currently being piloted in Victoria, Western Australia and the ACT, as mentioned above.

ILR affords victims their own lawyer and standing during the criminal prosecution process (Iliadis 2019). ILR acts independently of the prosecutor, prioritising victim interests, and can include providing victims with information, advice and representation prior to and during trial (Iliadis, 2020). There are different models of ILR for victims around the world (see Iliadis, 2019, 2020; Iliadis, Smith & Doak, 2021; Braun, 2014; Braun, 2019; Carroll, 2022), but generally proposals for ILR for victim-survivors of sexual violence are endorsed by the need to protect them against adversarial court processes, strengthen the veracity of their evidence and confidence when testifying, and protect them against disclosure(s) of their private information and intrusive questioning on these records (Iliadis, Smith & Doak, 2021). Research has found that where ILR is afforded to victims-survivors in criminal trials in clearly defined parameters and contexts, it can significantly enhance their experiences of procedural and substantive justice (Iliadis, 2019; Iliadis, 2020).

The European Union Victims' Rights Directive 2012/29/EU promotes the need for additional supports and legal protection for vulnerable complainants:

> *Persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships [or] victims of gender-based violence … should be provided with specialist support and legal protection.*

Disclosures and reporting

A victim-survivor's decision to disclose sexual violence or report formally to police is often one of the most challenging decisions they make in deciding whether or not to engage the criminal justice system. Exacerbating an already fearful and isolating process, which victims often navigate without sufficient information about their rights, role and protections, the criminal justice system is replete with myths and stereotypes, and empirically false

misconceptions, about sexual violence and its impacts (see Iliadis, Smith & Doak, 2021). These experiences ring true in Australia (see Iliadis, 2020; Iliadis et al., 2024) and internationally. For example, results of a survey of 587 English and Welsh victim-survivors suggested that a majority of those who reported to police found the process more traumatic than the original offence, with one respondent stating she had come to terms with the rape, but doesn't feel she'll ever come to terms with the police investigation (Daly & Smith, 2020). Practitioners in Iliadis' (2020) study have described how police discretion and the exercise of such discretion, is often informed by problematic myths and stereotypes about sexual violence. Police need to approach investigations and questioning with curiosity rather than adopting an approach that appears accusatory, questioning the victim-survivor's perceived involvement or responsibility for the violence committed against them.

Other Australian research, including key commissions of inquiry, have found that the absence of ILR from as early as police reporting for victim-survivors of sexual violence is a major factor contributing to feelings of fear that drives the lack of reporting of these offences, and the high attrition rates if they are reported (see Iliadis, 2020; VLRC, 2016, 2021). The absence of ILR for victims at the time of police reporting also means that victims provide sensitive information to police (such as who their counsellor is) to substantiate credibility and claims, without understanding that this information can be and often is used as a basis to discredit them if charges proceed and the case goes to trial. Having a trained independent lawyer accompany victims to provide a police report, and/ or provide them with the necessary information and advice prior to reporting, could enable victims to be better prepared for what to expect at the police station, what questions they ought to respond to, and how much information they ought to provide.

Cultural considerations for disclosures and reporting

Cases of domestic violence may go unreported by victim-survivors from minority ethnic communities because of individual or societal factors. At the individual level, women avoid disclosure because they feel ashamed or embarrassed, or fear that they would not be believed, and that they may not be able to be assisted (Johnson et al., 2017). Commonly reported barriers to seeking help especially for victim-survivors of domestic violence include fear of retaliation from their partner and extended family members and concern for children's safety in the aftermath (Hyman et al., 2009; Rodriguez et al., 2009; Satyen et al., 2019; Green et al., 2023). Women who experience domestic violence have also been found not to report to the police, in particular, due to their negative experiences with police responses and fears of repercussions (Wolf et al., 2003).

There are also factors that operate at the societal level to inhibit women from reporting domestic violence. These include family and marital laws, the acceptance of violence against

women (Tran et al., 2016), victim-blaming attitudes (Gracia & Herrero, 2006), and the disservice of health practitioners in failing to screen for domestic violence.

Pre-trial processes

Throughout the pre-trial process, ILR can provide timely legal information and advice to victims as they navigate the stages of criminal proceedings. Victims experience distress due to the lack of continuity, communication, and timely information about the process. While many states offer witness assistance or liaison services, even with a narrow interpretation of this role, victims report being unable to contact their officer, or that their designated officer keeps changing. The affiliation of these officers with the Office of the Department of Public Prosecutions ('ODPP', also referred to as the 'OPP' or the 'DPP' in some states) which allocates them, with a perceived lack of independence, can diminish the victim's sense of support (Smith & Daly, 2020).

What is noteworthy is the distinction between ILR, which has legal knowledge and standing, and non-legal advocates. Non-legal victim advocates might be seen to assume an important role in supporting victims in criminal and related processes. However, their role is usually limited to the provision of information and advice, such as assisting victims with issues outside of court, including compensation claims, counselling, and referral options. Non-legal advocates can work in conjunction with victim ILR, but should not be perceived as sufficient in supporting victim-survivors throughout the criminal trial process because they lack legal intervention and expertise, and cannot legally enforce the protection of victims' rights in court (such as victims' rights to protection from intrusive questioning on their private information relating to prior sexual experiences or counselling records, which still occurs in practice despite 'rape shield' safeguards; see Iliadis et al., *forthcoming*).

Where advocacy workers are not equipped to advise on the law, ILR provides an opportunity for victims to understand the rationale behind decisions being made, as they act as an interpreter of the law and prosecution process (Carroll, 2022). This fosters a sense of agency and voice for the victim, counteracting feelings of exclusion and isolation which drive low reporting and high attrition rates.

Plea Negotiations

While it is beyond the scope of this submission to address plea negotiations in detail, the role of victim ILR could extend to plea negotiations, from which victims are generally alienated. Some researchers have found that the plea negotiation process is shrouded in secrecy (Flynn, 2006), and victim-survivors can feel sidelined from this process, or denied of justice. There is also limited data on plea negotiations, their outcomes, and the types of offences involved,

which hinders comprehensive analyses of prosecutorial decision-making (Flynn, 2016). This lack of transparency heightens victims' fears of the negative aspects of plea negotiations, such as the reduction in the number or severity of charges, the minimisation of culpability for the perpetrator, and a de-escalation of the victim's 'victim status', which further reduces trust in and satisfaction with the criminal justice process.

Rape shield protections: Confidential communications and prior sexual experiences

All Australian states and territories offer a degree of protection on victims' confidential counselling communications. These are chartered within *Evidence Acts*, except for NSW, which outlines the protection in s 296 of the Criminal Procedure Act 1986 (NSW). They also offer a degree of protection on victims' prior sexual experiences, which are chartered within Evidence Acts and Criminal Procedure Acts, which work in conjunction with one another. However, victims' entitlements to these legislative protections, known as 'rape shield' laws, are rarely upheld, as found in research by Iliadis et al. (*forthcoming*).

Iliadis et al. (forthcoming) have conducted a nationwide study, funded by the Australian Institute of Criminology, which explores whether and how victims' sensitive third-party evidence (counselling, medical and therapeutic records, prior sexual experiences) is protected. In this study, Iliadis et al. (forthcoming) conducted a nationwide survey of victim-survivors, analysed a sample of sexual offence transcripts, and interviewed practitioners and lawyers representing victims to understand how problems with the use of sexual violence victim-survivors' sensitive third-party evidence arise in criminal prosecution processes. The final report is forthcoming publication, although, preliminary findings suggest that rape shield protections on victim-survivors' private information are not properly enforced, and victims continue to feel humiliated, ashamed, and retraumatised when engaged in the criminal justice system. Certainly, this was the experience of co-author Sarah Rosenberg.

The dangers of being questioned on counselling records, prior sexual history, and other private information that is not 'protected' by legislation, is a key reason as to why victims withdraw from the process (Powell et al., 2013; Iliadis, 2020). It also discourages other victims from reporting their assaults, which undermines the integrity of the criminal justice system: that reporting crime leads to a safer community and will not cause further harm. Further, beyond 'protected' information, defence counsel may use private information such as text messages, internet searches, and school and employment records, to distress, discredit, and humiliate the victim.

Victim independent legal representation (ILR) in Australia

Prior to trial, only two Australian states attempt to enforce the protection of a victim's counselling records. ILR has precedence in NSW and Queensland. It has operated in NSW since 2011 to prevent or restrict the disclosure of sexual assault victim-survivors' counselling notes that may contain confidential material, for example, in relation to previous sexual experiences (*Evidence Amendment (Confidential Communications) Act 1997* (NSW)). In Queensland, it is available to counselled persons for representation at domestic violence and criminal law proceedings to determine if leave will be granted to subpoena protected counselling notes (regarding a related sexual assault) and/or if material produced under a subpoena can be disclosed (Division 2A of the *Evidence Act 1977* (QLD)). This right to ILR, however, does not extend to legal standing in relation to other matters, such as disclosures or subpoenas of other sensitive evidence (such as prior sexual experiences, digital records containing private data, or education and employment records). Womens' Legal Services Queensland are advocating to extend the remit of ILR to protect a victim-survivor's prior sexual experiences that do not necessarily feature in counselling records. At times, however, the prosecution does not inform victims of their right to ILR or informs them too late in proceedings (Iliadis, 2019; WLSQ, 2022), limiting the legal representative's ability to familiarise themselves with the victim or prevent the subpoenaing of their records.

Notably, no jurisdictions afford ILR to victims in relation to the sexual history protection, unless this evidence features in communication records where the Counselling Notes Protect Privilege (in Queensland) and the Sexual Assault Communications Privilege (in NSW) would apply, respectively. Beyond this, most Australian jurisdictions rely on the prosecution to intervene. However, it is common for defence counsel to give late notice of intention to apply for leave to obtain and cross-examine the victim on their private records (Iliadis, 2019). This leaves insufficient time for prosecution to object to applications for leave by the defence. Prosecutors may also choose not to oppose applications due to fears of being perceived as hiding information or coaching victims (Donovan, 2022). Prosecution can apply for leave themselves in order to minimise the impact of evidence permitted under the defence's potentially successful application, but under-resourcing, case management changeover and the resultant lack of familiarity with the case poses challenges. As such, it is common for leave to be granted (Kelly et al., 2006; Iliadis, 2020), particularly when the accused is known to the victim as this can often be seen as probative evidence.

Academic research has argued that a failure to provide victims with ILR to enforce 'rape shield' protections is akin to denying them of human rights (O'Connell, 2018), with applications to obtain sensitive information being routinely used to intimidate complainants and encourage attrition (Bacik et al., 2010; Powell et al., 2013; McGlynn, 2017; Burgin & Flynn, 2019; Dowds, 2019; Iliadis, 2020). Representing victims in these circumstances is

crucial to "carrying out the balancing exercise" of the rights of the defendant, the state and the victim (a triangulation of interests; see Iliadis, 2020). It can also challenge the deeply embedded myths underpinning the frequency and rationale of applications to adduce victims' private and sensitive information in the first place (McGlynn, 2017; Iliadis, 2019). Indeed, the question of why or how any prior sexual experiences of victims are considered probative highlights how little has been achieved by way of dispelling the rape myths and stereotypes that pervade courtrooms (Iliadis, 2019).

Applications to access private records often occur once the trial has commenced, with a strong likelihood of success to avoid trial delays (Iliadis, 2019). As such, even in NSW and Queensland where ILR is limited to pre-trial applications, victims are left unprotected during the trial process (Killean, 2021). Perhaps of more significance is that improper questioning by the defence often still occurs despite leave having been denied (Iliadis, 2020). ILR should be available to victims during the trial, in order to protect victims' rights and interests at all times when decisions are being made, confidential information is subpoenaed, and when inappropriate questions are posed without objection. This is arguably no less than they are already entitled to in NSW and Queensland, but fail to receive. In fact, offering ILR for the pre-trial stage only leaves victims just as vulnerable as if they had no representation at all (Iliadis, 2019).

Independent legal representation through the Commissioner for Victims' Rights in South Australia

In South Australia, the Victims of Crime Act empowers the Governor of that state to appoint the Commissioner for Victims' Rights. Section 16 of the Act describes the Commissioner's functions:

- to assist victims in their dealings with prosecution authorities and other government agencies;
- if another Act authorises or requires the Commissioner to make submissions in any proceedings—to make such submissions (either personally or through counsel);
- to carry out any other functions assigned under other Acts.

Furthermore, section 32A of the Victims of Crime Act provides that a victim may exercise rights through an appropriate representative. The section (see below), for instance, authorises the Commissioner, with the victim's approval, to either in-person or through legal counsel, exercise any right that the victim is entitled to under the Declaration Governing Treatment of Victims. Once leave is granted and the Commissioner is able to represent the victim in court, the victim gains de facto standing in proceedings from which they would otherwise be excluded. Through representation, the interests of the victim thus shift from peripheral to integral, despite the victim not gaining personal party status to proceedings.

Section 32A -

(1) Rights granted to a victim under this, or any other, Act may be exercised on behalf of the victim by an appropriate representative chosen by the victim for that purpose. [Note— Such rights would include (without limitation) the right to request information under this or any other Act, the right to make a claim for compensation under this or any other Act and the right to furnish a victim impact statement under the Sentencing Act 2017.]
(2) In this section— appropriate representative, in relation to a victim, means any of the following:

(b) the Commissioner for Victims' Rights or a person acting on behalf of the Commissioner for Victims' Rights;
(c) an officer or employee of an organisation whose functions consist of, or include, the provision of support or services to victims of crime;

(e) another person who, in the opinion of the Commissioner for Victims' Rights, would be suitable to act as a representative.

Through his role as Commissioner for Victims' Rights in South Australia, Michael O'Connell provided ILR to victims for varying reasons, as demonstrated below. These interventions through ILR led to positive outcomes for victims, but as noted by O'Connell in Iliadis' (2020) study, he was constrained more so by resources than by power to intervene in cases. Therefore, it is not a viable solution to merely enforce ILR through the functions of the Commissioner, and state-funded ILR is needed to sufficiently enforce the rights and protections of victim-survivors across Australian jurisdictions more broadly.

Case studies: Independent Legal Representation through the Commissioner for Victims' Rights in South Australia

Pre-court preparation

'C' was the victim-survivor of sex offences perpetrated by two offenders. The case was split pre-trial, so 'C' was required to give their testimony twice. At the first trial 'C' experienced 'trial by ordeal' and was dismayed when the prosecutor did not object to questions in cross-examination that 'C' found offensive, unnecessarily intrusive and suggesting falsities. The verdict was not guilty. After 'C' asked the prosecutor questions in preparation for the next trial. The prosecutor stated that they could not address the questions because they would have to disclose some elements of the conversation and some of the answers the prosecutor might offer could be misconstrued as 'coaching'.

'C' asked the Commissioner for Victims' Rights for assistance. The commissioner engaged legal counsel (a solicitor renowned for representing accused people) who agreed to speak with 'C' – a conversation that would be protected by 'legal privilege'. At the next trial, 'C' was better prepared to give their testimony. 'C' felt emotionally and psychologically

empowered ('Cs' feedback). The legal counsel reported that they found talking to 'C' to be enlightening and educational. That counsel and the firm they co-owned often help victims enforce their rights.

Plea Negotiations

Withdrawal of charge

'K' the victim of gender-based violence met the prosecutor. After a brief conversation, 'K' formed the view that the prosecutor did not fully understand the evidence. Conversely, the prosecutor reached the conclusion that 'K' might not be a 'good witness', so there was not a reasonable prospect that continuing the prosecution would secure a conviction.

'K' surmised that the prosecutor would recommend withdrawing the charges. 'Ks' father asked the Commissioner for Victims' Rights for assistance. The commissioner engaged legal counsel who communicated with the prosecutor and accompanied 'K' to the next meeting. 'K' reported that the prosecutor at this meeting appeared to be prepared, to understand the evidence, and treated 'K' with respect. The prosecutor listened to the legal counsel and to 'K', and then determined that their initial assessment of 'K' and the evidence was incorrect. The case proceeded to trial and the accused person was found guilty.

Five adult survivors of childhood sex offences were each interviewed by a prosecutor. The prosecutor formed the view that 'discrepancies' and 'inconsistencies' between statements each made several years earlier and their accounts during the interviews were adequate to justify withdrawing all charges. The prosecutor made the decision and then notified the victim-survivors. Several victim-survivors were angered by the decision and felt they had been denied access to justice, so an advocate on their behalf approached the Commissioner for Victims' Rights.

The commissioner engaged a barrister who agreed to review the victim-survivors' statements. He interviewed those victim-survivors who approved, and then he determined that these victim-survivors would be very good witnesses for the prosecution, and he could not comprehend the decision to withdraw the charges. The barrister made a submission in writing to the prosecution, but the prosecutor and their management refused to reverse the decision.

The barrister felt that an injustice was done, but also that his experience had shown him that victims should have independent legal counsel to help in similar situations. Had he been involved prior to the prosecutor's decision; his appraisal was that the outcome would likely have been different.

Variation of charge

On several occasions, prosecutors advised victims that they would accept a plea to a lesser charge. Most of the victims who complained about these decisions, did so because they felt they were not consulted prior to the decision being made and that their views were discounted, even ignored.

Occasionally, legal counsel sat in the meetings when prosecutors conveyed charge decisions. Several victims who had this experience stated that having their 'own lawyer' made them more confident that their views were listened to and that the 'plea to a lesser charge' decision was tolerable – though not always acceptable.

Legal counsels' role was not simply a legal translator as some critics suggested, but rather a stronger, legally learned voice for victims.

Criminal Proceedings

Stay of Proceedings

The accused was charged with attempted murder resulting from acts he allegedly committed 12 years prior. On the commencement of the criminal proceedings, the accused's counsel applied for a 'stay of proceedings'. The prosecutor opposed the application but also believed the victim should be heard on the application.

An approach was made to the Commissioner for Victims' Rights who engaged legal counsel. That counsel interviewed the victim, and then, with the court's approval, made submissions grounded on the victim's fundamental right to access to justice. The court dismissed the application for the 'stay of proceedings' and the matter proceeded to trial where the accused was found guilty of attempted murder.

Suppression Order

In accordance with South Australia law, there is automatic suppression of information that might identify the victim of a sex offence. Notwithstanding this law, there are occasions when suppressing information to protect victims is appropriate and consistent with their right that there be no unnecessary intrusion on their privacy.

For example, in a case where 'A' murdered 'B', and surviving children would be identified if the name of 'A' or 'B' was published. In such a case, the Commissioner for Victims' Rights funded legal counsel to represent the children (with approval of their guardian) in submissions to the criminal court and to the Family Court.

Legal counsel has also given advice to victims of sex offences who were considering setting aside the automatic suppression of their identity.

Disclosure of evidence

Using a young teenager's laptop, an adult exposed a teenager to pornography, and then encouraged the teenager to engage in sexual activities beyond the teenager's understanding and contrary to community standards. The adult was subsequently arrested and charged with sex offences on a child.

Prior to the commencement of the trial, the defence counsel applied for an order that the prosecution provide an entire copy of the hard drive on the teenager's laptop. The prosecutor did not oppose the application. On hearing about the application, the Commissioner for

Victims' Rights recognised the potential intrusion on the teenager's privacy, so instructed legal counsel to intervene.

Legal counsel asked the court to permit 'the commissioner' to be heard, which the court approved. Drawing on victims' rights laws and laws to protect children, the commissioner asserted that to give the defence unfettered access to the teenager's hard drive was a grouse invasion of privacy. The court agreed, and made an order for disclosure that covered a day before the 'alleged' sex offences and a day after. Neither the defence nor the prosecutor objected.

Protected Communications

Refer to the case example above.

During proceedings – access to statement made before a Commission of Inquiry

'E', the victim of sex offences, had given evidence in camera before a Commission of Inquiry. During disclosure, the prosecution made the defence counsel aware of the 'Es' record of that evidence. Later at trial, defence counsel asked the court to order a copy of that record of statement be disclosed and that the defence be permitted to cross exam on that record. The prosecution offered no objection; however, the presiding judge held that the victim should be heard on the application, so adjourned the matter to allow the victim to seek advice and prepare submissions, if they chose to make them.

The court suggested the prosecutor ask the Commissioner for Victims' Rights to aid 'E', which the commissioner agreed to do. The commissioner engaged legal counsel who interviewed 'E', advised 'E' and made submissions on 'Es' behalf. Although the court approved the defence application, the court also invited the legal counsel for 'E' to remain within the precinct of the courtroom, so 'E' could seek further advice.

Sentencing

Victim Impact Statements – Pursuant to section 32A (described above), the Commissioner for Victims' Rights has engaged legal counsel to help victims write their impact statements and to present them during the sentencing stage of criminal proceedings.

Post-proceedings / sentence

Revocation or Variation of 'Licence' [Mental Incompetence] – see case example above Revocation of Anti-Violence Order [Domestic Violence].

The police refused to oppose an order, so the Commissioner for Victims' Rights engaged legal counsel to represent the victim.

On both occasions the person subject of the order attempted to have it set aside, the victim was represented by legal counsel, and the court refused to set the order aside. If not for the independent legal counsel for the victim, the order would have likely been set aside and the victim exposed to risk of further violence.

Cross-examination at trial

Research has long documented that rape myths and stereotypes underpinning investigations and prosecutions (Iliadis 2021, 2020, 2019; Powell et al. 2013) prevent victim-survivors from engaging the criminal justice system. Victim-survivors often describe feeling that 'they themselves are placed on trial' (Gillen, 2019) and seen as collateral damage where they lack independent voice. While the language and tone of cross-examination may have generally changed over the years, "complainants are still routinely questioned in ways that place them at the centre of intense scrutiny and judgment that is underpinned by rape myths and associated assumptions about the attributes of a real rape" (Quilter & McNamara, 2023).

Defence counsels regularly rely on rape myths (Zydervelt et al., 2017; Iliadis, 2019; McGlynn & Westmarland, 2019; Horan & Goodman-Delahunty, 2020; VLRC, 2021), and the terrain over which they may range is far-reaching and has devastating impacts on victim (Quilter & McNamara, 2023). Reliance on rape myths by both defence and prosecution occurs in both jury and judge-alone trials (McGlynn 2017). In all states' and the Commonwealth's Evidence Acts, courts must disallow questions that are misleading, harassing, offensive, humiliating, belittling, or have no basis other than stereotype. However, prosecutors' fears of not appearing impartial means that they often do not object to improper questions, while judges may not be clear about when to stop them. Inappropriate intervention by the judge can, and often does, lead to appeal (Kirchengast, 2023).

Following a guilty verdict: Victim Impact Statements and Appeals

In circumstances where the jury finds the defendant guilty, victims may provide a Victim Impact Statement (VIS). This is framed as their chance to detail the crime's impact on their lives. However, without knowledge, a VIS can be used as the basis for defence counsel to make an application to access the victim's counselling records, should they detail any mental distress or condition resulting from the crime, as many do. If the VIS mentions this information and defence counsel was not made aware prior to trial, the defence may subpoena the victim's medical records and effectively re-start cross-examination. At the culmination of an arduous process, the victim is once more stripped of their agency and voice, lengthening the process and potentially lessening the perpetrator's sentence. Where the prosecution is obliged to hand over any information to defence counsel, an independent legal representative could advise the victim and screen the document to mitigate unintended consequences.

When a defendant has been found guilty, they have the option to appeal their conviction, their sentence, or both. Sexual assault convictions are the most likely criminal convictions to be appealed (VLRC, 2021). In NSW, they account for one quarter of all conviction appeals and one third of all successful conviction appeals (Quilter & McNamara, 2023). Appeals prolong the legal process for victims indefinitely, particularly where there is a delay in commencing

the appeal or until the appellate judgement is delivered. Increasingly, matters are granted an appeal even when notice is filed out of time (VLRC, 2021), and sometimes defendants file a notice of intention to keep their options open. The prosecution can only appeal against a sentence if they believe it to be too light, but cannot, except in very special circumstances, appeal a not guilty verdict. The victim is excluded from the appeal process, because the focus is on the defendant (VLRC, 2021).

Concluding remarks and recommendations

ILR has a positive impact on procedural and substantive justice outcomes for victims of sexual offences (Iliadis 2020). The lack of ILR for sexual offence victim-survivors during the criminal process is a major impediment to their testimony and quality of evidence. Not only does ILR cultivate readiness for and confidence when testifying (Bacik et al., 1998; Iliadis 2019; Killean, 2021; Gillen, 2019; Iliadis, Smith & Doak, 2021; Carroll, 2022), protecting victims' from having their sensitive information paraded in front of the courtroom ensures that only probative evidence which is properly adduced and tested (Kirchengast, 2021) enters the courtroom. This minimises unnecessary delays caused by the posing of inadmissible questions (Braun, 2014) or lengthy follow-up questions due to victim distress (Temkin et al., 2018), and, most importantly, dissuades the jury from relying on victim-blaming myths used to discredit the victim, and therefore, the prosecution. There is a clear relationship between ILR and successful prosecution (O'Connell, 2021).

Very few countries fail to offer victims any form of ILR, suggesting that ILR is not all that uncommon within adversarial systems. While the perception of 'dual representation' for the victim is commonly cited as a key reason why ILR is not feasible, this view fails to acknowledge that victims have legitimate interest which may compete not only with the fair trial rights of the accused, but also with the interests of the prosecution (Iliadis, Smith & Doak, 2021). Few jurisdictions adopt a model where the independent counsel performs a duplicate prosecutorial function (Braun, 2014; VLRC, 2016; Iliadis, 2020). During Northern Ireland's pilot of ILR, agents of justice found that ILR did not alter the law, rather ensured the law was applied correctly (Smith & Daly, 2020). In Australia, O'Connell describes how police officers, prosecutors, magistrates and judges, as well as defence counsel, have recognised the potential of ILR in improving the administration of justice, despite their initial wariness (2017), and in improving legal culture with respect to observance of victims' rights (O'Connell, 2020). Provided that the victim remains non-party to the trial, and that ILR schemes are established within clear parameters, the assumption that the protection of complainants' rights will inevitably result in a diminishing of the accused's rights is contestable (Schenk & Shakes, 2016).

Any ILR scheme should be publicly funded and available through legal service providers, such as Women's Legal Services and Legal Aid, including culturally-specific or First Nations service providers. The ILR should be specialised in sexual offence matters, culturally-sensitive and trauma-informed, with an understanding of how culture, race, religion and socioeconomic status influences women's perception of abuse and their help-seeking behaviour (Green, Satyen & Toumbourou, 2023).

We propose that ILR be assigned to complainants of sexual offences in all states when a decision to prosecute is made, to protect them pre-trial where defence counsel make applications (under the legislative 'exceptions') to subpoena a complainant's protected counselling records, previous sexual experiences, digital communications, education/employment records, and other sensitive 'third-party' evidence, and during the trial where late applications are made, such as during cross-examination, to subpoena that information.

The rationale behind recommending that ILR be provided at the time a decision to prosecute is made, rather than at the time of the first subpoena, is two-fold:

- As prosecutors juggle multiple cases and frequent changes in assignments, notice of intention to apply for leave to access victims' private records often goes unseen. This leaves victims unprotected, with many being unaware of their right to ILR, or with little time for the ILR to intervene without causing delay. Being referred to ILR late means that the victims' private information may already have been accessed by the defence.
- ILR can serve as a single point of contact for the victim; a legally-informed case manager providing advice and assistance. This is crucial to mitigating secondary harm, and has benefits such as ensuring that requests made by the victim (e.g. giving testimony via video) are appropriately in place. In order to be trauma-informed, lawyers need more time with their clients to build trust.

It is also vital that victims are made aware of the specific powers and limits of their legal representative.

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