

#LETERSPEAK:

VICTIMS AS CATALYSTS FOR LAW REFORM IN SEXUAL ASSAULT TRIALS

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Despite significant attempts at reforming sexual assault prosecutions in jurisdictions around the world, victims remain reticent to access their justice systems. This article seeks to understand why recent law reform has not been more successful in encouraging sexual assault victims to come forward. The author argues that a traditional approach to reforming the criminal justice system is maladroit. Rather than face a process that systematically traumatises them again, victims are choosing to congregate online to obtain some sense of justice. The author highlights the advantages for law reformers in engaging with the advocates of these highly organised groups of online sexual assault victims. These online advocates' novel approach to law reform has resulted in Australian law reformers taking meaningful action to improve sexual assault prosecutions. This new approach promises to produce genuine progress in improving access to justice for victims of sexual assault.

I INTRODUCTION

Victims¹ of crime are vital participants in criminal justice systems. Without the willing participation of victims, the system generally cannot bring perpetrators to account for their criminal behaviour. However, securing the voluntary participation of victims poses a problem to many criminal justice systems in their goal of

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1 For the purpose of this article, victims are defined as persons who have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are violations of criminal laws. Whilst the term 'victim' is used throughout this article, the author notes that victims are also commonly referred to as complainants and survivors. It is acknowledged that there is controversy around the appropriateness of the use of the term: see, eg, Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide) 2 <http://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20he%20Courtroom_WholeDoc.pdf> ('*Victims of Crime in the Courtroom*').

achieving justice.² A measure of a well-functioning contemporary criminal justice system is that all citizens perceive that, if they are a victim of a crime, they have the right to access the criminal justice system by making a complaint to the police and, in doing so, feel assured that the complaint will be investigated diligently and proceed to a trial if deemed appropriate.³ As the Chief Justice of Canada explained,

‘[a]ccess to justice’ can mean many things. ... Having courts that can resolve your problem on time. But it also means knowing what tools and services are available, and how to get to them. It means knowing your rights and knowing how our legal systems work. ... And it means having confidence that the system will come to a just result ... Ultimately, it is about getting good justice for everyone, not perfect justice for a lucky few. It’s a democratic issue. It’s a human rights issue. It’s even an economic issue.⁴

The access to justice principle underpins justice systems worldwide. In 1985, the United Nations (‘UN’) General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.⁵ This Declaration was based on the conviction that, inter alia, victims ‘are entitled to prompt redress for the harm that they have suffered, through access to the criminal justice system’.⁶

The concern that victims do not perceive that they have viable access to the criminal justice system is particularly evident in relation to sexual assault victims. It is accepted, in common law jurisdictions, that too many victims of sexual assault do not perceive that they have viable access to justice.⁷ This perception is part of what commentators commonly refer to as a sexual violence ‘justice gap’.⁸

2 Tyrone Kirchengast, Mary Iliadis and Michael O’Connell, ‘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’ (2019) 45(1) *Monash University Law Review* 1, 26.

3 Carlos Carcach, Australian Institute of Criminology, *Reporting Crime to the Police* (Trends and Issues in Crime and Criminal Justice No 68, March 1997) 5.

4 Chief Justice Richard Wagner, ‘Access to Justice: A Societal Imperative’ (Speech, Annual Pro Bono Conference, 4 October 2018).

5 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN Doc A/RES/40/34 (29 November 1985) annex.

6 United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Handbook, 1999) iv (‘*Handbook on Justice for Victims*’). There are other possible forms of mechanisms of redress for victims such as the civil justice system. A discussion of these other mechanisms is beyond the scope of this article.

7 Liz Kelly, Jo Lovett and Linda Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study No 293, February 2005) 35–77; Haley Clark, ‘A Fair Way to Go: Justice for Victim-Survivors of Sexual Violence’ in Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, 2015) 18, 18–20 (‘A Fair Way to Go’).

8 See, eg, Clare McGlynn and Nicole Westmarland, ‘Kaleidoscopic Justice: Sexual Violence and Victim-Survivors’ Perceptions of Justice’ (2019) 28(2) *Social and Legal Studies* 179, 180; Katrin Hohl and Elisabeth A Stanko, ‘Complaints of Rape and the Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales’ (2015) 12(3) *European Journal of Criminology* 324, 324, citing Jennifer Brown, ‘We Mind and We Care but Have Things Changed?’

This article explains the sexual violence justice gap for victims of sexual assault. Despite recent attempts to bridge this justice gap for sexual assault victims, the relevant statistics suggest that the problem has not significantly improved.⁹ The author contends that this lack of improvement calls for a different approach to law reform. Contemporary circumstances are offering law reformers a new opportunity to engage with victim advocates. If the victim's perspective is added to law reformers' understanding of the access to justice problem, it increases the chance that the law reform that they formulate will narrow the sexual violence justice gap.

Following this introduction, a historical summary of the role of the victim in sexual assault trials is provided in Part II. The historical overview provides relevant context in which to understand this systemic problem. In Part III, an example of a typical common law jurisdiction's approach to sexual assault prosecutions is presented. Part IV presents the statistics and research that highlights that despite recent law reform, reporting of sexual assaults remain low. Part V identifies problems with the recent reforms that have failed to improve low victim engagement with the justice system. The proactive law reform work of two victim advocates is featured in Part VI. Part VII critiques two victim advocate case studies, including a discussion of the advantages and disadvantages of involving victim advocates in law reform initiatives. Part VIII concludes the article by summarising the case made for directly engaging victim advocates in law reform in order to improve access to justice for victims of sexual assault.

While this article documents the Australian experience, many other jurisdictions have also seen victim advocates become highly active.¹⁰ Given that the main platform for communication for victim advocates is online, it is no surprise that the work of victim advocates in one jurisdiction can impact victims in other jurisdictions. The law reform approach advocated in this article promises to make genuine progress in improving access to justice for victims of sexual assault worldwide.

Assessment of Progress in the Reporting, Investigating and Prosecution of Allegations of Rape' (2011) 17(3) *Journal of Sexual Aggression* 263; Kimberly A Lonsway and Joanne Archambault, 'The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform' (2012) 18(2) *Violence Against Women* 145; Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008); Kelly, Lovett and Regan (n 7) ix.

9 See below Part IV.

10 Owen Bowcott, '#MeToo and the Justice System: Complaints Up, but Convictions Down', *The Guardian* (online, 15 October 2019) <<https://www.theguardian.com/world/2019/oct/15/metoo-justice-system-complaints-up-convictions-down>>; '#MeToo Is at a Crossroads in America. Around the World, It's Just Beginning.', *The Washington Post* (online, 8 May 2020) <<https://www.washingtonpost.com/opinions/2020/05/08/metoo-around-the-world/?arc404=true>>.

II THE HISTORICAL ROLE OF VICTIMS IN SEXUAL ASSAULT TRIALS IN COMMON LAW JUSTICE SYSTEMS

An appreciation of the role of the sexual assault victim throughout the centuries assists us to understand the systemic roots of the sexual violence justice gap.¹¹ Early laws defined rape as a property crime. Property ownership is reflected in the word ‘rape’, which derives from its Latin root, *rapere*, meaning ‘seize, carry off by force, abduct’.¹² The rapist unlawfully seized a husband’s or father’s property (ie a wife or daughter). Rape within marriage was not a crime, as a husband cannot trespass or seize what is rightfully his.¹³ The Middle Ages began to delineate between the type of woman and the extent of recognition of a sexual assault. If you were a virgin, it could be rape, but a concubine or a wife¹⁴ could not be raped.¹⁵ During the 12th century, women could file suit against their rapists, so long as they were not married to them.¹⁶ The *Statute of Westminster 1275* acknowledged that rape was a public wrong.¹⁷ If a husband or father declined to prosecute the crime, then the Crown could.¹⁸ At that time, the victim was known as the prosecutrix and she was primarily responsible for the apprehension of the defendant, the investigation and proving the crime.¹⁹ Up until the early 15th century, the prosecutrix maintained the responsibility of investigating and proving the rape,²⁰ but by then, the role of apprehending the defendant was handed over to justices of

11 There is a comprehensive consideration of the history of the role of all crime victims: see generally Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006). It is to be noted that there are differences in terminology throughout the world — ‘rape’ is the historical term for what is also referred to in contemporary times as sexual assault. Until recently, rape was specific to female victims.

12 *Online Etymology Dictionary* (online at 4 December 2021) ‘rape’.

13 Suzanne Brown, ‘Feminist History of Rape’ (2003) 4(2) *Connections* 6, 6–7.

14 Marital rape was sanctioned in many common law jurisdictions up until the end of the 20th century: see generally *ibid*. For example, North Carolina was one of the last jurisdictions in the United States of America to criminalise marital rape: see Erik Ortiz, ‘“It’s Disgusting”: Loopholes Remain in North Carolina’s Sexual Assault Laws. Advocates Ask Why.’, *NBC News* (online, 11 May 2019) <<https://www.nbcnews.com/news/us-news/it-s-disgusting-loopholes-remain-north-carolina-s-sexual-assault-n1004436>>; The National Center for Victims of Crime, *Spousal Rape Laws: 20 Years Later* (Report, 2004) 1 <http://www.ncdsv.org/images/NCVC_SpousalRapeLaws20YearsLater_2004.pdf>. In South Australia, a husband could use ‘rougher than usual handling’ to persuade his wife to have sex with him up until 1992: see *R v Johns* (Supreme Court of South Australia, Bollen J, 26 August 1992) 13.

15 Suzanne Brown (n 13) 7.

16 *Ibid*.

17 *Statute of Westminster 1275*, 3 Edw 1, c 13.

18 Kirchengast, *The Victim in Criminal Law and Justice* (n 11) 30–1.

19 Suzanne Brown (n 13) 7.

20 Kirchengast, *The Victim in Criminal Law and Justice* (n 11) 31–2.

the peace and parish constables.²¹ During the 15th to 18th centuries, judges slowly took on greater investigatory functions.²²

By the 19th century, the role of the prosecutrix had diminished, being replaced by the authority of the judiciary.²³ By the end of that century, Crown Prosecutors were responsible for prosecuting rapes.²⁴ By the 20th century, victims were mere witnesses for the Crown.²⁵ When they did give evidence, their story was constrained by increasingly complex rules of evidence and procedure.²⁶ Nor were they given control over critical prosecutorial decisions,²⁷ leaving many feeling silenced and marginalised.²⁸

In line with the growth of the post-World War II feminist rights movement, victims' rights advocate groups gained momentum during the 1960s. One of the biggest breakthroughs for this movement came during the 1985 United Nations Congress on the Prevention of Crime and the Treatment of Offenders.²⁹ The associated report of the United Nations Secretariat called upon Member States to explicitly

- 21 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Consultation Paper, July 2015) 12 [2.19] ('*Victims of Crime in the Criminal Trial Process*'). See generally Barry Godfrey, 'Setting the Scene: A Question of History' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Routledge, 2nd ed, 2018) 13, 15.
- 22 *Victims of Crime in the Criminal Trial Process* (n 21) 12 [2.19], citing Antony Duff et al (eds), *The Trial on Trial: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007) vol 3, 29.
- 23 Ian Freckelton, 'Expert Evidence and the Role of the Jury' (1994) 12(1) *Australian Bar Review* 73, 73, citing RM Jackson, 'The Incidence of Jury Trial during the Past Century' (1937) 1(2) *Modern Law Review* 132, Julius Stone and WAN Wells, *Evidence: Its History and Policies* (Butterworths, 1991) and Carol AG Jones, *Expert Witnesses: Science, Medicine, and the Practice of the Law* (Clarendon Press, 1994) 24.
- 24 Tyrone Kirchengast, 'Recent Reforms to Victim's Rights and the Emerging "Normative Theory of the Criminal Trial"' (2010) 56(1–2) *Criminal Law Quarterly* 82, 93 ('Recent Reforms to Victim's Rights'). See also Kirchengast, *The Victim in Criminal Law and Justice* (n 11) 13–14.
- 25 Godfrey (n 21) 15, 18.
- 26 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory* (Information Paper No 1, May 2015) 4 [14]; Constance Backhouse, 'The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia' (2001) 26(2) *Queen's Law Journal* 297, 307; John H Langbein, 'Historical Foundations of the Law of Evidence: A View from the Ryder Sources' (1996) 96(5) *Columbia Law Review* 1168, 1169–70, 1173, 1181, 1184, 1189.
- 27 Tracey Booth and Kerry Carrington, 'Victims Support in Policy and Legal Process in Australia: Still an Ambivalent and Contested Space' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Routledge, 2nd ed, 2018) 293, 293; Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 260; *Victims of Crime in the Criminal Trial Process* (n 21) 14.
- 28 Booth and Carrington (n 27) 293.
- 29 *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/CONF.121/22/Rev.1 (26 August – 6 September 1985) ('*UN Congress on the Prevention of Crime and the Treatment of Offenders*'). See also Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No 19, Australian Institute of Criminology, 1999) 85 <<https://www.aic.gov.au/sites/default/files/2020-05/rpp019.pdf>>.

acknowledge that victims have the right to access justice and enforce procedural rights.³⁰ Many common law jurisdictions then enacted similarly worded Bills or Charters of Victim Rights.³¹ However, these rights granted to victims were of symbolic value only, as they were largely unenforceable.³² For example, the *Victims Rights Act 1996* (NSW) requires officials only to consider the victim's rights if it was 'relevant and practicable to do so'.³³ The *Victims Rights and Support Act 2013* (NSW) also established the Victims Advisory Board, a body designed to consult victims on areas of future reform and advise the government on the effectiveness of current policy.³⁴ However, the membership of the Victims Advisory Board does not require victim representation.³⁵

III A CONTEMPORARY JURISDICTIONAL CASE STUDY

Jurisdictions around the world have implemented incremental measures designed to encourage sexual assault victims to engage with the criminal justice system.³⁶ One jurisdiction that has been particularly proactive in attempting to address the sexual violence justice gap is the State of Victoria, Australia.³⁷ Victorian law reform of sexual assault has been stimulated by regular references given to the Victorian Law Reform Commission.³⁸

Over the last 20 years, Victorian law makers have implemented a raft of substantive and procedural changes in order to improve the perception of poor access to justice

- 30 Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Macmillan, 2016) 8; *UN Congress on the Prevention of Crime and the Treatment of Offenders* (n 29) 43–7.
- 31 Kirchengast, *Victims and the Criminal Trial* (n 30) 32. See, eg, *New Zealand Bill of Rights Act 1990* (NZ) s 27(1). Australian states and territories also followed suit, with NSW and Victoria introducing charters in 1996 and 2006, respectively: see *Victims Rights Act 1996* (NSW); *Victims' Charter Act 2006* (Vic). See also Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20(4) *Criminal Law Forum* 395, 398.
- 32 Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) 17(2) *University of New South Wales Law Journal* 595, 599; Kirchengast, *Victims and the Criminal Trial* (n 30) 5. The *Canadian Victims Bill of Rights* is 'a statement of principle and social policy, beguilingly clothed in the language of legislation': *Vanscoy v Ontario* [1999] 42 WCB (2d) 358, [22] (Day J).
- 33 *Victims Rights Act 1996* (NSW) s 7(2).
- 34 *Victims Rights and Support Act 2013* (NSW) s 111.
- 35 *Ibid* s 110.
- 36 For example, the International Criminal Court: Sarah Louise Steele, 'Victim-Witnesses in the International Criminal Court: Justice for Trauma, or the Trauma of Justice?' (2005) 12 *Australian International Law Journal* 99, 99–100. For evidence of increasing engagement, see Kelly, Lovett and Regan (n 7) 18.
- 37 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure* (Discussion Paper, 2001) 8 [1.19]–[1.20].
- 38 *Ibid*. See also Victorian Law Reform Commission, *Sexual Offences* (Interim Report, 2003) ('*Sexual Offences Interim Report*'); Victorian Law Reform Commission, *Sexual Offences* (Final Report, July 2004) ('*Sexual Offences Final Report*'); Victorian Law Reform Commission,

for sexual assault victims.³⁹ For example, an ‘intermediaries’ scheme is being piloted in Victoria where communication specialists assist vulnerable victims (those who are under the age of 18 years or who have a cognitive impairment) to provide evidence to police and in court.⁴⁰ This scheme includes a pre-trial ‘ground rules’ hearing where the communication needs of vulnerable victims are brought to the attention of the judge and lawyers.⁴¹ Other improvements enacted in Victoria include:⁴² limitations and prohibitions on evidence about a complainant’s sexual history; a prohibition on self-represented defendants personally cross-examining victims; availability of police interviews to stand as the evidence-in-chief of a complainant; the ability for victims to give their evidence to a court closed to the public or by video-link with a support dog at their feet.⁴³ Expert evidence which explains counterintuitive victim behaviour to the jury can also be given,⁴⁴ and judges are required to give directions to the jury about consent and some common sexual assault misconceptions.⁴⁵ Extensive educational material has also been

Family Violence Police Holding Powers (Interim Report, August 2005); Victorian Law Reform Commission, *Jury Directions* (Final Report, May 2009); Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) (*The Role of Victims of Crime Report*); Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Terms of Reference, 1 April 2020) (*Sexual Offences Terms of Reference*).

- 39 These reforms have often been prompted by the Victorian Law Reform Commission: see above n 38. See also Victorian Law Reform Commission, ‘VLRC: Sexual Assault Procedures Change’ (2006) 80(12) *Law Institute Journal* 84; Victorian Law Reform Commission, ‘VLRC: Sexual Offences Law Reform’ (2006) 80(11) *Law Institute Journal* 78; Victorian Law Reform Commission, ‘VLRC: Sexual Offences Shake-Up’ (2004) 78(10) *Law Institute Journal* 77.
- 40 ‘Victorian Intermediaries Pilot Program’, *Department of Justice and Community Safety* (Web Page, 31 December 2020) <<https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program>>; *Criminal Procedure Act 2009* (Vic) pt 8.2A (*Criminal Procedure Act*); County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide, 28 June 2018) 1 [1] <<https://www.countycourt.vic.gov.au/files/documents/2018-08/multi-jurisdictional-court-guide-intermediary-pilot-program-2806180.pdf>>. The United Kingdom (‘UK’) has also introduced an intermediaries scheme: see ‘Ministry of Justice Witness Intermediary Scheme’, *Gov.UK* (Web Page, 16 August 2021) <<https://www.gov.uk/guidance/ministry-of-justice-witness-intermediary-scheme>>.
- 41 Judicial College of Victoria, ‘Communication Intermediaries’, *Disability Access Bench Book* (Web Page, 16 November 2018) <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/59270.htm>>.
- 42 See, eg, *Victims and Other Legislation Amendment Act 2018* (Vic) s 4.
- 43 *Criminal Procedure Act 2009* (n 40) pt 8.2; Julie Morrison, *2018 Churchill Fellowship to Study the Use of Dogs in Court Supporting Vulnerable Victims and Witnesses as They Give Evidence* (Report, 2018); Director of Public Prosecutions (Vic) and Office of Public Prosecutions (Vic), *Annual Report 18/19* (Report, 30 August 2019) 14 <[http://www.opp.vic.gov.au/getattachment/81cfe723-43a7-4c60-a052-6cdb152f9f3d/OPP-Annual-Report-18-19-web-full-\(final\).aspx](http://www.opp.vic.gov.au/getattachment/81cfe723-43a7-4c60-a052-6cdb152f9f3d/OPP-Annual-Report-18-19-web-full-(final).aspx)>. Support dog programs have also been introduced in parts of the UK and the United States (‘US’): see, eg, *Assistance Dogs UK* (Web Page, 2022) <<https://www.assistedogs.org.uk>>.
- 44 See *Criminal Procedure Act* (n 40) s 388; *Evidence Act 2008* (Vic) s 79; Annie Cossins, ‘Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England’ (2013) 17(1) *International Journal of Evidence and Proof* 74.
- 45 *Jury Directions Act 2015* (Vic) pt 5.

developed in order to train police, legal practitioners and judges in ways to best facilitate a victim to engage with the justice system.⁴⁶ Like other common law jurisdictions, Victoria has also increased the statutory maximum sentence for rape. A convicted defendant faces up to 25 years' imprisonment,⁴⁷ making it equivalent to armed robbery and the maximum sentence for all other violent offences, such as manslaughter.⁴⁸

Other Victorian criminal authorities have also implemented new measures designed to encourage victim participation. In 2015, the Victims of Crime Consultative Committee began calling for representative victims to provide input into the formulation of government policy.⁴⁹ The prosecutions office launched its dedicated 'Victims and Witnesses' website in 2017, which assists victims in navigating unfamiliar court processes.⁵⁰

While such symbolic gestures are important in improving access to justice, other recent actions by lawmakers contribute to a victim's discomfort in coming forward. For example, there is community concern that the steps towards improving access to justice for victims of sexual assault have been impaired by a highly publicised 2020 Victorian trial.⁵¹ In 2018, a jury found Cardinal George Pell guilty of five child sexual assault offences. The Victorian Court of Appeal upheld the jury's verdict.⁵² On appeal, the High Court of Australia unanimously quashed Pell's conviction without ordering a retrial.⁵³ Whilst the High Court judges described the victim's evidence as credible, the Court held that a jury acting rationally on the whole of the evidence, ought to have entertained a doubt as to the applicant's guilt in relation to the offences. In the High Court's opinion there was 'a significant

46 See, eg, Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (Report, September 2017) ('*Challenging Misconceptions about Sexual Offending*').

47 *Crimes Act 1958* (Vic) ss 38–9.

48 25 years' imprisonment is the statutory maximum for manslaughter and armed robbery: *ibid* ss 5, 75A.

49 Parliamentary Library & Information Service, *Victims of Crime and the Victorian Criminal Justice System* (Research Note No 7, October 2015) 3 <https://www.parliament.vic.gov.au/images/stories/downloads/Research_Papers/Victims%20of%20Crime%20and%20the%20Victorian%20Criminal%20Justice%20System.pdf>.

50 'Supporting Victims and Witnesses', *Office of Public Prosecutions Victoria* (Web Page, 2017) <<https://victimsandwitnesses.opp.vic.gov.au>>.

51 Melissa Davey, 'Child Sexual Abuse Victims Should Not Be Put Off by George Pell Decision, Experts Say', *The Guardian* (online, 9 April 2020) <<https://www.theguardian.com/australia-news/2020/apr/09/child-sexual-abuse-victims-should-not-be-put-off-by-george-pell-decision-experts-say>>; Louise Milligan, 'Little Justice in Treatment of Alleged Abuse Victims', *The Sydney Morning Herald* (online, 7 January 2021) <<https://www.smh.com.au/national/little-justice-in-treatment-of-alleged-abuse-victims-20210103-p56re2.html>>. See generally Louise Milligan, *Witness: An Investigation into the Brutal Cost of Seeking Justice* (Hachette, 2020).

52 *Pell v The Queen* [2019] VSCA 186.

53 *Pell v The Queen* (2020) 268 CLR 123 ('*Pell*').

possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof”.⁵⁴

Lower Australian courts have begun to apply the *Pell v The Queen* (‘*Pell*’) judgment when overturning jury verdicts in sexual assault trials. In July 2020, the Australian Capital Territory Court of Appeal, in *Sirl v The Queen* (‘*Sirl*’),⁵⁵ overturned a jury verdict in a case where the drug dealer defendant had been found guilty of spiking the victim’s drink with methamphetamine and raping her in his home. The victim had originally told paramedics her severe injuries were a result of ‘rough sex’ but later reported the rape.⁵⁶ She explained that it had taken ‘weeks and weeks to get the courage’ to come forward,⁵⁷ as the defendant had ‘been intimidating me for over 12 months and making me scared. ... I was terrified to give his name, about what would happen to me when he found out I dobbed him in’.⁵⁸ The Court of Appeal accepted the appellant’s submission that the *Pell* decision had ‘changed the landscape’ for sexual assault jury verdicts.⁵⁹ Basing their review on the written records of the trial, the appellate court found the victim to be credible but, in applying the *Pell* decision, they overturned the jury conviction on the basis that ‘there is a significant possibility that an innocent person has been convicted’.⁶⁰

Like the *Pell* and *Sirl* trials, most sex offences occur behind closed doors without witnesses. When a defendant exercises their right not to give evidence, the jury is left with just the victim’s recollection of what happened behind that door many years ago. Based on the media interest surrounding the *Pell* legal precedent,⁶¹ it is logical for a victim of sexual assault to perceive that if the compellingly credible victim in *Pell*’s trial was not accepted as establishing that the crime took place beyond reasonable doubt, then the evidentiary hurdle is too high for their solitary evidence to ever be successful in bringing their perpetrator to justice.

54 Ibid 137 [9] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), quoting *Chidiac v The Queen* (1991) 171 CLR 432, 444 (Mason CJ) (‘*Chidiac*’), citing *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 618–9 (Deane J) (‘*Chamberlain*’).

55 [2020] ACTCA 37.

56 Ibid [68].

57 Ibid [73].

58 Ibid [57].

59 Ibid [12].

60 Ibid [226], quoting *Pell* (n 53) 137 [9] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), quoting *Chidiac* (n 54) 444 (Mason CJ), citing *Chamberlain* (n 54) 618–9 (Deane J).

61 Peta Doherty, ‘Canberra Man Robert Glen Sirl Wins Appeal to Have His Rape Conviction Overturned’, *ABC News* (online, 15 July 2020) <<https://www.abc.net.au/news/2020-07-15/robert-sirl-wins-appeal-to-have-rape-conviction-overturned/12459662>>.

Even though the Victorian authorities believe that they are listening to and acting upon the accepted need to improve access to justice for sexual assault victims,⁶² victims still face numerous roadblocks when seeking justice. For example, as a way to protect the privacy of victims, the law forbidding the public disclosure of the names of victims of sexual assault was amended in Victoria in February 2020.⁶³ These amendments added more complexity to a law that, in essence, prohibits a victim from publicly talking about their case following a guilty verdict, unless they apply for a court exemption. One victim wanted to apply for such an exemption. From the age of eight, this victim was repeatedly raped by her father, who also murdered her stepsister for reporting her own abuse to the police. The Court advised this victim that she should contact the perpetrator to get his consent or views on whether she should be allowed to identify herself and her murdered stepsister. The victim explains: ‘If I have to ask his permission to tell my story now, then I’ll just say “no”. And I’ll hate the law forever because yet again they have deterred me and let me down’.⁶⁴ Saxon Mullins in response to this law explained: ‘This is what happened in my case. Had to ask permission to use my own name, my own story. As if I hadn’t lost enough, as if there was anything left to take — my identity was no longer mine.’⁶⁵ The Attorney-General has subsequently urgently amended the law.⁶⁶

Despite the comprehensive attempt in Victoria to improve victim access to justice over the past few decades, in 2020 the government has asked the Victorian Law Reform Commission to start a major new inquiry into sex offences. In particular, the Commission has been asked to ‘identify the barriers to reporting and resolving sexual offences’.⁶⁷ The lack of a detailed understanding of the current system of reporting and prosecuting sexual assault complaints in Victoria (and across most

62 See, eg, *Judicial Proceedings Reports Act 1958* (Vic) s 4 (*‘Judicial Proceedings Reports Act’*). See also Jill Hennessy, Victorian Attorney-General, as quoted in the #LetUsSpeak campaign: Nina Funnell, ‘#LetUsSpeak: “Outrageous” Demand Victorian Courts Are Making of Rape Victim’, *news.com.au* (online, 31 August 2020) <<https://www.news.com.au/lifestyle/real-life/letusspeak-campaign-outrageous-demand-victoria-government-is-making-of-rape-victim/news-story/1be4d840ccf8b17b651368335a3aaf5c>> (*‘#LetUsSpeak’*).

63 *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic) s 3 (*‘Justice Legislation Amendment’*), amending *Judicial Proceedings Reports Act* (n 62) s 4.

64 Funnell, ‘#LetUsSpeak’ (n 62).

65 @SaxonAdair (Saxon Mullins) (Twitter, 31 August 2020, 11:45am AEST) <<https://twitter.com/SaxonAdair/status/1300248190797586432>>.

66 The *Judicial Proceedings Reports Act* amendments came into force on 18 November 2020: *Justice Legislation Amendment* (n 63) s 2. See also Jill Hennessy, ‘Urgent Changes to Ensure Victim-Survivors Can Speak Up’ (Media Release, Victoria State Government, 28 August 2020) <<https://www.premier.vic.gov.au/urgent-changes-ensure-victim-survivors-can-speak>>; ‘Victorian Government Makes Legal Change for Sexual Assault Survivors after #LetUsSpeak Campaign’, *news.com.au* (online, 29 August 2020) <<https://www.news.com.au/lifestyle/real-life/true-stories/victorian-government-makes-legal-change-for-sexual-assault-survivors-after-letusspeak-campaign/news-story/8e2fa6df1e4b17f95e8539285beefc11>>.

67 *Sexual Offences Terms of Reference* (n 38).

common law jurisdictions) suggest that the sexual violence ‘justice gap’ problem for victims of sexual assault persists.⁶⁸

IV LOW REPORTING, PROSECUTION, CONVICTION AND INCARCERATION RATES

Sexual assaults are the most underreported crime against the person.⁶⁹ National surveys in common law jurisdictions identify that 15–30% of adult women report having been sexually assaulted in their lifetime.⁷⁰ If these women cannot access a user-friendly system of justice, their confidence in the justice system is at risk.

Whilst measuring the rate of under-reporting of sexual assaults is methodologically challenging, studies in jurisdictions around the world all conclude that the rate of under-reporting of this crime is significant, with few cases ever being prosecuted through the courts.⁷¹ A 2010 comparative study of Australia, Canada, England and Wales, Scotland and the United States (‘US’) revealed that on average 86% of sexual assault crimes are never reported.⁷² Non-reporting is higher for sexual assaults than other violent offences.⁷³

68 Melanie Millsteed and Cleave McDonald, Crime Statistics Agency, *Attrition of Sexual Offence Incidents across the Victorian Criminal Justice System* (Report, February 2017) 2–4, 24–5; Judith Lewis Herman, ‘Justice from the Victim’s Perspective’ (2005) 11(5) *Violence Against Women* 571, 574; Clark, ‘A Fair Way to Go’ (n 7) 18.

69 Lynn Langton et al, Bureau of Justice Statistics, *Victimizations Not Reported to the Police, 2006–2010* (Special Report No NCJ 238536, August 2012) 4 <<https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf>>.

70 Australian Bureau of Statistics, *Personal Safety, Australia, 2005 (Reissue)* (Catalogue No 4906.0, 30 July 2014) (‘*ABS Personal Safety, 2005*’); Patricia Tjaden and Nancy Thoennes, ‘Prevalence, Incidence, and Consequences of Violence against Women: Findings from the National Violence against Women Survey’ (Research in Brief No NCJ 172837, National Institute of Justice and Centers for Disease Control and Prevention, November 1998) 3; Adam Cotter and Laura Savage, Statistics Canada, *Gender-Based Violence and Unwanted Sexual Behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces* (Juristat No 85-002-X, 5 December 2019) 3 <<https://www150.statecan.gc.ca/n1/en/pub/85-002-x/2019001/article/00017-eng.pdf?st=tstiUQGg>>.

71 See, eg, *Victims of Crime in the Courtroom* (n 1) 30. See also Richard B Felson and Paul-Philippe Paré, ‘The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police’ (2005) 67(3) *Journal of Marriage and Family* 597, 607–8.

72 Kathleen Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ (2010) 39(1) *Crime and Justice* 565, 572. See also *ABS Personal Safety, 2005* (n 70); Michael Planty et al, Bureau of Justice Statistics, *Female Victims of Sexual Violence, 1994–2010* (Special Report No NCJ 240655, March 2013) <<https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>>; Kate B Wolitzky-Taylor et al, ‘Is Reporting of Rape on the Rise? A Comparison of Women with Reported versus Unreported Rape Experiences in the National Women’s Study-Replication’ (2011) 26(4) *Journal of Interpersonal Violence* 807. See also above n 7.

73 Rachel Jewkes, Purna Sen and Claudia Garcia-Moreno, ‘Sexual Violence’ in Etienne G Krug et al (eds), *World Report on Violence and Health* (World Health Organization, 2002) 147, 150. In relation to the US, see Richard Felson and Paul-Philippe Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police* (Final Report No 209039, March

There are major psychological barriers to sexual assault victims participating in the criminal justice system. Some victims do not want to discuss the intimate violation that they experienced at the hands of their perpetrator. Victims do not want to have to repeatedly recall their experience with the authorities because each time can be re-traumatising.⁷⁴ A 2006 US study of 81 victims found that more than 80% of the victims without advocacy support were reluctant to seek further help after their first contact with the police.⁷⁵ Studies from the US, United Kingdom ('UK'), Canada and Australia similarly identified fear, shame and, in particular, lack of trust in the police and the justice system as the reasons why victims decide not to report the crime.⁷⁶

Commonly held misconceptions about what constitutes 'real' rape and how a victim of a sexual assault should behave, encourage victims to stay silent as they perceive that they will not be believed when measured against an ideal and unrealistic victim.⁷⁷ The courts in Australia, Canada, New Zealand, the UK and the US have all acknowledged the potential for commonly held misconceptions about victim behaviour to unduly influence decision-makers.⁷⁸ Some police and prosecutors operate under sexual assault misconceptions which bias their legal

2005) 4 <<https://www.ncjrs.gov/pdffiles1/nij/grants/209039.pdf>>; Helen Luce, Sarina Schrage and Valerie Gilchrist, 'Sexual Assault of Women' (2010) 81(4) *American Family Physician* 489. In relation to the UK, see Ministry of Justice, Home Office and Office for National Statistics, *An Overview of Sexual Offending in England and Wales* (Statistics Bulletin, 10 January 2013) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf>. In relation to Canada, see Cecilia Benoit et al, *Sexual Violence against Women in Canada* (Issue Brief, December 2015) 5 <<https://cfc-sw.gc.ca/svawc-vcscf/issue-brief-en.pdf>>.

74 Jessica Kennedy and Patricia Easteal, 'The Rights (Boxing) Ring: Australian Rape Trials' in Helen Gavin and Jacquelyn Bent (eds), *Sex, Drugs and Rock & Roll: Psychological, Legal and Cultural Examinations of Sex and Sexuality* (Inter-Disciplinary Press, 2010) 131, 133–4. Regarding the likelihood of secondary victimisation by the criminal justice system, see *Victims' Charter Act 2006* (Vic) s 4(1)(c); Steele (n 36) 100–1, 104; *Sexual Offences Interim Report* (n 38) 145–6 [4.4].

75 Rebecca Campbell, 'Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?' (2006) 12(1) *Violence Against Women* 30, 39.

76 Denise Lievore, Australian Institute of Criminology, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, 2003) 31; Liz Kelly and Linda Regan, *Rape: The Forgotten Issue?* (Report No JA 1.1999/DAP/161/WC, 2001) 15; Daly and Bouhours (n 72) 572, 578; Dean G Kilpatrick et al, *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study* (Report No 219181, 1 February 2007) 47–8; Planty et al (n 72) 7.

77 See also Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) *University of New South Wales Law Journal* 707; Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No 27, April 2014) vii.

78 Horan and Goodman-Delahunty (n 77) 710.

decisions against the victim's interests.⁷⁹ These misconceptions are also successfully exploited by defence lawyers, which makes victims reluctant to agree to being cross-examined in a public courtroom before the perpetrator.⁸⁰ Psychologist Judith Herman observes that 'if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law'.⁸¹ Research has identified that sexual assault victims are reticent about reporting the crime because, for example, they fear that they will not be believed or will be blamed or shamed for the assault or because they still fear the perpetrator.⁸²

Even in the minority of cases where the victim does report the crime, the attrition of sexual assault cases at all stages of the prosecutorial process remains high.⁸³ The 2010 comparative study also reports that only a third of those that are reported to police result in the defendant being charged and a fifth proceed to a trial.⁸⁴ England and Wales statistics reveal that prosecution rates for sexual assault are worsening. Whilst the number of rape claims handled by police rose from 35,847 to 57,882 during the last four years, the 2018–19 statistics reveal that the number of people being prosecuted for rape has fallen by over a quarter in the last year. Only 3% of all reported rapes end in a conviction. The rate of defendants being charged dropped from 64% in 2014–15 to 48% in 2018–19.⁸⁵

Understanding why victims are reluctant to report the crime is complex. Conducting a thorough study of the view of victims and reporting the results is not easy due to the vulnerable nature of the target group of the study. Some victims will not admit their experiences to anyone, let alone a researcher. The Australian

79 Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, 2018) 10; Hohl and Stanko (n 8) 327–8; Temkin and Krahe (n 8) 51.

80 Bluett-Boyd and Fileborn (n 77) 12–14.

81 Herman (n 68) 574.

82 This reference contains a detailed list of the psychological barriers that sexual assault complainants might experience when contemplating whether to report the crime: *Challenging Misconceptions about Sexual Offending* (n 46) 4. See also Tine K Jensen et al, 'Reporting Possible Sexual Abuse: A Qualitative Study on Children's Perspectives and the Context for Disclosure' (2005) 29(12) *Child Abuse and Neglect* 1395, 1408.

83 Regina A Schuller et al, 'Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes' (2010) 13(4) *New Criminal Law Review* 759, 760.

84 Daly and Bouhours (n 72) 609. See also Owen Bowcott and Caelainn Barr, 'Just 1.5% of All Rape Cases Lead to Charge or Summons, Data Reveals', *The Guardian* (online, 27 July 2019) <<https://www.theguardian.com/law/2019/jul/26/rape-cases-charge-summons-prosecutions-victims-england-wales>>.

85 James Hockaday, 'Rape is Being "Decriminalised" as Conviction Rates Fall to Record Low', *MetroUK* (online, 12 September 2019) <<https://metro.co.uk/2019/09/12/rape-is-being-decriminalised-as-conviction-rates-fall-to-record-low-10727752/?ito=cbshare>>; Crown Prosecution Service, *Violence against Women and Girls Report: 2018–19* (Report, 12 September 2019) 12–17 ('*Violence against Women and Girls*'); Alexandra Topping and Caelainn Barr, 'Rape Convictions Fall to Record Low in England and Wales', *The Guardian* (online, 30 July 2020) <<https://www.theguardian.com/society/2020/jul/30/convictions-fall-record-low-england-wales-prosecutions>>.

Royal Commission into Institutional Child Abuse heard from 6,875 survivors during private sessions in 2016–17.⁸⁶ The Commission reported that ‘[t]he impact of barriers to disclosure is reflected in the fact that a great many victims do not disclose child sexual abuse until many years after it occurs ... survivors took on average 23.9 years to disclose child sexual abuse ... [w]e know some victims never disclose’.⁸⁷ Available research into the reasons for low participation of sexual assault victims in the justice system reveals a range of barriers and filtering mechanisms that discourage victims of sexual assault from participating.⁸⁸

Victims are also discouraged from proceeding to trial because of low prospects of a successful prosecution. The 2010 comparative study of five jurisdictions reported that on average about 12.5% of reported sexual assault cases result in a conviction against the perpetrator,⁸⁹ and of those reported, only 7% of defendants will be jailed.⁹⁰ The UK has ‘one of the lowest conviction rates for rape in Europe’.⁹¹ The low conviction rates are all the more concerning to the justice system when research shows that there are very few false reports made. Studies estimate that more than 92% of sexual assault claims reported to the police are true.⁹² Whilst the negative perceptions of victims of the justice process are logical and explicable, they do create a tension with the community’s reliance upon victims to come forward in order to ensure that we have a well-functioning justice system.

Low reporting and conviction rates also contribute to eroding the capacity of criminal sanctions to act as a deterrent to sexual offending. Canadian and Australian studies reveal that defendants in sexual assault trials are more likely to

86 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 2017) vol 4, 16.

87 *Ibid.*

88 Melissa S Morabito, Linda M Williams and April Pattavina, *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the US* (Report No 252689, February 2019) 2 <<https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf>>; Center for Research on Violence against Women, ‘What Percentage of Rape Cases Gets Prosecuted? What Are the Rates of Conviction?’ (Research to Practice Brief No 7, December 2011) <https://web.archive.org/web/20211028013412/https://opsvaw.as.uky.edu/sites/default/files/07_Rape_Prosecution.pdf>.

89 This figure is based on statistics of reported sexual assaults during the period between 1990 and 2005: see Daly and Bouhours (n 72) 568. See also Cristine Rotenberg, Statistics Canada, *From Arrest to Conviction: Court Outcomes of Police-Reported Sexual Assaults in Canada, 2009 to 2014* (Juristat No 85-002-X, 26 October 2017) 3 <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54870-eng.pdf?st=tTjVsa6B>>.

90 Rotenberg (n 89) 3.

91 Hohl and Stanko (n 8) 324–5. See also *Violence against Women and Girls* (n 85) 12–17; Topping and Barr (n 85).

92 Kimberly A Lonsway, Joanne Archambault and David Lisak, ‘False Reports: Moving beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault’ (2009) 43(1) *Prosecutor* 10, 11–12; David Lisak et al, ‘False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases’ (2010) 16(12) *Violence Against Women* 1318, 1329. See also Melanie Heenan and Suellen Murray, Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003* (Summary Research Report, July 2006) 5; *Challenging Misconceptions about Sexual Offending* (n 46) 9.

have all charges dismissed without a hearing, are less likely to plead guilty and are more likely to be acquitted of all charges compared to other similarly violent crimes.⁹³ A 2009–14 Canadian study identified that case attrition was greater for sexual assaults compared to similar non-sexual assaults and that more defendants were not charged with sexual offences compared with non-sexual assaults.⁹⁴ Logic suggests that offenders who do not believe that they will be apprehended and convicted for the offence are less likely to be deterred.

The long-term impact of low reporting and conviction rates might be that the public's confidence in the justice system's ability to protect them from this violent crime is diminished. Whilst the link between community confidence in the justice system and the perceived sexual violence justice gap has not been measured (and would be very difficult to accurately measure), general legal theory assists us to appreciate this ramification. People's perceptions of police fairness are important in shaping their cooperation with the police and compliance with the law.⁹⁵ When members of the public perceive the police as fair, they consider them to be a legitimate authority and are more likely to cooperate with them.⁹⁶ Voluntary cooperation with the police offers societies 'a cost-effective way of preventing and reducing crime'.⁹⁷ The same argument can be applied to the justice system generally. Cooperation of victims of sexual assault is gained by fair decision-making and fair treatment by individual police officers, prosecutors and judges when exercising their authority.⁹⁸

If victims are not willing to come forward to the authorities, then the criminal justice system is not serving the community by protecting those vulnerable to crime. The importance of giving every citizen equal access to justice is enshrined

93 See, eg, Jacqueline Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (Crime and Justice Bulletin No 92, NSW Bureau of Crime Statistics and Research, January 2006) 1, 8.

94 Rotenberg (n 89) 3.

95 Dietrich Oberwittler and Sebastian Roché, 'Ethnic Disparities in Police-Initiated Contacts of Adolescents and Attitudes towards the Police in France and Germany: A Tale of Four Cities' in Dietrich Oberwittler and Sebastian Roché (eds), *Police-Citizen Relations across the World: Comparing Sources and Contexts of Trust and Legitimacy* (Routledge, 2018) 73, 75; Jonathan Jackson et al, 'Compliance with the Law and Policing by Consent: Notes on Police and Legal Legitimacy' in Adam Crawford and Anthea Hucklesby (eds), *Legitimacy and Compliance in Criminal Justice* (Routledge, 2013) 29, 32, citing Tom R Tyler (ed), *Legitimacy and Criminal Justice: International Perspectives* (Russell Sage Foundation, 2007).

96 See Jackson et al (n 95) 35; Jason Sunshine and Tom R Tyler, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) 37(3) *Law and Society Review* 513.

97 Andy Myhill and Paul Quinton, 'It's a Fair Cop? Police Legitimacy, Public Cooperation, and Crime Reduction: An Interpretative Evidence Commentary' (Research Paper, National Policing Improvement Agency, September 2011) 14 <https://www.researchgate.net/publication/265889188_It%27s_a_Fair_Cop_Police_Legitimacy_Public_Cooperation_and_Crime_Reduction_An_Interpretative_Evidence_Commentary>. See also Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, 2002) 176, 196, 200–1.

98 See, eg, Silvia Staubli, *Trusting the Police: Comparisons across Eastern and Western Europe* (Transcript Verlag, 2017) 39.

in the *Universal Declaration of Human Rights*. Article 7 provides that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law'.⁹⁹ Article 8 asserts that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.¹⁰⁰ Personal safety (including freedom from sexual violence) is a fundamental right of all citizens.¹⁰¹ To deny justice through sexual assault victims choosing not to come forward because of a perceived lack of support by police and/or prosecutors is to 'deny people their dignity, to say that some people are worthy of justice and some aren't'.¹⁰² Discouraging access to justice to a significant percentage of the female population by creating barriers which discourage them from reporting the crime is, in effect, saying to women that they are less worthy of receiving justice than men. This does not reflect contemporary community values. The law must adequately reflect community values if community members are to respect the law.

There is another compelling reason for the community to bridge the sexual violence justice gap. Economically, it is unwise for a community to ignore the significant under-reporting of any violent crime. Violent crimes traumatise victims who are more likely to suffer significant health issues, such as post-traumatic stress disorder and suicidality.¹⁰³ However, victims do not receive the necessary support services to cope with their trauma when they stay silent. Staying silent can also add to the distress that a victim of a violent crime has endured. Such health challenges impact upon a victim's ability to work and contribute to society as they would otherwise have done.¹⁰⁴ Furthermore, community resources will not be appropriately allocated to services specialising in sexual assault crimes as a result of the under-reporting of this crime. A 2017 US study of the financial burden of sexual violence estimated that the lifetime cost of rape is USD122,461 per victim. The economic burden includes medical costs, lost work productivity among victims and perpetrators and the expense of the criminal justice process. The government bears about a third of this cost.¹⁰⁵

99 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 7.

100 *Ibid* art 8.

101 *Ibid* arts 7, 8.

102 Wagner (n 4).

103 Emily R Dworkin et al, 'Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis' (2017) 56 *Clinical Psychology Review* 65.

104 Regarding the financial and social costs of victimisation, see *Handbook on Justice for Victims* (n 6) 93.

105 Cora Peterson et al, 'Lifetime Economic Burden of Rape among US Adults' (2017) 52(6) *American Journal of Preventive Medicine* 691, 697.

V PROBLEMS WITH RECENT REFORMS DESIGNED TO IMPROVE LOW VICTIM ENGAGEMENT

As the Victorian jurisdictional case study in Part III above highlights, reforms designed to narrow the sexual violence justice gap have been incremental. This is problematic as incremental law reform is embedded in the existing legal context. As the history in Part II above highlights, this promotes patriarchal notions of justice over the needs of victims. Mossman observes that the traditional focus of ‘[l]aw reform activity inherently confines the extent of change and tends to reinforce the status quo’.¹⁰⁶ The existing legal context promotes a normative theory of justice where the rights of the defendant are the prime focus of criminal justice systems.¹⁰⁷ Kirchengast argues that the normative theory of justice is too narrowly focussed on the defendant’s rights. Criminal law reform should achieve ‘fairness to all parties that experience consequences as part of the criminal incident’.¹⁰⁸

Legal attitudes to balancing fairness to the accused with fairness to the victim and community are changing.¹⁰⁹ As the Chair of the Victorian Law Reform Commission observed following his 2016 *The Role of Victims of Crime in the Criminal Trial Process* report, which involved consulting with victims of crime:

The time has come for the proper interests of the victim as a participant — whether a witness or not — in the criminal trial process to be recognised. This is part of the evolution of the criminal law. While securing the proper rights of the State and of the accused, this report shows a way forward for securing the rights of victims as participants in the modern criminal trial.¹¹⁰

One example of recent blunt law reform that does not adequately consider the impact of the reform on the specific interests of sexual assault victims is increasing punishments for offenders.¹¹¹ ‘Tough on crime’ political policies suggest that increasing a maximum sentence for a crime will further discourage perpetrators

106 Mary Jane Mossman, “‘Running Hard to Stand Still’: The Paradox of Family Law Reform” (1994) 17(1) *Dalhousie Law Journal* 5, 10, quoted in Reg Graycar and Jenny Morgan, ‘Law Reform: What’s in It for Women?’ (2005) 23(2) *Windsor Yearbook of Access to Justice* 393, 398.

107 *Sexual Offences Final Report* (n 38) 81 [1.9]–[1.10]. For a more detailed discussion of the tension between fairness to the accused and fairness to other justice users, see Duff et al (n 22) vol 3; Kirchengast, ‘Recent Reforms to Victim’s Rights’ (n 24) 87–9.

108 Kirchengast, ‘Recent Reforms to Victim’s Rights’ (n 24) 115.

109 Jonathan Doak, ‘Victims’ Rights in Criminal Trials: Prospects for Participation’ (2005) 32(2) *Journal of Law and Society* 294, 316; Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37(3) *Melbourne University Law Review* 539.

110 *The Role of Victims of Crime Report* (n 38) vii. See also *Attorney-General’s Reference [No 3 of 1999]* [2001] 2 AC 91, 118 (Lord Steyn), quoted in *R v H* [2004] 2 AC 134, 146 [12] (Lord Bingham); Kirchengast, ‘Recent Reforms to Victim’s Rights’ (n 24) 111.

111 Ms Foundation for Women, *Safety & Justice for All: Examining the Relationship between the Women’s Anti-Violence Movement and the Criminal Legal System* (Report, 2003) 20 (‘*Safety & Justice for All*’); Clark, ‘A Fair Way to Go’ (n 7) 18, 28–30, 32. See also Germaine Greer, *On Rape* (Melbourne University Press, 2018) 65–6.

from committing the crime.¹¹² Logically, this should encourage victims to come forward, as the wrong inflicted upon them has been sanctioned by the community as serious enough to warrant that the perpetrator face a hefty jail term. However, reforming sexual assault trials by increasing the statutory punishment for offenders is likely to have some unintended negative consequences. In jurisdictions that have increased their maximum available sentence for sexual assault, the justice gap persists and the average sentencing lengths for sexual assault remains low.¹¹³ One explanation for the impotence of this law reform is that there is sometimes pressure on perpetrators to plead guilty due to ongoing family/relationship dynamics. For example, perpetrators might be keen to ensure that, for example, their daughter does not have to go through the trauma of giving evidence and/or do not want their family secrets aired in a public court. Significant increases in penalties for sexual assault may discourage some of those perpetrators from pleading guilty to the charges.¹¹⁴ In this way, increasing statutory maximum penalties is not to the benefit of the victim and is unlikely to encourage some victims to engage with the justice system. The lack of improvement in rape statistics, despite the increase in penalties for rapists, has led some commentators to observe that a successful prosecution that results in a conviction, but during the process re-traumatises the victim, is not going to improve the perception that access to justice is viable for sexual assault victims.¹¹⁵

Law reform has sometimes been wrongly premised on the notion that improving sexual assault statistics will redress the justice gap. For example, Larcombe explains that increasing conviction rates will not itself bridge the sexual violence justice gap because

an increase in conviction rates could be secured by discouraging reporting of certain types of offences against certain types of victims; by disregarding the complainant's interests and wishes when making prosecutorial and plea-bargaining decisions; and by attempting to exploit, rather than reform, the legal myth of 'real rape'.¹¹⁶

Haley Clark argues that

policy debates need to move beyond focusing on increasing conviction rates and reducing victim trauma within the legal process, and to consider other aspects that will

112 See generally Jenny Williams, 'Getting Tough on Crime: Will It Win the War?' (2000) 7(1) *Agenda: A Journal of Policy Analysis and Reform* 33; Valerie Wright, *The Sentencing Project, Deterrence in Criminal Justice: Evaluating Certainty vs Severity of Punishment* (Report, November 2010).

113 Haley Clark, 'Judging Rape: Public Attitudes and Sentencing' [2007] (14) *Australian Centre for the Study of Sexual Assault Newsletter* 17, 17–19 <<https://aifs.gov.au/publications/archived/4238#judging>>.

114 Greer (n 111) 65–6.

115 Lisa Frohmann and Elizabeth Mertz, 'Legal Reform and Social Construction: Violence, Gender, and the Law' (1994) 19(4) *Law and Social Inquiry* 829, 831.

116 Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 42–3.

contribute to change in legislation and practice. Central to this is considering the understandings and experiences of victim/survivors.¹¹⁷

VI VICTIM CASE STUDIES¹¹⁸

Traditionally, victims' unsatisfactory experiences of the justice system have been an unknown. However, staying silent has not satisfied some young articulate victims of the 21st century. The advocacy work of two such victims are featured below.

A *Nina Funnell*

In 2007, a few hundred metres from her home, 23-year-old Nina was attacked by a stranger. She was held at blade point, strangled, bashed and indecently sexually assaulted. She fought back and as she fled, she rang 000 for help. Emergency responders took her address and hung up on her. According to Nina '[she] was ... [she] believed, running for [her] life and that he may still be coming after [her] and [she] was abandoned. That sense of abandonment is not something [she's] ever recovered from'.¹¹⁹

Nina rang back and was told that someone was coming and the emergency phone operator hung up again. She went home and the police arrived soon after. Nina went to the station and made a statement with the assistance of a specialist sexual assault detective, who took the time to explain the process to her. She was medically examined, and DNA samples were taken to see if the samples might match any DNA on the police databank.¹²⁰

Nina had to return to the station a few days later and go through photo books which she describes as a 'profoundly unsettling experience'.¹²¹ Being told that the photos were of convicted sex offenders who lived in her area added to her anxiety and sense of unsafety.¹²² Whilst looking at the photos she overheard two police officers commenting along the lines that '[t]he problem is women don't understand the

117 Haley Catherine Clark, 'A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault' (PhD Thesis, University of Melbourne, April 2011) 3 ('Criminal Justice for Victim/Survivors'). Regarding the importance of the woman's experience, see also Graycar and Morgan (n 106); *Safety & Justice for All* (n 111); Catharine A MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8(4) *Signs* 635, 636, 646–55; Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 48, 66, 81.

118 The two women who feature in this article are named in accordance with their preference to be identified. The author has provided this article to them in order to ensure that their stories are accurately portrayed and respected.

119 Nina Funnell et al, 'Survivors Speak: How the Criminal Justice System Responds to Sexual Violence' (2019) 31(1) *Bond Law Review* 21, 27.

120 *Ibid* 27–8.

121 *Ibid* 27.

122 *Ibid*.

risks that they put themselves in'.¹²³ Nina felt the police were implicating her as being, in part, responsible for the attack. She explains how dehumanising it was when the police referred to her as a 'witness', as if she was watching the scene rather than the one being beaten and choked.¹²⁴ She reflected that 'if you think about the nature of sexual violence it happens in an asymmetrical power relationship and then you find yourself against a system that you don't understand. It feels like you're being reinscribed within another asymmetrical power diode'.¹²⁵

Nina felt powerless in the impersonal criminal justice system, so she turned to what she knew as 'safe' in an attempt to regain a sense of control over her unbearable situation.¹²⁶ Nina is currently a professional journalist and author, and at the time of the assault, was in her honours year of her media and communications degree. Five weeks after her attack, she wrote a newspaper piece about the attack where she explains:

I refuse to be intimidated by this man or by the legal process and so I willingly attach my name and photo to this article. I'm not embarrassed to say I was almost raped. Rape should not be embarrassing to anyone other than the coward who commits it.¹²⁷

The investigating police told her that they were very disappointed in her media comments, citing that it was not helpful to the investigation.¹²⁸

Four months after the attack, Nina had not received any news from the police about her DNA sample results. She explains that the assault dominated her thoughts and nightmares every day of those four months.¹²⁹ In order to alleviate her increasing distress, Nina contacted Channel 7 saying that the DNA had not been tested and that her attacker was still at large. Commercial television led with the story that night. The next day, the State Premier ordered that the DNA be tested. With the

123 Ibid.

124 Nina Funnell, 'Nina Funnell: Why I Would Be Called an "Unreliable Witness" to My Own Assault', *The Sydney Morning Herald* (online, 14 July 2017) <<https://www.smh.com.au/lifestyle/nina-funnell-prevention-not-silence-is-what-will-eliminate-the-fear-in-reporting-assault-20170713-gxaa9k.html>>.

125 Funnell et al (n 119) 28.

126 Ibid.

127 Nina Funnell, 'This Man Attacked Me but I Am Not Afraid', *The Sydney Morning Herald* (online, 2 July 2007) <<https://www.smh.com.au/national/this-man-attacked-me-but-i-am-not-afraid-20070702-gdqiqr.html>>.

128 Funnell et al (n 119) 28.

129 The delays in testing DNA evidence in sexual assault trials is not unique to Australia: see Lauren Lantry, 'Trump Signs Bill to Help Eliminate Backlog in Rape Kit Testing', *ABC News* (online, 1 January 2020) <<https://abcnews.go.com/US/trump-signs-bill-eliminate-backlog-rape-kit-testing/story?id=67997113>>; Jennifer Peltz, 'Over 1,000 Arrests Nationwide after Authorities Test Backlogged Rape Kits', *HuffPost* (online, 13 March 2019) <https://www.huffpost.com/entry/new-york-feds-join-to-get-100k-rape-kits-tested-around-us_n_5c88f54fe4b0fbd7661f8840>.

support of a professional network of journalists, Nina could advocate for her own justice.¹³⁰

In the following years, Nina graduated from university and became a journalist in her own right, specialising in sexual assault reporting. Through this reporting, she has also been able to successfully agitate for law reform. In 2017, Nina was contacted by a sexual assault victim from Tasmania, Grace Tame, who had been groomed and repeatedly sexually assaulted by her high school teacher, Nicolaas Bester, in 2010.¹³¹ After an early release from Risdon Prison in 2013, the offender bragged about the abuse online, leading to a second conviction for ‘making child exploitation material’ in 2016.¹³² At the time of contacting Nina in 2017, Grace wished to speak out under her real name to educate others on the warning signs of grooming. However, due to a Tasmanian law that prevented anybody (including the victim) from publicly discussing Grace’s case, no media outlet was allowed to reveal the name of a sexual assault victim even with their consent.¹³³ As Grace explained, ‘[j]ournalists, commentators, and even my perpetrator have all been able to publicly discuss my case. I’m the only one who is not allowed to. It’s not just illogical, it’s cruel. I shouldn’t be forced to stay hidden in the shadows’.¹³⁴

In response, Nina initiated a #LetHerSpeak campaign to agitate for law reform. The campaign was formed in partnership with End Rape on Campus Australia, Marque Lawyers and News Corp, with Nina acting as creator and lead director of the campaign.¹³⁵ The campaign funded Grace’s successful application to the Supreme Court for a court order enabling her to self-identify in the media.¹³⁶ In August 2019, Nina broke Grace’s story exclusively for *news.com.au*, as Grace won the right to self-identify as a sexual assault victim in media.¹³⁷ At that time, more than 7,000 people signed the #LetHerSpeak petition for law reform,¹³⁸ and a subsequent newspaper poll found that 92% of Tasmanians support change so that

130 Funnell et al (n 119) 28–9.

131 Nina Funnell, ‘LetHerSpeak: Shocking Reason Woman Can’t Tell Her Sexual Assault Story’, *news.com.au* (online, 8 November 2018) <<https://www.news.com.au/lifestyle/let-her-speak-shocking-reason-woman-cant-tell-her-sexual-assault-story/news-story/718ad770a25833970f961c551f3eaab1>> (‘LetHerSpeak’).

132 *Bester v Barnes* (2016) 24 Tas R 241, 242 [1].

133 *Evidence Act 2001* (Tas) s 194K.

134 Funnell, ‘LetHerSpeak’ (n 131).

135 Nina Funnell, ‘Mocked, Blamed and Shamed: Abused Schoolgirl Grace Tame’s Fight to Tell Her Own Story’, *news.com.au* (online, 12 August 2019) <<https://www.news.com.au/lifestyle/real-life/mocked-blamed-and-shamed-abused-schoolgirl-grace-tames-fight-to-tell-her-own-story/news-story/b5574eeed0d78a406edf9218ba3fe0688>> (‘Mocked, Blamed and Shamed’).

136 Nina Funnell, ‘#Let Her Speak’, *GoFundMe* (Web Page, 24 March 2019) <<https://au.gofundme.com/f/wq34q-let-her-speak>> (‘#Let Her Speak GoFundMe’).

137 Funnell, ‘Mocked, Blamed and Shamed’ (n 135).

138 Nina Funnell, ‘#LetHerSpeak: Amend the Laws Which Prevent Sexual Assault Survivors from Telling Their Story’, *Megaphone.org.au* (Web Page) <<https://www.megaphone.org.au/petitions/let-her-speak>>.

victims can speak out under their real names, if they so choose.¹³⁹ Nina also recruited a diverse group of sexual assault survivor ambassadors from around Australia to endorse the push for law reform, along with celebrity ambassadors from Australia and abroad, including John Cleese, Alyssa Milano, and Tara Moss.¹⁴⁰ A GoFundMe was established to raise further funds for the legal and campaign costs associated with challenging this unjust law.¹⁴¹ As a result of this campaign, both Tasmania and the Northern Territory have amended the gagging laws.¹⁴²

Nina has, in her reporting and online presence, also highlighted other sexual assault hotspots such as rape on university campuses,¹⁴³ and the re-traumatisation of victims at the hands of the media.¹⁴⁴ In 2017, her work successfully triggered a whole-of-university review of James Cook University, after revealing that a staff member who raped an Indigenous student was promoted to ‘academic adviser to indigenous students’, shortly after being charged with the assault.¹⁴⁵ Nina’s contribution to sexual assault advocacy has been acknowledged by the Australian Human Rights Commission who awarded her the Community (Individual) award in 2010. In the last three years, Nina has been awarded numerous journalism awards for her work in this area.¹⁴⁶

139 Nina Funnell, ‘Hey Dad! Star Joins Fight to End “Absurd” Tasmanian Law’, *news.com.au* (online, 8 April 2019) <<https://www.news.com.au/national/tasmania/hey-dad-star-joins-fight-to-end-absurd-aussie-law/news-story/6ae355dc80d00db9a87ffb49678b0079>>.

140 Ibid.

141 Funnell, ‘#Let Her Speak GoFundMe’ (n 136).

142 *Evidence Amendment Act 2020* (Tas) s 4; *Sexual Offences (Evidence and Procedure) Amendment Act 2020* (NT) s 4.

143 Nina Funnell, ‘Student Leaders Accused of University Assaults’, *The Saturday Paper* (online, 15 June 2019) <<https://www.thesaturdaypaper.com.au/news/education/2019/06/15/student-leaders-accused-university-assaults/15605208008298>>.

144 Nina Funnell, ‘“Unprofessional, Unethical, Unsafe”: ABC Breaches Rape Victim’s Privacy in New Tracey Spicer Documentary’, *news.com.au* (online, 13 November 2019) <<https://www.news.com.au/national/unprofessional-unethical-unsafe-abc-breaches-rape-victims-privacy-in-new-tracey-spicer-documentary/news-story/584bcc2fe1bb28c534ff8d7a79e660f1>> (‘Unprofessional, Unethical, Unsafe’).

145 Nina Funnell, ‘Exclusive: James Cook University Adviser Douglas Steele Promoted after Raping Student’, *news.com.au* (online, 20 January 2017) <<https://www.news.com.au/lifestyle/real-life/news-life/exclusive-james-cook-university-adviser-douglas-steele-was-promoted-after-pleading-guilty-to-raping-a-student/news-story/fd0b00c9aa8eb528e1f43c3a5ac9c223>>.

146 Walkley ‘Our Watch’ award in 2017 and 2020, a United Nations Media Australia award in 2017 and the B&T Women in Media ‘Journalist of the Year’ award in 2019: The Walkley Foundation, ‘Winners Unveiled for the 2020 Mid-Year Celebration of Journalism’ (Media Release, 17 June 2020) <<https://www.walkleys.com/winners-unveiled-for-the-2020-mid-year-celebration-of-journalism>>; ‘Nina Funnell, Kerry Warren and Lori Youmshajekian: #LetUsSpeak’, *The Walkley Foundation* (Web Page, 2020) <<https://www.walkleys.com/award-winners/nina-funnell-kerry-warren-and-lori-youmshajekian>>; Australian Human Rights Commission, ‘2010 Media Release: Lifetime of Dedication Delivers Human Rights Medal to Thérèse Rein’ (Media Release, 10 December 2010) <<https://humanrights.gov.au/about/news/media-releases/2010-media-release-lifetime-dedication-delivers-human-rights-medal>>.

B Saxon Mullins

Saxon Mullins was at the centre of one of Australia's most controversial rape trials. In 2013, when she was 18 years old, Saxon went out to a nightclub with her girlfriends. A man posing to be the owner of the nightclub offered to take her to the VIP room. He led her out to a dark alley behind the club. Saxon was so frightened that she did not tell him to stop or try to escape. She submitted to him anally penetrating her. The next day, Saxon went to the police. Luke Lazarus was charged with rape and convicted by a jury. He won a retrial on appeal.¹⁴⁷ The second trial was before a judge without a jury because a judge decided that it was not possible to find a panel of jurors in Sydney who had not heard about this infamous case.¹⁴⁸

Whilst the trial judge in the second trial accepted that Saxon did not want to have sex with the defendant, the judge acquitted Lazarus, on the basis that he had reasonable grounds to believe Saxon was consenting. The judge relied upon the facts that Saxon 'did not say "stop" or "no"'. She did not take any physical action to move away from the intercourse'.¹⁴⁹ In interpreting the legal requirement that the defendant must have reasonable grounds to believe the complainant was consenting, the judge relied upon sexual assault misconceptions that genuine victims of sexual assault will say 'stop' or 'no' and will attempt to escape or fight back. Empirical research has proven that the perceptions that the judge relied upon are wrong; victims of sexual assault commonly verbally and physically freeze and do not resist the sexual assault in order to cope with the trauma.¹⁵⁰ The Court of Appeal determined that the trial judge erred by failing to include in her judgment the steps Lazarus took to ascertain whether the complainant was consenting.¹⁵¹ However, the Court of Appeal exercised its discretion not to order that the respondent be tried for a third time in the interests of fairness.¹⁵²

147 *Lazarus v The Queen* [2016] NSWCCA 52.

148 *R v Lazarus* (District Court of New South Wales, Zahra DCJ, 28 March 2017). In New South Wales, either the accused or the prosecution may seek a trial by judge alone in the interests of justice. If the accused wishes to avoid a jury trial the prosecution must consent or a 'trial by judge order' may be sought under s 132 of the *Criminal Procedure Act 1986* (NSW). The court may refuse the application on grounds that a factual issue requires the application of objective community standards.

149 *R v Lazarus* (2017) 270 A Crim R 378, 399 [110] (Bellew J) ('*Lazarus*'), quoting *R v Lazarus* (District Court of New South Wales, Tupman DCJ, 4 May 2017) 73.

150 Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296, 307; Arlie Loughnan et al, Preliminary Submission No 65 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (28 June 2018) 7–8.

151 *Lazarus* (n 149) 407 [148] (Bellew J).

152 *Ibid* 411 [168] (Bellew J).

Community outrage in response to the judge's reasoning was more in line with research than the court's approach.¹⁵³ Buoyed by the community response, Saxon felt compelled to agitate for change to the law and the criminal justice process. She was motivated to speak out to ensure that other women were not discouraged from reporting crimes when hearing about her appalling experience. Saxon chose to waive her anonymity and identified herself as the victim online and in the documentary interview, 'I Am That Girl'.¹⁵⁴ Her interview put a spotlight on the archaic application of the law to sexual assault crimes.

The documentary sparked a national debate on a 'systemic problem' with sexual consent laws.¹⁵⁵ Academics have been inspired by Saxon's advocacy, to research sexual consent laws.¹⁵⁶ In response to the documentary, the government instructed the New South Wales Law Reform Commission to review and report on consent and knowledge of consent in relation to sexual assault offences.¹⁵⁷ With just 10% of reported sexual assaults resulting in a conviction,¹⁵⁸ the Attorney-General acknowledged that there was a 'systemic problem',¹⁵⁹ and '[it's] a concern that someone who has not consented can go through four court cases and not get a final resolution for the complaint ... [t]here is a reluctance by complainants to come

- 153 See, eg, Clementine Ford, 'Why the Acquittal of Luke Lazarus Goes to the Heart of Rape Culture in Australia', *The Sydney Morning Herald* (online, 27 July 2017) <<https://www.smh.com.au/lifestyle/why-the-acquittal-of-luke-lazarus-goes-to-the-heart-of-rape-culture-in-australia-20170727-gxjvvp.html>>; Candace Sutton, 'Luke Lazarus Says Woman He Was Acquitted of Raping "Wanted to Be There"', *news.com.au* (online, 17 May 2018) <<https://www.news.com.au/entertainment/tv/radio/luke-lazarus-says-woman-he-was-acquitted-of-raping-wanted-to-be-there/news-story/41fa8daca15bbafd2e702bac30fce77f>>.
- 154 'I Am That Girl', *Four Corners* (Australian Broadcasting Corporation, 2018) <<http://www.abc.net.au/4corners/i-am-that-girl/9736126>>; Rachael Burgin, 'Communicating Consent: Narratives of Sexual Consent in Victorian Rape Trials' (PhD Thesis, Monash University, 2019) 222 ('Communicating Consent').
- 155 Stephanie Bedo, 'Controversial Case That Sparked a National Debate on Sexual Consent Could Lead to a Legislative Review', *news.com.au* (online, 8 May 2018) <<https://www.news.com.au/lifestyle/real-life/news-life/controversial-case-that-sparked-a-national-debate-on-sexual-consent-could-lead-to-a-legislative-review/news-story/fa6ccf813fc22c4ad0c761b11a41aaed>>.
- 156 See, eg, Horan and Goodman-Delahunty (n 77) 708–9; Burgin, 'Communicating Consent' (n 154) 222–3.
- 157 Mark Speakman and Pru Goward, 'Sexual Consent Laws to Be Reviewed' (Media Release, New South Wales Government, 8 May 2018); Louise Milligan and Lucy Carter, 'NSW Attorney-General Calls for Review of Sexual Consent Laws Following Four Corners Program', *ABC News* (online, 8 May 2018) <<https://www.abc.net.au/news/2018-05-08/nsw-attorney-general-calls-for-review-of-sexual-consent-laws/9734988>>; Michael McGowan, 'NSW to Review Sexual Consent Laws after Searing Four Corners Testimony', *The Guardian* (online, 8 May 2018) <<https://www.theguardian.com/society/2018/may/08/nsw-to-review-sexual-consent-laws-after-searing-four-corners-testimony>>.
- 158 Bedo (n 155).
- 159 Adam Baidawi, 'Sexual Consent Debated after Acquittal in Australia Rape Case', *New York Times* (online, 8 May 2018) <<https://www.nytimes.com/2018/05/08/world/australia/sexual-consent-law-debate.html>>.

forward ... [t]hey've already been traumatised once, and they have to go through this retraumatisation yet again'.¹⁶⁰

In recognition for her significant contribution to agitating for change to outdated consent laws, Saxon was awarded the 2018 'Young People's Human Rights Medal' by the Australian Human Rights Commission, for making a real difference to human rights.¹⁶¹ That same year, she was also named the most culturally powerful person in Australia by *The Australian Financial Review*.¹⁶²

More recently, Saxon has taken her law reform advocacy work online, as a co-director of Advocacy at Rape and Sexual Assault Research and Advocacy ('RASARA').¹⁶³ RASARA is a survivor-focussed multidisciplinary network of advocates, working towards changing community attitudes about sexual consent and assertively promoting best practice in rape and sexual assault law reform.¹⁶⁴ Saxon is active on @RapeReform.¹⁶⁵ She is igniting an online conversation about consent.¹⁶⁶ The online advocacy work of RASARA has resulted in the Queensland Attorney-General referring consent and the 'mistake of fact' defence to the Queensland Law Reform Commission on 2 September 2019.¹⁶⁷

160 Bedo (n 155).

161 Australian Human Rights Commission, 'Saxon Mullins Accepts the 2018 Young People's Human Rights Medal' (Facebook, 3 July 2019) <<https://www.facebook.com/aushumanrights/videos/1048123625577905/?v=1048123625577905>>.

162 'Saxon Mullins Tops AFR Cultural Power List', *SBS News* (online, 4 October 2018) <<https://www.sbs.com.au/news/saxon-mullins-tops-afr-cultural-power-list>>.

163 'Saxon Mullins', *Rape & Sexual Assault Research & Advocacy* (Web Page) <<https://rasara.org/saxon-mullins>>.

164 'Advocating for Rape and Consent Law Reform', *Rape & Sexual Assault Research & Advocacy* (Web Page) <<https://rasara.org/rapelawreform>>.

165 See, eg, @SaxonAdair (Saxon Mullins) (Twitter, 16 July 2020, 8:26pm AEST) <<https://twitter.com/SaxonAdair/status/1283709648135024640>>. The Twitter account @RapeReform is associated with Rape and Sexual Assault Research and Advocacy: see 'Rape and Sexual Assault Research and Advocacy @RapeReform', *Twitter* (Web Page, February 2020) <<https://twitter.com/RapeReform>>; 'Our Team', *Rape & Sexual Assault Research & Advocacy* (Web Page) <<https://rasara.org/our-team>>.

166 'Saxon Mullins', *Rape & Sexual Assault Research & Advocacy* (Web Page) <<https://rasara.org/saxon-mullins>>; Lydia Lynch, "'It Is Horrific": The Queensland Law Allowing Rapists Off Scot-Free', *The Sydney Morning Herald* (online, 12 June 2019) <<https://www.smh.com.au/national/queensland/it-is-horrific-the-queensland-law-allowing-rapists-off-scot-free-20190607-p51vmn.html>>.

167 For terms of reference, see Queensland Law Reform Commission, *Queensland's Laws Relating to Consent and the Excuse of Mistake of Fact* (Terms of Reference, 2 September 2019) <[https://www.qlrc.qld.gov.au/_data/assets/pdf_file/0009/624465/consent-and-mistake-of-factor-2-sep-2019-.pdf](https://www qlrc.qld.gov.au/_data/assets/pdf_file/0009/624465/consent-and-mistake-of-factor-2-sep-2019-.pdf)>. See also Lynch (n 166); Jonathan Crowe and Bri Lee, 'Reform', *Consent Law in Queensland* (Web Page) <<https://www.consentlawqld.com/reform>>; '#consentlawqld', *Twitter* (Web Page) <<https://twitter.com/hashtag/consentlawqld>>.

VII COMMENTARY

Contemporary social conditions are facilitating advocates like Nina and Saxon to come forward and agitate for better access to justice. A growing community awareness of consumer rights underlies this social movement as victims are learning that they are entitled to expect a minimum standard of care from the state.¹⁶⁸ As one victim has queried, '[w]hat is the justice system willing to offer?'¹⁶⁹ The state is portrayed as a provider of criminal justice services; the victim is a consumer of those services.¹⁷⁰ Victims of crime are therefore able to argue they are a stakeholder in the justice system and that they deserve empowerment, respect and fundamental rights.¹⁷¹

Gender equality is also amplifying the voices of victims of sexual assault as it is a predominantly gender-based crime. The media and online platforms have enabled the female consumer of justice to publicise their grievances with the legal system without having to engage with it. For example, in 2017 *The New Yorker* magazine broke a story about Harvey Weinstein's abusive treatment of women. This prompted several of Weinstein's victims to share their experiences of his abuse.¹⁷² Hollywood star Alyssa Milano tweeted a message suggesting that '[i]f all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem'.¹⁷³ Victims responded to this suggestion at an unprecedented rate. This multimedia campaign transformed into a worldwide political movement.¹⁷⁴ Brown asserts that the victim-led grassroots #MeToo movement 'has delivered social justice more swiftly and effectively than supposedly more enlightened public bodies tend to'.¹⁷⁵ By

168 Cook, David and Grant (n 29) 85.

169 Haley Clark, "'What Is the Justice System Willing to Offer?': Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) (85) *Family Matters* 28, 35 <<https://aifs.gov.au/sites/default/files/fm85d.pdf>>.

170 Cook, David and Grant (n 29) 85.

171 Ibid 85. See generally Doak (n 109); Robyn Holder, 'Seeing the State: Human Rights Violations of Victims of Crime and Abuse of Power' in Leanne Weber, Elaine Fishwick and Marinella Marmo (eds), *The Routledge International Handbook of Criminology and Human Rights* (Routledge, 2017) 419.

172 Ronan Farrow, 'From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories', *The New Yorker* (online, 23 October 2017) <<https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>>.

173 @Alyssa_Milano (Twitter, 16 October 2017, 7:21am AEST) <https://twitter.com/Alyssa_Milano/status/919659438700670976>. See also Nadia Khomami, '#MeToo: How a Hashtag Became a Rallying Cry against Sexual Harassment', *The Guardian* (online, 21 October 2017) <<https://www.theguardian.com/world/2017/oct/20/women-worldwide-use-hashtag-metoo-against-sexual-harassment>>.

174 Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (University of California Press, 2020) 8–10.

175 Elizabeth Nolan Brown, 'NBC Didn't Fire Matt Lauer. We Did.', *The New York Times* (online, 29 November 2017) <<https://www.nytimes.com/2017/11/29/opinion/matt-lauer-sexual-harassment-nbc.html>>. For the negatives of online sharing, see Carol Harrington, 'Speaking Out

giving a voice to sexual assault victims, the media has caused a considerable increase in support for the victim rights movement from citizens and politicians alike.¹⁷⁶ The two women whose advocacy work is featured in this article have both utilised their media and online presence when advocating for improving access to justice.

There are three key characteristics of the victims featured in this article, which makes their advocacy particularly valuable to law reformers. First, Nina and Saxon are confident and articulate. This gives them a privileged position from which to agitate for change on behalf of disenfranchised victims. Their success in harnessing the power of the media and online forums was wholly reliant on their sophisticated communication skills and social media fluency.¹⁷⁷ For example, Nina approaches sexual assault with the professionalism of a well-trained and experienced journalist. She describes her own experience of reporting the crime as ‘very, very poor’.¹⁷⁸ However, she does acknowledge that other victims have had good experiences. She observes that the

lack of consistency in and of itself is problematic because when you have been sexually assaulted the nature of sexual assault is that [it] robs you of power and control and certainty. So, if you’re up against a system where ... it’s kind of Russian roulette — you don’t know what level of professionalism or service provision you’re going to encounter — that creates anxiety, which in turn amplifies trauma ...¹⁷⁹

This, in turn, discourages victim engagement with the justice system. By sharing her personal experience and adding some well-informed commentary, Nina is able to offer a sophisticated perspective on the issue of access to justice which goes beyond what has been offered before, because she is giving it from the authority of a professional journalist with first-hand experience of the problem.

Secondly, both Nina and Saxon experienced the prosecution system *before* they publicly shared their experiences and opinions of the system. By sharing their experiences of engaging with the criminal justice system, they avoided many of the risks facing victims who share their experiences online before reporting the crime. Several studies have identified that online reporting can satisfy a victim’s

about Sexual Violence on Social Media May Not Challenge Gendered Power Relations’, *The Conversation* (online, 28 September 2018) <<https://theconversation.com/speaking-out-about-sexual-violence-on-social-media-may-not-challenge-gendered-power-relations-102563>>.

176 Anna North, ‘7 Positive Changes That Have Come from the #MeToo Movement’, *Vox* (online, 4 October 2019) <<https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019>>.

177 Michael Salter, ‘Justice and Revenge in Online Counter-Publics: Emerging Responses to Sexual Violence in the Age of Social Media’ (2013) 9(3) *Crime Media Culture* 225, 232, 236. See also Lena Wånggren, ‘Our Stories Matter: Storytelling and Social Justice in the Hollaback! Movement’ (2016) 28(3) *Gender and Education* 401, 403; Patrick White and Neil Selwyn, ‘Moving On-Line? An Analysis of Patterns of Adult Internet Use in the UK, 2002–2010’ (2013) 16(1) *Information, Communication and Society* 1, 18.

178 Funnell et al (n 119) 26.

179 *Ibid.*

core justice needs in some ways that the criminal justice system cannot.¹⁸⁰ Online sharing offers victims immediate feedback rather than months or years of delay. Delay adds to a victim's sense of powerlessness particularly when victims like Nina are not kept informed as to the progress of their complaint. The prospect of delays motivates victims to seek an alternate way to satisfy their imperative to warn other women/children about the perpetrator. Online sharing offers victims greater control over the process. Victims can record their experiences in their own words online, in contrast to giving evidence in court which requires them to respond to a set of questions where they have no control over the narrative.¹⁸¹ Online reporting also allows a victim to avoid public challenge to their credibility in the form of brutal cross-examination in the same room as the perpetrator. While a court conviction offers victims public recognition of a crime,¹⁸² online community support also delivers the desire of many victims to have their sexual assault symbolically recognised as a crime by their community.¹⁸³

While online disclosure can 'clearly function as a pathway to meet elements of victims' justice needs',¹⁸⁴ it is by no means a panacea. It can be re-traumatising as victims have to navigate abuse and trolling. Some victims describe online justice as a 'necessarily limited, partial, and muted site of justice'.¹⁸⁵ Victims' stories can also be reshaped and sensationalised in the media. Whilst victims have little control in the prosecution process, similarly they relinquish control to the media if they choose this path. For example, journalist, Tracey Spicer, circulated a documentary

- 180 Anastasia Powell, 'Seeking Informal Justice Online: Vigilantism, Activism and Resisting a Rape Culture in Cyberspace' in Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, 2015) 218 ('Seeking Informal Justice Online'); Salter (n 177) 236; Mindi D Foster, 'Tweeting about Sexism: The Well-Being Benefits of a Social Media Collective Action' (2015) 54(4) *British Journal of Social Psychology* 629, 642–3. See also Laura Rapp et al, 'The Internet as a Tool for Black Feminist Activism: Lessons from an Online Antirape Protest' (2010) 5(3) *Feminist Criminology* 244, 256; Frances Shaw, "'Hottest 100 Women": Cross-Platform Discursive Activism in Feminist Blogging Networks' (2012) 27(74) *Australian Feminist Studies* 373, 374; Wänggren (n 177); Anastasia Powell, 'Seeking Rape Justice: Formal and Informal Responses to Sexual Violence through Technosocial Counter-Publics' (2015) 19(4) *Theoretical Criminology* 571.
- 181 Herman (n 68) 574.
- 182 The low conviction and incarceration rates for this crime as documented in Part IV above highlight that the punishment offered by the criminal justice system is limited: see above Part IV.
- 183 S Caroline Taylor and Caroline Norma, 'The "Symbolic Protest" behind Women's Reporting of Sexual Assault Crime to Police' (2012) 7(1) *Feminist Criminology* 24, 28, 31, 37. See also Clare McGlynn, Julia Downes and Nicole Westmarland, 'Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences' in Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge, 2017) 179, 179–80, 182–3, 189.
- 184 Bianca Fileborn, 'Justice 2.0: Street Harassment Victims' Use of Social Media and Online Activism as Sites of Informal Justice' (2017) 57(6) *British Journal of Criminology* 1482, 1498. See generally Jessamy Gleeson and Breanan Turner, 'Online Feminist Activism as Performative Consciousness-Raising: A #MeToo Case Study' in Bianca Fileborn and Rachel Loney-Howes (eds), *#MeToo and the Politics of Social Change* (Palgrave Macmillan, 2019) 53.
- 185 Fileborn (n 184) 1498.

which included real names and personal stories of rape without the victims' knowledge or consent.¹⁸⁶

There is also concern that those sexual assault victims who chose to share their experience online or in the media, before or while they engage with the criminal justice process, run the risk of exposing themselves to unanticipated negative consequences. For example, active online victims may unwittingly enable the perpetrator to prepare themselves for any future investigation. The perpetrator is given an opportunity to rehearse a plausible version of events or leave the jurisdiction to avoid the prosecution. It is well documented that Catholic and Jewish abusers have left the jurisdiction, making it difficult to prosecute them.¹⁸⁷ Wealthy perpetrators are also given the opportunity to identify and silence their online active victims with compensation payments. Harvey Weinstein paid off victims for decades before being brought to account.¹⁸⁸ It is highly problematic for a community if rich citizens can avoid criminal prosecution and be allowed to continue their criminal behaviour. Wealthy perpetrators can also threaten to sue their alleged victims which may have a chilling effect on any other victims thinking about coming forward. As *The New York Times* observed, '[t]he powerful men who end up accused tend to sue and the costs can be immense'.¹⁸⁹

The third key characteristic of the victims featured in this article which makes their advocacy valuable to law reformers is their unique connection to an historically disconnected and silenced group of citizens (ie sexual assault victims). The vast

186 Funnell, 'Unprofessional, Unethical, Unsafe' (n 144). Tracey Spicer and the ABC apologised for the mistake: Broede Carmody, "'Utterly Gutted": ABC Issues Apology after #MeToo Privacy Blunder', *The Sydney Morning Herald* (online, 13 November 2019) <<https://www.smh.com.au/culture/tv-and-radio/utterly-gutted-abc-issues-apology-after-metoo-privacy-blunder-20191113-p53a5t.html>>.

187 See, eg, Ian Lee, 'How Jewish American Pedophiles Hide from Justice in Israel', *CBS News* (online, 19 February 2020) <<https://www.cbsnews.com/news/how-jewish-american-pedophiles-hide-from-justice-in-israel/>>; Laura Russell, 'Pursuing Criminal Liability for the Church and Its Decision Makers for Their Role in Priest Sexual Abuse' (2003) 81(3) *Washington University Law Review* 885, 887; Katie Wright and Shurlee Swain, 'Speaking the Unspeakeable, Naming the Unnameable: The Royal Commission into Institutional Responses to Child Sexual Abuse' (2018) 42(2) *Journal of Australian Studies* 139, 139, quoting 'Transcript: Read the PM's Full Statement on the Child Sex Abuse Royal Commission', *Newcastle Herald* (online, 12 November 2012) <<https://www.newcastleherald.com.au/story/969662/transcript-read-the-pms-full-statement-on-the-child-sex-abuse-royal-commission>>.

188 Jodi Kantor and Megan Twohey, 'Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades', *The New York Times* (online, 5 October 2017) <<https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>>.

189 Damien Cave, 'Craig McLachlan, Prominent Australian Actor, Faces Indecent Assault Charges', *The New York Times* (online, 11 January 2019) <<https://www.nytimes.com/2019/01/11/world/australia/craig-mclachlan-indecent-assault.html>>. See also Clarissa Sebag-Montefiore, 'Geoffrey Rush's Defamation Trial Becomes a #MeToo Reckoning for Australia', *The New York Times* (online, 6 November 2018) <<https://www.nytimes.com/2018/11/06/world/australia/geoffrey-rush-metoo-defamation.html>>. For an overview of how the Catholic Church uses its power to silence victims, see Kathryn A Dale and Judith L Alpert, 'Hiding behind the Cloth: Child Sexual Abuse and the Catholic Church' (2007) 16(3) *Journal of Child Sexual Abuse* 59, 60, 65–6; Jodi Death, 'Bad Apples, Bad Barrel: Exploring Institutional Responses to Child Sexual Abuse by Catholic Clergy in Australia' (2015) 4(2) *International Journal for Crime, Justice and Social Democracy* 94, 102, 104.

majority of victims are young and female.¹⁹⁰ This century has seen this group highly active in sharing their experiences online.¹⁹¹ Their online audience tends to be women of their own age. This online community is likely to have amplified the message that the criminal justice system does not offer victims realistic access to justice. Whilst online story sharing can have a negative impact upon this community's perceptions of access to justice, it also has the potential to be used as a way to communicate improvements to the system when they are made. Nina and Saxon have connected with a community of anonymous victims through their media and online advocacy. If law reformers were able to work with advocates like Nina and Saxon, they could access this online audience of anonymous victims. In this way, any law reform initiatives designed to improve access to justice could be shared within the online community, giving these consumers of justice factual information in an easily accessible and safe space.

VIII CONCLUSION

The first step towards improving access to justice for sexual assault victims is for justice systems to acknowledge that poor access to justice for sexual assault victims is a problem. Most common law jurisdictions have done this. The second step is to understand the problem. This step has been a key barrier for justice systems in better addressing victim perceptions of poor access to justice. Historically, understanding this problem has been hampered by the assumption that sexual assault victims will respond to law reform in the same way that other victims have.

- 190 Sharon G Smith et al, *The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief* (Report, November 2018) 1, 4; Australian Institute of Criminology, *Australian Crime: Facts & Figures 2014* (Report, 2016) 15 <https://www.aic.gov.au/sites/default/files/2020-05/facts_and_figures_2014.pdf>.
- 191 Amelia Rose Coleman, 'Blogging Their Way Out of Disadvantage: Women, Identity and Agency in the Blogosphere' in Rebecca English and Raechel Johns (eds), *Gender Considerations in Online Consumption Behavior and Internet Use* (Information Science Reference, 2016) 64, 75; Cory L Armstrong and Jessica Mahone, "'It's on Us.'" The Role of Social Media and Rape Culture in Individual Willingness to Mobilize against Sexual Assault' (2017) 20(1) *Mass Communication and Society* 92, 93. Regarding Twitter, see Megan Stubbs-Richardson, Nicole E Rader and Arthur G Cosby, 'Tweeting Rape Culture: Examining Portrayals of Victim Blaming in Discussions of Sexual Assault Cases on Twitter' (2018) 28(1) *Feminism and Psychology* 90, 93. Regarding YouTube, see Chloe Krystyna Garcia and Ayesha Vemuri, 'Girls and Young Women Resisting Rape Culture through YouTube Videos' (2017) 10(2) *Girlhood Studies* 26, 35–8. See, eg, 'The Invisible Crime', *The Sydney Morning Herald* (Web Page) <<https://www.smh.com.au/invisible-crime>>; 'A Rape Survivor Shares Her Experience Anonymously via Snapchat', *BBC News* (online, 5 March 2018) <<https://www.bbc.com/news/av/stories-43294271/a-rape-survivor-shares-her-experience-anonymously-via-snapchat>>; Eliana Dockterman, 'Rape Survivors Talk about Why They Tweeted Their Stories', *TIME* (online, 14 March 2014) <<https://time.com/25150/rape-victims-talk-about-tweeting-their-experiences-publicly>>. For the US, see 'Sexual Violence, Rape and Abuse Survivor Stories', *Take Back the Night Foundation* (Web Page, 2021) <<https://takebackthenight.org/survivor-stories>>; 'Survivor Stories', *RAINN* (Web Page, 2022) <<https://www.rainn.org/survivor-stories>>. UN Women suggests several ways using social media enables people to stand against 'rape culture': see '16 Ways You Can Stand against Rape Culture', *UN Women* (Blog Post, 18 November 2019) <<https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture>>.

However, traditional law reform is underpinned by a system that is influenced by centuries of patriarchal notions of justice. Sexual assault is a predominantly gendered crime and policies such as being ‘tough on crime’ aimed at improving access to justice for sexual assault victims have been ineffective. Persistently low reporting, prosecution, conviction and incarceration rates highlight that applying traditional law reform to sexual assault has not reaped the benefits that the law reformers were hoping to achieve. As Clark argues,

[t]he legal system has been established and institutionalised by (white) men and has largely excluded women (and victim/survivors generally) and has failed to recognise and respond to their interests. Despite increased societal awareness of and reforms recognising the harm of sexual assault, white male discourse continues to prevail in the legal system. ... In developing ways to improve the criminal justice system’s response to sexual assault, it is therefore essential to give precedence to the understandings, knowledge and experiences of victim/survivors.¹⁹²

Despite law reform efforts this century starting to acknowledge, include and listen to sexual assault victims,¹⁹³ concerns persist as to the effectiveness of such efforts in practice.¹⁹⁴ Those concerns are evidenced by the lack of improvement in the statistics and the accounts of victims such as Nina and Saxon. Law reform to date, though important and well intentioned, has had only limited practical effect. The Victorian Law Reform Commission reported in 2016 that there was broad acknowledgement from stakeholders in the criminal justice system that cultural change is part of the way we will improve it. For example, the Victorian Director of Public Prosecutions said that there has been ‘considerable cultural change in the way the legal profession interacts with victims’ but that this process should continue through educational programs.¹⁹⁵ The Victorian Law Reform Commission concluded that there is a need for wider cultural change where ‘victim-centred thinking and practice’ is part of the framework.¹⁹⁶

Giving precedence to the views of victims has been hampered by the inability of law reformers to directly access and engage with victims of sexual assault. The recent development of victim advocates and online spaces for victims to come together is providing law reformers with a new opportunity to more easily access

192 Clark, ‘Criminal Justice for Victim/Survivors’ (n 117) 5 (citations omitted). See also Barbara Hudson, ‘Beyond White Man’s Justice: Race, Gender and Justice in Late Modernity’ (2006) 10(1) *Theoretical Criminology* 29, 38.

193 See, eg, the engagement of the Victorian Law Reform Commission in their reference on Victims of Crime: *The Role of Victims of Crime Report* (n 38).

194 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (Final Report Nos 114 and 128, October 2010) vol 2, 1125 [24.96]; Bluett-Boyd and Fileborn (n 77) 57; *The Role of Victims of Crime Report* (n 38) 45–6 [4.9]–[4.21].

195 *The Role of Victims of Crime Report* (n 38) 47 [4.22], quoting Director of Public Prosecutions (Vic), Submission No 23 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (6 October 2015) 12 [67].

196 *The Role of Victims of Crime Report* (n 38) 47 [4.25], citing Victoria Police, *Future Directions for Victim-Centric Policing* (Policy Statement, August 2015) and Victoria Police, *Victoria Police Corporate Plan 2015–18: Year 1* (Report, September 2015).

and engage with this historically silent group. This offers law reformers a new opportunity to gain a deeper understanding of the needs of victims.

The two advocates featured in this article have already had great success in agitating for meaningful law reform. Saxon has instigated much needed updating of consent laws in Australia. Nina has successfully lobbied for outdated victim gagging laws to be repealed. Their success highlights the benefits to the legal system of having such voices included in future attempts at law reform, as their advocacy has enabled law reformers to better understand the unique and complex disadvantages that victims face in the adversarial system of justice.

Technology has provided victims of sexual assault with a platform they feel more comfortable actively engaging with. In one sense the criminal justice system now faces new competition from online justice in their quest to engage this group of citizens. Online sharing offers victims social recognition, validation and access to an online community of support, including an 'ever-expanding global network of like-minded anti-rape activists and supporters'.¹⁹⁷ Rather than perceiving the sharing of experiences online and in the media as counter to the work of the criminal justice system, legal institutions should consider appropriate ways to use these forums to engage with survivors and learn about their unique perspective.

The third step is to address the problem by implementing law reform that is accurately targeted to reduce the gap. The extensive attempts at law reform in jurisdictions such as Victoria shows that governments, courts and law reformers are eager to fix the access to justice problem. This goodwill has reaped little reward because most law reform efforts have been based on a two-dimensional understanding of the problem. If a third dimension, the victim's perspective, is added to law reformers' understanding of the access to justice problem, it increases the chance that the law reform that they formulate will be based on a holistic view of the problem. Consequently, the law reform implemented will be more effective in addressing the problem.

Embracing the views of victims in law reform initiatives is not expensive and bears little risk or downside. With information and sophisticated education strategies, any potential risks can be minimised. Involving victim advocates in law reform initiatives offers a novel approach to a vexed issue that has not responded to traditional reform. This new voice in the criminal justice landscape promises to provide valuable input into reforming criminal laws and procedures in order to encourage historically reticent sexual assault victims to participate in the legal system.

The online activities of sexual assault advocates not only offer victims a genuine voice in law reform but are also likely to instil confidence in victims to come forward, as these victim advocates are leading by example. Further, their presence online and in the media also enables them to engage and educate the wider community directly. In involving advocates with law reform activities, the legal system is reaching out to the victims who have joined the online victim community,

197 Powell, 'Seeking Informal Justice Online' (n 180) 232.

as the advocates will keep their constituents informed. This is a new way in which justice systems can be seen to be listening to victims and involving their perspective in reshaping the role of the victim in the criminal justice system.

The educative impact that reaching out to the online community of sexual assault victims might have on improving their access to justice can be explained by reference to the Chief Justice of Canada's definition of access to justice; access to justice 'means knowing your rights and knowing how our legal systems work'.¹⁹⁸ Engaging in dialogue with a previously unreachable group of anonymous victims offers the justice system a chance to provide direct factual information about victim rights and how the legal system works. This is yet another way through which engaging with victim advocates and their constituents (eg online social media followers or communities) promises to improve the justice gap.

This new approach to law reform promotes a dialogue and collaboration between historically silent sexual assault victims and legal institutions. In doing so, the legal system is actively acknowledging that victims play a vital role in securing community safety and justice. The more legal systems treat victims as genuine participants in the criminal justice system rather than as mere witnesses for the prosecution, the more likely the victims will be willing to engage in a system that has historically forced victims to 'to stay hidden in the shadows'.¹⁹⁹

198 Wagner (n 4).

199 Funnell, 'LetHerSpeak' (n 131), quoting the victim, Grace Tame.