Addressing gendered violence in Australia

This paper discusses two possible changes to the criminal law in gendered violence cases that is, lowering the prosecution's burden of proof from "beyond reasonable doubt" to "on the balance of probabilities" and second, in certain cases, abolishing the "right to silence".

Background

i. An estimated 2.2 million women in Australia aged 18 years and over (22%) have experienced sexual violence since the age of 15, including:
   - 20% (2.0 million) who experienced sexual assault
   - 5.5% (544,700) who experienced sexual threat[1].

ii. According to the Australian Bureau of Statistics, one in five Australian women and one in 20 men have experienced sexual assault since the age of 15[2]. Most assaults occur in private spaces, and most are against women by a man known to them.
Yet, almost 90% of women do not contact the police.

iii. Many victims of sexual assault are reluctant to report their cases to police, and fewer still pursue legal action, fearing lengthy court cases that will force them to relive their trauma and face harrowing cross-examination.[3] How can our legal system respond to ensure women's rights to be treated with respect, while providing a fair legal process to determine what actually happened in a sexual assault case?

2 Recent acknowledgements of the need for greater legal protection against sexual violence

a. On 1 November 2022 Micaela Cronin was appointed as Australia's inaugural Domestic, Family and Sexual Violence Commissioner.[4]

b. Australia's first Royal Commission into Family Violence was completed in 2015. On 28 January 2023, the Victorian Government announced the implementation of the final recommendations, meeting a commitment to implement all 227 recommendations.[5]

c. On 23 August 2023, the Australian government held a national roundtable on justice responses to sexual violence. A summary of outcomes was published on 12 October 2023.[6]

d. On 23.01.2024 the Australian Law Reform Commission issued a paper, "Justice Responses to Sexual Violence".[7]

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[1] https://www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/latest-release
[2] https://theconversation.com/almost-90-of-sexual-assault-victims-do-not-go-to-police-this-is-how-we-can-achieve-justice-for-survivors-157601
[3] https://www.sbs.com.au/news/article/what-is-the-legal-process-for-rape-cases-in-australia/ql7aop9sx
[4] https://ministers.dss.gov.au/media-releases/9561
[5] https://www.vic.gov.au/about-royal-commission-family-violence
[6] https://www.ag.gov.au/crime/publications/outcomes-summary-national-roundtable-justice-responses-sexual-violence
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e. The Australian Law Reform Commission (ALRC) paper launched an enquiry into sexual violence in Australia, and will provide its final report to the Attorney-General by 22 January 2025.

f. On Wednesday 1 May 2024 there was a meeting of National Cabinet to discuss the national crisis of gender-based violence[8].

A number of options are available for consideration in order to provide effective legal protection for victims of rape, assault, murder and other sexual crimes. To ensure the proposed changes cover the diversity of vulnerable people subject to such violence, laws should be proposed in gender diverse terms.

3 Options for consideration

i. Immediately amending by appropriate legislative changes the Commonwealth, Territory and state *Crimes Acts* to incorporate a separate Division entitled "Offences of Gendered Violence";

ii. placing within that Division, a definition of what constitutes 'Gendered Violence', including murder, rape, physical assault, trespass, intimidation, coercion, controlling behaviour and stalking;

iii. this Division would contain provisions fundamentally changing the substantive law for charges caught by it, so that there would be either a wholesale or qualified abolition of the "right to silence" for those accused of an offence of gendered violence; and

iv. the burden of proof on a prosecution for such a crime be lowered from "*beyond reasonable doubt"* to "*on the balance of probabilities"* as currently reflected by the *Briginshaw* standard and in s s140(2) of the Cwth and state and Territory *Evidence Acts,* discussed at heading **6 Balance of probabilities** below.

4 Reconsideration of hearing styles for gendered violence

The Commonwealth, state and Territory *Evidence Acts* make allowances for parties to seek, and judges to implement, a range of hearing styles to suit the needs of the parties, especially vulnerable parties and witnesses.

5 Abolition of the 'right to silence' and determining the facts when only two parties are present at the incident

i. Former West Australian Supreme Court judge Kenneth Martin has called for the "right to silence" to be re-evaluated in certain sexual assault cases and particularly those where there is no compelling corroborative evidence. Mr Martin says because "only two people know what happened" in the latter sexual assault cases, both parties should be required to give evidence, and have that evidence tested.

ii. He has commented thus on the Lehrmann case: "*[In] a civil case, Bruce Lehrmann had to give evidence. He had to be the first witness and be cross-examined on his story and on his inconsistencies with what he said to police, by two of the best cross-examiners in the country*".

[8] https://www.pm.gov.au/media/meeting-national-cabinet-gender-based-violence

iii. Mr Martin argues that society may have progressed past a place where the right to silence is necessary. He states, "*[H]istorically, the right to silence is understandable in circumstances where you had the power of the state marshalled against some impoverished, illiterate person. It would be a very one-sided, crushing situation*, " he says… "*But I think with education and a rebalancing of that over time".. "you have someone like Bruce Lehrmann who is highly educated, university-qualified, obviously intelligent and articulate, who knows what happened because he's the active participant – or non-participant – on his case. .. If you want to get a fair perspective of what happened .. a limited cross examination in terms of testing what he said doesn't strike me as particularly unfair when he's represented*".

Iv By abolishing the accused's right to silence in uncorroborated cases, the investigating police officers and court, provide an examination/ investigation process which allows for both parties to the incident to be questioned. Apart from potentially arriving at a more truthful and accurate version of what in fact occurred this process may also remove long perceived unfairness over only one party's evidence being closely scrutinised in a highly sensitive two-sided contest.

6. Balance of probabilities

i. By lowering the burden of proof on a prosecution on a charge of Gendered Violence [9] from "beyond reasonable doubt" to "on the balance of probabilities", the chances of the DPP establishing guilt in some (but not all) cases will probably be increased.

ii. Some might argue that the recent widely publicised *Lehrmann*[10] defamation case could be a reliable guide as to outcomes[11], if our proposed changes to the burden of proof are made. It might be suggested that consistently with the judgement in *Lehrmann*, men contesting 'serious allegations' with potential 'grave consequences'[12] face a greater risk of adverse findings being made against them when the lower civil standard of proof is applied.

iii. Bearing in mind that any Gendered Violence case will be fact specific, in our view *Lehrmann* is not a 'guide' as such but is simply an example of findings made on the facts of that case.

iv. Noting that our proposal for change involves not just a lowering of the burden of proof but also an adherence to the *Briginshaw* standard of proof[13] it is appropriate to examine briefly that case. It is a longstanding, widely respected and applied decision on the burden of proof in civil cases.

v. Dixon J in *Briginshaw*[14] stated that:

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[9] See par 3ii above where it is suggested that what constitutes 'Gendered Violence', includes murder, rape, physical assault, trespass, intimidation, coercion, controlling behaviour and stalking

[10] *Lehrmann v Network Ten* [2024] FCA 369

[11] Note that according to press reports Mr Lehrmann has been granted an extension of time until 31 May 2024 in which to appeal.

[12] See discussion of *Briginshaw* below

[13] As stated at 3 iv above

[14] This common law principle has been enacted in Cwth & state and Territory *Evidence Acts*. See s140(2) "*(1) In a civil proceeding the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities*

"**when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence ... It cannot be found as a result of a mere mechanical comparison of probabilities." His Honour went on to explain that the standard is one of "reasonable satisfaction": …but reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. <u>The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer....</u> In such matters <u>'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences</u>**." (our underlining)

vi. *Briginshaw* and s140 of the *Evidence Acts* provide, we would argue, a separate form of protection for those facing charges of Gendered Violence in terms of prescribing the cogency of the evidence that a party must adduce to satisfy a Court in respect of 'serious allegations' (such as murder, rape assault etc) that are attended with 'grave consequences' (such as incarceration or substantial fines).

viii. The effect, in our view, of what may be practical differences (if any) between outcomes based on the 'beyond reasonable doubt' test, as opposed to a test of "on the balance of probabilities" as buttressed by *Briginshaw* considerations, remains difficult to assess or predict.

7. Conclusion

i. Legislation, whether at the Commonwealth or state/ Territory level, usually follows, implements and entrenches community norms and expectations.

ii. The degree of current community and political agitation underpinning the events at sub-pars 2 a. to f. above suggests that there have been recent significant shifts in community expectations, thinking and thus norms, as regards violence by men towards women.

iii. Parties who would wish to suggest otherwise and resist changing community expectations and norms to impede fundamental change of the kind we have suggested above may face considerable difficulty in persuading the legislature to "leave things as they are".

iv. We invite in this context, closer examination of the proposals we have outlined above for legislative change, expansion of police Investigative powers and changes to court procedures and practices.

Amalina Wallace
[redacted]

Robert Clynes OAM LL.B
[redacted]

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
(a) the nature of the cause of action or defence, and
(b) the nature of the subject-matter of the proceeding, and
(c) the gravity of the matters alleged."

24 May 2024

Addressing gendered violence in Australia
Option 2: Provision of a court provided victim advocate in rape cases

There is significant current community concern about the substantial problems with male violence towards women in Australia, and the need to consider reforming current legal processes to protect women and other minorities from murder, rape, physical assault, trespass, stalking, controlling behaviours and emotional abuse.

1. Recent acknowledgements of the need for greater legal protection against sexual violence

a. On 1 November 2022 Micaela Cronin was appointed as Australia's inaugural Domestic, Family and Sexual Violence Commissioner.[1]

b. Australia's first Royal Commission into Family Violence was completed in 2015. On 28 January 2023, the Victorian Government announced the implementation of the final recommendations, meeting a commitment to implement all 227 recommendations.[2]

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e. The Australian Law Reform Commission (ALRC) paper launched an enquiry into sexual violence in Australia, and will provide its final report to the Attorney-General by 22 January 2025.

f. On Wednesday 1 May 2024 there was a meeting of National Cabinet to discuss the national crisis of gender-based violence[5].

A number of options are available for consideration in order to provide effective legal protection for victims of rape, assault, murder and other sexual crimes. To ensure the proposed changes cover the diversity of vulnerable people and subject to such violence, laws should be proposed in gender diverse terms.

2 Addressing the criminalisation of the rape survivor

i) Consider this scenario: A house has been broken into. The home has been broken into, belongings stolen, windows smashed, items broken and scattered on the floor, and the home owner beaten up in the process. The home owner appears in court as a witness for the prosecution. The barrister, on instructions from the alleged thief, accuses the home owner of having wilfully invited the burglar in. Again, on instructions from his client, the barrister attacks the home owner, accuses them of wilfully inviting the burglar in, of having tempting possessions flagrantly on show for all to see, and of having a whisky before bed,

[1] https://ministers.dss.gov.au/media-releases/9561
[2] https://www.vic.gov.au/about-royal-commission-family-violence
[3] https://www.ag.gov.au/crime/publications/outcomes-summary-national-roundtable-justice-responses-sexual-violence
[4] https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/
[5] https://www.pm.gov.au/media/meeting-national-cabinet-gender-based-violence

a clear indication of their wish for their home to be violated. The home owner is accused of having willingly submitted to the assault, and the burglar asserts that the home owner consented to the break in.

ii) Ridiculous? This is a strategy employed every day in sexual assault cases all over Australia, when barristers test the integrity and reliability of the memory of the victim by highlighting inconsistencies and issues in their evidence, and by questioning whether they had sex at all. Survivors may be browbeaten crudely and humiliated at length by barristers, whose only means of getting their client acquitted may be to, on instructions from the defendant, accuse the survivor of having not only invited but willingly participated in the attack. The courtroom attacks on rape survivors include verbal abuse, insinuations and offensive suggestions that could constitute harassment and would never be allowed in any Australian workplace.

iii) Australian states and territories have introduced rape shield laws in an attempt to limit malicious courtroom attacks on survivors, however these laws are sometimes not upheld by trial judges. While the alleged perpetrators are protected from incriminating themselves by their right to silence, there is no similar court protection for rape survivors. In effect the onus of proof is reversed. The survivor may be interrogated as if guilty, and is subject to relentless attack not just on their credibility, their reputation, their dress, their sexual history and their sobriety, but by inference also on their presumed overall trustworthiness.

iv) Just as defendants have lawyers to present their case, to advocate, persuade, explain and present evidence on their behalf in a court of law, so rape survivors are entitled to have the same representation, and are also entitled to the same dignity given to a defendant by the presumption of innocence.

v) In Australia, sexual assault is defined differently in different jurisdictions, resulting in variations in the operation of the consent defence across different states and territories[6]. In Australian criminal trials, victims are witnesses rather than parties to the action. As such, they have no legal advocate in court. The prosecutor formally acts for the community, not the victim[7].

vi) Equally, the accused's lawyer effectively defends the case by transferring the decision about guilt or innocence to the victim/survivor. That is, they attack the integrity of the victim by relentlessly asking questions which cast doubt on the victim's integrity and reliability, inferring that the victim actually welcomed and consented to the rape. Defence counsel still[8] ask such questions to undermine victims' character and testimony.

vii) This criminalisation of the victim is continued when rape trials are reported by Australian media. For example, the rape trial against Bruce Lehrmann was

[6] https://aifs.gov.au/resources/practice-guides/sexual-assault-laws-australia#:~:text=Because%20of%20the%20elements%20of,the%20victim%20was%20not%20consenting.
[7] https://lsj.com.au/articles/new-report-into-lehrmann-prosecution-mires-case-in-yet-more-controversy/
[8] https://bridges.monash.edu/articles/journal_contribution/Development_of_the_Office_of_Commissioner_of_Victims_Rights_as_an_Appropriate_Response_to_Improving_the_Experiences_of_Victims_in_the_Criminal_Justice_System_Integrity_Access_and_Justice_for_Victims_of_Crime/8325155

labelled by some media outlets as “the Higgins trial”, inferring by that description that it was Brittany Higgins who was actually on trial.[9]

viii) While this adversarial process imputes blame onto the accuser/victim, in Australian courts the accuser is not currently given a legal advocate to protect their privacy, their dignity and their mental health. As noted above the prosecutor acts for the state, but not for the complainant.

ix) Rape victim/survivors in Australia continue to report experiencing the justice system's procedures, particularly trials, as re-traumatising and re-victimising (Heath, 2005; Koss & Achilles, 2008; Orth & Maercker, 2004; Taylor, 2004).[10] Sexual assault is a major health and welfare issue in Australia and worldwide. For survivors, the effects can be wide-ranging and lifelong. They can experience physical injuries, long-term mental health effects, and disruption to everyday activities such as eating and sleeping habits. [11]

3 Conclusion

This paper proposes provision of legal representation / specialist advocacy to the rape victim[12]. Introducing victim lawyers is a positive step we can make to enhance victims’ well-being, dignity and access to justice. It allows for questions to be asked of the rape survivor while giving them the protection of an advocate.

Robert Clynes OAM LL.B

[redacted]

Amalina Wallace

[redacted]

Attachment A: Precedents for complainant/victim advocate; Mary Iliiadis, Senior Lecturer in Criminology, Deakin University and Kerstin Braun, Senior Lecturer in Criminal Law and Procedure, University of Southern Queensland; March 25, 2021; The Conversation; https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428

[9] https://www.theage.com.au/politics/federal/brittany-higgins-thanks-supporters-after-lehrmann-trial-aborted-20221204-p5c3gd.html

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Attachment A

Precedents for complainant/victim advocate

[Excerpts from article by Mary Iliiadis, Senior Lecturer in Criminology, Deakin University and Kerstin Braun, Senior Lecturer in Criminal Law and Procedure, University of Southern Queensland; March 25, 2021; The Conversation; https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428]

How can we make going to court better for those seeking justice? One critical way is to provide victims with their own lawyers[13].

Women's fears and community mistrust

According to the Australian Bureau of Statistics, almost 90% of women do not report their sexual assault to police. One of the reasons victims do not report sexual violence — or delay reporting — is fear they will not be believed. For cases that proceed to prosecution, victims' experiences are generally negative. This is due to insensitive treatment by criminal justice personnel, including defence lawyers.

Compounding this are the myths and stereotypes that underpin [intrusive defence questioning] at trial. These include questions about victims' sexual history, used to create a false perception the victim consented to sexual activity or is the "type" of person who is more likely to consent. This is also a reason why so few convictions are reached.

Women are re-traumatised

Given victims are disclosing highly personal and distressing details about their assaults, and potentially being subjected to fierce cross-examination at trial, they are often re-traumatisated by going to court. This intensifies the barriers women face reporting and having their stories heard, which further denies them validation and control.

As US psychiatrist Judith Herman has noted, "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."

The adversarial system

The adversarial nature of Australia's criminal justice systems means crime is contested between two parties: the state who prosecute in the public interest and the accused person.

This means the victim is not considered a party to proceedings, despite being directly impacted by the offence, and therefore does not have an active role or voice.
Courts have a duty to protect victims from certain misleading, intimidating and humiliating questioning, such as in relation to victims' sexual history and character.

However, research shows defence counsel continue to ask such questions to undermine victims' character and testimony.

[13] Mary Iliiadis, Senior Lecturer in Criminology, Deakin University and Kerstin Braun, Senior Lecturer in Criminal Law and Procedure, University of Southern Queensland; March 25, 2021; The Conversation; https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428

If victims can be assured their privacy and interests will be protected, they might be more inclined to report and/or stay engaged in the criminal justice system. Having a lawyer present at trial may also decrease victims' feelings of stress and anxiety and improve their confidence when testifying.

As former South Australian Commissioner for Victims' Rights, Michael O'Connell, has argued, legal representation can allow victims to feel like *integral players […] rather than mere bystanders in the criminal justice system.*

Victim lawyers around the world

There are several different models of legal representation for victims around the world.

In the German system, victims of sexual offences can engage lawyers who have rights to represent them, including the ability to elicit evidence and ask questions of the accused person at trial. In Denmark and Sweden, victims of sexual offences also have the right to engage a lawyer from as early as the police reporting stage, to receive advice about the legal process and compensation claims, as well as moral support.

The right to victim lawyers in adversarial systems - like Australia's — is less common. Victim lawyers are available in Ireland to prevent the disclosure of victims' sexual history evidence in court. England and Wales also recently piloted provision for victim lawyers, as has Northern Ireland.

In Queensland and New South Wales, sexual assault victims can be legally represented when challenging defence applications for the disclosure of their counselling notes and other confidential therapeutic records. However, this representation does not extend to the actual criminal trial.

Resistance to the idea

Despite the benefits of lawyers for victims, concerns about practical implications remain.

This is due to the perceived threat a third party — a victim's lawyer — might pose to the two-sided contest between the state prosecutor and the accused person. There are concerns the system would become unbalanced. In 2016, the Victorian Law Reform Commission opposed the idea on the basis police and prosecutors are already obliged to keep victims informed about the legal process and victim lawyers might lead to "dual representation".

However, this fails to recognise victims have legitimate interests that might compete with the interests of the prosecution, who represent the public interest. These include rights to privacy about their personal records and prior sexual history, and to be free from character attacks during cross-examination at trial. While it may not be viable, at present, to introduce victim lawyers throughout the entire prosecution process, there is certainly scope to introduce them at specific stages.

Change that is positive and possible

In the first instance, we need social and cultural change to quash the myths and stereotypes about sexual violence. They prevent victims from reporting and undermine investigations, prosecutions and victim experiences.

In the meantime, introducing victim lawyers is a practical, possible change we can make to enhance victims' well-being, safety and access to justice.

Addressing gendered violence in Australia
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home owner is accused of having willingly submitted to the assault, and the burglar asserts that the home owner consented to the break in.

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[6] https://aifs.gov.au/resources/practice-guides/sexual-assault-laws-australia#:~:text=Because%20of%20the%20elements%20of,the%20victim%20was%20not%20consenting.

[7] https://lsj.com.au/articles/new-report-into-lehrmann-prosecution-mires-case-in-yet-more-controversy/

[8] https://bridges.monash.edu/articles/journal_contribution/Development_of_the_Office_of_Commissioner_of_Victims_Rights_as_an_Appropriate_Response_to_Improving_the_Experiences_of_Victims_in_the_Criminal_Justice_System_Integrity_Access_and_Justice_for_Victims_of_Crime/8325155

[9] https://www.theage.com.au/politics/federal/brittany-higgins-thanks-supporters-after-lehrmann-trial-aborted-20221204-p5c3gd.html

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ix) Rape victim/survivors in Australia continue to report experiencing the justice system's procedures, particularly trials, as re-traumatising and re-victimising (Heath, 2005; Koss & Achilles, 2008; Orth & Maercker, 2004; Taylor, 2004).[10] Sexual assault is a major health and welfare issue in Australia and worldwide. For survivors, the effects can be wide-ranging and lifelong. They can experience physical injuries, long-term mental health effects, and disruption to everyday activities such as eating and sleeping habits. [11]

Option for consideration: This paper proposes provision of legal representation / specialist advocacy to the rape victim[12]. Introducing victim lawyers is a positive step we can make to enhance victims' well-being, dignity and access to justice. It allows for questions to be asked of the rape survivor while giving them the protection of an advocate.

3. The Model for a Victim's Advocate

i) We propose that on a contested hearing, the complainant or victim be given the option of being represented in court, at the expense of the community, by solicitor and counsel.

ii) For an interesting and helpful background discussion of 'victims' advocacy' schemes in Australia and other countries, see the article by legal academics Mary Iliadis and Kerstin Braun in "*The Conversation*" of 25 March,2021 referenced at footnote 12 below.

iii) We have in mind that arrangements for representation in these circumstances would be state or Commonwealth funded and organised through the various state and territory legal aid bodies unless the complainant or victim chose to organise their own legal representation. It is noted that the Commonwealth presently funds a possibly analogous scheme for legal representation in the circumstances of 'family violence' cases , under section 102NA of the *Family Law Act 1975.* Equally legal aid schemes provide nationally at the present time for an independent children's representative in custody or care disputes under the latter act : see s68L.

iv) Counsel's role would have a single focus i.e. the interests of the victim. On our proposal, it would be a limited one and that would be:

(a) *generally, to ensure that any cross examination of the victim or complainant was conducted with due fairness having regard to the interests of the complainant;*

(b) specifically, to address whether any lawful and proper objection might be made to any questions posed by cross examining counsel; and

(c) where appropriate, to make any such objection as above.

[10] https://aifs.gov.au/research/family-matters/no-85/what-justice-system-willing-offer

[11] ABS 2017; Cashmore & Shackel 2013; Hailes et al. 2019

[12] https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428

v) With the leave of the court ,to be granted only after hearing from the representatives of the prosecution and defence, counsel for the complainant might also be permitted a right to ask the complainant questions by way of re-examination .

vi) " The Conversation" article at 5ii) above suggests that in its 2016 report entitled "The Role of Victims of Crime in the Criminal Trial Process" the Victorian Law Reform Commission ('VLRC') opposed the idea of victims' advocates. In that respect the VLRC noted at para 7.161 that a victims' representative could not "be accommodated in Victoria's adversarial criminal trial". We would say in response that this is because there have been no legislative changes in Victoria of the kind we are now suggesting, which might facilitate a victims' advocate role.

vii) Further the VLRC considered a much broader model for the victims' advocate that would : *"permit lawyers to appear on behalf of victims to object to improper questioning, introduce evidence or cross-examine witnesses.*

viii) The Commission noted this "would introduce significant complexity into the trial process and risk prejudicing the jury against the accused. It would require the accused's lawyer to respond to objections, legal submissions and evidence introduced by both the prosecution and the victim's lawyer, and therefore undermine the accused's fair trial".

ix) By creating or permitting a considerably more confined role for a 'complainant's counsel' as we suggest at 3 iv above, the legal system would be giving due recognition to the rights and interests of the victim when those rights and interests can sometimes be detrimentally overlooked under current trial practices and procedures.

x) It is acknowledged that to a certain extent the creation of a complainant's advocate role can suggest that the legal system is engaging in a kind of pre-judgement in favour of the veracity of the complainant's allegations. That kind of approach has been sanctioned already however with for example the notion of a 'victims of crime commissioner': see ACT *Victims of Crime Act 1994, s13* and the recent discussion of this issue in the Sofronoff report[13]. "

i) *Note: "Addressing gendered violence in Australia: Options 1" in this series proposes modification or abolition of the right to silence for the alleged perpetrator, noting that Former West Australian Supreme Court Judge Kenneth Martin has called for the "right to silence" to be re-evaluated in sexual assault cases. Martin says because "only two people know what happened" in a sexual assault case, both parties should be required to give evidence, and have that evidence be tested.*[14]

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[13] Australian Capital Territory Board of Inquiry Criminal Justice System FINAL REPORT Walter Sofronoff KC 31 July 2023: see at pp170 -193 & paras 700-802;

[14] Ellie Dudley , Legal Affairs correspondent, 'Enquirer' p 18, 20-22 April; the Weekend Australian

Addressing Gendered Violence in Australia

Should juries in sexual assault cases be told the criminal history of the defendant?

1 Background

The Australian Bureau of Statistics estimated in a statement on 23 August 2023 that 2.2 million women aged 18 years and over (22%) have experienced sexual violence since the age of 15, including:
- 20% (2.0 million) who experienced sexual assault, and
- 5.5% (544,700) who experienced sexual threat[1].

We have previously submitted three proposals to this ALRC Enquiry on Sexual Violence. They are:

(a) abolishing the right to silence in gendered violence cases[2];
(b) lowering the burden of proof in gendered violence cases[3]; and
(c) establishing a government funded victims advocate for rape complainants in court[4].

2 Current NSW law on admission of evidence of past criminal conduct

The current law in NSW prohibits the admission into evidence of a defendant's past criminal conduct unless, as laid out in the tendency evidence and coincidence rules contained in ss97, 97A, 98 and 100 of the Evidence Act 1995:

1. Reasonable notice is given to all parties about producing the evidence.
2. The proposed evidence has significant probative value and is highly relevant to the facts in issue.
3. That value substantially outweighs any unfair prejudice that may be caused to the defendant.

We note that following the Royal Commission into Institutional Responses to Child Sexual Abuse, **these rules were relaxed in relation to charges of child sexual offences to allow evidence of a defendant's previous sexual interest in children. This is detailed in the new s97A of the amended Act.**

3 Debate over disclosure of criminal history

How much the court should know is a question that comes up time and again in discussions of justice and the law. The current enquiry into justice responses to sexual violence by the ALRC is an opportunity to reconsider historic legal processes in order to achieve a just outcome, not only for defendants, but for complainants. A discussion of the debate on disclosure can be found at the Australian Lawyers Alliance web page, in an article dated 15th Sep 2022[5].

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[1] abs.gov.au/statistics/people/crime-and-justice/sexual-violence/latest-release
[2] See Option 1 FINAL Burden of proof and right to silence; Wallace and Clynes 24 May 24
[3] Ibid.,
[4] Options 2 v5 20 May 24 victim advocate in rape trials; Wallace and Clynes
[5] www.lawyersalliance.com.au/opinion/should-juries-be-told-the-criminal-history-of-the-defendant; 15th Sep 2022

4 The problem of male violence

Sexual violence against women is supported by processes ranging from the macro to the micro levels of social life. It reflects prevalent social attitudes that condone male sexual aggression and are mediated by a range of practices, such as violent pornography. Policy, criminal justice and therapeutic strategies to prevent and reduce sexual offending should take into consideration the social contexts and practices that legitimate sexual violence, even in "appropriate" sexual relationships[6]. It could be seen that the decision not to inform courts of a defendant's previous convictions is one which passively condones male violence rather than confronting it.

5 Conclusion

This paper now proposes taking account of an accused's criminal record at the point of addressing the question of guilt or innocence instead of just (as is done currently) at the sentencing stage. Precedents for this proposal include:

i. In Britain, since 2004, juries can be told a person's preceding convictions where it is 'important explanatory evidence'. Announcing the change, the UK government said that trials should be a search for truth and justice and should protect society.[7]

ii. We also note that a few years ago, NSW Solicitor-General Michael Sexton argued in his book, *On the Edges of History: A Memoir of Law, Books and Politics*,[8] that a jury should not be denied knowledge that an alleged rapist committed rapes in the past, or that an accused fraudster has a string of convictions for dishonesty.

iii. Again, following the Royal Commission into Institutional Responses to Child Sexual Abuse, these rules of exposure of previous convictions were relaxed in relation to charges of child sexual offences to allow evidence of a defendant's previous sexual interest in children. **This is detailed in the new s97A of the amended Act.**

The adoption of this "disclosure" change in gendered violence cases along with further suggested changes at 1 a, b and c above, are all proper and justified steps to rebalance the scales of justice for those who persist in committing acts of sexual violence against women and other vulnerable people.

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24 May 2024

[6] https://www.aic.gov.au/sites/default/files/2020-05/recidivism-of-sexual-offenders-rates-risk%2520factors-and%2520treatment-efficacy.pdf
[7] https://www.lawyersalliance.com.au/opinion/should-juries-be-told-the-criminal-history-of-the-defendant; 15th Sep 2022
[8] On the Edges of History: A Memoir of Law, Books and Politics; Michael Sexton