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 contribute to the ALRC Inquiry into Justice Responses to Sexual Violence. This submission represents a collaboration between Sarah Rosenberg and Associate Professor Mary Iliadis, who are passionate about independent legal representation.

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 pulls together advocates, experts and services to encourage collaboration and amplify the evidence based research of others. Sarah is currently partnering on a Queensland Government Department of Justice project, led by a team of Deakin University researchers at the Deakin Network Against Gendered Violence, on the development, pilot and evaluation of a state-wide victim advocacy model and integrated response to sexual assault. Sarah is a member of the National Women's Safety Alliance, the Independent Collective of Survivors, the Australian Women Against Violence Alliance and the Expert Advisory Group informing this Inquiry.

Associate Professor Mary Iliadis is recognised, internationally, for her research on legal responses to domestic, family and sexual violence. She pioneered the first transnational study on victim-focused reforms that offer victim-survivors of sexual violence enhanced rights to information and participation in criminal justice systems across Australia, England and Ireland. She leads several competitively funded research projects in the areas of trauma-informed responses to sexual offence victim-survivors through the role of independent legal representation to safeguard victims' private information from use in the courtroom. She is also researching how technologies are weaponised to perpetrate violence, and harnessed by advocates, victim-survivors and practitioners to enhance responses to gendered violence. A/Professor Iliadis is funded by the Department of Foreign Affairs and Trade, the Australian Institute of Criminology, the eSafety Commissioner, and the Queensland Government's Department of Justice and Attorney-General. She is the Founding Co-Convenor of the Deakin Network Against Gendered Violence, with A/Professor Lata Satyen.

The authors have consulted with and sought advice from Michael O'Connell AM APM (inaugural Commissioner for Victims' Rights), Julie Sarkozi (Department of Justice and Attorney-General QLD), Professor and Associate Dean Jonathan Doak (Nottingham Trent University), Associate Professor Kerstin Braun (University of Queensland), and Eamon Keane (University of Glasgow), whose research and experience is quoted throughout this paper.

We would like to acknowledge the traditional owners of the land on which we live and work, the Gadigal people of the Eora Nation and the Wadawurrung and Wurundjeri peoples. We have deep appreciation for the knowledge and experiences of First Nations victim-survivors, who are disproportionately affected by gendered, sexual and institutional violence, and believe that their voices must be centred in our fight for justice. We pay our respects to any First Nations persons reading this paper, and acknowledge that sovereignty was never ceded.

The Right to a Fair Trial: Fairness Beyond the Accused

"A fair trial does not mean a trial which is free from all possible detriment or disadvantage to the accused."
- Jonathan Doak, 2008

"The current adversarial status quo provides defendants with an unfair advantage that may compromise society's legitimate right to bring offenders to justice."
- Bowden, Henning & Plater, 2014

"Victims' rights should be disentangled from the punitive, law and order rhetoric. Instead the focus should be on victims as people and victims' rights as fundamental to justice."
- Michael O'Connell AM APM, 2017

"The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community."
- Victorian Law Reform Commission, 2021

1. Introduction

Calls to strengthen Australia's criminal justice system are not new. Countless reports, inquiries and action plans have detailed the need for reform, while in recent years, multiple separate inquiries have considered matters affecting complainants and their recourse to justice. Rallies, roundtables, strategies. And yet, the police and legal systems continue to fail victims of sexual violence.

Due to the adversarial nature of the Australian legal system, victims of sexual crime have essentially zero legally enforceable rights. From the moment the crime is reported, through to criminal proceedings, the victim is a mere passenger. The re-traumatisation this causes is well-documented; along with insensitive treatment, the lack of agency associated with inconsistent communication and case management, and little information about the process throughout its entirety, "nothing has the potential to replicate the dynamics of abuse more than being positioned as 'just a witness' in the accountability process for her or his own rape" (Benton-Greig, 2011). Victims feel excluded, dismissed, ill-prepared, humiliated and distressed, describing the process decades ago as "state-sanctioned victimisation" (Van De Zandt, 1998), and now, still, "barbaric and inhumane" (Lee, 2018). Indeed, "if one set out intentionally to design a system for provoking symptoms of traumatic stress, it would look very much like a court of law" (Herman, 2005). Overwhelmingly, victims' rights are evaded, circumvented and resisted (Kelly et al., 2006; Smith, 2018; Iliadis, 2020), the adversarial focus on winning eclipsing legislative safeguards meant to protect victims' privacy, known as 'rape shield' laws. With no avenue to redress repeated departures from proscribed procedure by agents of justice (Benton-Greig, 2011), victims are bystanders in a system that would collapse without their cooperation (O'Connell, forthcoming).

As a result, we see high attrition rates (prosecution is rarely commenced) (VLRC, 2021) and improper attrition rates (complainant abandonment due to fear) (Iliadis, Smith & Doak, 2021), and low conviction rates (AIHW, 2022), when the ability for the state to prosecute is already limited by incredibly low rates of reporting (ABS, 2023) and no enforceable duty for police to investigate (Iles, 20233). Knowing that the justice system relies on victims to report crime and cooperate as a witness for the state (Holder, 2018; Iliadis, 2020), our treatment of victims is dramatically behind where it should be. How many more victims have to be sexually assaulted by perpetrators whose earlier victims did not make or maintain their complaints because they could not cope with the legal system?

It is our belief that Independent Legal Representation (ILR) for victims of sexual violence, with the important inclusion of legal standing at designated times in the courtroom, could be the factor that finally makes a difference. Indeed, the absence of representation for complainants has surfaced as a major factor contributing to the feelings of isolation and fear that drive low reporting and high attrition rates (Iliadis, Smith & Doak, 2021; Donovan, 2022). Rape jurisprudence has long established that secondary victimisation can be minimised when justice processes offer dignity, recognition and voice to complainants (McGlynn & Westmarland, 2019), and when procedural justice - which is of equal if not more importance to them than the trial outcome (Herman, 2003; Clark, 2010; Elliott et al., 2012; Iliadis & Flynn, 2018), while also being a key consideration in the decision for other victims to report - is upheld. ILR is the most legitimate route through which to meet these needs (Gillen Review, 2019).

This paper accepts the value of ILR in reducing re-traumatisation for complainants, but it focuses on another of its values; ILR can better secure victim evidence in the context of the fair trial process (Kirchengast, 2021) and strengthen the integrity and functionality of the legal system. That is, the contribution of ILR to achieving procedural justice is not only valuable in and of itself, it is a tool to realise substantive justice. Contrary to the belief that the state cannot accommodate victims' needs because they may not align with public interest, we argue that upholding victims' rights is *inherently* in the public interest. As the state's chief witness, without whom the prosecution of offenders would not proceed, upholding procedures that ensure their confident testimony, the presentation of evidence supporting their account, the protection of their private and sensitive information, and the objection to humiliating questioning, is critical for effective prosecution. Without enforcing these procedures, which are legislated but routinely circumvented, a jury is persuaded against the victim and consequently, the state. Not only is the victim denied procedural justice, the result is a negative impact on substantive justice outcomes and the reinforcement of community misconceptions about sexual violence.

The crisis of confidence that victims have in the criminal justice system is warranted, but the public should understand that it, too, should be concerned. A failure to protect victims is not only amoral, but, ultimately, a waste of state resources, given the immense resources spent preparing a brief of evidence for prosecution. ILR for victims, from the time of the decision to prosecute through to particular aspects of proceedings (with *much* opportunity to extend the role before and after the legal process) can change that narrative, and close the gap between theoretical rights and victims' experiences. Models from other jurisdictions will demonstrate the merits of piloting ILR, and form the backbone of our own narrow model suggestion for ILR in Australia.

2. The trouble with business as usual

Despite being directly affected by the offence, victims are not a party to legal proceedings. In an adversarial justice system, the victim is a witness to a case between two parties: the state, who pursues prosecution in the public interest, and the accused. Victims are often surprised that what they regard as 'their case' is actually the state's case, and the prosecutor does not act in their interest (Iliadis, 2020). The victim has no legitimate status, and no active role except when being questioned as a witness. Indeed, in stark comparison to inquisitorial systems, where the victim is involved in the court's active investigation of the facts of a case, the interests of the victim are deemed 'separate'. This creates a sense of powerlessness from the beginning.

Decision to prosecute

The exercise of prosecutorial discretion is a key point of attrition (George et al., 2023). For the majority of victims whose perpetrator is not prosecuted, there is little information and no sense of closure in the decision by the state not to proceed. Prosecuting authorities are highly discrete (Flynn, 2016), with decision-making powers immune to external review. Despite prosecution almost always being in the public interest, prosecutions in Australia are only likely to proceed when they align with rape myths (ALRC, 2010; Iliadis & Braun, 2021; George et al., 2023). Rape myths are stereotyped, false beliefs that discredit victims - for example, rape is only committed by strangers in the dark, 'real' victims will have physical injury, sexual assault is more severe if it involves a weapon. Understanding factors influencing prosecutorial decision-making is vital to improving sexual assault justice outcomes (Lievore, 2005). In England and Wales, the Victim Right to Review (VRR) increases transparency (Doak, 2005). Though imperfect - reviews are conducted in-house (Flynn & Iliadis, 2017) - Australia could benefit from implementing a VRR scheme. This was recommended in the 2017 Royal Commission into Child Sexual Abuse, and in the 2022 Women's Safety and Justice Taskforce Report, but is yet to be adopted.

Legal process

It is a troubling reality that those responsible for investigating and prosecuting sex crimes are overburdened, when less than 10% of victims report their assault (ABS, 2023), and a fraction of those reports result in a charge. Officers are working multiple cases at once, sometimes numbering into the teens (VLRC 2022), and do not even have an enforceable duty to investigate (Iles, 2023). Solicitors at the Office of the Director of Public Prosecutions (DPP) face similar challenges with frequent changes in assignments, and a backlog exacerbated by COVID-19 (VLRC, 2022). In addition to a lost opportunity to build staff capacity to lead trauma-informed cases, a lack of prosecutorial rapport with victims leads to miscommunication, and stymies information flows (Lowik et al., 2024). Victims await information about the progress of the case and their role in it, but have no choice over when or how that information comes, or if it ever comes at all. This lack of communication translates as a message about victims' lack of worth and status in the system (Clark, 2010). As well as the resulting lack of trust, repeated continuances and the associated distress are a primary reason why victims 'drop out' of the process (Lowik et al., 2024), most often resulting in the DPP dropping the charges against the offender. In fact, with cases taking between two to seven years to be finalised, some defence teams seek delays as a tactic to place pressure on complainants (Women's Safety and Justice Taskforce, 2022).

The distress caused to victims by a lack of continuity, communication and information about the process *aside*, the result is that those with the responsibility of prosecuting offenders in trial lack a complete understanding of the case at hand, and have little to no legal strategy prepared to lead the case. A senior or crown prosecutor is usually appointed no more than a week prior to trial, and it is not uncommon for complainants to meet the prosecutor "outside the courtroom door" (Legal Aid Board, 2019). The victim is ill-prepared to give testimony, and despite a duty to present all admissible evidence, the prosecutor is not familiar with what that evidence might even be. This inefficiency undermines the substantial resources invested in preparing a case for prosecution in the first place.

Plea bargaining

Despite offering a guaranteed conviction and a reduction of backlog and resource expenditure, victims are alienated from the plea bargain process. Plea bargaining is shrouded in secrecy, and limited data on plea deals, their outcomes and the types of offences involved hinders analysis of prosecutorial decision-making (Flynn, 2016). This lack of transparency also heightens victims' fears of the negative aspects of plea bargaining - a 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' - reducing trust in and satisfaction with the process. Without participation of the victim, the potential of a plea deal is lost - prosecutors are gatekeepers of victims' opportunities for justice (Spohn, 2020 via George et al., 2023).

Accessing a complainants' private information

All states have legislative protections in place to prevent defence counsel from compelling a victim's counselling records, and in some states medical records, without leave of the court. This is due to clear issues of privacy and sensitivity. However, victims' entitlements to these legislative protections, known as 'rape shield' laws, are rarely upheld. 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 complainant.

Counselling communications feature highly personal and sensitive information relating to the complainant's private life, including in relation to diagnoses of disease, chronic illness or mental illness, unwanted pregnancy, and other information they have yet to disclose or chosen not to disclose with witnesses or family. While a complainant's counselling communications could corroborate evidence, access to the information is most typically used to undermine complainants based on rape myths (McGlynn, 2017; Burgin & Flynn, 2019; Dowds, 2019; Iliadis, 2020). For example, records of Victim X's diagnosis of PTSD following their assault could be used to suggest that they are mentally unstable and imagined the crime, or, records of Victim Y's abortion years prior, their substance abuse, or rebellious childhood could be used to paint them as someone of bad character who is therefore not credible.

Counselling communications also include information relating to a victim's sexual experiences. All states have further legislative protections safeguarding a complainant's sexual history, aimed at preventing the suggestion of consent based on stereotypes. Sexual history includes any information about a victim's previous sexual acts, and general sexual behaviours, such as flirting or provocative and sexual messages. It also includes sexual activity that occurred after an alleged assault. Such information is known to be used by defence counsel to

imply that the victim is promiscuous, less worthy of belief or responsible for the crime committed against them.

Prior to trial, only two states attempt to enforce the protection of a complainant's counselling records. In NSW and QLD, complainants can seek ILR to contest access attempts. Those victims are not afforded the dignity of choice, as the prosecution directs them to ILR late in proceedings (Iliadis, 2019; Bromley & Sarkozi, 2022), hampering the representative's ability to familiarise themselves with the victim. The ILR may successfully prevent records from being used to question the victim during cross-examination, but their perpetrator may already have gained access to the private and sensitive information, including their first disclosure of the assault. The essence of privacy is that once invaded, it can seldom be regained. What's more, victims are seldom informed as to why defence would be interested in their records in the first place.

Notably, no jurisdictions afford ILR to victims in relation to the sexual history protection, unless this sensitive third-party evidence features in communication records where ILR in NSW and QLD would apply. Although, QLD is advocating to extend the remit of ILR to protect a complainant's prior sexual experiences that do not necessarily feature in counselling records. Beyond this, jurisdictions rely on the prosecution to intervene. However, notice of intention to apply for leave often leaves insufficient time for prosecution to object to applications for leave by the defence. Regardless, prosecutors may choose not to oppose applications due to fears of being perceived as hiding information (Donovan, 2022). Prosecution can apply for leave themselves in order to minimise the impact of evidence permitted under defence's successful application, but under-resourcing and the resultant lack of familiarity with the case poses challenges. As such, leave is granted consistently (Kelly et al., 2006; Smith, 2018; Iliadis, 2020), particularly when the accused is known to the victim.

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). Resilient rape myths are "often exploited through the practices of legal actors and the flexibility of current legislation" (Bluett-Boyd & Fileborn, 2014); defence barristers apply for leave knowing there is great variance among judges as to how they exercise their discretion because "any evidence relating to a victim's prior sexual history can reduce the likelihood of successful conviction" (Iliadis, 2020). Many academics position a failure to provide complainants with ILR to protect their sexual history as akin to denying them of human rights (Doak, 2008; Wemmers, 2012; O'Connell, 2018), with applications to obtain sensitive information being routinely used to intimidate complainants and encourage attrition (Temkin & Krahé, 2008; Bacik et al., 2010; Powell et al., 2013; McGlynn, 2017; Burgin & Flynn, 2019; Dowds, 2019; Iliadis, 2020). With the fear of their private information being accessed being intimidation enough, there is evidence of notice of intention to apply being passed on to victims, without genuine intention (Bartley, 2001; Bacik et al., 2010 via Iliadis, 2020).

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 QLD where ILR is limited to pre-trial applications, victims are left unprotected (Killean, 2021). Perhaps of more significance is that improper questioning by the defence often still occurs despite leave having been denied (Iliadis, 2020). Neither the judge (who often takes a passive role at trial, and was likely not the presiding Judge at the pre-trial hearing), nor the

prosecution (who is often not across the law of the protection, or fears reprimand for failing to hand over all evidence), are likely to object. The defence may then even be emboldened to use the ILR's challenge to their subpoena of the victim's information pre-trial to portray the victim as deceitful in front of the jury. The failure to enforce protections relating to victims' counselling/medical records and sexual history allows prejudices to shape the outcomes of trials, and the experience of victims in relation to procedural justice (Iliadis, 2019). In NSW and QLD where ILR is afforded to victims in relation to counselling records, the failure underscores the limitations of confining ILR to the pre-trial phase (Iliadis, 2019) because, despite being obviously ill-informed about the protection, "the gatekeeper of any limits and boundaries around cross-examination is the prosecution" (Sarkozi, 2023). Delayed notice, no meaningful, if any, legal avenue for the victim to enforce the protections, and uncertainty over whether the protection will be respected by any of the judicial actors leaves victims "equally as vulnerable as they would be if the legislation did not exist" (Iliadis, 2019; Sarkozi, 2023).

Cross-examination

Cross-examination is the most challenging trial process for complainants. While discrediting a witness is commonplace, sexual assault complainants endure a level of scrutiny and personal attack unknown in other cases, which takes on particular meaning in the context of the crime (Schenk & Shakes, 2016). That is, cross-examination in sexual assault cases is distinctly personal (NSWLRC, 2020) and particularly distressing as compared to other criminal proceedings (QLRC, 2020). Drawing out inconsistencies in testimony has evolved into offending, humiliating and attacking the complainant themselves (Quilter & McNamara, 2023), often in hopes of eliciting a reaction that displeases the jury.

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 (Smith & Skinner, 2017; Zydervelt et al., 2017; Iliadis, 2019; McGlynn & Westmarland, 2019; Goodman-Delahunty, 2020; Cossins, 2020 NSWLRC, 2020; VLRC, 2021; Deck et al., 2022), and the terrain over which they may range is wide (Quilter & McNamara, 2023). Reliance on rape myths by both defence and prosecution occurs in both jury and judge-alone trials (McDonald, 2020).

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' fear 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).

Jury directions

After closing remarks, the judge delivers a summing-up and jury directions, to guide the jury's understanding of legal principles and prevent inappropriate conclusions from evidence. However, jury directions are not self-executing forms of correction (Cooper, 2022).

Studies show that jury directions related to addressing rape myths are often forgotten (George et al., 2023). In NSW, for example, analysis determined that the direction relating to

differences in the victim's accounts, introduced in 2018, was only given in 34% of trials (Quilter & McNamara, 2023). Although judges are susceptible to biases like any member of the public (Chalmers et al., 2023), a "significant amount of responsibility for ensuring that jury directions effectively guide jurors has been placed in the hands of the trial judge" (Byrne, 2021). Notably, the judge does not even clarify that the victim is a witness in the state's trial. With only so many levers a defence lawyer can pull to discredit a victim, jury directions should at least push back on ones that give licence to ignorance about the legal system.

The timing of the delivery of jury directions is also problematic. Currently, end-of-trial directions are lost in lengthy monologues, with the average summing-up being 120 minutes for a ten-day sexual assault trial in 2018 (BOCSAR, 2021 via Cooper, 2022). Jurors are often faced with "back-to-back directions that offer diametrically opposed sets of guidance on important matters such as what to make of the suggestion that the complaint was delayed, or that their evidence contained inconsistencies" (Quilter & McNamara, 2023). Further, jurors are more influenced by personal attitudes than trial evidence (Leverick, 2020), fitting evidence into preconceived narratives rather than forming them based on evidence (Pennington & Hastie, 1992; Leverick, 2020). There is an established link between rape myth acceptance and juror decision-making in favour of the defendant in diverse jurisdictions (Leverick, 2020). So, to be effective, jury directions should be given throughout the trial or at least before the complainant's testimony (Chalmers & Leverick, 2018; Ellison, 2019; Quilter, McNamara & Porter, 2022). However, even in Victoria where integrated jury directions are given at the time the myth arises, they are under-utilised (VLRC, 2021). This may be due to unfamiliarity or time concerns (Australasian Institute of Judicial Administration, 2019). The statutory language itself is weak - asking that a direction be raised "as soon as is practicable", rather than at the time the evidence is raised, with or without submission from the prosecution (Quilter & McNamara, 2023).

Ultimately, the delivery of jury directions, which are a safeguard against misconceptions that undermine victims and can assist jurors in their decision-making, is incomplete, ineffective, and largely ad hoc (Byrne, 2021; Iliadis & Braun, 2021). Even if delivered perfectly, the limits of jury directions to counter rape myths must be considered, given that they do not prevent questioning that engages the very rape myths they seek to 'correct' in the first place (Quilter & McNamara, 2023).

Sentencing and victim impact statements

After the trial, 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, they cannot discuss offences for which the defendant was found not guilty, and it must not include opinion. Defence can also ask that other details be omitted. If the VIS, which is sometimes required to be submitted before the trial and must be passed on to defence counsel, describes mental distress or counselling for PTSD, this information can be used as the basis to make an application for leave to access the victim's counselling records. If the VIS describes the aforementioned, and the defence *did not* have access to it prior to the trial, they may subpoena the victim's medical records and effectively re-start cross-examination. Without this information, 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.

Appellate proceedings

In circumstances where 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).

Re-trial

For a large proportion of successful appeals where a new trial is ordered, prosecution does not proceed to a retrial, choosing instead to drop the charges (Donnelly et al., 2011). Similar patterns have been identified in other countries, including New Zealand, Canada, the United Kingdom, Ireland and Germany (Quilter & McNamara, 2023). In circumstances where a retrial does take place, jurisdictions typically relieve complainants of the obligation to testify again by submitting audiovisual recordings of their testimony, including the trial transcripts, into evidence for the retrial. However, limits on the recording of evidence mean that complainants sometimes have to take the stand again (VLRC, 2021). This can lead to attrition, with victims unable or unwilling to participate in the process a second time (ALRC, 2010).

Post-proceedings

For victims whose perpetrator has been found not-guilty, any anti-violence or restraining orders in place to 'protect' the victim from the perpetrator are finalised. It is well-established that such orders, usually put in place by police after a perpetrator is charged and until the trial period particularly in cases of intimate partner sexual violence, are often not well-enforced, and as such are limited in their ability to keep victims safe. However, the lack of *any* protective legal measure for the victim whatsoever is distressing. Perpetrators are often emboldened following proceedings, amplifying the victim's existing fear of retaliation. This fear is a key reason preventing victims from reporting the crime in the first place. Their perception of vulnerability is heightened knowing that the perpetrator is aware that there are no legal constraints between them and the victim. Understanding that the evidence of harm against the victim and supporting evidence was beyond reasonable doubt in order for the perpetrator to be prosecuted, coupled with awareness of the likelihood of a not-guilty verdict, it is crucial that the legal system provides protection for victims even if a conviction is not achieved.

3. So what?

The above section has highlighted the inefficacy of a legal system where prosecution lacks a thorough understanding of the case and does not enforce victims' rights together with evidentiary rules or protective legislations that restrict irrelevant and intrusive questioning by the defence. Such failures, beginning with insufficient information provided to the victim and culminating in a brutal attack in cross-examination, deny the victim both procedural and substantive justice.

We know that fair treatment (procedural justice) is of equal, if not greater significance in shaping victims' perceptions of justice than the outcome of the trial (Herman, 2003; Clark, 2010; Elliott et al., 2012; Iliadis & Flynn, 2018). But disregard for procedural justice not only hinders the achievement of victims' 'justice needs' (Bluett-Boy & Fileborn, 2014), it negatively impacts the state's prosecution. Circumvention of legislation 'protecting' victims' privacy impairs the clarity of their testimony (Ellison, 2001; McGlynn, 2017), makes them vulnerable to suggestible defence questioning (Gillen Review, 2019), and leaves inappropriate statements by defence unchallenged. This does little to further the state's argument that the perpetrator is guilty beyond reasonable doubt. If anything, it supports the defence in suggesting that the complainant is not credible. Whether incompetence, unfamiliarity with the evidence or fear of appearing unobjective, the prosecution's failure to enforce procedure validates defence, prejudicing the jury against the victim and by extension, the state. This is not effective prosecution; it leads to poor substantive justice outcomes. What's more, jurors take reinforced rape myths out of the courtroom with them, contributing to a culture of impunity.

The sentiment is captured by Lord Hope: "The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary distress and humiliation of witnesses is inadequate. So too if evidence or questions are permitted at the trial which lie so close to the margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case" (R v A (No 2)(2001) UKHL 25).

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 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. Victims are put "in the untenable position of having to censor what they share in their personal healing journey" (Rape Crisis England & Wales, 2024). "Where a victim refuses to initiate court proceedings or undergo counselling, or to the extent to which the openness of the counselling relationship is constrained, both the interests of the victim and the interests of the community in general are harmed" (R v Young (No 46)(1999) NSWLR 681).

If legally and operationally, the state is considered the wronged party in sexual assault cases (Kirchengast, Iliadis & O'Connell, 2019), we should be concerned that the "status quo" - harassing and traumatising the state's chief witness by undermining legislation without intervention - "provides defendants with an unfair advantage that may compromise society's legitimate right to bring offenders to justice" (Bowden et al., 2014).

4. Why established support mechanisms fall short

Victim's Rights Charters

Each state has a victims' charter outlining the rights of victims of crime. These are "vague, difficult for victims to understand, lack clarity and, even when there is a degree of specificity, rarely provide remedies to victims whose rights are not honoured" (O'Connell, 2017). A legal right is one that when violated requires remedy. Few victims' rights in Australia pass the test of a legal right (O'Connell, 2017), and as such, these frameworks have been criticised for being "largely unenforceable" (Royal Commission into Child Sexual Abuse, 2017). There is no statutory obligation that agents of justice inform victims of their rights, which presumes that victims are conversant with them (O'Connell, 2017). Except for in NSW and SA where the Office of Commissioner of Victims' Rights can handle complaints about breaches, victims have no recourse to enforce the rights outlined in the charters when they are violated.

Commissioner of Victims' Rights

A Commissioner of Victims' Rights exists in NSW, VIC, ACT, SA and WA. The Commissioner's role is to assist victims in dealing with justice agencies, but they do not directly represent the victim. A Commissioner may only take victim concerns forward in pressing circumstances, at their discretion (Kirchengast, Iliadis & O'Connell, 2019). The South Australian Commissioner's role is unique, likened to a victim ombudsperson. When receiving a complaint about a charter violation, they may personally or through legal counsel exercise any right entitled to the victim under the charter. However, the Office is inconsistent, and typically not independent of political influence (Kirchengast, Iliadis & O'Connell, 2019). To be meaningful, each state's Commissioner should emulate the inaugural South Australian Commissioner's role, investigating departures from charters, advising the Attorney-General on how to marshal resources to help victims, and consulting with prosecutors and the judiciary about court practices affecting victims (Kirchengast, Iliadis & O'Connell, 2019).

Sexual assault services

All states fund sexual assault services. These are incredibly over-burdened due to the rate of sexual violence. Sexual assault support workers cannot provide legal information, although three upcoming pilots commissioned by the Attorney-General hope to integrate legal services into frontline support services to minimise points of contact for victims. Similarly, Sexual Assault Services Victoria is urging funding for "justice navigators", to offer case management and advocacy for victims as they navigate support and compensation schemes, and provide information about justice options. The connecting of supports for victims can in itself be a form of justice, but should not be the end goal. Currently, support workers can assist victims to report crime if they have capacity. Although, if they do, once the victim's counselling records are subpoenaed by defence counsel, the support worker may become a witness and be required to provide a statement or give testimony. They can also attend court with the victim, if they have time, though at limited capacity – they may sit at the back of the courtroom in silence.

Witness assistance or liaison officers

Some states offer witness assistance or liaison services. Similar to the DPP which allocates them, victims express a lack of continuity and communication with these services. Even with a narrow interpretation of this role, the officer is expected to advise the victim of hearing

outcomes and the next stages of legal proceedings. However, it is not rare for a victim to not know the name of their officer. Victims report being unable to contact their officer, or that their designated officer keeps changing. Victims are also ill-informed of what the officer's role is in relation to their needs. The affiliation of these officers with the DPP, and indeed even a perceived lack of independence, can diminish the victim's sense of support (Smith & Daly, 2020). Subject to resources, the officer can attend court, again at the back of the courtroom in silence. When non-legal support services accompany complainants to court, there is no evidence to suggest any improvements in the treatment of complainants by other trial parties (Braun, 2014; Clark, 2010).

Judge-alone trials

Judge-alone trials for sexual assault matters have long been considered, due to the view that replacing the jury with 'some other entity' will improve the complainant's experiences of the trial process (McDonald, 2020). Currently, either the accused or the prosecutor may make an application for a judge-alone trial, however the accused must agree in order for the application to be granted. Even if the prosecution wishes not to have a judge-alone trial, the judge may order one in response to the accused's application.

Judge-alone trials have been piloted in some common law jurisdictions. New Zealand recommended against the shift after piloting judge-alone trials (New Zealand Law Commission, 2015). Reliance on rape myths was found to occur in both jury and judge-alone trials in New Zealand (McDonald, 2020). Scotland recognised their potential merit, but would require further study before approving implementation (Lord Justice Clerk's Review Group, 2021), while Northern Ireland rejected the shift after public outcry at evidence 'too incipient' to warrant a pilot (Gillen Review, 2019). South Africa already implements juryless trials, although they are heard by a judge and a two-person lay panel (George et al., 2023). Most submissions to Victoria's consideration of judge-alone trials opposed the shift, citing no evidence that they result in better experiences for complainants or fewer acquittals (Fileborn et al., 2021; Victims of Crime Commissioner, 2022; VLRC, 2021), while NSW found that generally, judge-alone trials are more likely to result in acquittals compared to jury trials (Gu, 2024).

Given that judges are as likely as jurors to hold false beliefs about rape (Chalmers et al., 2023), a jurisdiction would need to consider rigorous public review schemes of judicial conduct before implementing the reform.

-

Victims should receive fair and respectful treatment from all agents of justice. In doing a public service by supporting the state to hold a perpetrator to account, this requires more than the provision of information. It is not about wanting to feel more included, either - this is belittling. Victims are relied upon to risk their wellbeing to help protect the community, they are owed participation in the trial against their perpetrator. Mostly, agents of justice "do not intend harm but the imperatives of the institution to which they are accountable, time constraints, competing responsibilities, trial strategy and lack of specialist knowledge about the dynamics of sexual abuse can lead to that outcome" (Benton-Greig, 2011). Recognising this harm is essential to stopping it. The need to support victims has moved beyond counselling services and compensation as adjuncts to the criminal trial (Kirchengast, 2011). The unique circumstances of sexual assault victimhood demand unique supports (Iliadis, 2019). Departures from legal procedure require legal redress.

5. The solution

ILR provides victims with their own lawyer during the criminal prosecution process. The ILR is independent of the prosecutor and prioritises the victims' interests. There are different models of ILR for victims around the world. The role can include, but not be limited to, providing case management, advocacy, advice and representation to victims at various stages of the police and legal processes, including prior to reporting, during the investigation, pre-trial, during trial and after proceedings are finalised.

ILR can mitigate secondary harm, improve the state's prosecution efforts and strengthen the integrity of the justice system.

Emotional support, case management and advice

ILR provides emotional support to victims, forming a highly significant relationship with them (Bacik et al., 1998). Emotional support comes from the legal representative being present throughout the process (Carroll, 2022), creating an important sense of continuity amidst a confusing and inconsistent process. One legally qualified source replaces the fragmented arrangements of a host of advocate bodies delivering support at various times, and who may not collect information effectively or communicate it to the right party at the right time. Adequate information provision and preparation can make a significant difference to victims' experience of the legal system (Brindley, 2024). The ongoing support throughout the process can counter negative impacts associated with not guilty verdicts by giving complainants a sense of validation despite the unwelcome outcome (Iliadis, 2019; Smith & Daly, 2020; Killean, 2021).

A key differentiation is their legal knowledge, training and professional legitimacy, allowing independent lawyers to uniquely assist victims to navigate the legal system, informing about the nature of the court process in a timely manner and describing various outcomes to be expected. The ILR's responsiveness to the needs of the victim serves as a protective measure against secondary victimisation (Carroll, 2022). Where advocacy workers are not equipped to advise on the law, ILR provides 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 is crucial to feelings of inclusion, and has value for public policy, encouraging more reporting, less attrition and more convictions (Iliadis, 2019).

Improving testimony

Victims are universally unprepared to give evidence. The prosecution should, but rarely does, discuss inconsistencies in the victims' account and how to respond to them. Court-related stress and the distress of being ill-prepared can make complainants vulnerable to 'making mistakes' when giving evidence, having difficulty recalling events, and being persuaded by defence counsel suggestions. This causes an incomplete or inconsistent description of events during testimony, with that testimony taking longer to provide (Gillen Review, 2019). As the state's chief witness, confident victim testimony is critical to effective prosecution. ILR cultivates readiness for and confidence in testifying, which secures the integrity of victims' evidence (Bacik et al., 1998; Ellison, 2001; Temkin, 2002; Iliadis 2019; Killean, 2021; Gillen Review, 2019; Iliadis, Smith & Doak, 2021; Carroll, 2022).

Protecting complainants' private information

ILR is able to represent complainants in ways that advocates cannot (Raitt, 2010; Braun, 2014; Carroll, 2022), by making submissions on the victim's behalf to oppose the subpoena of private records. Not only does this foster a sense of agency and voice for the victim, it is crucial to "carrying out the balancing exercise" of the rights of the defendant, the state and the victim required under applications to invade victims' privacy (Keane & Convery, 2020). All participants have interests that must be taken into account for a trial to be considered fair, even if this does not equate to a legally upheld 'right to a fair trial' (Hoyano, 2015 via Iliadis, Smith & Doak, 2021). As detailed, many academics position a failure to provide complainants with ILR as akin to denying them human rights, because applications to obtain sensitive information are often used to intimidate complainants. Allowing victims to be heard in these circumstances is fundamental to justice, and can challenge the deeply embedded myths underpinning the frequency and rationale of applications to adduce victims' private and sensitive information (McGlynn, 2017; Iliadis, 2019).

Extending ILR into the courtroom

In order to meaningfully address the challenges facing complainants in sexual offence trials, ILR needs to be present for cross-examination. The support complainants receive as they participate in this process is paramount to their experiences of procedural justice (Killean, 2021).

In light of evidence of routine circumvention of judicial instructions or determinations established in the pre-trial phase that might establish ground rules or limits to cross-examination in relation to complainant privacy (Kelly et al., 2006; Smith, 2018; Iliadis, 2019 & 2020), ILR should be able to protect complainants' rights and interests at all times when decisions are being made, confidential information is subpoenaed and inappropriate questions are posed without objection. This is arguably no less than they are already entitled to, but fail to receive. In fact, offering representation only for the pre-trial stage leaves victims just as vulnerable as if they had no representation at all (Iliadis, 2019; Sarkozi, 2023). We know that neither the prosecution nor the presiding trial judge can be trusted to ensure proper procedures are followed, and so the representative is simply a check on other parties (Bacik et al., 1998; Braun, 2014). Northern Ireland included this very concept in its piloting of ILR; representatives attended trial as a 'silent observer' to ensure evidence is not introduced that is not permitted (Smith & Daly, 2020 via Women's Safety and Justice Taskforce, 2022).

Importantly, this benefits the trial itself. Enforcing legislation secures quality, probative evidence which is properly adduced and tested (Kirchengast, 2021), minimises unnecessary delays caused by the posing of inadmissible questions (Braun, 2014) or lengthy follow-up questions due to complainant distress causing unclear testimony (Temkin, 2002), and dissuades the jury from relying on victim-blaming myths used to discredit the complainant and therefore the prosecution. There is a clear relationship between ILR and successful prosecution (O'Connell, 2021), because procedural justice has utility for substantive justice.

Suggested remit of ILR

In accordance with adversarial principles, victims should not be afforded general representation as an equal party throughout the trial, rather, the independent legal representative's assigned rights would relate directly to matters involving the complainant's personal information, special witness arrangements and ground rules in relation to cross-examination. Notice would be passed on to the victim without delay, given this task would not sit with the prosecution, who must "juggle" varying interests (Doak, 2005). By introducing ILR in circumstances where the victim's rights, interests or privacy are compromised or not adequately represented, the victim becomes a valued participant in the legal process, and the integrity of the justice system, and indeed the verdict, is upheld.

It is of course vital that "complainants themselves are made aware of the specific powers and limits that govern the role of their legal representative" (Iliadis, Smith & Doak, 2021). Any distress or dissatisfaction caused by unmet expectations will undermine the enhanced sense of procedural justice (Manikis, 2015).

6. ILR helps us to adhere to international law principles

Convention on Preventing and Combating Violence Against Women and Domestic Violence

The Council of Europe (excluding the UK) requires, under the Convention on Preventing and Combating Violence Against Women and Domestic Violence, states to implement 'measures' to protect the privacy of complainants (Article 56(1)(f)) and protect them from intimidation, retaliation, and repeat victimisation (Article 56(1)(a)). Member states must enact legislation that enables victims to be heard, supply evidence and have their concerns presented (Article 56(1)(d)), with appropriate support services and intermediaries so that their interests are duly presented and taken into account (Article 56(10)(e)) (Istanbul Convention, 2011 via Iliadis, Smith & Doak, 2021).

European Court of Human Rights

The European Court of Human Rights acknowledges circumstances where the treatment of complainants has breached their human rights in multiple European countries (Doak, 2008). For example, Y v Slovenia ruled that "A person's right to defend himself [sic] does not provide for an unlimited right to use any defence arguments." While defence has to be allowed leeway to challenge the applicant's credibility, cross-examination should not be used as a means of intimidation or humiliation. Cross-examination by the accused in this case was seen as a breach of the victim's personal integrity under Article 8 of the European Convention on Human Rights (Y v Slovenia (41107/10, May 2015) via Iliadis, Smith & Doak, 2021).

United Nations Committee on the Elimination of Discrimination against Women

Article 2(e) of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) imposes a 'due diligence' obligation that underpins the whole Convention. It requires parties to adopt and implement 'diverse measures' to address gender-based violence, which the CEDAW Committee recommends "including having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws" (CEDAW Committee, 2017 via George et al., 2023). Failure to enforce laws can, and has been, described as the decriminalisation of rape (Rape Crisis England and Wales, 2020).

Case law under CEDAW demonstrates the importance of complainants' rights, with Goeckce v Austria ruling that defendants' rights cannot supersede a domestic abuse victim's right to life or physical and mental integrity (Goeckce v Austria (C/39/D/5/2005) via Iliadis, Smith & Doak, 2021). Similarly, in V.K. v Bulgaria, CEDAW found that proceedings must adopt a gendered analysis of violence to avoid stereotypical understandings of rape and sexuality impacting complainants' rights and prospects for a fair trial (V.K. v Bulgaria (C/49/D/20/2008) via Iliadis, Smith & Doak, 2021). Implementing ILR to protect complainants' from being interrogated about their sexual reputation and history, and enabling the pre-recording of evidence for vulnerable victims, is critical to supporting Article 2 of the CEDAW.

Rome Statute

Under Article 68(3) of the Rome Statute, the International Criminal Court allows concerns of victims to be introduced at any stage during a proceeding, when the victim deems fit. When leave is obtained, victims can choose their own legal representative and make submissions

(Iliadis, Smith & Doak, 2021). Victim participation is considered a benchmark of best practice in truth commissions, inquiries and grassroots transitional justice mechanisms (Doak, 2015 via Iliadis, Smith & Doak, 2021). Trial Chambers are required to be vigilant in preventing witness harassment or intimidation during questioning, especially victims of sexual violence (Doak et al., 2024). The Chambers are given considerable scope to develop practice, for example in relation to whether lawyers may prepare witnesses for trial by means of 'witness proofing', and in how witness evidence should be presented at trial (Jackson & Brunger, 2015).

International Covenant on Civil and Political Rights and the Convention on the Rights of the Child

Article 17 of the ICCPR and article 16 of the CRC prohibit arbitrary interference with privacy and unlawful attacks on reputation. The United Nations Human Rights Committee has interpreted the right to privacy as comprising freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The provision of ILR safeguards complainants from unlawful attacks to their reputation and character, which deters others from reporting and contributes to attrition.

7. Other jurisdictions have a positive ILR evidence base

Very few countries fail to offer victims any form of legal representation, with countries that prioritise non-legal victim advocacy still offering some form of legal advocacy (Smith & Daly, 2020). This suggests that ILR is not all that uncommon within adversarial systems. The following section details some examples of ILR in inquisitorial, hybrid and adversarial systems. The models of ILR do not disrupt but in fact strengthen the prosecutorial process, and demonstrate that our own narrow model suggestion can be implemented with ease in Australia's legal system. More models are described in the appendix.

Germany

Germany's inquisitorial system allows for Private Accessory Prosecutors (PAPs). Victims may join the charges brought by the state against the accused, which entitles them to a state-funded legal representative who can be heard in relation to the request for evidence, witness questioning and closing statements (Braun, 2014; VLRC, 2015). Victims who do not qualify for PAPs are entitled to engage a legal representative as a witness. The representative is present during the victim's testimony, and can make applications on behalf of the victim pertaining to their role as a witness, for example, applying to remove the accused from the courtroom. While the broader PAP scheme is not applicable to Australia, the narrower rights of victims who engage legal representatives as witnesses can be replicated without disrupting our two-party system (Braun, 2014). This is a more comprehensive version of the representation available in NSW and QLD, with greater capacity for representatives to ensure that the protections established pre-trial are enforced in the courtroom.

Scandinavia

In Sweden's hybrid system, victims have extensive participatory rights, accessed through an auxiliary prosecutor presenting alongside the state as an injured party like in Germany (Antonsdóttir, 2018), or through independent counsel during the investigation and trial. Since 1988, Sweden has allowed independent legal representatives an unconditional right to be heard at all questioning, hearings, and trial processes (Carroll, 2022). They may challenge the state on the decision to press charges, have input into what evidence is presented, object to questioning and support victims to access their procedural rights. They also file the victim's compensation claim, which in Sweden happens alongside the criminal trial.

In Denmark's, Norway's and Iceland's adversarial systems, ILR is robust (VLRC, 2015). Representatives may provide guidance prior to reporting and throughout the investigation, and may safeguard victims' private records and make submissions regarding procedural issues. When the victim is being questioned during trial, they can object and pose additional clarifying questions. They can also call witnesses to speak to the impact of the crime on the victim. In Denmark and Iceland, complainants' legal representatives can even cross-examine the defendant and, at judicial discretion, cross-examine other witnesses.

Ireland

Ireland was the first adversarial system to introduce ILR (Donovan, 2022). Victims can access state-funded ILR to oppose applications for the introduction of their sexual history evidence and counselling records pre-trial. The Gillen Review found that ILR is the most effective way to support complainants, improving confidence in testimony, safeguarding their interests,

reducing attrition and improving low conviction rates (Gillen Review, 2018). To maximise protections for victims, the more recent O'Malley Report has recommended that applications be submitted as early as possible (O'Malley Report, 2020), in part because without awareness, victims waive their right to protection early on. It also recommended that victims be represented by a lawyer of the same seniority as the defence's team. Indeed, examining rival accounts of an event when one party is represented by an expert and the other not at all is concerning. Most significantly, the Report recommended that ILR be extended to cross-examination to ensure that questioning goes no further than necessary and is in accordance with the leave granted (O'Malley Report, 2020).

Scotland

In Scotland, complainants have a right to ILR in respect of the potential disclosure of evidence to defence counsel which engages their Article 8 (European Convention on Human Rights) right to privacy and family life. This includes counselling and medical records, and physical property such as a mobile phone. Perplexingly, the question of whether the evidence should be obtained will engage the right to ILR, but ILR cannot make submissions about whether the evidence is to be admitted and used at court. While there are strict rules restricting the use of sexual history evidence, the right to ILR does not extend to sexual history evidence. However, there is at present a Bill before Parliament to remedy this, spearheaded by Eamon Keane. ILR is non-means tested.

The University of Glasgow has been awarded funding to establish a clinic providing independent legal advice and representation by practising Scottish solicitors, without charge. This includes advising and representing victims in relation to the Victim's Right to Review, police recovery of the victim's sensitive records, and applications to access records by the defence, special measures and bail conditions, complaints about the police or legal system and advice on rights of appeal. The Emma Ritch Law Clinic will also offer innovative teaching to students and instil awareness of trauma-informed lawyering, while gathering data and producing research about ILR.

Japan

The Japanese legal system operates on adversarial principles, but without juries. In 2009, Japan adapted the German law giving victims status as a co-accuser in serious criminal cases (Matsui, 2020). ILR is state-funded if the victim cannot afford the legal fees. Victims can also file civil damage claims during the criminal trial and can receive damage awards more easily. If a prosecutor decides not to file charges, victims have a right to appeal to the Prosecution Review Commission, which consists of a jury of randomly selected citizens whose decision is legally binding.

United States

The US Federal Crime Victims' Rights Act 2004 provides ten rights afforded to victims of federal crimes, including the right to be heard during a criminal proceedings involving bail, plea bargaining, sentencing and parole applications. Victims therefore have a right to be heard before a decision affecting their rights is made. This duty to accord procedural fairness requires the prosecutor to give a victim a reasonable opportunity to comment in the circumstances, which might not require a formal hearing; however, a victim can apply for remedy if they have not been accorded procedural fairness. These rights can be enforced by ILR via a motion of relief or *writ of mandamus*.

In 2006, in *Kenna v. U.S. District Court for C.D. Cal*., the United States Federal Court in the Ninth Circuit, recognised that the legal system "has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process" (via O'Connell, forthcoming).

8. To the critics

"Arguments against the inclusion of complainant legal representation can be summarised as either 1) that legal representatives are unnecessary; or 2) that they are inappropriate" (Killean, 2021).

Legal representatives are not necessary

We have described at length why existing non-legal support mechanisms fall far short of providing the information, advocacy and protection that victims require to effectively participate in the justice process and retain some form of wellbeing. There is no improvement in the treatment of complainants when non-legal supports accompany them to court (Clark, 2010; Braun, 2014). The prosecution cannot meet the victim's emotional needs or protect their interests adequately due to under-resourcing, frequent changes in assignments and the demand for impartiality. This has ramifications for the trial itself, as we have detailed. Complainants' legal and human rights can *only* be preserved through some form of ILR (Doak, 2005; Raitt, 2013).

The appropriateness of ILR in an adversarial system

Since the adversarial trial system relies on the balance of power between prosecution and defence, objections to third-party participatory rights tend to centre on the perceived threat to the accused's right to a fair trial and the longstanding principle of equality of arms (Hoyano, 2015 via Iliadis, Smith & Doak, 2021). The system is perceived to be out of balance if another party were involved, such as LR for the complainant. This would be the case if defendants had to defend themselves against two accusers (Braun, 2014; VLRC, 2016; Iliadis, 2020), but few jurisdictions adopt a model where the independent counsel performs a duplicate prosecutorial function. The implementation of ILR for complainants can be seen as a "triangulation of interests" (Lord Steyn, 2001 via Bowden et al., 2014), where the legal system strikes a balance between the interests of the victim, the accused and the state (O'Connell, 2018).

If ILR for the complainant is confined to filling gaps in their protection, upholding legislation that they are already entitled to, it is difficult to see what prejudice is presented. Given that adversarial systems have already expanded to accommodate amicus curiae, McKenzie friends, children's advocates, and intermediaries, there should be no reason why ILR cannot operate effectively in a context where criminal trials are already adapting to international shifts in relation to evidence and procedure (Iliadis, Smith & Doak, 2021). 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, inaugural Commissioner of Victims' Rights 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 (O'Connell, 2017), and in improving legal culture with respect to observance of victims' rights (O'Connell, 2020). The victim remains non-party to the trial. Provided 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).

Some academics go further than this, arguing that "the current adversarial status quo provides defendants with an unfair advantage that may compromise society's legitimate right to bring

offenders to justice" (Bowden et al., 2014). The two-party system actually prevents the balancing of rights, because the rights of each party are inherently not equal (Gerry, 2009). In order to be faithful to the adversarial tradition, "the least we can do is to ensure that distinctive, meritorious interests are not handicapped from the outset" (Raitt, 2011). That is, we must at least uphold legislation protecting the interests of victims, or risk prejudicing the trial, and the public interest under the rule of law. Indeed, "a fair trial does not mean a trial which is free from all possible detriment or disadvantage to the accused" (Doak, 2008). The UK Law Commission echoed this when quoting former Lord Chief Justice of England and Wales, Lord Judge, who stated that if measures "make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective" (UK Law Commission, 2023).

ILR will render trials lengthy

A last objection to ILR is that its implementation would add significant time to a trial. However, ILR actually contributes to "the efficient administration of the system, while also bringing about a better outcome" (O'Connell, 2020). ILR minimises delays caused by late applications for complainants' information, and by reducing the posing of inadmissible questions (Braun, 2014) or lengthy follow-up questions due to unclear testimony caused by a lack of preparation or the distress of unregulated questioning (Temkin, 2002). ILR in quasi-systems such as Norway and Denmark has been largely unproblematic (Braun, 2019), and has had few disruptive effects in archetypical adversarial systems, such as Ireland (Iliadis, 2019), Canada (Mohr, 2002) and the ICC (Van den Wyngaert, 2011) (via Iliadis, Smith & Doak, 2021). With prudent judicial management and specific limits to its remit, there is no reason why ILR cannot operate effectively in an adversarial context (Iliadis, Smith & Doak, 2021).

-

While ILR for victims has not historically been a part of adversarial systems, this does not mean it cannot become part of the adversarial system in future (Braun, 2014). "The criminal justice system, which cannot function without victims, needs to adjust its perspective to see them as valued participants and to support them appropriately" (Victims Commissioner for England and Wales, 2020 in Donovan, 2022).

9. Toward an Australian model of ILR

ILR has precedence in NSW and Queensland. It has operated in NSW since 2011 to prevent or restrict the disclosure of sexual assault complainants' 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 and/or if material produced under a subpoena can be disclosed (Division 2A of the Evidence Act 1977 (QLD)). Queensland are currently advocating to extend the remit of ILR to protect a complainant's prior sexual experiences that do not necessarily feature in counselling records.

In NSW and Queensland, defence counsel have been known to make late applications (during the trial) to subpoena complainant's protected communications, which precludes the opportunity for a complainant to engage ILR, because the ILR is limited to pre-trial hearings. There are also circumstances where ILR will successfully argue against defence counsel's application to adduce protected communications, but, for a range of reasons already outlined, questioning on protected communications will occur nonetheless. This underscores the need to expand the scope of ILR to the trial stage. The ACT, WA and Vic have received federal funding to pilot ILR in the contexts set out above. Victoria and the ACT are allowing ILR into the trial as part of the pilots where defence subpoena protected communications.

<u>Our Recommendation</u>

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 complainants' private records often goes unseen. This leaves complainants 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 complainants' private information may already have been accessed by the defence.
- ILR can serve as a single point of contact for the complainant; 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 complainant (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.

As noted, it is vital that complainants are made aware of the specific powers and limits of their legal representative.

The ILR should be publicly funded and available through legal service providers such as Women's Legal Services and Legal Aid, including any culturally-specific or First Nations service providers. The ILR should be specialised in sexual offence matters, culturally-sensitive, 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), and trauma-informed, with a goal of reducing shame and promoting dignity (Moran & Salter, 2022).

NHS Education for Scotland has developed a skills framework for working with victims and witnesses, which details a roadmap for different members of the legal system to:

1. Understand the prevalence and impact of trauma
2. Avoid re-traumatisation where at all possible
3. Support recovery from the impact of trauma where possible
4. Enable equal and effective participation in the legal process
5. Support resilience of the workforce and reduce the potential impact of vicarious trauma

The framework is cumulative, allowing for the development or commissioning of skills training ranging from trauma-informed to trauma-enhanced, for people who have greater contact or lesser contact with witnesses (NHS Education for Scotland, 2022).

Costing

Immediate costs for ILR have to be considered in relation to the legal costs and the long-term public health costs that are offset, and the benefits accrued:

- Prevention of future offending
- Reduction of costs of trauma to victims
- Better employment outcomes for victims
- Increased efficiency of the court process i.e. less hours overall and less cost
- Shorter cross-examination (inappropriate or inadmissible questions concerning medical and sexual history of the victim would occur less frequently, reducing the frequency of objections and delays) i.e. less hours overall and less cost
- Fewer state-funded victim service providers could be required where victims have ILR

The UK Home Office estimated the cost of sexual offences in England and Wales to be 12.2 billion each year. Of this, around 10 billion was caused by the emotional impact of the crimes and the inadequate responses to them. Each rape conviction was found to prevent an average of around 6 further sexual offences, which equates to an estimated saving of around $400,000 per conviction, even *after* the cost of imprisonment (Oliver et al., 2019).

For an ILR scheme to be rolled out across England and Wales, it would cost 4 million pounds a year - $7.5 million AUD. Salaried posts are most cost effective, including overheads and staffing costs' (Smith & Daly, 2020). While we are yet to hear whether funds are adequate for Australia's legal services pilots, they have been allocated $8.4 million over three years.

Suggested test and evaluation

We propose a split test for the aspect of ILR we have called for that would be new in Australia; the trial. This would involve comparing sexual assault trials that have ILR in the courtroom and sexual assault trials that restrict ILR to the pre-trial stage. We believe that the test will demonstrate the need to increase funding for ILR to operate during trial, or risk a redundancy of the pre-trial costs in states where ILR schemes already exist. A series of feasibility and system viability tests, beyond our own, would need to be conducted to ensure the solution works for stakeholders involved in the testing process.

Hypotheses	**Measure**
ILR increases rate of reporting	Complainant feedback forms, 'net promoter score'
ILR decreases rate of complainant attrition	Complainant feedback forms, 'net promoter score'
ILR adequately prepares victims for trial	Complainant feedback forms
ILR increases confidence of victims' testimony	Complainant feedback forms Prosecuting team feedback forms
ILR shortens the length of the legal process, which saves taxpayer money and benefits the broader community	Reduction in delays, with the decrease in time between commencement and conclusion quantified in cost reduction
ILR shortens cross-examination	Reduction in duration of cross, quantified in cost reduction of legal fees for all legal actors
ILR enhances victims' sense of procedural justice	Complainant feedback forms, 'net promoter score'
ILR increases conviction rates and reduces the chance for reoffending	Percentage increase in guilty verdicts, highlight costs associated with reoffending

In evaluating efficacy, evaluators should have demonstrated expertise in trauma-informed service delivery. Evaluators should include people with lived experience, and metrics should be identified and valued by people with lived experience, alongside the established metrics. Learnings should be published in a timely manner. Any undertaking of the pilot requires a commitment from jurisdictions to invest in cultural and judicial education alongside it.

Broader uses for ILR in the long-term

- Pre-reporting advice
- Protection of victims' digital communications during police investigation
- Charge bargaining (withdrawal or variation of charge)
- Decision to prosecute (victim right to review)
- Suppression orders
- Plea deals (giving a voice to plea bargaining)
- Trial procedure and special measures (separate court entrance to perpetrator, private room for victim's family, courtroom architecture is suitable)
- Pre-recorded testimony for vulnerable witnesses
- Delivering integrated jury directions
- Sentencing (victim impact statement to avoid re-questioning)
- Post-proceedings (revocation or anti-violence order)

10. It's time

Legally and operationally, the state is considered the wronged party in cases of sexual assault, not the victim. And yet, in the face of immense courage to undergo the re-traumatisation empirically associated with attempting to hold a perpetrator to account, not for redress for having suffered the primary consequences of sexual violence, but in order to facilitate the state's role in protecting the community, the state has sanctioned the traumatisation of victims. Beyond that, it has effectively decriminalised rape.

The resources expended by the state to make a brief suitable for prosecution are rendered void, as an under-resourced prosecuting agency fails to prepare its chief witness, and, fearful of procedural rules it perhaps does not understand, fails to uphold legislation to protect their privacy, wellbeing and, in the eyes of the jury, their credibility. As justice in an adversarial system is defendant-centric, fairness measured only against how well the accused's rights are affirmed in relation to the power of the state, the fact that victims are rarely afforded even the courtesy of information about their role in proceedings is eclipsed by misdirected cries that the accused deserves a fair trial. Ramifications ripple out of the courtroom doors to widen the justice deficit, as victims are discouraged from reporting, victim-blaming attitudes are validated, and offending continues, largely without accountability or deterrence, at a huge cost.

Fortunately, common law is flexible, capable of steady adaptation to the needs of contemporary society. In a society where one in five women have experienced sexual violence at least once since the age of fifteen (AIHW, 2022), yet only 8% of them report to the police (ABS, 2023), and a fraction of their perpetrators make it to the inside of a courtroom, it is time that the law adapts. Victims have long since learned to not measure accountability in courtroom convictions - it is too rare that a perpetrator even make it to the inside of a courtroom. But we should all be interested in changing that; accountability is a form of prevention.

ILR for victims can mitigate secondary harm that comes with participation in the legal process, improve the state's prosecution of criminals and strengthen the integrity of the system itself. Concerns for the rights of the accused have weight, but do not preclude a complainant having access to representation. Rather, they call for caution in the form that representation takes, in order to ensure that the defendant is not unfairly disadvantaged. Arguments in favour of ILR far outweigh the objections - the adversarial system is not an insurmountable barrier to representation.

Not only is it possible to protect the rights of victims while ensuring the accused achieves a fair trial, protecting the rights of victims is critical to the very principle. "The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community" (VLRC, 2021). Protecting victims is in the public interest.

Appendix

Jurisdiction	Remit of Legal Advocacy or ILR	Stage of Process
Ireland	May make submissions regarding remit of sexual history and counselling records	Investigation, pre-trial and trial
Northern Ireland	May provide advice before reporting, may make submissions regarding disclosure of medical records and sexual history	Before reporting, pre-trial
Scotland	May make submissions on whether evidence engaging complainers' Article 8 European Convention on Human Rights right to privacy and family life can be obtained (not adduced), which extends to counselling and medical records, and physical property e.g. mobile phone. Bill before Parliament currently to introduce ILR in relation to sexual history.	Pre-trial process
Canada	May make submissions regarding sexual history and counselling and medical records, and most states offer free ILR of up to 4 hours before trial	Before reporting, pre-trial
USA	May make submissions regarding subpoenaing of private records and medical history	Pre-trial
India	Complainants can hire ILR as needed Has been recommended that ILR be court-appointed in the police process	Entire process
Denmark	May object to sexual history evidence, may sometimes cross-examine the defendant, may, at judicial discretion, cross-examine other witnesses and may, at judicial discretion, make submissions regarding procedural issues	Entire process
Norway	Free legal advice of up to 3 hours prior to reporting, may process case files, adduce evidence, cross-examine witnesses including the defendant, and appeal decisions made by prosecution	Prior to reporting, pre-trial and trial
Sweden	May suggest evidence and ask questions, object to questions and request adduction of evidence, and can cross-examine the defendant	Entire process
Iceland	May access the brief of evidence relevant to the complainant and protect their interests (usually in relation to their police statement and medical records), and if the case proceeds to court, may access the entire brief of evidence	Entire process
Italy	May access the brief of evidence, may present at court proceedings, may cross-examine the defendant and make objections	Pre-trial and trial
Japan	May make submissions regarding use of evidence, may cross-examine witnesses including defendant, may make closing arguments and may present the victim's opinion of facts and application of the law	Pre-trial and trial
Germany	May be present during police questioning, advise the victim pre-trial (case management), assist in gathering evidence, witness preparation, may access the brief of evidence, and during trial can speak on the victim's behalf, call witnesses on their behalf, object to questions, cross-examine the defendant, address the court regarding the guilt of the defendant; and regarding sentencing and victim compensation	Entire process
Belgium	Present at the reporting stage, may access brief of evidence at the end of the investigation, may speak on the victim's behalf during trial, call witnesses on their behalf (at the judge's discretion), object to questions, cross-examine the defendant, make submissions and address the court as to the guilt of the defendant - may not address the court regarding the sentence, but may address the court concerning compensation for the victim	Entire process
France	May be appointed during reporting, may access the brief of evidence before trial, speak on victim's behalf in court, call witnesses, cross-examine the defendant, make submissions, address the court concerning the verdict and regarding victim compensation	Pre-trial and trial

State	Protection of counselling/medical records?	Protection of digital comms?	Protection of school or work records?	Protection of sexual history?	Is ILR provided in relation to protections?	Does the ILR extend to trial?
NSW	Yes, counselling communications are under the definition of 'protected confidence' in s 296 of the *Criminal Procedure Act 1986* (NSW). This is affirmed in s 298, whereby a person cannot seek to compel a protected confidence without leave of the court. Medical records not explicitly included.	No	No	Yes, see *Criminal Procedure Act 1986* (NSW) s 294CB	SACP scheme affords ILR to victims in relation to counselling records	No
QLD	Yes, protected counselling communications are defined by s 14A(1) of the *Evidence Act 1977*(Qld), and cannot be subpoenaed except with leave of the court per s 14F. As per s14A(2). Medical records are not protected counselling communications.	No	No	Yes, see s 4(1) *Criminal Law (Sexual Offences) Act 1978* (Qld)[J1]	Counselling Notes Protect scheme affords ILR to victims in relation to counselling records	No
VIC	Yes, under definition of confidential communication in Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) – leave may be applied for under s 32C(1) to adduce the communication in court (see also s 32CC)	No	No	Yes, see *Criminal Procedure Act 2009* (Vic) s 340 to s 343 – but leave may be applied for in s 342 – details provided s 344	No	No
ACT	Yes, per Division 4.4.3 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT), counselling records are protected. Protected confidence is not given to medical records relating to offence per s 79K.	No	No	Yes, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 75	No	No
TAS	Yes, for counselling communications – s 127B(3) *Evidence Act 2001* (Tas) No, for medical records – see s127A(3).	No	No	Yes per s 194M *Evidence Act 2001* (Tas). Considerations for leave granted by the court also considered in s 194M.	No	No
SA	Yes, s 67E *Evidence Act 1929* (SA); s 67F allows parties to apply for this to be adduced.	No	No	Yes per s 34L *Evidence Act 1929* (SA), but permission can be granted by judge in s34L(1)(b)[J2]	No	No
WA	Yes, s 19C of the *Evidence Act 1906* (WA) prevents disclosure of protected communications, including counselling communications. Medical records are not included in this definition.	No	No	Yes, see s 36B of the *Evidence Act 1906* (WA). Further sections including ss 36BA and 36BC give further clarification on lack of adducing sexual disposition and experience.	No	No
NT	Yes, s 56B of *Evidence Act 1939*(NT) in relation to 'confidential communication' – defined in s 56 – *only* extends to communications in counselling. Section 56F(1)(b) indicates that this Act does not prevent the adducing of medical records.	No	No	Yes per s 4 *Sexual Offences (Evidence and Procedure) Act 1983* (NT). [J3] Leave can be applied for under the same section and the evidence must have "substantial relevance".	No	No

References

Australian Bureau of Statistics. (2023). *Sexual violence: statistics on female experiences of sexual assault, including victimisation rates, socio-demographics, incident characteristics and responses.* Australian Bureau of Statistics.

Australian Institute of Health and Welfare. (2020). *Sexual assault in Australia*. Australian Institute of Health and Welfare.

Australian Law Reform Commission (2010). Family Violence - A National Legal Response, Report 114. Australian Law Reform Commission.

Australian Law Reform Commission (2024). Justice Responses to Sexual Violence, Issues Paper 49, Australian Law Reform Commission.

Bacik I, Hanley C, Murphy J, et al. (2010). Separate legal representation in rape trials. Rape Law: Victims on Trial? (conference presentation). Dublin Rape Crisis Centre & the Law School Trinity College Conference, Dublin.

Bacik, I, Maunsell, C. & Gogan, S. (1998). *The Legal Process and Victims of Rape*. The Dublin Rape Crisis Centre. Trinity College Dublin.

Benton-Greig, P. (2011). The needs of victims in sexual offence trials. *Canterbury Law Review*, 17/1: 88-95.

Bluett-Boyd, N. & Fileborn, B. (2014). Victim/survivor-focused justice responses and reforms to criminal court practice. Australian Institute of Family Studies.

Bowden, P., Henning, T., & Plater, D. (2014). Balancing fairness to victims, society and defendants in the cross-examination of Vulnerable Witnesses: An impossible triangulation? *Melbourne University Law Review*, 37/3: 540-584.

Braun, K. (2014). Legal representation for sexual assault victims. *Current Issues in Criminal Justice*, 23/3: 819–37.

Braun, K. (2019). Victim participation rights: Variation across criminal justice systems, Palgrave Macmillan, Switzerland.

Brindley, S. (2023). *On the Periphery: Exploring Effective Participation for Complainers of Sexual Crime in Scotland* (PhD). University of Glasgow School of Law.

Bromley, N. & Sarkozi, J. (2022). Women and girls' experiences across the criminal justice system as victim-survivors of sexual violence and also as accused persons and offenders. Women's Legal Service Queensland.

Burgin, R., & Flynn, A. (2019). Women's behaviour as implied consent: male "reasonableness" in Australian rape law. *Criminology & Criminal Justice*, 21/3: 334-352.

Byrne, G. (2021). Submission to the Victorian Law Reform Commission in relation to its inquiry into Improving the Response of the Justice System to Sexual Offences. Victorian Law Reform Commission.

Caroll, C. P. (2022). Accessing Rights and Mitigating Revictimization: The Role of the Victim's Legal Counsel in the Swedish Criminal Justice System. *Violence Against Women*, 28/1: 255-276.

Cooper, J. (2022). Judges as Myth-Busters: A Re-Examination of Jury Directions in Rape Trials. *Griffith Law Review*, 31/4: 485-512.

Cossins, A. (2020). Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial. Palgrave Macmillan UK.

Chalmers, J. & Leverick, F. (2018) Methods of Conveying Information to Jurors: An Evidence Review - Research Findings. Scottish Government, Edinburgh.

Chalmers, J. , Keane, E. P.H., Leverick, F. & Munro, V. E. (2023) Putting victims and witnesses at the heart of the justice system? The Victims, Witnesses and Justice Reform (Scotland) Bill. *Criminal Law Review*, 11: 709-730.

Clark, H. (2010). *What is the justice system willing to offer?* (Family Matters No. 85). Australian Institute of Family Studies.

Deck, S. L., Powell, M. B., Goodman-Delahunty, J., & Westera, N. (2022). Are all complainants of sexual assault vulnerable? Views of Australian criminal justice professionals on the evidence-sharing process. *The International Journal of Evidence & Proof*, 26/1: 20–33.

Doak, J., Jackson, J., Saunders, C., Wright, D., Gómez Fariñas, B., & Durdiyeva, S. (2024). Cross-Examination in Criminal Trials Towards a Revolution in Best Practice?. Nuffield Foundation.

Doak, J. (2005). Victims' Rights in Criminal Trials: Prospects for Participation. *Journal of Law and Society*, 32/2: 294-316.

Doak, J. (2008). *Victims Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties.* Bloomsbury Publishing, UK.

Donnelly, H., Johns, R., & Poletti, P. (2011). *Conviction Appeals in NSW - Ch 13 'Sexual Assault Appeals'*, Research Monograph 35. Judicial Commission of NSW.

Donovan, E. (2022). From Bystander to Participant: Recognising and protecting victims by providing legal advice and legal representation. Chief Victims Advisor to Government.

Dowds, E. (2019). Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force. *The Modern Law Review,* 83/1: 35-63.

Elliott, I., Thomas, S. D., & Ogloff, J. R. (2012). Procedural justice in contacts with the police: The perspective of victims of crime. *Police Practice and Research*, 13(5), 437–449.

Ellison, L. (2001). The mosaic art? Cross-examination and the vulnerable witness. *Legal Studies*, 21/3: 353-375.

Fileborn, B., Loney-Howes, R., O'Neill, T., & Hindes, S. (2021). Submission to the VLRC - Improving the Response of the Justice System to Sexual Offences. Victorian Law Reform Commission.

Flynn, A. (2016). Plea negotiations, prosecutors and discretion: an argument for legal reform. *Australian and New Zealand Journal of Criminology*, 49/4:564–82.

George, A-J., Lowik, V., Suzuki, M., & Corbett-Jarvis, N. (2023). Specialist Approaches to Managing Sexual Assault Proceedings: an Integrative Review. The Australasian Institute of Judicial Administration.

Gillen Review. (2019). Report into the law and procedures in serious sexual offences in Northern Ireland. The Criminal Justice Board.

Green, J., Satyen, L., & Toumbourou, J. W. (2024). Influence of cultural norms on formal service engagement among survivors of intimate partner violence: A qualitative meta-synthesis. *Trauma, Violence, & Abuse*, 25/1: 738-751.

Gu, J. (2024). The effect of judge-alone trials on criminal justice outcomes. NSW Bureau of Crime Statistics and Research.

Herman, J. (2005). Justice From the Victim's Perspective. *Violence Against Women,* 11/5: 571-602.

Herman, J. (2023). The mental health of crime victims: Impact of legal intervention. *Journal of Traumatic Stress*, 16/2: 159-166.

Holder, R. (2018). *Just interests: Citizens, victims and the potential for justice*. Edward Elgar.

Horan, J., & Goodman-Delahunty, J. (2020). Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned. *UNSW Law Journal*, 43/2: 707-737.

Hoyano, L. (2015). Reforming the adversarial trial for vulnerable witnesses and defendants. *Criminal Law Review*, *2:*107-129.

Iles, K. (2023). *Make Police Investigate.* https://www.makepoliceinvestigate.org.

Iliadis, M. (2019). Victim representation for sexual history evidence in Ireland: a step towards or away from meeting victims' procedural justice needs?. *Criminology & Criminal Justice*, 20/4, 416–432.

Iliadis, M. (2020). Adversarial justice and victims' rights: Reconceptualising the role of sexual assault victims. Routledge.

Iliadis, M., Fitz-Gibbon, K., & Walklate, S. (2019). Improving justice responses for victims of intimate partner violence: examining the merits of the provision of independent legal representation. *International Journal of Comparative and Applied Criminal Justice*, 45: 105-114.

Iliadis, M., & Flynn, A. (2018). Providing a check on Prosecutorial decision-making: An analysis of the Victims' Right to Review reform. *The British Journal of Criminology*, *58*/3: 550-568.

Iliadis, M., Smith, O., & Doak, J. (2021). Independent legal representation for rape complainants: Lessons from Northern Ireland. *Journal of Law and Society,* 48/2: 250–272.

Keane, E., & Convery, T. (2020). *Proposal for Independent Legal Representation in Scotland for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character*. Rape Crisis Scotland.

Kelly, L., Temkin, J., & Griffiths, S. (2006, June 30). Section 41: An Evaluation of New Legisalation Limiting Sexual History Evidence in Rape Trials. London.

Killean, R. (2021). Legal representation for sexual assault complainants, in R. Killean., E. Dowds & A. McAlinde (Eds.), *Sexual Violence on Trial* (174-186). Routledge.

Kirchengast, T. (2011). The Integration of Victim Lawyers into the Adversarial Criminal Trial (conference paper). The Australian and New Zealand Critical Criminology Conference Proceedings, Sydney.

Kirchengast, T. (2021). Victim legal representation and the adversarial criminal trial: A critical analysis of proposals for third-party counsel for complainants of serious sexual violence. *The International Journal of Evidence & Proof*, 25/1: 53-72.

Kirchengast, T. (2023). Victim Legal Representation, Procedural Change and Adversarial Criminal Trial Reform: Systemic Support for Sex Offences Victims and Survivors in Victoria. *Criminal Law Journal*, 47/15: 15-25.

Lee, B. (2016). *Eggshell Skull*. Allen & Unwin, Sydney.

Lowik, V., George, A-J., Suzuki, M., & Corbett-Jarvis, N. (2024). The 'Trauma-Informed' Court: Specialist Approaches to Managing Sexual Offence Proceedings (Part 1). *Journal of Judicial Administration,* 33/29.

Manikis, M. (2015). Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims. *The University of Toronto Law Journal*, 65/2: 85-123.

McDonald, E. (2020). *Rape myths as barriers to fair trial process: comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot (2020).* Canterbury University Press.

McGlynn, C. (2017). Rape trials and sexual history evidence: reforming the law on third-party evidence. *Journal of Criminal Law*, 81/5: 367–92.

McGlynn, C., & Westmarland, N. (2019). Kaleidoscopic justice: Sexual violence and victim survivors' perceptions of justice. *Social & Legal Studies*, 28/2: 179–201.

Moran, R., & Salter, M. (2022). Therapeutic politics and the institutionalisation of dignity: 'Treated like the Queen'. *The Sociological Review,* 70/5: 969-985.

New Zealand Law Commission. The Justice Response to Victims of Sexual Violence, Report 136. New Zealand Law Commission.

New South Wales Law Reform Commission. Consent in relation to sexual offences, Report 148. New South Wales Law Reform Commission.

NHS Education for Scotland. (2023). Trauma-Informed Justice. NHS Education for Scotland.

O'Connell, M. (2020). Improving Access to Justice: Procedural Justice Through Legal Counsel for Victims of Crime, in *An International Perspective on Contemporary Developments in Victimology*, a festschrift in Honor of Marc Groenhuijsen. Springer, Switzerland.

O'Connell, M. (2018). Comments (review), in S. Walklate (ed) *Handbook of Victims and Victimology*. Routledge, Abingdon, Oxon.

O'Connell, M. (2017). Comments, in V. Hetu. *Victims of Rape,* in India, Thomson Reuters, New Delhi, India.

O'Connell, M. (2012) Commissioner for Victims' Rights: Strengthening Victims' Rights, in H. Morosawa, JP Dussich & GF Kirchhoff (eds). *Victimology and Human Rights Security: New Horizons*. Wolf Legal Publishers, Netherlands.

Oliver, R., Alexander, B., Roe, S., & Wlasny, M. (2019). The economic and social costs of domestic abuse, Research Report 107. UK Home Office.

O'Malley Review Report. (2020). Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences. Department of Justice.

Powell, A., Henry, N., Flynn, A., & Henderson, E. (2013). Meanings of sex and consent: the persistence of rape myths in Victorian rape law. *Griffith Law Review*, 22/2: 456–80.

Queensland Law Reform Commission (2020). Review of consent laws and the excuse of mistake of fact, Report 78. Queensland Law Reform Commission.

Quilter, J., & McNamara, L. (2023). Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis (*Crime and Justice Bulletin, No. 259)* NSW Bureau of Crime Statistics and Research.

Rape Crisis England & Wales, The Centre for Women's Justice & End Violence Against Women. (2023). *Keep Counselling Confidential*.

Raitt, F. (2011). *Without fear or favour: a voice for rape survivors in the criminal justice system*. Rape Crisis Scotland.

Raitt, F. (2010). Independent legal representation for complainants in rape trials, in C. McGlynn & V. Munro (eds). *Rethinking Rape Law*, Routledge-Cavendish, London.

Raitt, F. (2013). Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings. *Criminal Law Review,* 9: 729-749.

Schenk, E. & Shakes, D. (2016). Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military. *University of Denver Criminal Law Review*, 6/1: 1-36.

Smith, O., & Daly, E. (2020). Evaluation of the Sexual Violence Complainants' Advocate Scheme Final Report. Loughborough University.

Smith, O. (2018). *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths*. Palgrave Macmillan, London.

Spohn, C. (2020). Sexual assault case processing: the more things change, the more they stay the same. *International Journal for Crime, Justice and Social Democracy*, 9/1: 86-94.

Temkin, J., Gray, J., & Barrett. J. (2016). Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study. *Feminist Criminology*, 13/2: 205-226.

Temkin, J., & Krahé, B. (2008). *Sexual assault and the justice gap: A question of attitude.* Hart Publishing, UK.

Temkin, J. (2002). *Rape and the Legal Process.* Oxford University Press, Oxford.

UK Law Commission. (2023). *Evidence in Sexual Offences Prosecutions: a consultation paper* (Report), citing Judicial College, The Equal Treatment Bench Book (July 2022), [2-44], drawing from Lord Chief Justice, Lord Judge, in the Toulmin Lecture (2013).

Van de Zandt, P. (1998). Heroines of fortitude, in P. Easteal (Ed). *Balancing the Scales: Rape, Law, Reform and Australian Culture.* The Federation Press, Sydney.

Victims of Crime Commissioner (2022). Submission to the VLRC: Improving the response of the justice system to sexual offences. Victorian Law Reform Commission.

Victorian Law Reform Commission. (2016). The role of victims of crime in the criminal trial process, Report, VLRC.

Victorian Law Reform Commission. (2021). Improving the responses of the justice system to sexual offences, Report, VLRC.

Wemmers, J-A. (2012). Victims' rights are human rights: The importance of recognizing victims as persons. *Temida,* 15/2: 71-83.

Women's Safety and Justice Taskforce: *Hear Her Voice*. (2022). Volume 2, Queensland.

Zydervelt, S., Zajac, R., Kaladelfos, A., & Westera, N. (2017). Lawyers' Strategies for Cross-examining Rape Complainants: Have We Moved Beyond the 1950s? *The British Journal of Criminology*, 57/3: 551-569.

Legislation

Evidence Act 2011 (ACT)

Evidence Act 1995 (Cth)

Evidence (National Uniform Legislation) Act 2011 (NT)

Evidence Act 1995 (NSW)

Evidence Act 2008 (VIC)

Evidence Act 1977 (QLD)

Evidence Act 2001 (TAS)

Evidence Act 1929 (SA)

Evidence Act 1906 (WA)

Evidence Amendment (Confidential Communications) Act 1997 (NSW)