

# Submission to the Australian Law Reform Commission

## Justice Responses to Sexual Violence

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**Dr. Gemma Hamilton:** ARC DECRA Fellow and Senior Lecturer, Criminology and Justice Studies, RMIT University, Melbourne Australia. Dr Hamilton's research focuses on violence against women and children, with expertise in sexual assault, policing, and forensic interviewing. She is currently the Editor-in-Chief of the international journal, *Investigative Interviewing: Research & Practice*. She is the lead author of the book, *The Intersections of Family Violence and Sexual Offending*.

**Dirkje Gerrits:** Research Assistant, Criminology and Justice Studies, RMIT University, Melbourne Australia. Dirkje is an early career researcher with a background in psychology and a research focus on improving investigative interview practices for adult victim-survivors of sexual offences. Dirkje recently completed a PhD, "Exploring the Utility of Social Emotional Support in Investigative Interviews" with support from the Dr Nina Westera scholarship.

This submission draws on an Australian Research Council funded project entitled, "Sexual Offence Interviewing: Towards Victim-Survivor Well-Being and Justice" (DE240100109: Discovery Early Career Researcher Award). This project examines adult victim-survivors' experiences and perceptions of police interviews in sexual offence cases in Australia in the last five years (2019 onwards). The project has conducted in-depth interviews with 15 adult victim-survivors of sexual violence across Australia as of May 2024. This submission focuses on the audio and visual recording of police interviews with victim-survivors/complainants in sexual offence cases.

### Police Responses to Reports of Sexual Violence

Back in 2010, the ALRC recommended that, "Federal state and territory legislation should permit the tendering of pre-recorded evidence of interview between a sexual assault complainant and investigators as the complainant's evidence-in-chief." It was recommended that such provisions, "should apply to all complainants of sexual assault, both adults and children" (Recommendation 26-6). While most Australian states and territories have updated their legislation to include the use of pre-recorded evidence-in-chief, this option tends to be adopted as an exception rather than the rule for adult complainants who are not intellectually impaired. Pre-recorded evidence-in-chief usually needs to be submitted and approved under a special provision. Although measures and terminology differ across states and territories in relation to 'special provision', most acknowledge that victim-survivors of sexual offences are considered vulnerable (Criminal Procedure Act 1986 (NSW), Criminal Procedure Act 2009 (VIC), Evidence Act 1906 (WA), Evidence Act 1929 (SA), Evidence Act 1939 (NT), Evidence Act 1977 (QLD), Evidence Act 2001 (Tas), Evidence (Miscellaneous Provisions) Act 1991 (ACT). See Appendix A for an overview of legislative and police practices pertaining to pre-recorded evidence-in-chief.

A review of each state and territory's police interviewing practices for adult sexual offences suggest there is often a two-step reporting process (ACT Policing, n.d., Government of South Australia, 2022, New South Wales Police Force, n.d., Northern Territory Government, 2024, Queensland Police, 2022, Tasmanian Government, 2022, Victoria Police, 2024, WA Police Force, 2022). First, complainants may go through a disclosure step (or 'pre-interview') where an initial written record is obtained about their complaint. States and territories have different avenues for this first step, with some states having the option of filling out an online form, disclosure over a telephone call, or reporting in-person to police (e.g., at a police station or different location). This first report may be reviewed by a trained police officer who determines whether they should pursue the case. The second step may involve trained police officers deciding to investigate the report, in which further interviews are conducted with the complainant, and only *sometimes* these interviews are audio and visually recorded. It is unclear what factors inform the decision to, or not to, audio and visually record the interview. The legislative and police processes for recording investigative interviews with adult complainants are still not consistent across Australia.

From interviews with victim-survivors in our research, it is clear that police interviews with adult sexual offence complainants are routinely not being audio or visually recorded. In other words, complainants are not being given the option to have their interviews audio or visually recorded.

Victim-survivors have described lengthy and inefficient processes when reporting sexual violence to police. Typical experiences have involved:

- Being interviewed at a local police station for many hours (unrecorded).
- Having the case referred to a detective or different officer, and having to repeat the account multiple times to different officers (unrecorded).
- Giving a formal written statement whereby their narrative has been paraphrased by police.
- Having to spend hours reading through and editing the written statement.

Several victim-survivors in the research expressed a strong preference for having their police interviews recorded. They described mustering the courage to attend the police station and make the report, only to be told that they needed to follow this up and make a formal report. This made the first interview feel futile. As one victim-survivor described:

*"We waited and then went in and I was there for ages and I disclosed what had happened to me and I felt obviously I felt quite ashamed and dirty and my mum was in the room with me; it was the first time she was hearing the bulk of it but mostly I felt relieved to be reporting and then I was told that this is really serious and that I should report; and I thought what?! We've been here for hours what do you mean?"*

It would take this victim-survivor another four months to follow through with the formal report. Clearly, the unnecessary bureaucratic process acted as a barrier to formally reporting the sexual violence.

During the subsequent statement process, victim-survivors' described that their accounts (initially explained in their own words) were paraphrased into the officer's words in the written statement. At times, this obscured the meaning and accuracy of victim-survivors' accounts. As one victim-survivor articulated:

*"The first report that I did wasn't recorded... This one with the detective is the one that gets written down and you sign it off and all of that and we went through it three times, and I felt with that one that it was very structured and it didn't feel like I had the ability to tell the story in my own words, and I felt like when I read it back it was written paraphrased in his own words, and I found that really hard because I didn't know this process, I didn't know how it worked, and I didn't know how much ability I had to be able to correct things that he'd written to be in my own words, do you know what I mean? To put it back in my own words."*

This point was also echoed by another victim-survivor:

*“I wasn’t even given the opportunity to have it as video recorded. ...If they video recorded me, they would have got it verbatim—how I said it.”*

As outlined in the Victorian Law Reform Commission (2021), Video Audio Recorded Evidence (VARES) may have the following benefits:

- They avoid complainants having to repeat their story.
- They allow an account to be captured near the time of the offending, resulting in more complete and accurate information.

Scholars have also argued that recording police interviews can help to improve the quality of police questioning and promote police accountability; minimise memory distortion and degradation over time; and record complainant’s emotions at the time of the report (Bluett-Boyd & Fileborn, 2014; Kebbell & Westera, 2011).

The recording of interviews appeared to work well for victim-survivors in our research who were given this option. Back in 2010, Northern Territory stakeholders also stated that procedures for pre-recording evidence in sexual offence cases for adult complainants was operating well (ALRC).

Some criminal justice actors might have concerns about the use of audio and visually recorded evidence. For example, Crown Prosecutors in New Zealand have expressed concern that video recorded evidence can be lengthy, overly descriptive, lack logical structure, and be confusing for jurors and other criminal justice decision makers to follow (Westera et al., 2017). Similar concerns were expressed by The Criminal Bar Association and judges in the Victorian Law Reform Commission (2021) who emphasised that it can be difficult to produce VAREs in a neat and chronological way (p. 469). This presents a dilemma, as it is well established that human memory (especially for traumatic memories) does not often operate in a clear and neat fashion (Hohl & Conway, 2016; Goodman-Delahunty et al., 2020; Tidmarsh & Hamilton, 2020).

Victim-survivors in the authors’ current research described how it can be very difficult to accurately explain complicated circumstances regarding sexual violence and fit an account into an overly structured written statement for police. Key details and context can be lost. When referring to the initial interview with police, one victim-survivor commented:

*“I think it should have been video recorded, just from the start, because unfortunately, when you see it on paper it doesn’t logically make sense, but if you listen to it, then it obviously does.”*

At the current time, it appears that some jurisdictions conflate the use of a recorded police interview and expect it will be used for both investigative purposes by police, as well as evidential purposes at trial. This dual-purpose sets a VARE up to fail and may be detrimental to a complainant’s case. Instead, two separate recordings could be taken with victim-survivors at the relevant times.

We argue in this submission that victim-survivors should be given the option to have their report to police audio and/or visually recorded. Then, should their case proceed to trial, they could either (i) use that initial recording as evidence, or (ii) record a more succinct version as their evidence-in-chief should that option be granted to them.

It is vital that any recorded interview with a complainant is conducted by a *trained officer*. This will likely involve the fast-tracking of sexual offence reports to specially trained detectives or units, rather than having reports screened and interviews conducted by untrained officers. This point was raised by the ALRC back in 2010: “clearly, legislation permitting wider use of pre-recorded evidence should be supported by investment in up-to-date technology and a comprehensive training program for interviewers” (26.187).

Current technologies enable the easy recording and transcribing of police interviews with victim-survivors (whether in person, via telephone, or an online meeting). This would save police time and resources. Importantly, it would minimise some of the burdens that victim-survivors face when reporting sexual violence to police (e.g., having to repeat their account multiples times to different people at multiple appointments; having to read through and edit pages of a paraphrased statement that has changed the wording and structure of their account). Overall, it would make the front-end of the reporting process more efficient and less traumatic for victim-survivors.

## Recommendations

- Ensure legislation and processes for the recording of police interviews with complainants in sexual offence cases is more consistent across Australia.
- Give complainants/victim-survivors the option of having their report/s to police audio and/or visually recorded.
- Fast-track disclosures of sexual violence to a specialist trained officer who can conduct a recorded interview in an appropriate manner.

## Conclusion

Some Australian jurisdictions appear to be following outdated and inefficient processes of taking victim-survivors' written statements in sexual offence cases. Allowing and promoting the recording of police interviews with victim-survivors would be one simple change that could save time and maximise the use of the initial report/s. It is widely established that most sexual offence cases do not progress through to trial (Bright et al., 2021; Daly & Bouhours, 2010;), therefore, we are unnecessarily burdening victim-survivors during the reporting process. In short, the system is wasting a lot of their time. We need to acknowledge the extensive work that victim-survivors are doing from the start of the reporting process and take action to minimise any unnecessary labour.

It is important to emphasise that victim-survivors should be given an *informed* choice whether they want their report to police audio/visually recorded. Giving victim-survivors agency is a well-recognised principle of a victim-centred and trauma-informed approach (Rich, 2019). Some victim-survivors might prefer to communicate all or parts of their account in written form (e.g., via anonymous reporting tools or in written statements in-person or in e-mail). The important thing is to promote options and honour preferences, whichever Australian jurisdiction the victim-survivor resides. Part of this informed choice should also involve the explanation of any pros and cons of having their interview/s recorded, especially if they are to be used as evidence-in-chief in court.

Police websites state that specially trained officers conduct interviews in sexual offence cases. In reality, victim-survivors are often initially interviewed by an officer who does not have specialist skills in sexual offences nor investigative interviewing. This is problematic for many reasons. It can impact what information is initially obtained and whether cases are referred on for investigation. It could also compromise a complainant's case if their recorded interview is completed by an untrained officer who questions in an ineffective way. It is therefore crucial that officers are equipped with best practice interviewing skills. This should involve fast-tracking reports of sexual violence to specially trained officers and upskilling general duties officers with greater knowledge about sexual violence and investigative interviewing.

It is hoped that this submission has helped to communicate some key concerns and recommendations based on interviews with Australian victim-survivors of sexual violence. Obviously, much larger changes are also needed to promote more effective justice responses. We need to continue developing justice response options outside of the criminal legal system and keep victim-survivor well-being at the forefront of any developments. For victim-survivors who report sexual violence to police, the recommendations in this submission offer a small difference that could improve the reporting and investigation experience.



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## Appendix A

**Table 1: An overview of Australian legislative and police practice in obtaining and submitting pre-recorded evidence-in-chief in sexual offence cases.**

| State or Territory           | Legislation: Use of pre-recorded evidence-in-chief | Witness criteria to use pre-recorded evidence-in-chief  | Police Practices  |
|------------------------------|--|---|---|
| Victoria                     | Yes - as a special provision                       | Adult complainants of sexual offences who do not have a cognitive impairment, usually give evidence via closed circuit television facilities (or other arrangements such as partitions in courtroom) but with a <b>special provision</b> approved by the court, can submit a pre-recorded police interview (VARE - visual and audio recorded evidence). | Frontline police initially take a written statement which may follow with an investigation. If police decide a criminal proceeding is <b>likely</b> , further statements (written or audio), are obtained later. The visual and audio recorded evidence (VARE) occurs separately from the disclosure interview and is conducted by a specially trained <b>detective</b> . |
| Australian Capital Territory | Yes  | Adult complainants of sexual offences have a choice to give evidence via a video link (or other arrangements such as partitions in courtroom) or submit pre-recorded evidence-in-chief.   | Initial police report/complaint (can be online report, over the phone, or in-person) which may be followed by a formal statement that is <b>likely</b> audio-video recorded and conducted by a specially trained <b>investigator</b> .  |
| New South Wales              | Yes - as a special provision                       | Adult complainants of sexual offences who do not have a cognitive impairment, usually give evidence via closed circuit television facilities (or other arrangements such as partitions in courtroom) but with a <b>special provision</b> approved by the court, can submit a pre-recorded police interview.   | If presenting in person, a detective on duty takes a written formal statement which may follow with an investigation. Further statements are obtained later by <b>detectives</b> . <b>NSW</b> also has an option to report initially through an online form.  |
| Queensland                   | Yes - in special circumstances                     | Adult complainants of sexual offences have a choice to give evidence via a video link (or other arrangements such as partitions in courtroom) or submit pre-recorded evidence-in-chief. Typically, the report is in the form of a written statement or in <b>special circumstances</b> an electronically recorded version.                              | Initial online police report/complaint followed by a statement to police which is usually in the form of a typewritten statement or <b>sometimes</b> can be video recorded.   |

|                    |                             |  |  |
|--------------------|-----------------------------|--|--|
| Northern Territory | Yes - as vulnerable witness | Adult complainants of sexual offences can be considered a <b>vulnerable witness</b> . They have a choice to give evidence via a video link (or other arrangements such as partitions in courtroom) or submit pre-recorded evidence-in-chief. Further consideration is given to age, education, ethnic or cultural background, gender, language, maturity, personality, in the decision to submit pre-recorded evidence-in-chief. | Unclear.   |
| Western Australia  | Yes - as special witness    | Adult complainants of sexual offences who do not have a cognitive impairment can be considered a <b>special witness</b> . Pre-recorded evidence-in-chief can be submitted in cases of a serious sexual offence, trauma affected, and where complainant is intimidated or distressed by giving evidence in court.   | Initial online police report/complaint (usually recorded in writing) which may be followed by a formal audio-video recorded Pre-recorded evidence-in-chief interview. The formal interview is conducted by a trained police officer.   |
| South Australia    | Yes - vulnerable witness    | Adult complainants of sexual offences can be considered a <b>vulnerable witness</b> . They have a choice to give evidence via a video link (or other arrangements such as partitions in courtroom) or submit pre-recorded evidence-in-chief.   | Unclear.   |
| Tasmania           | Unclear                     | Adult complainants of sexual offences, who are not intellectually or physically impaired, are considered competent and can provide evidence in court with special arrangements (e.g., via video-audio link, partitions in courtroom, support person).  | Initial informal report which involves a police report only to gather information, not for investigative purposes. May be followed by a formal police report <a href="#">which is conducted by a specialist trained officer to gather</a> information for investigative purposes. Unclear whether the latter is a written or audio/visual statement. |