

Rape & Sexual Assault Research & Advocacy (RASARA)

A TARGETED RESPONSE TO SEXUAL VIOLENCE

A submission to the Parliamentary Inquiry into Family,
Domestic and Sexual Violence

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Introduction

Rape & Sexual Assault Research & Advocacy (RASARA) is an independent, not-for-profit organisation established to develop an evidence base for addressing sexual violence across Australia and to advocate for best practice in community and legal responses to rape and sexual assault against adults and children.

RASARA's mission is to produce and amplify research that drives reform to the laws and systems that contribute to the prevention and response to sexual violence. The members of RASARA include:

- *Dr Rachael Burgin, Swinburne University*
- *Saxon Mullins, survivor-advocate*
- *Professor Jonathan Crowe, Bond University*
- *Dr Trishima Mitra-Kahn, Women with Disabilities Australia*
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- *Nina Funnell, journalist and survivor-advocate*
- *Georgie Burg, survivor-advocate*

More information about RASARA is available at rasara.org.

Following the announcement of a review into the justice system's response to sexual violence by the Victorian Law Reform Commission, the ongoing commitment of RASARA is to advocate for a targeted response and focus on sexual violence in the National Plan to Reduce Violence Against Women and Children.

This submission addresses three primary themes in addressing the terms of reference of the Inquiry:

1. The requirement of a targeted, specific response to sexual violence.
2. All Australian States and Jurisdictions to legislate a standard of 'affirmative consent' in relation to sexual offences.
3. Survivor informed recommendations which recognise the intersections of marginalisation that are experienced among survivors, including a focus on 'the trauma of the process of justice'.

This is the second submission made to the Inquiry by RASARA. The accompanying submission has a focus on comprehensive relationships and sex education as a primary prevention of sexual violence and is led by Katrina Marson.

I THE REQUIREMENT FOR A TARGETED, SPECIFIC RESPONSE TO SEXUAL VIOLENCE

Objectives in the development of the existing National Plan to Reduce Violence Against Women and Children included national coordination strategies to reduce violence against women, prevention and education strategies, emphasising respect and dignity within relationships, support for gender equity and accountability for perpetrators of violence towards women and children.

It is appropriate to say these aims have failed in relation to sexual violence. Conviction rates for sexual offences remain low, and in some jurisdictions, fewer cases are being referred for prosecution. At the same time, the Australian Bureau of Statistics (ABS) figures (Australian Bureau of Statistics, 2020) show that most jurisdictions (except for Queensland and Western Australia) experienced increased reporting rates, with significant variations between jurisdictions. Attrition rates are also high for sexual offences.

Increased research funding, and a focus on a sexual violence in the next National Plan are essential if the overall objectives to reduce and eliminate violence against women and children are to be achieved. Further work to understand the drivers of sexual violence will help to ensure that both the community and justice system responses are evidence-based and cost-effective. This would support community expectations of a reduction in this type of violence.

II ALL AUSTRALIAN STATES AND JURISDICTIONS TO OPERATE UNDER A STANDARD OF ‘AFFIRMATIVE CONSENT’ IN RELATION TO SEXUAL OFFENCES

An affirmative standard redefines consent in positive terms. That is, consent is something one actively gives to another. Affirmative consent requires that a person demonstrates willingness to engage in a sexual act either verbally or through their actions (Burgin, 2019a; Burgin & Flynn, 2019).

There is a wide variation across jurisdictions at law about how affirmative consent should be legislated. For instance, following reviews into consent in sexual offences by the New South Wales Law Reform Commission, a draft proposal was released that included ‘explicitly clarifying the meaning of consent’. A similar review has been recommended in the Northern Territory (Roberts 2020), and the law in Queensland on sexual consent and the ‘mistake of fact’ excuse is also currently under review.

Additionally, a review of the justice system’s response to sexual violence has been announced for Victoria. The Victorian Law Reform Commission is tasked with producing recommendations that could ‘reduce the trauma’ for survivors in their dealings with the justice system, as well as improving responses to sexual violence. This is an important contrast to the approaches taken by reviews in Queensland and New South Wales which are both characterised by narrow terms of reference that focus solely on the offences of rape or sexual assault and the definition of consent. Instead, the Victorian Commission is to look broadly at all relevant legislation, policy and importantly, research that are relevant to the issues covered in the review.

This means that the Commission will be able to look beyond simply the definition of consent and the fault element of the relevant offences, allowing the Commission to review the handling of sexual offences cases from reporting to trial decision, including an analysis of the way that statutes function in relation to each other. This is something the NSW and Queensland reviews have been unable to do, greatly limiting the chances that the reforms will be effective.

Further significant areas for review in the area of affirmative or communicative consent include:

- Utility of expert evidence to dispel rape myths (ANROWS, p.14)
- Reviews of sexual history evidence (McGlynn n.d.)
- Victims' right to review decisions not to prosecute (Iliadis and Flynn 2018; Kirchengast 2016, Crown Prosecution Service 2020)
- Reform to the excuse of mistaken belief in relation to sexual consent, given its potential to undermine affirmative consent models (Crowe and Lee 2020)
- An affirmative model of consent that is understood in personal, societal, legal and government levels.

Accordingly, RASARA calls for holistic reviews into the broader justice response to sexual violence, including survivor informed strategies to mitigate trauma for survivors.

III 'THE TRAUMA OF THE PROCESS OF JUSTICE'

The committee should have regard to:

- a) The necessity for specialist sexual violence courts

In 2019, a specialist sexual violence court pilot program in New Zealand demonstrated success with relation to best practice in management of trauma for sexual assault survivors.

Case management progression, improvements in trial quality, enhanced trial preparations for victim-survivors, judge engagement and sensitivity with regard to unacceptable questioning and intervention, defendant plea management processes and dedicated case managers have contributed to lowered rates of anxiety in the survivors who participated (District Court of New Zealand 2019).

- b) The necessity for sexual violence victims to have legal representation

There is considerable research (Braun 2014, 2019; Iliadis 2020; Freiberg and Flynn forthcoming) to indicate that survivors of sexual violence hold higher risks of re-traumatisation by the criminal justice system than other victims of crime. The adversarial nature of questioning, processes of testifying, inability to control the environment and inability to be adequately supported during the trial process can have long term negative outcomes on survivors who can wait years for their cases to proceed to trial.

The right to be represented by legal counsel who are sensitive to the nature and challenges of trial processes may help to increase low reporting rates, increase conviction rates, demystify the legal process and enhance the confidence, courage and self-esteem of survivors (Burgin 2019b; Freiberg and Flynn forthcoming).

- c) Standardised data collection for police, prosecution offices and courts

The Australian Bureau of Statistics (2020b) has noted that crime reporting methods vary between Australian jurisdictions. Moreover, methods have changed over time within jurisdictions, meaning the rate of sexual offence reports per 100,000 people cannot always be compared from one year to the next within a particular state or territory. Establishing standardised data collection methodologies across all jurisdictions would allow law makers and researchers to have, for the first time, a clear view of which policies are effective and where additional efforts are required to achieve the desired outcomes.

d) An Indigenous-led strategy to sexual violence

Aboriginal and Torres Strait Islander women are at an increased risk of sexual violence. Given the lived experience of generational violence and trauma, as well as the links between this experience of sexual violence and the theft of culture, lands and waters ('colonisation'), such violence can only be prevented or adequately responded to through Indigenous-led strategy.

The need for self-determination in Indigenous communities' efforts to reduce sexual violence is well understood, however as detailed in point (c) above, data collection is not standardised. A telling example is that the ABS (2020a) provides comprehensive data on the Indigenous status of both victims and offenders for sexual offences (among other offences), but only for New South Wales, South Australia, the Northern Territory and, to a limited extent, Queensland. Standardisation as proposed here could inform more targeted strategies for adoption by Indigenous communities across Australia.

That said, in the four jurisdictions where data is available, the reporting rates of sexual violence against Indigenous victims are consistently more than double those of non-Indigenous victims, highlighting the need for specific measures in these communities.

e) An LGBTQI+ led approach to sexual violence

f) A framework to protect the rights of People with Disabilities from sexual violence.

For historic reasons, both the LGBTQI+ and disabled communities are less likely to report offences to police than members of the general population (Henry et al 2020), and it's understood that the higher rates of sexual violence experienced by both communities requires specific attention in a way which is not undermined by a lack of trust in authority. Resolving these issues will require efforts led by members of these communities, in conjunction with policy makers.

g) Humanising the traumatised – a holistic response

Amongst survivors of sexual violence, the perceived dehumanising nature of justice is a key driver of low rates of reporting offences. The 'trauma of the process of justice' remains a significant deterrent and cause of fear for many survivors who have survived their attacks but doubt their courage when confronting an adversarial court process in which, all too often, the process demeans and challenges them, while the judges' sentencing remarks reflect kindly on the future potential of the offender, at the same time as minimising the impact of the offence on the survivor and their future (Braun 2019).

Specialist sexual violence courts as recommended above would alleviate the hostility to which traumatised victims – usually women and children – are exposed. Such courts could allow appropriate trauma-informed practices including permitting children to hold a comfort toy while testifying; removal of the requirement for survivors to sit with their offenders and the offenders' supporters during sentencing hearings; management of survivors in physical distress (vomiting, nosebleeds) while testifying; and introducing specialist debriefing to sexual violence survivors following criminal cases (Burg 2019, Burg 2020, Milligan 2018).

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