



Australian Government
Australian Institute of
Family Studies



Australian Government
Attorney-General's Department

Understanding adult sexual assault matters:

Insights from research and
practice

AN EDUCATIONAL RESOURCE FOR THE JUSTICE SECTOR



The Australian Institute of Family Studies (AIFS) and the Attorney-General's Department (AGD) acknowledge the Traditional Owners of Country throughout Australia and recognise their continuing connection to lands and waters. We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders past and present.

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References to case law and legislation in this resource are accurate as at 31 May 2024.

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Help and support

The contents of this resource are sensitive. It includes detailed discussions about sexual offences against adults, and stories from victims and survivors of sexual offences.

Reader discretion is advised. If you are struggling at any time during or after reading the resource, please seek help and support if you need it. The following services are available to assist.

1800RESPECT

Call: 1800 737 732

Visit: www.1800respect.org.au

Offers counselling, information and referrals for anyone who has experienced, or is at risk of, domestic, family and/or sexual violence either online (web chat or video call) or by phone (call or text)

Beyond Blue

Call: 1300 224 636

Visit: www.beyonddblue.org.au

Offers counselling and information for anyone who may be experiencing anxiety, depression or suicidal ideation both online (web chat or online forums) or by phone (call)

MensLine Australia

Call: 1300 789 978

Visit: www.mensline.org.au

Offers counselling for men with family relationship concerns, including family violence either online (web chat or video call) or by phone (call)

13YARN

Call: 13 92 76

Visit: www.13yarn.org.au

Offers yarning opportunities for Aboriginal and Torres Strait Islander people who are feeling overwhelmed or having difficulty coping – by phone (call)

You can find support near you, via:

The Australia's National Research Organisation for Women's Safety (ANROWS) directory:

www.anrows.org.au/support-directory

The National Association of Services Against Sexual Violence (NASASV) directory:

www.nasasv.org.au/support-directory

If you or someone else is in immediate danger, call Triple Zero: 000

If you or someone else is in crisis, call Lifeline: 13 11 14

Development of this resource

This resource was developed by AIFS on behalf of AGD to support police, lawyers and judicial officers to implement evidence-based best practice in matters involving sexual offending against adults. This work would not have been possible without the generous contributions of the Standing Council of Attorneys-General Working Group on Criminal Justice Responses to Sexual Assault and other sexual violence specialists, academics, advocates and justice professionals who AIFS consulted with.

This resource has drawn from research that has directly consulted with adults with a lived or living experience of a sexual offence, to incorporate their voices throughout. **All readers are encouraged to listen and learn from the critically important voices of victims and survivors.**

The development of this resource was informed by a literature review that synthesised research evidence from over 100 relevant sources from peer-reviewed Australian and international literature. We have prioritised Australian sources and used national statistics where possible.

Focus of this resource on sexual offending against adults

This resource is focused only on sexual offending against **adults** (i.e. people aged over the age of consent in the jurisdiction where the offence occurred), described as 'sexual assault' ([defined below](#)).

Sexual offending against children ('child sexual abuse') is an important issue that warrants separate consideration. Therefore, child sexual abuse is **not** addressed in the scope of this resource.

If you need information or support about child sexual abuse, please refer to:

- **The National Office for Child Safety** fact sheet about child sexual abuse: www.childsafety.gov.au/resources/child-sexual-abuse-get-facts
- **The National Office for Child Safety** support directory: www.childsafety.gov.au/get-support
- **Bravehearts** information and support line: 1800 272 831 or website: www.bravehearts.org.au

If you believe a child is in immediate danger, call **Triple Zero: 000**

If you or a child you know is in crisis, call **Kids Helpline: 1800 55 1800** or **Lifeline: 13 11 14**

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Understanding sexual offences against adults

Key terms

‘Consent’

There have been recent and ongoing reforms to legal definitions of consent.¹ Each jurisdiction currently has a slightly different **statutory definition** for the purposes of their respective sexual assault laws. Given this dynamic environment, this resource will focus on consent as a ‘free and/or voluntary’ agreement to a sexual act, noting this is recognised in each jurisdiction.²

The *Commonwealth Consent Policy Framework: Promoting Healthy Sexual Relationships and Consent Among Young People* (‘Commonwealth Consent Framework’) recognises ‘free and voluntary’ agreement as one of 5 core concepts of a **community definition** of consent.³ The framework also states:

- Consent must be affirmative and communicated, specific and informed, ongoing and mutual, and reflective of capacity.⁴
- Consent is negated in some circumstances where a person could not have given free or voluntary consent. A range of factors, including but not limited to age, intoxication and coercion, consciousness or other impairment, can affect a person’s capacity to consent.⁵

The Australian Government’s campaign, *Consent Can’t Wait*, aims to improve community understanding and attitudes on consent and respectful relationships, to reduce the incidence of sexual violence in Australia. More information on the campaign and supporting resources are available at www.consent.gov.au.

‘Sexual violence’

In this resource, ‘sexual violence’ refers to unwanted sexual activity that occurs without consent.⁶ Sexual violence can take many forms that are not always physical.⁷ Sexual violence is always capable of causing profound harm.⁸

Certain forms of sexual violence are criminalised in every Australian state and territory (‘jurisdiction’). These are classified as ‘sexual offences’ under the Australian and New Zealand Standard Offence Classification.

‘Sexual offences are acts, or intent of acts, of a sexual nature against another person which are non-consensual or where consent cannot be given.’⁹

‘Sexual assault’

This resource uses the term ‘sexual assault’ to refer to forms of sexual violence against adults that is **physical** in nature. The laws regarding sexual offences against adults differ in each Australian jurisdiction. Not all jurisdictions use the term ‘sexual assault’ in the same way, and some do not use that term at all.

To align with the definition used in the Standing Council of Attorneys-General *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–2027* (‘SCAG Work Plan’), this resource uses the term ‘sexual assault’ to broadly refer to:

‘criminalised sexual violence or harm that involves any physical contact, threat or intent of contact of a sexual nature against a person’s will.’¹⁰

Language and terminology

The particular language and terminology used in this resource is designed to reflect its context: sexual assault in the justice system, with a focus on the criminal justice system. This language and terminology is not intended to be exhaustive or reductive, nor to minimise the experiences or perspectives of people who do not identify with it.

- It uses binary gendered language in some instances. This aligns with the *National Plan to End Violence Against Women and Children 2022–2032*. Further, it recognises the gendered nature and statistics of sexual violence.
- It refers to adults who have experienced a sexual offence as ‘victims and survivors’ in most instances. This recognises the fact that some people prefer the term ‘survivor’ because it reflects the resilience and empowerment involved in overcoming the harms associated with their experience, while others prefer the term ‘victim’ because it more directly acknowledges those harms. We acknowledge some people do not identify with either term.
- It refers to people who have reported being victimised by a sexual offence as ‘complainants’ or ‘witnesses’ when discussing them in specific criminal justice contexts.
- It refers to people who have been accused of committing a sexual offence as ‘accused’ when discussing them in specific criminal justice contexts. This is to acknowledge the presumption of innocence and the role of fairness in Australia’s adversarial criminal justice system. It is not to imply that complainants cannot be victims and survivors or that those accused cannot be perpetrators.
- Its focus on the criminal justice system encompasses both policing and court contexts. The premise for this resource acknowledges that police and court responses must be improved to prevent further harm to victims and survivors that is caused via their experiences of these responses.¹¹ While ‘justice’ may be different for each individual, many victims’ and survivors’ experiences of the justice system in delivering justice (both in process and outcome) may run counter to their expectations or views. Accordingly, the resource uses language that aims to fairly acknowledge, within the requirements of the criminal justice system, these victim and survivor experiences.

Sexual assault matters in the criminal justice system

Legal processes governed by the adversarial system

This resource does not seek to describe or represent the legal processes that exist in each Australian jurisdiction for determining sexual assault matters. Rather, it shares knowledge and resources that aim to equip police, lawyers and judicial officers who work within these processes with an accurate and evidence-based understanding of the ways that sexual assault cases can differ from false assumptions and stereotypes about them. In doing so, it seeks to counteract the potential impacts that these kinds of false assumptions and stereotypes can have on the functioning of these legal processes within the adversarial justice system.

Criminal legal processes for determining sexual assault under the adversarial justice system can be inherently challenging for people to go through. The challenges can be heightened for victims and survivors because:

... certain aspects of a criminal trial make it likely that testifying as a sexual assault complainant will always be difficult for many survivors of sexual violence. Factors such as the trial's adversarial nature, and the need for complainants to recount in detail experiences and information that they are socialised to understand as deeply personal, suggest that the process will always be challenging, if not distressing.¹²

Central to these legal processes is that an accused person can only be found guilty of an alleged offence (or offences) if the jury, or in some instances a judicial officer, is satisfied that each charge is proved beyond reasonable doubt (the standard of proof in criminal matters). The prosecution bears the burden of proving the offence and meeting this evidentiary threshold. Both the standard and the burden of proof are fundamental to the presumption of innocence – that is, that an accused person has the right to remain silent and to be presumed not guilty, unless and until they are found guilty.¹³

When a complainant makes an allegation of sexual assault against an accused, the ensuing legal processes must constitute a fair trial of the allegations in question. The concept of a fair trial is a broad one,¹⁴ requiring the court to protect the fundamental rights of an accused person,¹⁵ and ensure that the interests of the complainant and their family, and the public, are taken into account.¹⁶

Legitimacy and the influence of false assumptions and stereotypes

Within the adversarial criminal justice system, police, lawyers and judicial officers have particular roles and responsibilities, which require them to make decisions in accordance with the law. This may also include the exercise of discretion, applying relevant legal principles or considerations. The proper execution of these roles and responsibilities ensures that the principles of the adversarial system are upheld and both the processes and the outcomes in determining sexual assault matters are legitimate.

It is inappropriate for false assumptions and stereotypes about sexual assault, that are irrelevant under the law, to influence decisions by police, lawyers and judicial officers, and also decisions by the jury.¹⁷ If this occurs, it can not only compromise the legitimacy of the criminal justice system, it can threaten principles – like fairness – that the system seeks to uphold.

Why do we need to strengthen our understanding?

Sexual assault is widespread¹⁸

Sexual assault is common but underreported in our community. Many separate and intersecting factors can increase the risk of experiencing sexual assault ('risk factors'), and create barriers to reporting, seeking help and/or seeking justice for sexual assault. Key risk factors include:

- **Being a woman.**¹⁹
 - In 2022, the victimisation rate for females in Australia (206 victims and survivors per 100,000 females) was more than 5 times that of males (39 victims and survivors per 100,000 males).²⁰
- **Being subject to a power imbalance favouring the perpetrator, potentially arising from a range of personal, interpersonal, cultural and/or structural circumstances:**²¹
 - Experiencing discrimination and disadvantage can put people at increased risk of experiencing sexual assault, create barriers to criminal justice for those experiences (see [Insight 12](#)), and render those experiences invisible (see [Insight 13](#)).²²
 - This is particularly likely for people who experience overlapping circumstances, which can be a source of discrimination and/or disadvantage ('intersectional discrimination').²³

Circumstances identified as risk factors and as possible sources of discrimination do not cause sexual assault. Perpetrators cause sexual assault. This includes perpetrators exploiting circumstantial factors to enable perpetration of sexual assault.

Australian national statistics indicate that most recorded perpetrators of sexual assault are men. For example, key statistics about offenders drawn from police records in each Australian jurisdiction indicate that 97% of accused people who had proceedings against them during a 12-month financial year reference period at some stage between 2010-11 and 2019-20 were male.²⁴

There are numerous factors that contribute to common gendered patterns of sexual violence (i.e. committed by men against women), including the condoning or minimisation of violence against women, limitations on women's independence in public and private life, rigid gender stereotypes, and cultural and social forms of masculinity that emphasise male aggression, dominance and control.²⁵

Sexual assault is often misunderstood

The *2021 National Community Attitudes towards Violence against Women Survey* published in 2023 indicates that a small (but significant) proportion of the Australian public hold views that contribute to a social environment in which sexual assault is normalised, minimised and/or misunderstood. The findings indicate problematic attitudes and beliefs that represent false assumptions about what sexual assault is or is not, and stereotypes about who women and men are and how they behave.²⁶

These views can create a social context that defaults to mistrusting women and excusing men from allegations of sexual assault.²⁷ These defaults are not a balanced, just way of trying the discrete facts involved in any given allegation according to the principles inherent in the criminal justice system. Further, they may cause victims and survivors to experience (or anticipate) blame, shame and stigma, which, in turn, creates internal barriers to reporting and seeking help for sexual assault.²⁸

Societal misunderstandings of sexual assault may be influenced by false assumptions and stereotypes about consent, the dynamics and nature of offending, and complainants' behaviour. False assumptions and stereotypes may be used (often unintentionally) to understand sexual assault cases in more simple and predictable terms.²⁹ Over time, these false assumptions and stereotypes can become a framework, or 'mythology', which can become the implicit criterion for understanding or testing cases of sexual assault.³⁰ Victims and survivors may even assess their own experience of sexual assault according to whether it matches this mythology, and feel dissuaded from labelling it as 'sexual assault' if it does not.³¹

Research shows that false assumptions and stereotypes about sexual assault can filter into the criminal justice system.

This may be due to personal biases and attitudes or community beliefs that are brought into the system – for example, by jurors who may attach ‘moralistic’ relevance to stereotypical facts.³² It may also be due to systemic factors – for example, if legal culture or practice stemming from the nature of the adversarial system focuses on stereotypical facts and/or is influenced by the legacy of historical laws in relation to defences, burdens of proof, evidence or procedures.³³ Numerous Australian studies have suggested that it may be easier to deliver justice for cases that involve stereotypical facts. This may be because these cases happen to involve facts that may be easier to prove – for example for evidentiary reasons,³⁴ or because they are falsely assumed to be more ‘real’ or credible.³⁵

Irrespective of how they get there, once false assumptions and stereotypes enter the justice system, they can negatively affect procedures and outcomes in sexual assault cases by:

- influencing prosecutors’, police officers’ and jurors’ interpretations of sexual assault cases³⁶
- negatively affecting victims’ and survivors’ experiences in the justice system³⁷
- undermining the justice system’s capacity to prevent future harm (and the fear of harm) associated with sexual assault – noting that false assumptions and stereotypes can cause the justice system to disproportionately focus on a narrow range of factual scenarios,³⁸ and/or undermine accountability or deterrence for all (not just stereotypical) perpetrators³⁹
- presenting a risk to the integrity of the justice system,⁴⁰ given that ‘the concept of a fair trial extends beyond the interests of the defendant to those of complainants, witnesses and society.’⁴¹

Counteracting the influence of false assumptions and stereotypes about sexual assault is critical. This may assist victims and survivors to feel more comfortable engaging with the criminal justice system (if they want to), and assist the system to fairly and rigorously process and deliver justice to sexual assault cases.

What can you expect while reading this resource?

Aim

This resource aims to support police, lawyers and judicial officers to implement evidence-based best practice in matters involving sexual offending against adults.

- It provides accurate information about various social, scientific and legal factors regarding sexual assault to counteract false assumptions and stereotypes.
 - The research evidence presented in this resource is intentionally general in nature. It is not necessarily relevant and, therefore, admissible as evidence in sexual assault matters generally, nor is it indicative of a specific accused person's guilt or otherwise in a particular case. Decisions made within the criminal justice process to determine any sexual assault matter (such as charging a person or finding an accused person guilty) must be based on consideration of the available evidence that is admissible against the alleged facts in the case.
- It highlights practice examples and demonstrates approaches that may assist in lessening the influence of false assumptions and stereotypes that can undermine best practice.
 - These practice examples are not intended to be exhaustive, particularly given the ongoing reforms and developments in relation to sexual assault. They are drawn from various Australian jurisdictions and, therefore, are not necessarily binding law, or required practice, in other jurisdictions.

Approach

In keeping with this aim, the resource adopts the following approach.

- **Focuses on practical application:** developed with a view to the complex realities of working with sexual offending against adults through the lens of the law.
- **Incorporates recent evidence:** draws on research about sexual offending against adults, to incorporate current approaches and analyses.
- **Features new trends in law and policy:** draws on recent trends in justice approaches to sexual offending against adults, to highlight how they might inform best practice.
- **Complements existing resources:** cross-references resources that police, lawyers and judicial officers might use in their practice, to help guide and supplement their approaches to sexual offending against adults.

The resource is divided into 13 'Insights' that draw on research to present nuanced information to counter false assumptions and stereotypes about sexual assault. To avoid inadvertently reinforcing those false assumptions and stereotypes, this resource emphasises correct information ('the reality') through its format and sequencing, and de-emphasises incorrect information through the use of adequate context and forewarnings ('false assumptions').⁴² Each Insight canvasses Australian legislation and/or practice examples to identify methods for police, lawyers and judicial officers to apply this information in practice ('practice examples').

Insights directly respond to some of the false assumptions and stereotypes that can arise in relation to sexual assault, providing evidence and examples that may assist in counteracting their influence in the criminal justice system. This is done in a general way that also recognises that the experiences of victims and survivors are diverse.

This resource does not aim to act as a substitute for materials that provide a thorough reflection on the diverse lived experiences of all victims and survivors. In particular, this resource is not a substitute for materials that reflect on the unique experiences of victims and survivors who experience discrimination and disadvantage.

Insights 11, 12 and 13 introduce some of the factors that can affect victims' and survivors' experiences. Readers are strongly encouraged to refer to the 'practice examples' and 'further reading' provided in those Insights, to consolidate their understanding and hone their skills in relation to engaging with victims and survivors in the course of their work in the criminal justice system.

This resource intends to supplement and not replace specialised training.

Guide

This resource provides detailed information about sexual assault and is not necessarily intended to be read in one sitting. Readers may choose to navigate to a specific insight or practice examples relevant to their role, and may use the table below to assist with navigation.

Insight	Topic
Insight 1	There are multiple forms of sexual assault, which all have the potential to be profoundly harmful
Insight 2	Sexual assault does not always involve, resistance, physical force or physical injuries
Insight 3	Sexual assault is most often perpetrated by people who victims and survivors know, like intimate partners and known peers
Insight 4	Consent to sexual acts cannot be inferred from a person's physical or social characteristics
Insight 5	Consent to one sexual act does not mean consent to any and all other sexual acts, or to future sexual acts
Insight 6	Alcohol and other drugs affect adults' capacity to consent to sexual acts, and do not diminish perpetrator responsibility for sexual assault
Insight 7	There is no 'normal' way for a person to behave following sexual assault
Insight 8	Memory recollection 'errors' are normal and common after sexual assault
Insight 9	Many victims and survivors delay reporting their experience of sexual assault
Insight 10	False allegations of sexual assault are not common
Insight 11	There are significant barriers to justice for sexual assault matters
Insight 12	Victims and survivors can face additional barriers to criminal justice for sexual assault due to discrimination and/or stereotypes
Insight 13	Victims' and survivors' experiences of sexual assault may be overlooked or ignored due to discrimination and/or stereotypes

INSIGHT 1

There are multiple forms of sexual assault, which all have the potential to be profoundly harmful

All forms of sexual assault are serious and have the potential to be profoundly harmful. Attempting to measure or compare that harm can ignore or minimise the diverse lived experiences of victims and survivors. Each case, and any associated harms, should be assessed on the particular facts and according to all the circumstances of that case.⁴³

For the purposes of this resource, sexual assault can include:

- non-consensual physical acts that involve penetration, such as assault with intent to engage in non-consensual penetration of the vagina or anus, non-consensual penetration of the vagina or anus, or non-consensual oral sex⁴⁴
- non-consensual physical acts that do not involve penetration, such as performing non-consensual oral sex.⁴⁵

There are false assumptions and stereotypes about what constitutes sexual assault and whether it is harmful. These can be linked to certain stories (also described as ‘scripts’) about seduction that blur the lines between consensual sex and sexual violence,⁴⁶ and minimise forms of sexual assault that are less easily recognised or understood to be serious.⁴⁷

✗ THE FALSE ASSUMPTION

‘Some forms of sexual assault are more harmful than others.’⁴⁸

✓ THE REALITY

All sexual assault is inherently violent and has the potential to be profoundly harmful. As then Justice Kirby noted in *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43 at page 62, this violence is not necessarily predominantly sexual; it involves an assault upon ‘the person, privacy, autonomy and human dignity of a victim and survivor.’⁴⁹

Sexual assault involves a violation that is achieved through sexual behaviour – which may be short or long in duration, subtle or overt in nature, and involve physical contact or a threat, or intent of physical contact. Sexual assault may be a one-off act or form part of a pattern of intentional acts of controlling and/or exploitative behaviour.⁵⁰

Sexual assault might not necessarily involve penetration. Historically, penetration shaped legal and social understandings of sexual assault.⁵¹ However, as understandings have evolved to recognise other forms of sexual behaviour that may be used to inflict violence, penetration is no longer a determinative feature for all offences covered by sexual assault.

No matter what form it takes, an incident of sexual assault has the potential to be profoundly harmful. The harm connected to any given sexual assault should be understood according to the unique context and facts involved, and not in relative terms. This includes major physical and mental health and welfare issues, which can be wide-ranging and lifelong.⁵²

The Australian Institute of Health and Welfare classifies sexual assault as a ‘major health and welfare issue in Australia and worldwide.’⁵³ Harms that victims and survivors may experience include:

- financial harm, including the need to take time off work after the offence⁵⁴ and the costs for accessing health services and mental health support, which may include higher costs if accessing such services without referrals⁵⁵
- physical harm (that may require hospitalisation),⁵⁶ including short-term injuries such as bruises inflicted during an assault⁵⁷ and long-term injuries such as ongoing bodily pain⁵⁸

- psychological distress, including anxiety and fear that may result in changes to social and leisure routines, sleep routines and/or eating habits⁵⁹
- high rates of post-traumatic stress disorder (PTSD),⁶⁰ involving complex and lifelong healing.⁶¹

PTSD is a psychiatric disorder that can develop after exposure to a traumatic experience. Its symptoms can include:⁶²

- re-traumatisation (i.e. remembering the traumatic experience)
- avoidance of cues that evoke the traumatic experience
- negative emotions and thoughts
- hyperarousal (i.e. traits of irritability, panic and disruptions in sleep and cognitive function).

Victims and survivors may also experience ongoing cumulative harm from a combination of the specific harms listed above, and from inadequate responses when seeking help (e.g. from the justice and/or medical systems) (see [Insight 11](#)).⁶³

Some of the harms that the broader community may experience include reductions in general feelings of safety and impacts on the economy due to the public costs associated with providing criminal, legal, health, housing and other support services to victims and survivors.⁶⁴



PRACTICE EXAMPLES

Australian research shows that complainants reflect negatively on interactions with police when they do not appear to take reports of sexual assault experiences as seriously as other crimes.⁶⁵ Negative justice system experiences that involve disbelieving, or casting blame on, a complainant can give rise to 'secondary victimisation'. This is sometimes described as a 'second assault'.⁶⁶

Each allegation of sexual assault is unique and should be taken seriously, within the requirements of the criminal justice system – rather than dismissing certain allegations according to stereotypical ideas of 'real' sexual assault or an artificial hierarchy of perceived seriousness based on these kinds of stereotypes.⁶⁷

Police responses to allegations of all forms of sexual assault

Positive engagements with police lead some victims and survivors to report feeling heard, supported and understood when discussing their sexual assault experience.

- A study involving interviews with sexual assault workers and lesbian, gay, bisexual, trans/transgender, queer, intersex, asexual and other sexually or gender diverse (LGBTQIA+)⁶⁸ community workers highlighted the importance of consistent responses to allegations of all forms of sexual assault, not only those that involve penile penetration.⁶⁹ For example, a sexual violence support worker indicated that it can be 'really meaningful' when a victim and survivor of a form of sexual assault that is 'often dismissed as less harmful (e.g. oral assault) is taken seriously by police, referred to a sexual violence service, and offered a forensic medical examination'.⁷⁰
- A study examining the lived experience, and support needs, of victims and survivors who experience sexual assault in the family violence context highlighted the benefits of supportive, specialised and victim-centred policing responses. These practices were observed in the ways that officers in specialised police sexual offence units (Sexual Offences and Child Abuse Investigation Teams, referred to as SOCITs) engaged with victims and survivors. One stakeholder noted that 'SOCIT has been very supportive to speak with the women and I think that gives them a voice and an avenue to take action'.⁷¹

Judicial decision-making reflecting an understanding of the multiple forms of sexual assault and their potential harms

- In *R v Hibberd* [2009] NSWCCA 20 at [56], Justice Price noted that '[t]here is no canon of law which mandates a finding that digital penetration must be considered less serious than other non-consensual acts of sexual intercourse'.⁷² Rather, 'each case will depend on its own facts'.⁷³
- Justice Simpson in *R v AJP* [2004] NSWCCA 434 at [24], and Justice Wheeler in *C v The State of Western Australia* [2006] WASCA 261 at [35], have noted that there is no 'hierarchy' of non-consensual sexual acts.⁷⁴
 - As Justice Wheeler put it: '[i]t is, in my view, important to stress that the seriousness of the offence will be determined by all of the circumstances of the case'.⁷⁵



READING

Some key resources for reading:

- George, Amanda-Jane et al., Australasian Institute of Judicial Administration, Australian Attorney-General's Department, CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, [*Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review*](#) (2023)
- Australian Institute of Health and Welfare, [*Sexual Assault in Australia*](#) (Media Release, Cat. No: FDV 5, 28 August 2020) <[Sexual Assault in Australia, Summary - Australian Institute of Health and Welfare \(aihw.gov.au\)](#)>
- Department of Social Services, Commonwealth of Australia, [*The National Plan to End Violence against Women and Children 2022-2032*](#) (2022)
- KPMG and Centre for Innovative Justice, RMIT, [*'This is My Story. It's Your Case, but it's My Story': Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters*](#) (Report, July 2023)
- Women's Safety and Justice Taskforce, [*Hear Her Voice*](#) (Report 2, Volume 1, 2022)

INSIGHT 2 Sexual assault does not always involve resistance, physical force or physical injuries

Sexual assault is about the absence of consent, not the presence of force or injury.

Although some sexual assault cases may involve force and/or cause physical injury, these factors are not reliable metrics to measure, or understand, sexual assault.

In all Australian jurisdictions, physical force is not an element of the criminal offences that comprise sexual assault (as defined in this resource). The 2021-22 Personal Safety Survey estimated that, of the women who had experienced sexual assault by a male within 10 years prior to the survey, only 23% were physically injured in the most recent incident.⁷⁶

Despite this, false assumptions and stereotypes about sexual assault continue to frame it with reference to force or injury. False assumptions endure about sexual assault being 'something perpetrated by a stranger; committed in a public place; and one that results in injuries or in which a weapon was used.'⁷⁷

X THE FALSE ASSUMPTION

'A victim and survivor of sexual assault would sustain physical injuries,⁷⁸ because the perpetrator would need to use physical force to commit the assault.'⁷⁹

'A victim and survivor of sexual assault would resist and fight the perpetrator.'⁸⁰

✓ THE REALITY

Sexual assault does not necessarily involve the use of force and may not result in physical injury. Physical injury does not feature in most reported cases of sexual assault in Australian national statistics.⁸¹

The low recording of physical injury in sexual assault cases may be linked to numerous factors.

- There can be difficulties with gathering forensic evidence (if any exists). This includes issues that delay or prevent victims and survivors from accessing forensic examinations and/or limit the relevance of the evidence they produce (see [Insight 11](#)). These issues mean that, even if a victim and survivor does sustain physical injuries from a sexual assault, those injuries may not be documented. Further, even if a physical injury is documented, it may not be relevant as proof of the alleged facts in dispute. For example, it is very difficult to determine whether an injury sustained during sexual activity was a result of that activity being consensual or non-consensual.⁸²
- It is more common for victims and survivors to 'fawn' or 'freeze' in response to sexual assault than to 'flight' or 'fight'.⁸³ It is particularly likely for a victim and survivor to fawn or freeze if they know the perpetrator.⁸⁴ This may be because sexual assault is a 'relationship-based' crime that often involves complex interpersonal dynamics.⁸⁵

'Fawning' is a trauma response that involves complying with somebody who is posing a threat. It can even involve helping them to achieve what they want, to appease them and ultimately reduce the level of threat they pose.⁸⁶

'Freezing' is a trauma response that may involve going silent, still and/or limp to reduce feelings of emotional or physical pain, and to avoid further harm.⁸⁷

'Flight' refers to a trauma response that may involve avoiding or fleeing from danger.⁸⁸

'Fighting' is a trauma response that may involve attempting to gain control and power over danger by exhibiting aggressive, argumentative or otherwise violent behaviours in response to it.⁸⁹

The evidentiary difficulties described above mean that seeking to gather or rely on evidence that a defendant used force, or that a complainant sustained physical injury, is not a reliable way to understand or assess the credibility of a sexual assault allegation and 'may be unproductive'.⁹⁰



PRACTICE EXAMPLES

Sexual assault was historically understood as a crime that involved an element of force.⁹¹ Australian research demonstrates that there are ongoing false assumptions related to this that can impact current criminal justice processes.

- A study analysing 141 cases referred for prosecution found that almost half of the complainants did not sustain physical injuries during the course of the alleged assault.⁹² However, cases without evidence of physical injury were less likely to proceed to trial or sentencing.⁹³
- Another study found that some complainants blame themselves and/or struggle to acknowledge or understand their own sexual assault experiences if they did not involve stereotypical traits like physical violence or physical resistance.⁹⁴ Similar findings are also reflected in international research.⁹⁵

Findings from the Personal Safety Survey in 2016 also suggest that victims and survivors are more likely to report sexual assault if they were physically injured by it.⁹⁶

Understandings of consent regarding allegations of sexual assault should move beyond rubrics of sexual assault built around resistance, physical force and physical injury. They should encompass a more thorough and nuanced consideration of the wide range of facts that can be relevant to the issue of consent.

Legislation: consent and absence of resistance

Each Australian jurisdiction has legislative provisions that recognise that consent must be 'free and/or voluntary' (see also [Insights 4](#) and [5](#)).⁹⁷

Consent provisions in the Australian Capital Territory (ACT), New South Wales (NSW), Queensland, Tasmania, Victoria and Western Australia (WA) specifically recognise that consent is not inferable solely from the absence of resistance.⁹⁸

Jury directions: injury or violence

In NSW, Victoria and Queensland (date of commencement to be proclaimed), legislated jury directions state that the absence of injury or violence, or threats thereof, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.⁹⁹

Judicial decision-making rejecting absence of resistance as indicative of consent

The Supreme Court of Queensland noted in the case of *R v HCB* [2020] QCA 164, at [54], that it is open to the jury to reject any inference that the absence of forceful resistance indicates consent. This is open in circumstances where there is evidence that the complainant had a freeze response that precluded those actions at the time.¹⁰⁰ Further, the court noted at [58], that it is also open to the jury not to infer anything from the absence of physical injuries (i.e. that evidence may be interpreted neutrally, meaning it has no material bearing on the outcome).¹⁰¹



READING

Some key resources for reading:

- Department of Social Services, Commonwealth of Australia, *The Commonwealth Consent Policy Framework: Promoting Healthy Sexual Relationships and Consent Among Young People* (2023)
- Tidmarsh, Patrick and Gemma Hamilton, *Misconceptions of Sexual Crimes Against Adult Victims: Barriers to Justice* (2020) (no. 611) Trends and Issues in Crime and Criminal Justice

INSIGHT

3 Sexual assault is most often perpetrated by people who victims and survivors know, like intimate partners and known peers

Sexual assault is typically experienced in contexts where the perpetrator and the victim and survivor know each other.

Australian national statistics indicate that women are more likely to experience sexual violence by a male they know than by a male stranger. The 2021-22 Personal Safety Survey estimated that, of the 2.2 million women aged over 18 who experienced some form of sexual violence since the age of 15, 2 million indicated it involved a male they know, including 1.1 million who indicated it involved an intimate partner.¹⁰² The survey also estimated that, of the women who had experienced sexual assault by a male within 10 years prior to the survey, this assault would have been:

- perpetrated by a male they knew (85%)
 - most commonly, this was an intimate partner (54%), including a cohabiting partner (28%) or a boyfriend or date (25%)
 - in some instances, this was a known peer, including a friend or housemate (14%), acquaintance or neighbour (12%) or co-worker (5%)
- perpetrated in a residential location (69%).¹⁰³

Further, national statistics on crimes recorded by police indicate that 36% of all sexual assaults recorded in 2022 were related to family and domestic violence.¹⁰⁴

False assumptions and stereotypes about sexual assaults only being committed by strangers can minimise the experiences of victims and survivors where sexual assault is committed by a person known to them.¹⁰⁵ This can arise in a range of educational, institutional and occupational settings, in friend and community groups, and in family and intimate partner relationships.

Despite being the most prevalent form of sexual assault, a sexual assault committed by a person who knows the victim and survivor tends to be interpreted through false assumptions and stereotypes that minimise seriousness and shift the blame from the perpetrator to victim and survivor.¹⁰⁶

X THE FALSE ASSUMPTIONS

'Most people are sexually assaulted by strangers, not by people they know'.¹⁰⁷

'Victims and survivors of sexual assault always discontinue any relationship with the perpetrator'.¹⁰⁸

'Sexual assault does not happen between people who are in, or who have previously been in a relationship together. Consent can be presumed between intimate partners'.¹⁰⁹

'Sexual assault in an intimate partner relationship is not serious',¹¹⁰ and usually happens as a 'once-off', in isolation of other forms of family and domestic violence'.¹¹¹

✓ THE REALITY

Sexual assault is typically a 'relationship-based' crime,¹¹² perpetrated by someone the victim and survivor knows. Most commonly, the perpetrator is an intimate partner. In other instances, the perpetrator may be known to the victim and survivor through social or professional networks – for example, a friend, acquaintance or housemate,¹¹³ or a supervisor, educator, leader or co-worker.¹¹⁴

Intimate partner relationships

Sexual assault is most common in the context of intimate relationships ('intimate partner sexual assault'). It is important to remember that intimate partners always have the right to refuse to participate in sexual acts.¹¹⁵ Consent must be 'free and/or voluntary'¹¹⁶ and should not be assumed.¹¹⁷

Intimate partner sexual assault is an underreported form of family and domestic violence, and rarely occurs without other forms of violence, and abusive and controlling behaviour, in such relationships.¹¹⁸

As recognised in Australia's *National Principles to Address Coercive Control in Family and Domestic Violence*, coercive control is 'almost always an underpinning dynamic of family and domestic violence.'¹¹⁹ Coercive control involves perpetrators using patterns of abusive behaviours, including acts of abuse, violence and manipulation, that create fear and deny liberty and autonomy.¹²⁰ Sexual harm in the context of family and domestic violence can include 'rape, sexual assault, image-based abuse, control of sexual health and/or reproductive decision-making, and other unwanted sexual behaviour.'¹²¹ Different forms of sexual harm go beyond traditional notions of forced or coerced sexual engagement, and can include a wide range of acts that control a victim's and survivor's body for sexual or reproductive purposes.¹²² Intimate partner sexual assault, which overlaps with reproductive coercion, can include forced pregnancy, forced sterilisation and contraceptive sabotage (also referred to as 'stealthing'; see [Insight 5](#)).¹²³ These acts are used to 'diminish ... a person's autonomy and control over their bodies and lives.'¹²⁴

Intimate partner sexual assault is more likely to involve physical injury than sexual assaults committed in other contexts.¹²⁵ Victims and survivors of intimate partner sexual assault are at a higher risk of experiencing:

- a wide range of physical (including gynaecological), psychological, emotional and 'psychic' and spiritual distress¹²⁶
- severe physical injuries (including non-fatal strangulation)¹²⁷
- death (by suicide or homicide).¹²⁸

Victims and survivors experiencing sexual assault in an intimate partner relationship may face numerous barriers to leaving. These include the harms described directly above, financial uncertainty and/or difficulties accessing safe ways to leave the relationship, such as social isolation.¹²⁹

Victims and survivors may face unique barriers to reporting and/or pursuing justice for incidents of intimate partner sexual assault (in addition to the generic barriers discussed in [Insight 11](#)).¹³⁰ For example, victims and survivors may:

- experience confusion around, or minimisation of, the nature of an assault within an intimate partner context; for example, because their partner manipulated them into normalising or minimising the violence¹³¹
- fear not being believed or being blamed;¹³² for example, because they stayed with the perpetrator after an assault¹³³
- fear their partner¹³⁴
- not want to send their partner to jail¹³⁵
- be managing extreme mental health crises due to the co-occurrence of sexual violence and family and domestic violence¹³⁶
- weigh the tangible and personal costs of engaging the justice system in their private lives and relationships against the likelihood of a successful conviction.¹³⁷

Known peers

Known peers may exploit the circumstances surrounding their current or prior relationship with, and/or proximity to, a victim and survivor. For example, through:

- the security and trust that can arise among people who know each other and/or are in comfortable and familiar social situations¹³⁸
- the secure and trusting environment of a social event and/or the alcohol being consumed at such an event (used to intentionally 'blur boundaries and exacerbate power imbalances to initiate or intimidate others into unwanted sex')¹³⁹
- the power dynamics that can arise in close or respected networks.¹⁴⁰

Victims and survivors who experience sexual assault by a known peer face unique barriers to recognising and/or seeking justice for their experience (in addition to the generic barriers discussed in [Insight 11](#)). For example they may:

- be afraid of that peer¹⁴¹
- fear social backlash from mutual friends or community members,¹⁴² or other negative social reactions like disbelief or stigma¹⁴³
- be less likely to label their experience as sexual assault.¹⁴⁴



PRACTICE EXAMPLES

Australian research has demonstrated how false assumptions about the relationship context of sexual assault can impact the determination of allegations of sexual assault. One study analysing prosecutorial decisions found that 61% of cases referred for prosecution involved an accused person who was known to the complainant, either as a current or former partner (26%) or in another form of relationship including family member (35%).¹⁴⁵ These cases were more likely to be acquitted/dismissed or withdrawn, and less likely to reach a guilty conviction, than cases involving an accused who was a stranger to the complainant.¹⁴⁶

Interviews with prosecutors as part of the study suggested that there can be difficulties prosecuting sexual assault where complainants know the accused, for example due to:

- extraneous factors, like jurors' misunderstandings of consent,¹⁴⁷ and/or stereotypes that normalise violence in relationships¹⁴⁸
- legal considerations, like complex evidentiary difficulties in these kinds of cases¹⁴⁹
- These findings are consistent with international research involving mock jurors, which found that study participants were less likely to attribute guilt to a perpetrator for intimate partner sexual assault.¹⁵⁰

An appropriately nuanced framework should be brought to understandings of the prevalence, nature and complexity of allegations of sexual assault perpetrated by intimate partners and other known peers. This includes complainants' behaviour following assaults and/or the potential relevance of evidence in this context, within the requirements of the criminal justice system and subject to applicable laws in particular jurisdictions.

Jury directions: people who know each other or are married or in a relationship

Victoria, NSW and Queensland (date of commencement to be proclaimed) have statutory directions providing that non-consensual sexual activity can occur in many different circumstances and between different sorts of people, including people who know each other.¹⁵¹ These jurisdictions also have legislated jury directions (date of commencement to be proclaimed in Queensland) that acknowledge non-consensual sexual activity can occur between persons who are married or who are in a relationship with one another.¹⁵²

Court decisions that recognise the harms associated with known peer sexual assault

Australian courts have acknowledged the complexities and seriousness involved with sexual assault perpetrated by known peers.

- In *R v VN* [2023] QCA 184 at [184], the appellate court noted that ‘there is no standard way in which a victim of sexual offending reacts to the perpetrator of that offending, or behaves following the offending; particularly ... where the offending occurs in the context of the family home and the offender is for all intents and purposes a member of the family ...’¹⁵³
- In *Di Giorgio v The Queen* [2016] VSCA 335 at [70], the appellate court agreed with the trial judge in noting that a sexual assault committed against the complainant by her then-colleague and team leader ‘involved a significant breach of trust, and an exploitation of a relationship of both power and affection.’¹⁵⁴

Police and prosecution: evidence of family and domestic violence where intimate partner sexual assault is alleged

Section 74A of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT), introduced in 2023, provides that evidence of family violence may be relevant evidence in a sexual offence proceeding, ‘if it provides context for a fact in issue in the proceeding.’¹⁵⁵ In considering whether evidence of family violence is relevant evidence, the court must take into account that: ‘a single act may amount to family violence; and ... a number of acts that form part of a pattern of behaviour may amount to family violence, even though some or all of acts, when viewed in isolation, may appear to be minor or trivial.’¹⁵⁶

Examples of such evidence would be the nature of the relationship between the complainant and the alleged perpetrator, the complainant’s reaction during and after the sexual assault, and the issue of consent. It may also be used to prove that a party has the tendency to commit the kinds of acts in question (i.e. as ‘tendency evidence’).

Prosecutors: subpoena of witnesses in intimate partner sexual assault cases

In some cases of serious offending, prosecutors may suspect that a complainant’s cooperation has dropped due to intimidation by an intimate partner (or their supporters) and, further, may be concerned that the complainant is at risk of repeat victimisation and homicide. In such cases, prosecutors have acted protectively (and in the public interest) to subpoena the complainant to give evidence.¹⁵⁷ This reflects prosecutors’ understanding of the dangerous patterns of violence that can be associated with intimate partner sexual assault.

Judicial decision-making reflecting an understanding of intimate partner sexual assault

- NSW courts have recognised that, by itself, the fact of a pre-existing relationship between the perpetrator and the victim and survivor does not make sexual assault less serious.¹⁵⁸
- NSW courts have also recognised that, if a sexual assault occurs in a ‘domestic context’, this does not make it any less serious.¹⁵⁹
- In 1963, the Full Court of the High Court of Australia held that there is no presumption of consent to sexual intercourse,¹⁶⁰ and that ‘[l]awful marriage to a complainant provided neither a defence to, nor an immunity from, a prosecution for rape.’¹⁶¹



READING

Some key resources for reading:

- Coumarelos, Christine et al., Australia’s National Research Organisation for Women’s Safety Limited (ANROWS), *Attitudes Matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia* (Research Report, February 2023)
- Flood, Michael et al., Queensland University of Technology (QUT), *Who Uses Domestic, Family and Sexual Violence, How And Why? The State of Knowledge Report on Violence Perpetration* (Report, 2023)
- Lilley, Caroline et al., ‘Intimate Partner Rape: A Review of Six Core Myths Surrounding Women’s Conduct and The Consequences of Intimate Partner Rape’ (2023) 12(1) *Social Sciences* 34
- Salter, Michael et al., ‘Gay, Bisexual, Transgender, Intersex and Queer Men’s Attitudes and Experiences of Intimate Partner Violence and Sexual Assault’ (2021) 36(23–24) *Journal of Interpersonal Violence* 11630.

INSIGHT 4 Consent to sexual acts cannot be inferred from a person's physical or social characteristics

Legislation in each Australian jurisdiction and the overarching Commonwealth Consent Framework clearly indicate that **consent involves a free and/or voluntary agreement**.¹⁶² However, societal understandings of consent do not always reflect the need for people to freely and/or voluntarily agree to a sexual act.¹⁶³

Laypeople may turn to false assumptions and stereotypes about appearances and/or behaviour to assume or infer consent to a sexual act. For example, they may infer consent by reference to a person's physical appearance, whether they engage in attractive, sexual or risky behaviour, and/or their sexual physiology.¹⁶⁴

It may be more likely for a layperson to think that a person's appearance or behaviour can be used to assume or infer that person's consent if they think that consent is something that has to be outwardly refused (i.e. along the lines of 'no means no').¹⁶⁵ Although legal and policy frameworks have shifted to affirmative or communicative models to recognise consent, recent studies indicate that it is still common for members of the Australian public to think about consent as something that can be assumed unless or until a person refuses it.¹⁶⁶

False assumptions and misunderstandings about consent may influence the determination of sexual assault trials where the jury (comprised by members of the Australian public) is required to determine whether the complainant consented to the sexual act in question.¹⁶⁷

✗ THE FALSE ASSUMPTIONS

'If someone appears or behaves in an attractive, sexual and/or risky way, then:

- *they are 'asking for it',¹⁶⁸ so people can assume their consent to sexual activity*
- *people cannot help themselves if they want to have sex with them.¹⁶⁹*

'If someone appears or behaves in an unattractive way, then they would not normally receive attention and would be flattered by it, so people can assume their consent to sexual activity.¹⁷⁰

'If somebody is aroused or has an orgasm during sexual activity, that means they consent to it.¹⁷¹

✓ THE REALITY

Each Australian jurisdiction recognises that consent must be 'free and/or voluntary'.¹⁷²

Legislation in the ACT, NSW, Queensland, Victoria and Tasmania recognises that 'free and/or voluntary' consent to a sexual act is communicated by words or actions, and a person must say or do something to find out whether another person is consenting to a sexual act for it to be consensual.¹⁷³ This can be understood as an 'affirmative model' of consent.

Relatedly, the Commonwealth Consent Framework recognises that people who intend to engage in a sexual act with other people have an active role to play in proactively checking for others' consent,¹⁷⁴ and that people must not make assumptions or inferences about others' consent from external factors.¹⁷⁵ For example, consent cannot be assumed or inferred from:¹⁷⁶

- the fact that someone is silent, frozen or disengaged
- the fact that someone does not say 'no', or does not express hesitation or resistance
- the absence of signs of apparent discomfort
- the presence of signs of physical arousal.

These kinds of external factors may arise because a victim and survivor is having a trauma response to a distressing situation (see [Insight 2](#)),¹⁷⁷ and/or because their body is having a normal physiological reaction to sexual stimuli (regardless of whether it is consensual).¹⁷⁸ These responses do not, in themselves, convey consent to, or enjoyment of, a sexual act.¹⁷⁹

While other jurisdictions do not [yet]¹⁸⁰ have affirmative consent models, their case law does indicate that people must intentionally (verbally or non-verbally) express their consent to a sexual act for the consent to be 'free and/or voluntary', and it cannot be assumed or inferred.¹⁸¹ This can be understood as a 'communicative consent model'. Like the affirmative consent model, the communicative consent model requires that people communicate whether or not they consent to a sexual act,¹⁸² rather than consent being assumed from the absence of refusal.

Determinations of consent should not be based on false assumptions and inferences about people's appearance, behaviour or sexual physiology (e.g. arousal or orgasm) alone, because none of these factors can solely prove whether or not a person freely and/or voluntarily consented to a sexual act.



PRACTICE EXAMPLES

Australian research highlights the impacts of false assumptions about consent in justice processes for sexual assault. One study showed that some prosecutors think juries believe complainants are 'asking for it' if they engage in behaviour that puts them at risk of experiencing sexual assault (like returning to violent partners or getting intoxicated).¹⁸³ Another study demonstrated that complainants' behaviour, clothing and any 'flirtatious conduct' is frequently invoked in the trial context.¹⁸⁴ Complainants have also reported being fearful of police officers judging them based on their relationship with the perpetrator, their behaviour or character and/or their profession.¹⁸⁵

Understandings of consent regarding allegations of sexual assault should reflect the touchstone concept of free and/or voluntary agreement, not false assumptions inferred from appearance or behaviour of the complainant or any other external factors.

Legislative provisions that recognise consent cannot be assumed

Consent provisions in each jurisdiction recognise that consent must be free and/or voluntary.¹⁸⁶

- Consent provisions in the ACT, NSW, Queensland (date of commencement to be proclaimed), Tasmania and Victoria recognise that consent must be communicated by words or actions.¹⁸⁷
- Consent provisions in NSW specify that consent must be present 'at the time' of the sexual activity.¹⁸⁸ This reflects that consent must be assessed at the time the sexual activity occurs and cannot be presumed or implied based on any behaviour or circumstances before that activity.

Evidentiary provisions that recognise consent cannot be inferred

- Legislative provisions in each Australian jurisdiction minimise the possibility of external factors being admitted in sexual assault cases and influencing determinations of consent.
- Evidence relating to the sexual reputation of the complainant is wholly inadmissible¹⁸⁹ (except in some circumstances, with leave of the court, in the NT).¹⁹⁰
- Evidence relating to the sexual experience of the complainant is generally inadmissible (with some limited exceptions).¹⁹¹

Jury directions that may limit the influences of external factors on understandings of consent

In NSW, Victoria and Queensland (date of commencement to be proclaimed), legislated jury directions state that it should not be assumed that a person consented to a sexual act just because they wore certain clothing, had a particular appearance, consumed alcohol or other drugs, or were present in a particular location (like a nightclub or an accused's home).¹⁹²

In Victoria and Queensland (date of commencement to be proclaimed), these directions also state that consent cannot be assumed just because a person was acting in a flirtatious manner.¹⁹³



READING

Some key resources for reading:

- Coumarelos, Christine et al., Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Attitudes Matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia* (Research Report, February 2023)
- Department of Social Services, Commonwealth of Australia, *The Commonwealth Consent Policy Framework: Promoting Healthy Sexual Relationships and Consent Among Young People* (2023)

INSIGHT 5 Consent to one sexual act does not mean consent to any and all other sexual acts, or to future sexual acts

As discussed in [Insight 4](#), legislation in each Australian jurisdiction and the overarching Commonwealth Consent Framework clearly indicate that **consent involves a free and/or voluntary agreement**.¹⁹⁴ However, societal understandings do not always recognise this.¹⁹⁵

In addition to those discussed in [Insight 4](#), societal misunderstandings of consent can relate to disregarding the need to gain consent,¹⁹⁶ and/or failing to understand that people change their minds about consent.¹⁹⁷ For example, the 2017 National Community Attitudes towards Violence against Women Survey found that at least 10% of over 17,500 participants considered sexual assault to be more justifiable if consent was not clearly communicated or if a sexual act continued after a person withdrew consent (i.e. after initially consenting to it or another sexual act).¹⁹⁸

These are further examples of false assumptions and misunderstandings about consent that can influence the determination of sexual assault trials where the jury (comprised of members of the Australian public) is required to determine issues of consent.¹⁹⁹

✗ THE FALSE ASSUMPTION

'If someone consents to a sexual act on one occasion, then it can be presumed that:

- *they consent to that sexual act on any other occasion*
- *they consent to any other sexual act on that occasion or any other occasion.*²⁰⁰

✓ THE REALITY

Each Australian jurisdiction recognises that consent must be 'free and/or voluntary',²⁰¹ and that the consent applies to the specific sexual act being consented to.²⁰²

The Commonwealth Consent Framework notes that consent must be 'specific and informed'²⁰³ – meaning:

- One instance of consent can only apply to one specific sexual act and cannot be transferred to other acts, or different times, or different people.
- One instance of consent can only apply to an act that a victim and survivor is accurately informed about.
 - This concept also has common law precedent. Courts have recognised that, if a person consents to a sexual act, this consent is not valid if the perpetrator was fraudulent about what that act would involve, or the circumstances surrounding it.²⁰⁴
- For example, if a person consents to sexual activity involving the use of protection and/or contraception (e.g. with a condom), this does not, by itself, mean they have consented to sexual activity without the use of protection and/or contraception. Removing, tampering with, or not using a protective/contraceptive device without the other person's consent is sometimes referred to as 'stealthing'.²⁰⁵



PRACTICE EXAMPLES

An Australian study sought to understand how false assumptions about consent and different or future sexual acts can operate on juror decision-making in determining allegations for sexual assault. The study analysed the case *R v Lennox; ex parte Attorney-General* [2018] QCA 311, an appeal against conviction for penetrative sexual assault (referred to as 'rape' in this case) on the basis that the original verdict was 'illogical and irrational'. The jury had found the accused not guilty for charges of indecent assaults and guilty for a charge of rape. In discussing the decision, the study suggested that the jury may have been less inclined to view kissing and touching as non-consensual because these kinds of acts are societally understood as unremarkable and typical acts of courtship. In contrast, the jury's finding that the penile penetration was non-consensual suggested the influence of a stereotype that this is 'real' sex that requires more explicit communications around consent.²⁰⁶

Understandings of consent regarding allegations of sexual assault should reflect concepts relevant to the specificity and communication of consent, not on stereotypes that lead to consent being assumed in particular circumstances or for particular sexual activity.

Legislative provisions that recognise consent must be specific

Australian jurisdictions have expanded their consent provisions in important ways.

- Consent provisions in the ACT, NSW, Victoria and Queensland (date of commencement to be proclaimed) recognise that consent to a particular sexual act does not equate to consent to other acts, on other occasions, or with other people.²⁰⁷
 - In NSW, sexual activity with a condom is included as an example of a particular sexual activity that a person may consent to without consenting to any other sexual activity (e.g. sexual activity without a condom).
- Consent provisions in the ACT, NSW, SA, Victoria and Queensland (date of commencement to be proclaimed) recognise that consent can be withdrawn at any time.²⁰⁸
- Consent provisions in the ACT, Northern Territory (NT), SA, Tasmania, Victoria and Queensland (date of commencement to be proclaimed) recognise that consent is not valid if it was provided in circumstances where one person says or does something to indicate to the other person that a condom must be used during the sexual act being consented to, but the other person does not use a condom, or intentionally disrupts the effective use of a condom, during the sexual act.²⁰⁹



READING

Some key resources for reading:

- Coumarelos, Christine et al., Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Attitudes Matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia* (Research Report, February 2023)
- Department of Social Services, Commonwealth of Australia, *The Commonwealth Consent Policy Framework: Promoting Healthy Sexual Relationships and Consent Among Young People* (2023)

INSIGHT

6 Alcohol and other drugs affect adults' capacity to consent to sexual acts, and do not diminish perpetrator responsibility for sexual assault

Consumption of alcohol and other drugs by perpetrators and victims and survivors is a common feature in sexual assault cases and can affect a person's capacity to consent to sexual activity.²¹⁰

Intoxication can be 'voluntary', where the person has chosen to consume alcohol or other drugs, or it can be 'involuntary', where the person has been forced to consume, or without their knowledge consumed, alcohol or other drugs.

- Involuntary intoxication is associated with the common phenomenon of 'drug-facilitated sexual assault', involving a perpetrator intentionally using drugs to incapacitate a person to enable a sexual assault against them.²¹¹
- Perpetrators can also be opportunistic and take advantage of a voluntarily intoxicated person, a common experience reported by Australian sexual assault survivors.²¹²

Victims and survivors who were intoxicated when sexually assaulted are often blamed for it. This can be linked to misunderstandings around consent, including that consumption of alcohol implies consent to future sexual activity, or that consent to sexual activity while intoxicated continues if the complainant passes out or falls asleep.²¹³

Drug-facilitated sexual assault is often associated with more self-blame, stigma and negative reactions than other forms of sexual assault.²¹⁴ These negative and incorrect judgements about complainants who report being sexually assaulted in these circumstances are underpinned by numerous false assumptions.²¹⁵

✗ THE FALSE ASSUMPTIONS

'If someone alleges that they have been sexually assaulted when they were intoxicated, they are probably lying about it – for example:

- *they might 'reframe' a consensual sexual act as sexual assault because they regretted it once they were sober²¹⁶*
- *they might have misremembered the consensual sexual act.²¹⁷*

'If someone was sexually assaulted while intoxicated, it is their fault.'²¹⁸

'If someone sexually assaults a person when they were intoxicated, they are not responsible.'²¹⁹

✓ THE REALITY

How alcohol and other drugs are used to facilitate sexual assault

Intoxication is a common feature in a diverse variety of sexual assault cases.²²⁰ There are a wide range of circumstances in which intoxication can occur, whether it be intoxication by the complainant or the alleged perpetrator or both.

One reason for complainant intoxication featuring so commonly is the prevalence of drug-facilitated sexual assault. Drug-facilitated sexual assault most often involves the use of alcohol, although other kinds of drugs often receive more focus in the media.²²¹ Examples of other drugs include prescription drugs such as sleep aiding or anxiety medication, muscle relaxers and tranquilisers, or illegal or 'street' drugs including GHB (gamma-hydroxybutyrate, AKA 'fantasy'), Rohypnol, ecstasy and ketamine.²²²

Some drugs are specifically used in drug-facilitated sexual assault because they leave the body quickly and may be undetected or underestimated by police, lawyers and/or judicial officers (like GHB, which is metabolised in 20–60 minutes).²²³ Further, routine toxicology screening procedures do not detect all substances used to commit drug-facilitated sexual assault.²²⁴ These factors create unique evidentiary barriers that compromise the justice process, particularly given the focus on physical evidence.²²⁵

Another reason complainant intoxication is common is because perpetrators can take advantage of people who are intoxicated. Intimate partners or known peers may be particularly likely to use alcohol or other drugs to facilitate sexual assault as part of coercive or controlling behaviour.²²⁶ One of the reasons for this is that they are in a position to take advantage of their familiarity with the victim and survivor and knowledge of their background (e.g. previous substance use or the effect that a particular substance has on them).²²⁷

Effects of alcohol and other drugs on memory

Regardless of whether alcohol or other drugs are consumed voluntarily or involuntarily, their effects can potentially raise evidentiary complexities. Research suggests that very extreme intoxication can impair memory via blackouts, and alcohol and recreational drugs can lead to amnesia or discrepancies in memory.²²⁸ This can be a deliberate consequence in cases of drug-facilitated sexual assault carried out with the aim that the intoxicated person has no, or very impaired, memory of what happened to them.

Importantly, a meta-analysis of studies examining the impact of alcohol on memory found that moderate intoxication does not reduce the accuracy of details remembered (when compared with details recalled by sober people). However, moderate intoxication may reduce the quantity of details recalled in memory.²²⁹

Research evidence suggests that incomplete memories are no less 'correct' (i.e. accurate and reliable).²³⁰ Further, research specific to the effect of alcohol on the memory of sexual assault suggests that 'while recall of peripheral details diminishes, recall of core memories is more robust.'²³¹

Alcohol and other drugs can affect the capacity to consent to sex

The Commonwealth Consent Framework states that everyone involved in a sexual act needs to have the capacity to reach, communicate or withhold consent to that sexual act.²³² Intoxication can impair the capacity to consent.²³³

Evidence about a complainant being intoxicated may be used to decide whether they had capacity to consent to sex.²³⁴ The degree of intoxication, and whether it meant the complainant was unable to consent, are matters for the jury.²³⁵

- Such assessments can be complex and ambiguous,²³⁶ including because intoxication is variable and the consumption of alcohol and other drugs does not necessarily mean that someone immediately loses their capacity to consent.²³⁷ Further, jurors are often required to rely on 'common sense' about the effects of alcohol and other drugs on cognitive functioning, instead of scientific evidence.²³⁸
- Therefore, each case of alleged sexual assault involving intoxication of the complainant requires an assessment of whether the complainant was capable of understanding their situation and making up their mind in the particular circumstances.²³⁹ Consumption of alcohol by a person does not imply their consent to sexual behaviour.

Alcohol and other drugs do not excuse sexual assault

Voluntary intoxication by someone who has committed sexual assault does not excuse sexual assault, nor diminish responsibility for it. This is recognised in laws in some Australian jurisdictions relevant to assessing whether an accused person knew or believed a person was consenting to sex (see the practice examples below).



PRACTICE EXAMPLES

Australian research has demonstrated the pervasiveness of false assumptions around sexual assault involving alcohol and other drugs.

- One study indicated that mock jurors in assessing evidence of complainant intoxication may be influenced by a stereotypical story (also described as a 'script') that women are 'sexual gatekeepers'.²⁴⁰ This includes the related false assumption that women vigorously and verbally resist if they object to a sexual act²⁴¹ (see also [Insight 2](#)). Findings included:
 - If the evidence shows an intoxicated complainant behaving in a passive way (particularly if the intoxication was voluntary), jurors may interpret this evidence as an indicator of consent.²⁴²
 - Instructions directing mock jurors on how to use evidence about complainant intoxication assisted them in making complex decisions about capacity to give consent.²⁴³
 - These same instructions did not counteract the influence of stereotypical scripts on mock jurors' assessments of guilt – that is, defendants were still more likely to be found guilty when their behaviour matched that of a stereotypical sexual assault.²⁴⁴
- Another study found that jurors in sexual assault trials usually use 'common knowledge' to determine the level, and significance, of the complainant's intoxication,²⁴⁵ and assessments of intoxication are usually imprecise.²⁴⁶
- A study of prosecutorial decisions has demonstrated that evidence of complainant intoxication is associated with police and prosecutors choosing not to proceed with charges.²⁴⁷ This is consistent with findings from research analysing police decisions in the USA.²⁴⁸

Each allegation of sexual assault is unique and should be considered in the context of an accurate understanding of the prevalence, nature and impacts of alcohol and other drugs in the facilitation of sexual assault.

Consent laws: intoxication of accused

NSW has specific legislative provisions that require judges and jurors to disregard the defendant's voluntary intoxication when making findings about whether the defendant:

- knew that the complainant did not consent to a sexual act
- was reckless as to whether the complainant was consenting or
- reasonably believed that the complainant was consenting.²⁴⁹

Tasmania has legislative provisions which provide that where the accused argues they mistakenly thought the complainant consented to the sexual act in question, that mistake is not honest or reasonable if it was made at a time when the accused was:

- in a state of self-induced intoxication and
- if the accused would not have made that mistake if they had not been intoxicated at the time.²⁵⁰

Queensland also has legislative provisions (date of commencement to be proclaimed) which provide that an accused person's voluntary intoxication is not relevant in deciding whether that person had an honest and reasonable belief as to consent.²⁵¹

Consent laws: intoxication of complainant

NSW legislation provides that a person does not consent to a sexual activity if they are so affected by alcohol or another drug as to be incapable of consenting to the sexual activity.²⁵² Similar provisions exist in the ACT, Victoria, SA, Tasmania and the NT, which state there is no consent where the complainant is so affected by alcohol or another drug as to be 'incapable' of agreeing to the sexual activity.²⁵³

Legislative provisions in Queensland (date of commencement to be proclaimed) also include that there can be no consent where the complainant is so affected by alcohol or another drug as 'to be incapable of consenting' or 'incapable of withdrawing consent' to the sexual activity.²⁵⁴

In NSW, Victoria and Queensland (date of commencement to be proclaimed), legislated jury directions state that it should not be assumed that a person consented to a sexual act just because they consumed alcohol or other drugs.²⁵⁵

Judicial officers' references to intoxication in judgments

Australian courts have shown awareness and sensitivity to the impacts of alcohol and other drugs on incidents of sexual assault.

- In *R v Palmer* [2017] ACTSC 357 at [29], the court noted that 'sexual assault by young intoxicated men is not uncommon and is extremely serious.'²⁵⁶
- In *R v Alenezi* [2021] NSWDC 718 at [221], the court accepted that the complainant's voluntary intoxication was proof of vulnerability, and that the defendant specifically 'selected this vulnerable young woman for sexual exploitation ...'²⁵⁷



READING

Some key resources for reading:

- Australian Institute of Health and Welfare, *Alcohol, Tobacco & Other Drugs in Australia* (Web Page, 23 April 2024) <[Alcohol, tobacco & other drugs in Australia, About – Australian Institute of Health and Welfare \(aihw.gov.au\)](#)>
- Tidmarsh, Patrick and Gemma Hamilton, *Misconceptions of Sexual Crimes Against Adult Victims: Barriers to Justice* (2020) (no. 611) *Trends and Issues in Crime and Criminal Justice*

INSIGHT 7

There is no 'normal' way for a person to behave following sexual assault

Victims and survivors can behave in a variety of ways during and after sexual assault.²⁵⁸

Research consistently shows that victims and survivors behave differently 'in response to the trauma of experiencing and reporting a sexual assault' and when giving evidence about the sexual assault in legal proceedings.²⁵⁹ Their responses or behaviour may also change at various stages in the justice process – for example, when making a first report, being interviewed by police, or giving evidence in court.²⁶⁰

Victims' and survivors' responses and behaviour can range from appearing emotional with visible displays of stress to appearing numb or having emotions under control.²⁶¹

False assumptions and stereotypes about how victims and survivors would behave or respond during or after sexual assault can influence perceptions of complainant credibility or case viability,²⁶² despite the fact that a person's emotional state does not reliably indicate their honesty (or lack thereof).²⁶³ Further, these assumptions and stereotypes are at odds with evidence about the wide range of normal neurobiological brain and bodily responses, and how these can affect victims' and survivors' behaviour and responses in relation to sexual assault.²⁶⁴

✗ THE FALSE ASSUMPTION

*'If someone has experienced sexual assault, they will appear distressed afterwards – including when they report it to police or when they testify about it in court.'*²⁶⁵

✓ THE REALITY

Normal neurobiological brain and bodily responses to sexual assault can vary significantly.²⁶⁶ These responses can arise during a distressing experience, and/or afterwards when a person is put in a situation where they are forced to relive the experience – for example, when police, lawyers and/or judicial officers ask them questions about it.²⁶⁷

The trauma of sexual assault can cause victims and survivors to behave in ways that appear chaotic²⁶⁸ or inconsistent with what is stereotypically associated with a distressed person.²⁶⁹ For example, victims and survivors may exhibit one or more of the following behaviours:²⁷⁰

- appearing emotionally numb
- avoiding eye contact
- lacking expressions of pain
- having a flat or restricted affect.

Research indicates that appearing calm and controlled can be a coping mechanism.²⁷¹

Victims and survivors can also behave in more stereotypically 'distressed' ways – for example, by visible displays of emotion and clear expressions of distress to others.²⁷²

Regardless of how a victim and survivor behaves, it is important to understand that their emotional state 'does not reliably tell an observer whether they are being honest'.²⁷³

- We cannot determine from observing their emotional state whether someone is lying.²⁷⁴
- A lack of apparent distress when a person is recounting an experience of sexual assault – for example, in court giving evidence – does not have a bearing on the reliability of that evidence.



PRACTICE EXAMPLES

Australian research has documented complainants' reflections on a lack of approaches that acknowledge the prevalence and impacts of trauma (i.e. 'trauma-informed'²⁷⁵ approaches) in the criminal justice system.²⁷⁶ The absence of trauma-informed approaches can cause complainants to fear that their normal reflexive responses to distressing situations will be misunderstood, misinterpreted and/or misconstrued.²⁷⁷

Further, a study of cases referred for prosecution indicated that some of the factors that prosecutors used to determine whether a complainant was credible relied upon them being articulate, calm, clear-headed, confident and consistent (in behaviour and statements).²⁷⁸ Assessing credibility in this way is unrealistic given the varied and unpredictable reactions victims and survivors can have as complainants throughout the justice process.

Each allegation of sexual assault is unique, and the complainant's behaviour should be understood, within the requirements of the criminal justice system, on an individual basis. Further, understanding of the complainant's behaviour should be informed by the (many) factors that can influence individual responses to sexual assault.

Jury directions that may limit the influence of false assumptions about complainant behaviour

In NSW, Queensland (date of commencement to be proclaimed) and Victoria, there are legislated jury directions stating that people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything.²⁷⁹

In NSW, Queensland (date of commencement to be proclaimed) and Victoria, there are also legislated jury directions that state that:

- Trauma may affect people differently.²⁸⁰
- People respond differently when giving evidence in court about a sexual offence.²⁸¹
- The presence, or absence, of emotion or distress does not, of itself, mean that a person is not telling the truth about a sexual offence.²⁸²

A study of mock jurors in Australia has shown that these kinds of jury directions can go some way to improving jurors' understandings of complainants' behaviour. For example, they can be effective in giving jurors improved knowledge about trauma and reducing the influence of legally irrelevant stereotypes about the emotional demeanour of complainants.²⁸³ This study also suggested that jurors who are directed not to rely on the complainant's emotional demeanour when assessing credibility should be given further instructions about what they can reliably use to evaluate the complainant's credibility in this context, such as 'behavioural clues that reliably discriminate between lying and truth-telling'.²⁸⁴



READING

Some key resources for reading:

- George, Amanda-Jane et al., Australasian Institute of Judicial Administration, Australian Attorney-General's Department, CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (2023)
- KPMG and Centre for Innovative Justice, RMIT, *'This is My Story. It's Your Case, but it's My Story': Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (Report, July 2023)
- Sexual Assault Resource Centre, Government of Western Australia North Metropolitan Health Service, *How the Body Responds to Trauma* (Fact Sheet)

INSIGHT

8 Memory recollection 'errors' are normal and common after sexual assault

Memory plays a critical role in the justice system. Despite this, fact finders and decision makers do not always have an accurate understanding of how it works,²⁸⁵ including how the quality of memory relates to its reliability.

- Witnesses' memories of a crime are important in criminal cases because there may be minimal or weak physical evidence.²⁸⁶ This is even more so in a sexual assault case, where the issues in dispute may hinge on the statements of the complainant and (optionally) the accused, as (often the only) witnesses to the alleged incident.²⁸⁷
- Inaccurate understandings of memory (often founded on a memory belief system based on 'common sense')²⁸⁸ can lead to unrealistic expectations about memories of sexual assault²⁸⁹ that are linked to myths about how the brain works in processing information and making memories.²⁹⁰ These can lead to false assumptions about what reliable memories 'look like', and to the stereotype that inconsistency is 'indicative of fabrication or unreliability'.²⁹¹

False assumptions and stereotypes about memory can have significant implications for sexual assault matters in the criminal justice system. The influence of these kinds of false assumptions and misunderstandings about memory can 'contribute to the high attrition rates of rape cases in the criminal justice system'.²⁹²

X THE FALSE ASSUMPTION

*'Victims' and survivors' memories of sexual assault are clear, coherent and detailed, and victims and survivors always consistently recall their memories.'*²⁹³

✓ THE REALITY

It is common and normal for victims and survivors to have disjointed recollections of their experience of sexual assault.²⁹⁴ This is consistent with findings from psychological and neurobiological science about memory more generally. For example, it is normal for memory recollections to vary,²⁹⁵ and for people to struggle with linear memory recollection, particularly when they are affected by trauma.²⁹⁶

However, these features of memory, sometimes mislabelled as 'errors', do not necessarily mean that a memory is unreliable.²⁹⁷ The expectation of consistency of memory has been rejected by research, including research on memory, recall and trauma.²⁹⁸

Research has identified key features of memory particular to the traumatic experience of sexual assault.

- Exposure to repeated similar assault or abuse incidents has implications for memory recall. Memories can suffer from a lack of distinctiveness, and it is difficult to recall details of a particular event within a series of repeated events, because 'nothing stands out'.²⁹⁹
- After the trauma of sexual assault, memories may be affected by amnesia, or there may be differences between accounts.³⁰⁰
- Brain damage, psychological illness and pharmacological interventions/injury/illness experienced during or after sexual assault may also affect memories or result in memory loss or inconsistencies.³⁰¹



PRACTICE EXAMPLES

Australian research findings have identified common misunderstandings about memory, which are at odds with memory science. These misunderstandings have been demonstrated to influence justice system responses to sexual assault cases.³⁰² Further, complainants have reflected negatively on a lack of trauma-informed practice throughout the criminal justice process,³⁰³ particularly when police and lawyers ask them questions about their memories of some details of their experience of sexual assault. These kinds of questions can make complainants feel confused, doubted and even 'threatened'.³⁰⁴

A scientifically supported understanding of memory is important to address misunderstandings that lead to false assumptions influencing the assessment of the credibility of allegations of sexual assault.

Police interviewing of complainants when reporting sexual assault

Research with police officers has identified the importance of police using approaches to investigative interviewing of complainants that do not contribute to a 'climate of disbelief' (discussed in [Insight 10](#)), so that complainants are not made to feel that their memories are inherently unreliable.³⁰⁵

Questioning of complainants when giving evidence

A NSW study found that 76% of the 75 sexual assault trials analysed involved questions that drew attention to differences between the account given at the trial and the account given on a previous occasion – for example, to a friend or family member, the police or a doctor.³⁰⁶ Similarly, in a Victorian study, these kinds of questions were also prevalent, despite the availability of jury directions on how to appropriately consider inconsistencies in the complainant's account.³⁰⁷

The quality of complainants' memory is a focal issue in sexual assault trials, meaning it is often targeted by lawyers in the questioning of complainants.³⁰⁸

- This can involve questions that are framed in confusing ways and/or solely aimed at evoking evidence of memory inconsistencies that non-experts (such as jurors) may interpret 'as signs of confabulation or deception'.³⁰⁹
 - For example, a question might be framed as follows: 'You told the police that ... do you remember that?' It can be unclear what is actually being asked of the complainant from this question (e.g. whether they remember a particular event or whether the particular event happened).
- Further, depending on the issues in dispute at trial, these kinds of questions may be improper. This can be so when the only reason the question is asked is for the jury to hear evidence that the complainant's memory is inconsistent, leading them to infer that the memory is unreliable. This may be improper because such an inference is based on false assumptions about how memory works (i.e. that reliable evidence must involve consistently recalled memories).
 - This provides a basis on which judges can intervene in cross-examination (in addition to those bases discussed in [Insight 11](#)). Judges could intervene to disallow these questions if they breach the parameters for the fair treatment of 'vulnerable' witnesses and defendants set by orders made by a judge before a trial as part of hearings, typically described as 'ground rules hearings'. These have been introduced in most Australian jurisdictions, with different rules around their use.³¹⁰
 - Complainants have given positive feedback about their experience of judges intervening when the defence has used unfair or inappropriate tactics to question their account of the offence when they were called as a witness.³¹¹

Jury directions

Legislation in Victoria³¹² and NSW³¹³ allows judges in those jurisdictions to direct juries that people may not remember or describe the details of sexual assault the same way each time, if certain conditions allow or require this kind of direction.³¹⁴

Judicial awareness and understanding of memory science

Some judicial officers make specific reference in their judgments to the fact that it is normal for memory to be confusing, lacking in detail or inconsistent.³¹⁵ For example:

- In *Mohamed v R* [2008] NSWCCA 45 at [18], the then Chief Judge at Common Law Peter David McClellan noted:

Merely because there are inconsistencies in the evidence of a witness it does not follow that it should be rejected either in whole or in part. There are many reasons why inconsistencies may emerge in an account of an event by a person who has been physically threatened and subject to inordinate stress at the time the events occur.³¹⁶

- In *HO v R* [2023] NSWCCA 245 at [108], Justice Wilson noted that inconsistencies may be particularly explicable in the context of several offences:

It is unremarkable, and certainly not uncommon, that a victim of multiple offences of a similar nature might be unclear as to precisely when, in what order, or even where a particular assault occurred.³¹⁷

- In *Reed v R* [2006] NSWCCA 314 at [64], then Chief Justice James Jacob Spigelman recognised that cross-examination of sexual assault complainants is often influenced by assumptions that 'have no scientific basis and, indeed, are contrary to what we do know about human memory.'³¹⁸
- *Lehrmann v Network Ten Pty Limited* (Trial Judgment) [2024] FCA 369 concerned a civil defamation action regarding allegations of sexual assault in separate criminal proceedings. Justice Lee referred to the literature on memory science, including the literature on the impact of trauma on memory, which formed part of a set of agreed facts between the parties.³¹⁹ Further, in assessing the credibility of a witness who was the complainant of the alleged sexual assault, Justice Lee stated:

[O]ne must not only take account of the well-known general features of human memory, but also ... [her] mental state and the well-known specific effect of trauma, and in particular sexual assault, on her memory.³²⁰



READING

Some key resources for reading:

- Quilter, Julia, Luke McNamara and Melissa Porter, 'Differences in Accounts and the 'Lying' Complainant: A Qualitative Study of Rape Trials in Victoria, Australia' (2023) 73 *International Journal of Law, Crime and Justice*, 100593
- Goodman-Delahunty, Jane and Mark A Nolan, 'The Quality of Autobiographical Memories of Sexual Assault' in Greg Byrne and Jacqueline Horan (eds), *Sexual Assault Trials: Challenges and Innovations* (Lexis Nexis, forthcoming)

INSIGHT 9

Many victims and survivors delay reporting their experience of sexual assault

Most victims and survivors who report sexual assault do so following a period of time after the alleged incident,³²¹ referred to as 'delay'.

- Of the 119,589 female victims and survivors recorded by police between 2014 and 2019, 52% took one week or more after the date of the incident to report it to police.³²²
- Of the 24,541 male victims and survivors recorded by police between 2014 and 2019, 61% took one week or more after the date of the incident to report it to police.³²³
- Over a quarter (27%) of the victims and survivors recorded by police in 2019 reported their experience to police one or more years after the date of the incident.³²⁴
- Delayed reporting is particularly common when the victim and survivor is male³²⁵ or in an intimate partner relationship with the perpetrator.³²⁶

It is important to note, however, that Australian national statistics indicate most cases of sexual assault are never reported.³²⁷ This can be due to the anticipation of adverse reactions to reporting (discussed in [Insight 10](#)) and other barriers to seeking justice for a report (discussed in [Insight 11](#)).

Despite the fact that it is common for victims and survivors to delay reporting sexual assault, one common set of false assumptions about sexual assault is that 'real' complaints are made immediately, and that reports, in general, are easy to make. Relatedly, it is falsely assumed that delayed complaints are likely to be fabrications or false recollections.³²⁸

✗ THE FALSE ASSUMPTION

*'Victims and survivors of sexual assault would report to police immediately.'*³²⁹

*'People who delay disclosure are likely to be lying or falsely recalling sexual assault.'*³³⁰

✓ THE REALITY

Delaying reporting is an extremely common, normal reaction to an experience of sexual assault and to concerns about the response to reporting.³³¹

There are many reasons why victims and survivors may delay reporting.

- It can take time for victims and survivors to understand, or recognise, the nature of their experience.³³² This may be for reasons that include having experienced confusion, shock or guilt about it.³³³
- They may fear being poorly judged,³³⁴ or be experiencing embarrassment, shame and/or stigma³³⁵ (some of the numerous barriers to criminal justice; see [Insight 11](#)).
- They may be experiencing symptoms consistent with PTSD that causes them to avoid or otherwise struggle to process and seek help for the experience.³³⁶
- Sexual assault in the context of family and domestic violence can have compounding consequences for victims and survivors. Where there are repeated incidents, there is a 'tendency towards self-criticism, acquiescence and "normalising" of the conduct increases.'³³⁷ These are experienced in addition to the barriers to reporting family and domestic violence, such as economic dependency, housing insecurity, presence of children and fear of the offender.³³⁸



PRACTICE EXAMPLES

An Australian study with complainants, and advocates, identified that some complainants experienced negative and insensitive reactions from police when the police learned the sexual assault being reported was not recent (and, consequently, that there may not be any physical evidence to support the case).³³⁹

Although it may have implications for the availability of evidence in some cases,³⁴⁰ delayed reporting is not automatically an indication that a reported allegation of sexual assault is not credible, reliable or truthful. Therefore, delay in reporting should not automatically be viewed as a reason not to charge or prosecute the report within the requirements of the criminal justice system.

Police approaches to investigative interviewing

Given that police have been described as ‘gatekeepers’ of the criminal justice system,³⁴¹ their approaches to investigative interviewing are a key area where negative reactions to delayed reporting may negatively impact victims and survivors. A large body of Australian research focuses on investigative interviewing in the context of sexual assault.³⁴²

One study has recommended changes in investigative interview approaches with the aim of better acknowledging the reasons why sexual assault complainants may ‘have difficulty giving a complete account of their experience(s) in their first interview’, and how this may cause a delay in giving a complete report of the incident.³⁴³ For example, the complainant may be uncomfortable providing personal sensitive information until they have spent considerable time with an interviewer. The following example was provided by a victim representative:

We had a young man who had been sexually assaulted. We had a whole lot of counts and they were all indecent assaults. On about the sixth session this young man had with the prosecutor, he disclosed that there'd been a rape involved. It was only because he got to know everybody well and felt much more trusting.³⁴⁴

Significant developments in specialised training for police officers in conducting investigative interviewing with complainants who allege sexual assault have brought a focus on trauma-informed approaches. This includes, for example, appropriate and sensitive lines of questioning during interviews.³⁴⁵

- An Australian and UK research review identified 4 main elements essential for promoting good police and investigative interviewing. These are: ‘(a) an evidence-based interview framework, (b) opportunities for skill development, (c) quality assurance for interview and organisational performance, and (d) reliable methods of recording verbal evidence.’³⁴⁶
- Australian and New Zealand research identified modifications to investigative interviewing processes in sexual assault matters to better meet evidentiary requirements, establish witness credibility and manage complainant vulnerabilities.³⁴⁷ Modifications included:
 - streamlining the interview process, so that complainants can ‘provide an uninterrupted account of their experiences ... [which] is something that [complainants] place value on’³⁴⁸
 - ensuring a supportive approach to conducting the interview, to improve the quality and quantity of the account, by catering to complainants’ psychological needs and improving attitudes to avoid giving the impression of disbelief.³⁴⁹

Jury directions: delayed reporting and credibility

The need for jury directions regarding delayed reporting and credibility has been a focus of recent inquiries into justice responses to allegations of sexual assault reported by adults.³⁵⁰ This has also been emphasised in the context of child sexual abuse reporting. The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that every jurisdiction review its legislation and introduce any amendments necessary to ensure that judges ‘not direct, warn or suggest to the jury that delay affects the complainant’s credibility unless the direction, warning or suggestion is requested by the accused, and is warranted on the evidence in the particular circumstances of the trial.’³⁵¹

In NSW, Victoria and Queensland (date of commencement to be proclaimed), legislated jury directions address false assumptions about delayed reporting.

- In Queensland (date of commencement to be proclaimed), the directions must specify that the absence or delay of a report of sexual offending does not necessarily indicate that an allegation in relation to that sexual offending is false.³⁵²
- In Victoria, the directions must specify that people react differently and there is no 'normal' way to respond to sexual offending. Some people may complain immediately but others do not, and delaying making a complaint is common.³⁵³
- In NSW, Victoria and Queensland (date of commencement to be proclaimed), the directions must specify that there may be a variety of reasons why a complainant may not report or delay reporting sexual offending.³⁵⁴
- In Queensland (date of commencement to be proclaimed), the directions may include examples of the reasons why a complainant may not report or delay reporting sexual offending,³⁵⁵ including because the complaint:
 - was overborne by the abuse of a relationship of authority, trust or dependence
 - has employed strategies to cope with the sexual offence, such as suppression or dissociation
 - has a fear of ostracism from their community.

These sorts of directions are considered particularly strong corrective mechanisms for addressing the false assumptions about delays that can impact jury decision-making.³⁵⁶

Strong jury directions may only reach their full potential as measures to counter the impact of false assumptions and stereotypes about delayed reporting when incorporated into practice by judicial officers. An Australian study of sexual assault trials found that narratives that fostered doubt about the credibility or reliability of the case based on the complainant's delayed reporting continued to feature heavily at trial.³⁵⁷ Further, it found that trial judges did not always address these delay narratives by giving a corrective direction, despite the availability of strong provisions for this purpose (namely section 52 of the *Jury Directions Act 2015* (Vic), discussed above).³⁵⁸



READING

Some key resources for reading:

- KPMG and Centre for Innovative Justice, RMIT, *'This is My Story. It's Your Case, but it's My Story': Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (Report, July 2023)
- Tidmarsh, Patrick and Gemma Hamilton, *Misconceptions of Sexual Crimes Against Adult Victims: Barriers to Justice* (2020) (no. 611) *Trends and Issues in Crime and Criminal Justice*
- Women's Safety and Justice Taskforce, *Hear Her Voice* (Report 2, Volume 1, 2022)

INSIGHT 10 False allegations of sexual assault are not common

False allegations of sexual assault are not common.

Research has estimated that only approximately 5% of reports made to police are confirmed false (acknowledging, however, that some reports discussed in this research were suspected but not demonstrably false).³⁵⁹ Despite this, false allegations are perceived as common.³⁶⁰ This perception may be partly because most allegations of sexual assault do not proceed through the justice system or reach a guilty conviction.³⁶¹ Laypeople may not understand that when a case is discontinued or does not reach a guilty conviction, this does not necessarily mean it was based on a false allegation. Rather, it means that the evidence available to support the case was not able to establish the elements of the alleged offence beyond a reasonable doubt.

This perception may also be influenced by negative attitudes and beliefs that construct women as liars.³⁶² In its report on the findings on the 2021 National Community Attitudes towards Violence against Women Survey published in 2023, Australia's National Research Organisation for Women's Safety (ANROWS) indicated that 'a minority of respondents endorsed: hostile gendered stereotypes of women as malicious, vengeful and untrustworthy', agreeing with false assumptions about women commonly making false allegations of sexual assault.³⁶³

✗ THE FALSE ASSUMPTION

*'People often make false allegations of sexual assault.'*³⁶⁴

*'People make allegations of sexual assault for ulterior motives, such as revenge.'*³⁶⁵

✓ THE REALITY

Australian researchers have said that '[g]iven the serious difficulties with studying false rape allegations, many of the reported false report rates, both high and low, cannot be relied upon for an accurate assessment of how often false allegations occur'.³⁶⁶ However, based on a meta-analysis of 7 studies published in Australia, Canada, the UK and the USA between 1999 and 2014, these researchers estimated only approximately 5% of reports of sexual assault made to police are confirmed false.³⁶⁷

The fact that most allegations of sexual assault do not proceed to a conviction may create a misconception that these allegations are not substantiated.³⁶⁸ This misconception overlooks the fact that if a police officer or prosecutor decides that a case is not strong enough to proceed through court, or if a jury (or judge) finds an accused person 'not guilty' in court, this does not necessarily mean that the complainant's allegation was 'false'. For example, an Australian study of cases referred for prosecution indicated that prosecutors withdrew some cases even though they believed that the complainants were telling the truth.³⁶⁹ This reflects that sexual assault cases may be withdrawn, or not proceed, for reasons that have nothing to do with whether the alleged facts are true, and instead may reflect numerous barriers to criminal justice (see [Insight 11](#)).

The negative perception of women as particularly likely to lie is a stereotype that reflects societal biases rather than any sound evidence.³⁷⁰ Further, it is not logical to assume that women would often lie about allegations of sexual assault, given that such a lie would expose them to some of the challenging experiences in the justice system discussed in [Insight 11](#). There are many disincentives that are more likely than not to discourage people from making false allegations. For example:

- Most complainants who have pursued justice through the criminal justice process have expressed feeling it did them more harm than good.³⁷¹
- Sexual assault is met with greater doubt, scepticism and minimisation than other crimes.³⁷²
- Victims and survivors who disclose are viewed with distrust and even disrespect.³⁷³
- The process of making and following through with a complaint is not easy.³⁷⁴



PRACTICE EXAMPLES

Australian research has identified that the ‘climate of disbelief’³⁷⁵ that can emerge from the false assumption that false allegations are common can cause victims and survivors to anticipate encountering negative social reactions to sexual assault disclosures (‘anticipatory stigma’).³⁷⁶ Anticipatory stigma can cause victims and survivors to experience adverse health effects,³⁷⁷ undermine their likelihood of seeking help or support,³⁷⁸ and put them at greater risk of re-victimisation.³⁷⁹

Each allegation of sexual assault is unique and should be taken seriously, within the requirements of the criminal justice system, rather than dismissing certain allegations according to a false assumption that false allegations are common.

Police and prosecution responses to reports of sexual assault allegations

Complainants have reflected positively on their experiences in the criminal justice system when they felt listened to and, most importantly, believed.³⁸⁰ For example, complainants have reported positive experiences during the reporting stage when police have:

- appeared invested in the case³⁸¹
- asked questions calmly and thoughtfully³⁸²
- reassured them that making the report was the right thing to do³⁸³
- understood that the facts alleged in the report are serious.³⁸⁴

It is critical for police and prosecutors to appropriately investigate allegations of sexual assault before deciding whether to progress them further through the criminal justice system. However, it is important that during this process they are sensitive to complainants and avoid giving them the impression that they are being blamed, disbelieved or otherwise stigmatised for coming forward.

- For example, police can avoid contributing to the ‘climate of disbelief’ around sexual assault by sensitively communicating and framing the requirement for complainants’ reports to be as accurate and truthful as possible about the alleged assault.³⁸⁵



READING

Some key resources for reading:

- George, Amanda-Jane et al., Australasian Institute of Judicial Administration, Australian Attorney-General’s Department, CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (2023)
- KPMG and Centre for Innovative Justice, RMIT, *‘This is My Story. It’s Your Case, but it’s My Story’: Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (Report, July 2023)
- Women’s Safety and Justice Taskforce, *Hear Her Voice* (Report 2, Volume 1, 2022)

INSIGHT 11

There are significant barriers to criminal justice for sexual assault matters

Most sexual assault cases do not make it to or through the criminal justice process.³⁸⁶

Australian national statistics indicate that, in the 2021-22 financial year, 92% of female victims and survivors who experienced sexual assault committed by a male perpetrator did not report the most recent incident to police.³⁸⁷

If sexual assault cases are reported, they may not be successfully prosecuted. The rate of people reporting sexual assault to police across Australia has increased.³⁸⁸ However, attrition rates remain high and conviction rates remain low.³⁸⁹ This may reflect the fact that sexual assault cases can be difficult to develop and prosecute through the criminal justice system.³⁹⁰ Some of the reasons for that difficulty can include:

- limitations in the availability or strength of corroborative/supportive evidence (e.g. CCTV footage, forensic evidence, text messages or social media posts, and/or evidence from a witness or witnesses other than the complainant)³⁹¹
- false assumptions and stereotypes influencing how cases are processed.³⁹²

The barriers to criminal justice for sexual assault include barriers to reporting and barriers to convictions, which can be mutually reinforcing. For example, if convictions are most often reached for cases that involve stereotypical facts, because these kinds of facts happen to give rise to strong evidence and/or match false assumptions about sexual assault (e.g. about physical injury), then cases that involve different facts may be less likely to be pursued. In turn, a narrow range of factual scenarios may become the default model of sexual assault cases in the criminal justice system. This relates to the issue discussed at the outset of this resource: over time, simple and predictable understandings can become a framework, or 'mythology', against which cases of sexual assault are understood and tested.³⁹³

✗ THE FALSE ASSUMPTION

*'It is easy for victims and survivors to report sexual assault.'*³⁹⁴

*'It is easy to successfully prosecute allegations of sexual assault.'*³⁹⁵

✓ THE REALITY

Barriers to reporting

Victims and survivors face numerous barriers to disclosing sexual assault and/or entering the criminal justice system. These barriers can cause victims and survivors to delay, or completely avoid, engaging with the complex and traumatic realities that can be involved with pursuing criminal justice.³⁹⁶ Some of the barriers to seeking help and/or justice for sexual assault include:

- lack of awareness of reporting and justice options³⁹⁷
- lack of trust in reporting and justice options,³⁹⁸ which may stem from a history of negative relationships with the justice system and/or a legitimate fear of unfair justice responses (e.g. particularly for Aboriginal and Torres Strait Islander people, discussed in [Insight 12](#))
- not recognising that a given sexual act (or acts) constitutes sexual assault³⁹⁹
- not understanding that a perpetrator's behaviour is unlawful (particularly in an intimate partner relationship)⁴⁰⁰
- fear of retaliation from the perpetrator or members of the community⁴⁰¹

- fear of not being believed,⁴⁰² including because their experience does not fit within stereotypical ideas of 'real' sexual assault,⁴⁰³ and/or because the accused person holds a famous, respected and/or wealthy status or profile in the community⁴⁰⁴
- fear of experiencing shame, stigma or embarrassment⁴⁰⁵
- fear of being blamed,⁴⁰⁶ or experiencing self-blame⁴⁰⁷
- experiencing, or fear of experiencing, dismissive or discouraging responses from friends, family or trusted service professionals (such as a doctor or a carer)⁴⁰⁸
- not believing their experience is 'worthy of justice'⁴⁰⁹
- internalisation of stereotypical ideas of 'real' sexual assault.⁴¹⁰

These barriers can be heightened for victims and survivors who experience intersectional discrimination, as discussed in [Insight 12](#).

Barriers to seeking help and/or justice for sexual assault can negatively affect victims' and survivors' recovery and health.⁴¹¹ For example, experiencing negative reactions to disclosure can decrease the likelihood of victims and survivors seeking further formal and social support,⁴¹² and 'are linked to a host of poor outcomes' including PTSD and significant emotional and behavioural issues.⁴¹³

When justice actors display negative reactions, the effects are sometimes referred to as 'secondary victimisation', and they are sometimes described as akin to a 'second assault'.⁴¹⁴ Further, victims' and survivors' negative experiences with police⁴¹⁵ are associated with more PTSD symptoms,⁴¹⁶ decreased cooperation and accelerated case attrition.⁴¹⁷

Barriers to convictions

It may be particularly difficult to develop and reach guilty convictions for sexual assault cases.⁴¹⁸ This can be due to a complex range of legal considerations and external factors.⁴¹⁹

A primary example of legal considerations that can affect the success of sexual assault cases is the availability or strength of the evidence.⁴²⁰

- It is common for the only available evidence in sexual assault cases to come from the complainant and the accused.⁴²¹ The strength of this evidence may be undermined:
 - Defence counsel may pursue lines of questioning or make closing arguments that lead jurors to believe that the complainant's testimonial evidence alone cannot prove the offence beyond reasonable doubt.⁴²²
 - Complainants may experience confusion, exhaustion and/or emotional challenges during police investigations, which compromises their ability to recall memories and provide evidence to support the case.⁴²³
- Police, lawyers and jurors may place significant focus on corroborative and other supportive evidence in sexual assault cases.⁴²⁴ However, such evidence may not always be available, noting:
 - Forensic examination may not always be accessible,⁴²⁵ or happen quickly enough following an alleged sexual assault to produce reliable evidence.⁴²⁶
 - Medical professionals may not have adequate training or support to appropriately engage with complainants and/or extract relevant evidence during forensic examinations.⁴²⁷
- Even where corroborative/supportive evidence is available, its strength may be limited:
 - Forensic evidence may not be sufficient to prove the alleged acts in dispute (i.e. even if it can prove that a sexual act occurred, it may not prove it was non-consensual).⁴²⁸
 - Forensic examinations alone are not reliable in either confirming or ruling out sexual abuse.⁴²⁹
 - The unreliability of forensic examinations includes hymen examinations, noting 'no medical or legal conclusion may be inferred by hymen examination [of that complainant] alone'. The hymen may not be noticeably damaged from forced penetration, and hymenal injuries that do not involve extensive laceration(s) heal quickly and usually leave no trace evidence.⁴³⁰

A primary example of external factors that can affect the success of sexual assault cases is the influence of false assumptions and stereotypes. False assumptions and stereotypes can:

- affect how people interpret reports of sexual assault,⁴³¹ which may be linked to misinformation or attitudes and personal biases⁴³²
- influence the way that police, prosecutors and jurors assess and draw inferences from evidence and evaluate responsibility and blame.⁴³³ These interpretations are subjective and can result in different conclusions being drawn from the same set of facts.⁴³⁴

Another example of external factors is complainants' willingness to cooperate with the case. Complainants' willingness to cooperate has been found to be a key factor that increases the likelihood of arrest and conviction in sexual assault cases.⁴³⁵ However, there are significant difficulties and stresses involved with cooperating in the criminal justice system, and these may cause complainants to decide not to cooperate and to withdraw from prosecution.⁴³⁶ For example, complainants' willingness to cooperate can be undermined by how often their relationships with police break down, including because police must strictly observe policies and legislation within the criminal justice system that sit in tension with complainants' needs.⁴³⁷

It is important to note that even 'successful' complainants (i.e. complainants involved in a case that reaches a guilty conviction) can experience harm in the process of seeking justice for sexual assault.⁴³⁸



PRACTICE EXAMPLES

Complainants and sexual violence specialists have reflected positively on strategies that were used to guide and support them through the justice process. Throughout the criminal justice system, supportive strategies are increasingly being recommended and adopted by way of legislation and training. This includes innovations in police practice,⁴³⁹ which are important given police are sometimes referred to as the 'gatekeepers' of the criminal justice system.⁴⁴⁰

Some of the strategies that complainants and specialists have reflected positively on – which primarily arose in the context of interactions with police but may also be relevant for lawyers and judicial officers to observe in their own practice where appropriate – include:

- having interactions grounded in empathy, patience and sensitivity⁴⁴¹
- having interactions in safe and private spaces⁴⁴²
- having candid discussions about the criminal justice process⁴⁴³ that are empathetic but do not provide false assurances or 'sugar-coat' information⁴⁴⁴
- being given sufficient time and (sustained) attention⁴⁴⁵
- being provided with support, including being linked to specialist sexual violence practitioners who can be a 'primary lifeline'⁴⁴⁶
- being kept up-to-date about the progression of the case⁴⁴⁷
- being provided with some self-determination surrounding the justice process⁴⁴⁸
- being referred to appropriate services to address any health and social welfare concerns that may be contributing factors in their experience of violence.⁴⁴⁹

Some sectors have materials to support police, lawyers and judicial officers to apply these kinds of strategies within the frameworks of their professional responsibilities and standards – outlined in the [Resources in relation to sexual assault matters](#) at the end of this resource.

An appropriately nuanced framework should be brought to understandings of the barriers to criminal justice for sexual assault matters for all victims and survivors. This includes barriers to reporting and barriers to conviction for sexual assault.

Interventions to stop unfair or inappropriate tactics

Complainants have reflected positively on their experiences of judges intervening when unfair or inappropriate tactics are used to confuse them or cast doubt on their story, particularly in the context of being cross-examined in their capacity as witnesses.⁴⁵⁰

- There are common law protections against unfair or inappropriate tactics, known as ‘improper’ questioning.⁴⁵¹
- The ACT, NSW, NT, Tasmania, Victoria and Queensland (date of commencement to be proclaimed) have legislative provisions that require courts to disallow improper questioning,⁴⁵² including questions that are confusing, harassing, insulting or have no basis other than a stereotype.⁴⁵³ Similar (albeit slightly less comprehensive) provisions apply in WA.⁴⁵⁴

Special measures and witness intermediaries to support complainants

Each jurisdiction has legislative provisions that can provide support to witnesses, including complainants, giving evidence at trial. These can be used in circumstances where the witness is affected by unique sensitivities and/or vulnerabilities, including because the trial relates to sexual assault.⁴⁵⁵ Some of those supports may include:

- giving evidence by way of an audiovisual recording (available in the ACT, NT, Queensland, SA, Tasmania and WA).⁴⁵⁶
- giving evidence from outside the courtroom; for example, by way of closed circuit television facilities (available in all jurisdictions)⁴⁵⁷
- having support people in court (available in all jurisdictions)⁴⁵⁸
- giving evidence (and/or having it heard) in court without other people present (available in all jurisdictions)⁴⁵⁹
- giving evidence (and/or having it heard) in court without the accused person present, or otherwise without being able to directly see or hear the complainant (available in all jurisdictions)⁴⁶⁰
- not being cross-examined by the accused person directly (i.e. not through a lawyer; available in all jurisdictions).⁴⁶¹

Additionally, most states and territories have a witness intermediary, or similar, scheme in place. Witness intermediaries are specialists who assist witnesses with communication barriers to give their best evidence. They are not advocates who put forward a particular position or argument, they do not act as a ‘support person’ for the accused or witness, and they are not expert witnesses who offer an opinion about the case. Rather, witness intermediaries may be used to assist police in communicating with complainants during investigations and assist the court and counsel in communicating with a witness and understanding their communication needs at trial.

- NSW, Victoria and the ACT currently have permanently legislated witness intermediary schemes.⁴⁶²
- SA and WA have similar legislated schemes – involving ‘communication partners’ in SA and ‘communicators’ in WA.⁴⁶³
- Tasmania and Queensland currently have pilot programs for witness intermediaries underway.⁴⁶⁴

Eligibility for this kind of support differs across jurisdictions.



READING

Some key resources for reading:

- George, Amanda-Jane et al., Australasian Institute of Judicial Administration, Australian Attorney-General’s Department, CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (2023)
- Dowling, Christopher, Australian Institute of Criminology, ‘Police Training in Responding to Family, Domestic and Sexual Violence’ (2024) 689 *Trends & Issues in Crime and Criminal Justice*
- KPMG and Centre for Innovative Justice, RMIT, *‘This is My Story. It’s Your Case, but it’s My Story’: Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (Report, July 2023)
- Te Kura Kaiwhakawā/Institute of Judicial Studies, *Responding to Misconceptions About Sexual Offending: Example Directions for Judges and Lawyers* (2023)
- Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences: Report* (September 2021)
- Women’s Safety and Justice Taskforce, *Hear Her Voice* (Report 2, Volume 1, 2022)

INSIGHT 12

Victims and survivors can face additional barriers to criminal justice for sexual assault due to discrimination and/or stereotypes

As discussed in [Insight 11](#), most sexual assault cases in Australia do not make it to or through the criminal justice process,⁴⁶⁵ including because of numerous (interrelated) barriers to criminal justice.

Seeking criminal justice for sexual assault may be more complicated for victims and survivors who experience discrimination and/or disadvantage⁴⁶⁶ – for example, based on their attributes, including racial and cultural background, age, gender, sex, sexuality, or their material circumstances, including work.

- These complications can be exacerbated for these victims and survivors when their experiences of sexual assault are overlooked (see [Insight 13](#)).
- They can also be exacerbated for people who experience overlapping forms of discrimination and/or disadvantage ('intersectional discrimination').
 - Intersectional discrimination operates in a way that is separate to, and compounds, the discrimination and/or disadvantage someone may face based on only one of the attributes or circumstances flagged above.⁴⁶⁷

✗ THE FALSE ASSUMPTION

*'All victims and survivors face the same barriers to criminal justice for sexual assault.'*⁴⁶⁸

✓ THE REALITY

Aboriginal and Torres Strait Islander victims and survivors

Aboriginal and Torres Strait Islander victims and survivors may find it difficult to seek help or justice for sexual assault,⁴⁶⁹ particularly if it was committed by an intimate partner.⁴⁷⁰ These difficulties may arise from unique barriers faced by these victims and survivors, including:

- deep distrust or fear of authorities – for example, based on intergenerational trauma⁴⁷¹ and/or culturally unsafe or insensitive, racist, unsatisfactory and/or unjust interactions⁴⁷² including misidentification of victims and survivors as perpetrators of family and domestic violence⁴⁷³ and the removal of children⁴⁷⁴
- wanting to avoid reporting intimate partner sexual assault, due to fear of exposing the partner to racism in the criminal justice system⁴⁷⁵
- fear of being misunderstood, particularly if English is not a first language⁴⁷⁶
- lack of cultural sensitivity among services⁴⁷⁷
- geographic constraints (particularly for regional, rural and remote communities).⁴⁷⁸

Culturally and linguistically diverse ('CALD')⁴⁷⁹ victims and survivors

CALD victims and survivors may find it difficult to seek help or justice for sexual assault. These difficulties may arise from unique barriers faced by these victims and survivors, including:

- experiences of historic discrimination and violence by authorities in their home countries⁴⁸⁰
- wanting to avoid reporting intimate partner sexual assault due to fear of exposing their partner to racism in the criminal justice system⁴⁸¹
- limited translator and interpreter services⁴⁸²
- dependence on the perpetrator, including economically⁴⁸³ and/or for visa sponsorship⁴⁸⁴

- community or religious beliefs about marriage as a private and permanent institution⁴⁸⁵
- isolation from social supports, including distance from their home country⁴⁸⁶
- minimisation and/or lack of understanding of sexual violence – for example, due to certain forms not being criminalised in their home country.⁴⁸⁷

LGBTQIA+ victims and survivors

Many LGBTQIA+ victims and survivors often do not seek help or justice for sexual violence.⁴⁸⁸ This may be because these victims and survivors can face unique barriers, including:

- experiencing discrimination in the criminal justice system,⁴⁸⁹ and broader experiences of (and fears of experiencing) heterosexism, homophobia and transphobia⁴⁹⁰
- fears of being forced to ‘come out’, and general discomfort with disclosing sexual orientation⁴⁹¹
- fears of being treated unfairly in comparison to heterosexual and cisgender victims and survivors⁴⁹²
- responses not being appropriate – for example, due to a lack of capacity, training and understanding in relation to LGBTQIA+ peoples’ experiences of violence⁴⁹³
- fears of police being unable, or unwilling, to do anything to help⁴⁹⁴ – which may be born out of apprehension, or actual experience, of discrimination within the criminal justice system.⁴⁹⁵

Victims and survivors with disability

Without appropriate support, victims and survivors with disability may be perceived as unreliable when reporting or giving evidence as complainants of sexual assault.⁴⁹⁶ Alternatively, their complaints may not progress to the justice system at all.⁴⁹⁷ Indeed, sexual assault against people with disability is often underreported.⁴⁹⁸

Victims and survivors with disability may face unique barriers when reporting sexual assault to health professionals, police and other criminal justice professionals.⁴⁹⁹ These barriers can include:

- communication needs⁵⁰⁰ that require accessible and inclusive communication strategies and reasonable adjustments,⁵⁰¹ and that police, lawyers and/or judicial officers may not be aware of⁵⁰²
- limited understanding about sexual assault and their legal rights in relation to it⁵⁰³
- fear that the report will be exploited by the perpetrator (i.e. where the perpetrator is a carer) to deny the victim and survivor their basic needs and/or misinterpreted by carers as a reason to restrict the victim’s and survivor’s independent living⁵⁰⁴
- not being appropriately supported to exercise decision-making capacity.⁵⁰⁵

Victims and survivors who are sex workers⁵⁰⁶

There are significant limitations in data about sexual assault against sex workers.⁵⁰⁷ One limitation may be underreporting of sexual assault, noting victims and survivors who are sex workers face unique barriers to seeking help and justice for sexual assault, including:

- experiences of stigma and discrimination due to their association with the sex industry⁵⁰⁸
- fear and mistrust of authorities (particularly for CALD sex workers, and those on visas) especially given the context of working in a stigmatised and (in some jurisdictions) criminalised industry⁵⁰⁹
- normalisation of sexual assault in their profession⁵¹⁰
- minimisation of sexual assault, including because it is perceived as part of the work.⁵¹¹

Older victims and survivors

Sexual assault is the least likely form of elder abuse to be brought to the attention of a third party.⁵¹² There are a range of personal and systemic barriers to help seeking for elder abuse generally.⁵¹³ Based on those barriers, sexual assault against older victims and survivors may not be disclosed for a variety of reasons including:

- a desire to keep elder abuse secret, particularly if it involves friends or family⁵¹⁴
- fear of consequences arising in connection to their relationship to the perpetrator – including not wanting to get them in trouble, not wanting to worsen their circumstances, and/or not wanting to worsen the relationship with them⁵¹⁵
- a lack of knowledge about services⁵¹⁶
- a concern that services may not have the capacity to provide appropriate help.⁵¹⁷

The highest rates of underreporting of sexual assault are among older and ageing populations compared to other age groups, and among nursing home residents (particularly females with cognitive or physical impairments).⁵¹⁸

Male victims and survivors

Women experience disproportionately high rates of sexual assault.⁵¹⁹ While men experience lower rates of sexual assault, it is important to recognise that they face unique barriers to seeking help and justice.

One key underlying barrier is that men may be more likely to have their reports trivialised than victims and survivors who are not men.⁵²⁰ Trivialisation can cast doubt on the authenticity of these reports, and ultimately contribute to the 'invisibility' and even 'silencing' of male rape,⁵²¹ as discussed in [Insight 13](#).



PRACTICE EXAMPLES

Complainants who experience discrimination (including intersectional discrimination) have reflected negatively on their experiences in the criminal justice system. A key theme is barriers to access and/or participation. For example:

- a lack of culturally safe and appropriate spaces, support people and communication strategies for Aboriginal and Torres Strait Islander complainants⁵²²
- cultural barriers to discussions around sexual assault that may undermine the ability for CALD complainants to access and/or participate⁵²³
- LGBTQIA+ complainants feeling discriminated against during police investigations⁵²⁴
- a lack of accessible spaces and/or effective communication strategies to accommodate and support the participation of complainants with disability⁵²⁵
- sex workers who are complainants fearing not being recognised as a victim and survivor because of their employment, particularly in jurisdictions where it is criminalised.⁵²⁶

Male complainants have also reflected negatively on experiences in the Australian criminal justice system.⁵²⁷ Older female complainants have reflected on issues with reporting and progressing through the system.⁵²⁸

An appropriately nuanced framework should be brought to understandings of the barriers to criminal justice for victims and survivors who may experience discrimination and/or face stereotypes that normalise or otherwise obscure the unique harms and barriers they experience (see [Insight 13](#)).

Materials to guide practice that is appropriate and supportive for a wide range of victims and survivors

There are a range of materials that may assist police, lawyers and/or judicial officers to apply a comprehensive knowledge base about different victims' and survivors' unique experiences, and ideally support them to overcome some of the unique barriers to reporting sexual assault. This list contains some useful materials:

- The Magnolia Project and Aboriginal Legal Rights Movement have created a [Practice Guide](#) that refers to sexual assault and explains it in the context of culturally appropriate Aboriginal and Torres Strait Islander conceptualisations of violence.⁵²⁹
- The Northern Integrated Family Violence Services Partnership has created a [Toolkit](#) to improve responses to CALD women (and children) who have experienced family violence.
- ANROWS has created a [Best Practice Fact Sheet](#) for working with CALD communities in addressing violence against women.
- Safe and Equal has created a [Digital Guide](#) to supporting LGBTQIA+ victims and survivors; it includes 'Practice considerations', a [Tip Sheet](#), and [Webinar Slides](#) specifically related to supporting trans women.
- People with Disability Australia (PWDA) and Domestic Violence NSW have created a [Guide](#) that outlines barriers that victims and survivors with disability may face to help and support for domestic and family violence, and provides policy recommendations to address them.
- PWDA, Building Access and WWILD also have a [Handbook](#) to support victims and survivors of family and domestic violence with intellectual disability.
- ECU Social Ageing (SAGE) Futures Lab, on behalf of the Older People's Rights Service, has created [Best Practice Guidelines](#) for interviewing older people that may be experiencing (or at risk of) harm, including sexual abuse.
- The NSW Elder Abuse Helpline & Resource Unit has created a [Toolkit](#) that sets out a 5-step approach to identifying and responding to the abuse of older people, including sexual abuse.
- The Royal Australian College of General Practitioners has a [section](#) in its clinical guidelines for working with patients of abuse and violence that sets out information to support working with male victims and survivors.



READING

Some key resources for reading:

- **Aboriginal and Torres Strait Islander victims and survivors:** Lovatt, Heather and Bronwyn Honorato, Queensland Centre for Domestic and Family Violence Resource, *Prevention, Early Intervention and Support for Aboriginal and Torres Strait Islander People Who Have Experienced Sexual Violence: Practice Paper* (Practice Paper, February 2019)
- **CALD victims and survivors:** Mitra-Kahn, Trishima, Carolyn Newbigin and Sophie Hardefeldt, Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women. State of Knowledge Paper* (Landscapes Issue DD01, December 2016)
- **LGBTQIA+ victims and survivors:** Callander, Denton et al., The Kirby Institute, NSW Sydney, *The 2018 Australian Trans and Gender Diverse Sexual Health Survey: Report of Findings* (Report, 2019)
- **Victims and survivors with disability:** Centre of Research Excellence in Disability and Health (CRE-DH), Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Nature and Extent of Violence, Abuse, Neglect and Exploitation Against People With Disability in Australia: Research Report* (Research Report, March 2021)
- **Sex workers who are victims and survivors:** Hirsch, Rachel V, Project Respect, *The Extent, Nature and Impact of Family, Domestic, and Sexual Violence (FDSV) Against Women in the Australian Sex Industry: A State of Knowledge Paper* (Report, 2022)
- **Older victims and survivors:** Qu, Lixia et al., Australian Institute of Family Studies (AIFS), *National Elder Abuse Prevalence Study: Final report* (Final Report, July 2021)
- **Male victims and survivors:** Kambashi, Ngoso et al., 'Adult Male Rape Myths in England Since 1994: A Systemic Mixed Methods Review' (2023) 29(4) *Psychology, Public Policy, and Law* 497

INSIGHT

13

Victims' and survivors' experiences of sexual assault may be overlooked or ignored due to discrimination and/or stereotypes

It is important to understand that there is no single experience of sexual assault. Sexual assault occurs in all communities and against all types of people.

Victims and survivors are diverse, and their experiences of sexual assault are not homogenous.⁵³⁰

However, some stereotypes set up discriminatory constructs about what kind of person can be a 'real' victim and survivor.⁵³¹ These stereotypes can cause the experiences of victims and survivors who do not match them to be considered less believable, less credible and/or more blameworthy⁵³² – including:

- Aboriginal and Torres Strait Islander victims and survivors
- CALD victims and survivors
- LGBTQIA+ victims and survivors
- victims and survivors with disability
- victims and survivors who are sex workers
- older victims and survivors
- male victims and survivors.

Further, discriminatory stereotypes can be compounded by limited data and underreporting of sexual assault by these victims and survivors⁵³³ to effectively cause their experiences to be overlooked or ignored. This ignorance is particularly problematic given that some of these victims and survivors experience intersectional discrimination and are at greater risk of experiencing more frequent and severe sexual violence,⁵³⁴ and face greater barriers to criminal justice (see [Insight 12](#)).

X THE FALSE ASSUMPTION

'Some people are not real victims and survivors of sexual assault.'⁵³⁵

✓ THE REALITY

Aboriginal and Torres Strait Islander victims and survivors

Aboriginal and Torres Strait Islander victims and survivors may have their experiences overlooked or ignored if they are not understood in culturally appropriate terms. Violence against women in Aboriginal and Torres Strait Islander contexts has complex, intersecting drivers.⁵³⁶ It cannot be understood solely through dominant, Eurocentric lenses (including patriarchal subordination and silencing of women).⁵³⁷ Rather, violence against women in Aboriginal and Torres Strait Islander contexts must be understood more broadly and in consultation with perspectives of Aboriginal and Torres Strait Islander people.⁵³⁸ This is consistent with the approach agreed upon in the *National Agreement on Closing the Gap*, to 'listen to the voices and aspirations' of Aboriginal and Torres Strait Islander people.⁵³⁹ Further, it honours their ongoing strength and resilience in sustaining the world's oldest living cultures.⁵⁴⁰

The experiences of Aboriginal and Torres Strait Islander victims and survivors must also be understood in the context of specific factors identified as impacting Aboriginal and Torres Strait Islander people. This includes wide-ranging socio-economic and environmental factors, as well as significant cultural and historical factors linked to the devastating impacts of colonisation (which includes dispossession from land, family and culture, systemic racism and discrimination, and inter-generational trauma).⁵⁴¹ These factors underlie general disparities between Aboriginal and Torres Strait Islander people and non-Indigenous Australians on key health, education and economic opportunity measures.⁵⁴² These disparities may be linked to discrimination and disadvantage faced by Aboriginal and Torres Strait Islander victims and survivors, which can render their experiences of sexual assault invisible, as well as create barriers to criminal justice for those experiences (see [Insight 12](#)).

Sexual assault against Aboriginal and Torres Strait Islander people is underreported (reasons for this include the barriers faced by Aboriginal and Torres Strait Islander victims and survivors identified in [Insight 12](#)).⁵⁴³ However, research indicates that Aboriginal and Torres Strait Islander people experience disproportionate rates of sexual assault.⁵⁴⁴

- National statistics indicate that, in 2016, Aboriginal and Torres Strait Islander people were up to 3.4 times more likely to experience sexual assault than non-Indigenous Australians in jurisdictions where data were sufficiently reliable (NSW, Queensland, SA and the NT).⁵⁴⁵
- In 2022, Aboriginal and Torres Strait Islander people were disproportionately represented in the number of sexual assaults recorded,⁵⁴⁶ compared to their representation in the total population.⁵⁴⁷

CALD victims and survivors

CALD victims' and survivors' experience of sexual assault can occur against a backdrop of stereotypes about their sexuality, including 'exoticised stereotypes' due to being in minority communities in a predominately white society.⁵⁴⁸ These kinds of stereotypes may cause those experiences to be misunderstood, minimised and/or normalised.⁵⁴⁹

The 2021-22 Personal Safety Survey estimated that in Australia, in the 2-year period prior to the survey:

- 2.1% of women born in non-English-speaking countries experienced sexual violence
- 2.0% of women born in mainly English-speaking countries experienced sexual violence.⁵⁵⁰

As data collection does not typically disaggregate data on specific population groups, available statistics may underrepresent the rate of violence experienced by CALD people.

LGBTQIA+ victims and survivors

Sexual violence against LGBTQIA+ people can be rendered invisible through discrimination and stereotypes in relation to these people's sexuality generally,⁵⁵¹ and the exclusion of LGBTQIA+ people from sexual health-related policy frameworks.⁵⁵²

There are gaps in the data about sexual assault against LGBTQIA+ people.⁵⁵³ However, available research has shown high rates of adult sexual violence against LGBTQIA+ people.⁵⁵⁴

- National statistics indicate that, in the 2021-22 financial year, LGBTQIA+ women were more likely to have been victimised by sexual violence (13%) than heterosexual women (2.4%).⁵⁵⁵
- Almost half (48.6%) of LGBTQIA+ participants in the 'Private Lives' survey (2019)⁵⁵⁶ reported having been coerced or forced into sexual acts they did not want to engage in.⁵⁵⁷
- A national survey in relation to LGBTQIA+ peoples' sexual health indicated that, in 2018, LGBTQIA+ people reported nearly 4 times greater rates of sexual violence or coercion than the general Australian public.⁵⁵⁸

Victims and survivors with disability

Sexual violence against women with disability operates in a context where these women are subjected to sexist and ableist stereotypes that deny their agency and capacity, and/or misrepresent their sexuality as one of two extremes: hypersexual or non-existent.⁵⁵⁹

Victims and survivors with disability are at high risk of experiencing sexual violence.

- The 2021-22 Personal Safety Survey estimated that, in Australia, in the 2-year period prior to the survey, women with disability were more likely to have experienced sexual violence within a 2-year period (4.0%) than women without disability (2.5%).⁵⁶⁰
- Women with disability were up to 4 times more likely to have experienced sexual violence in Australia at some stage in their lives than women without disability.⁵⁶¹
- Men with disability were up to 2.6 times more likely to report having experienced sexual violence in Australia at some stage in their lives than men without disability.⁵⁶²

Victims and survivors who are sex workers

Victims and survivors who are sex workers experience significant stigma, social isolation and discrimination⁵⁶³ – including those who work in jurisdictions that have decriminalised sex work.⁵⁶⁴ Further, they are subjected to stereotypes that normalise violence and sexual assault against women in the sex industry.⁵⁶⁵ Repeated reports of sexual assault tend to be ignored, minimised and/or normalised,⁵⁶⁶ and even perceived to be part of the work.⁵⁶⁷

Available research suggests that sex workers are at very high risk of experiencing various forms of sexual violence.⁵⁶⁸ It is difficult to determine an exact rate of violence as data about sexual assault against sex workers are limited.

Victims and survivors who are older and ageing people

Female nursing home residents whose circumstances make them vulnerable (including living with disability, financial insecurity or ill-health) are at particularly high risk of sexual assault.⁵⁶⁹ Sexual assaults within nursing homes are disproportionately perpetrated by male residents against female residents with cognitive or physical impairments.⁵⁷⁰

Although data about sexual assault against people aged over 65 years are limited, and cases are underreported,⁵⁷¹ available research has shown high rates of sexual violence against this population.⁵⁷²

- A national study of elder abuse found that, of 598,000 older people estimated to have experienced some form of elder abuse in Australia between 2020 and 2021, an estimated 39,500 (6.6%) had experienced some form of sexual abuse.⁵⁷³
- The Royal Commission into Aged Care Quality and Safety found that the rates of unlawful sexual contact against older and ageing Australians included up to 50 incidents per week.⁵⁷⁴

Victims and survivors who are men

As flagged in [Insight 12](#), male victims and survivors are twice as likely to have their reports trivialised than victims and survivors who are not men.⁵⁷⁵ Trivialisation may be influenced by false assumptions and rigid gendered understandings of sexual assault and cultural beliefs around male aggression.⁵⁷⁶

- False assumptions around masculinity (e.g. that men would ‘fight back’⁵⁷⁷) can cause men to be blamed for an experience of sexual assault if they did not physically defend themselves from it,⁵⁷⁸ despite the reality (discussed in [Insight 2](#)) that it is more common for victims and survivors to ‘fawn’ or ‘freeze’ in response to sexual assault.
- False assumptions and stereotypes that ‘male rape only occurs between gay men’⁵⁷⁹ can leave male victims and survivors concerned that they will be labelled as homosexual.⁵⁸⁰
 - It is true that gay and bisexual men report higher levels of sexual victimisation than heterosexual men.⁵⁸¹ However, any man can commit or experience sexual assault irrespective of their sexuality,⁵⁸² and research has indicated that heterosexual men are both perpetrators as well as victims and survivors.⁵⁸³

Women experience disproportionately high rates of sexual assault.⁵⁸⁴ However, it is important to note that men can and do experience it.⁵⁸⁵



PRACTICE EXAMPLES

Each allegation of sexual assault is unique and it is important to recognise, within the requirements of the criminal justice system, all experiences and perspectives of victims and survivors of sexual assault across a diversity of backgrounds and characteristics.⁵⁸⁶ At the same time, it is important that, in doing so, we do not create culturally relative definitions that can perpetuate stereotypes, dehumanise victims and survivors from diverse backgrounds and legitimise or excuse violence in some communities.⁵⁸⁷

Australian cases that recognise unique experiences of sexual assault against people who experience intersectional discrimination

Australian courts have made efforts to acknowledge the high risks of experiencing sexual assault amongst some groups who are more likely to experience discrimination, and to respond to the complexities in this context. For example:

- The Supreme Court of Queensland has acknowledged that people from CALD backgrounds can be particularly vulnerable to sexual violence, and this may be relevant in assessing a defendant's culpability – for example, because it indicates the defendant behaved in a 'calculated' or 'predatory' way.⁵⁸⁸
- The Victorian County Court accepted that racist comments made in the context of sexual offending were aggravating features of an offence(s).⁵⁸⁹
- The Supreme Court of New South Wales and the Court of Appeal of New South Wales have rejected submissions in relation to cultural considerations including 'traditional views about women'⁵⁹⁰ and 'the place occupied by women'⁵⁹¹ in other countries.
- The Supreme Court of Victoria has acknowledged that people with intellectual disability can be 'extremely vulnerable' to sexual offending, and this can be a serious aggravating feature of an offence.⁵⁹²
- The Australian Capital Territory Supreme Court has acknowledged that sex workers are particularly vulnerable to sexual violence.⁵⁹³

Legislation that addresses sexual assault against sex workers

In Queensland (date of commencement to be proclaimed), legislated jury directions state that it should not be assumed that a person consented to a sexual act just because they worked as a sex worker.⁵⁹⁴ Further, consent provisions provide that consent to a sexual act is not legally valid in circumstances where a sex worker participates in the sexual act because they were falsely or fraudulently led to believe they would be paid or rewarded for that participation.⁵⁹⁵



READING

Some key resources for reading:

- **Aboriginal and Torres Strait Islander victims and survivors:** Lovatt, Heather and Bronwyn Honorato, Queensland Centre for Domestic and Family Violence Resource, *Prevention, Early Intervention and Support for Aboriginal and Torres Strait Islander People Who Have Experienced Sexual Violence: Practice Paper* (Practice Paper, February 2019)
- **CALD victims and survivors:** Mitra-Kahn, Trishima, Carolyn Newbigin and Sophie Hardefeldt, Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women. State of Knowledge Paper* (Landscapes Issue DD01, December 2016)
- **LGBTQIA+ victims and survivors:** Callander, Denton et al., The Kirby Institute, NSW Sydney, *The 2018 Australian Trans and Gender Diverse Sexual Health Survey: Report of Findings* (Report, 2019)
- **Victims and survivors with disability:** Centre of Research Excellence in Disability and Health (CRE-DH), Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Nature and Extent of Violence, Abuse, Neglect and Exploitation Against People With Disability in Australia: Research Report* (Research Report, March 2021)

- **Sex workers who are victims and survivors:** Hirsch, Rachel V, Project Respect, *The Extent, Nature and Impact of Family, Domestic, and Sexual Violence (FDSV) Against Women in the Australian Sex Industry: A State of Knowledge Paper* (Report, 2022)
- **Older victims and survivors:** Qu, Lixia et al., Australian Institute of Family Studies (AIFS), *National Elder Abuse Prevalence Study: Final report* (Final Report, July 2021)
- **Male victims and survivors:** Kambashi, Ngoso et al., 'Adult Male Rape Myths in England Since 1994: A Systemic Mixed Methods Review' (2023) 29(4) *Psychology, Public Policy, and Law* 497

Resources in relation to sexual assault matters

Table A below depicts some of the key roles and resources that may be involved in justice system responses to sexual assault matters in each jurisdiction as at 31 May 2024.

Table A: Roles and resources in justice system responses to sexual assault matters

Sector	Jurisdiction	Title	Resources
Police			
	ACT	Sexual Assault and Child Abuse Team	
	NSW	Sex Crime Squad	
	NT	Sex Crimes Unit	
	Qld	Child Abuse and Sexual Crime Group, Sexual Violence Response Team	QPS Sexual Violence Response Strategy 2023-25
	SA	Sexual Crime Investigations	
	Tas	ARCH and Specialist Sex Crime Investigators	Tasmania Police Manual [4.4.10]
	Vic	Sexual Offences and Child Abuse Investigation Teams	Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018-2023
	WA	Sex Assault Squad	
Lawyers			
Prosecutors	ACT	The Office of the Director of Public Prosecutions	The Prosecution Policy of the Australian Capital Territory
	NSW	Office of the Director of Public Prosecutions	ODPP New South Wales Prosecution Guidelines
	NT	Director of Public Prosecutions	Guidelines of the Director of Public Prosecutions
	Qld	Office of the Director of Public Prosecutions	<ul style="list-style-type: none">• Director's Guidelines (under review)• Queensland Law Handbook Online – Sexual Offences
	SA	Office of the Director of Public Prosecutions	<ul style="list-style-type: none">• Director of Public Prosecutions South Australia Statement of Prosecution Policy & Guidelines• Legal Services Commission South Australia, Law Handbook – Sexual Offences
	Tas	Director of Public Prosecutions	Prosecution Policy and Guidelines
	Vic	Office of Public Prosecutions Victoria	Policy of the Director of Public Prosecutions for Victoria
	WA	The Office of the Director of Public Prosecutions for Western Australia	Director of Public Prosecutions for Western Australia Statement of Prosecution Policy and Guidelines
Defence counsel	NOTE: Defence counsel are not drawn from any one organisation or office like prosecutors are. However, there are still resources published by peak bodies for criminal defence lawyers, including, for example, in NSW: Papers by Public Defenders		
Courts			
	ACT	Magistrates Court of the Australian Capital Territory Australian Capital Territory Supreme Court	

Sector	Jurisdiction	Title	Resources
	NSW	New South Wales Local Court New South Wales District Court Supreme Court of New South Wales	<ul style="list-style-type: none"> • Criminal Trials Courts Bench Book (Judicial Commission of NSW) • Equality before the Law Bench Book (Judicial Commission of NSW) • Local Court Bench Book – Sexual Offences (Judicial Commission of NSW) • Sentencing Bench Book – Sexual Assault (Judicial Commission of NSW) • Sexual Assault Trials Handbook (Judicial Commission of NSW)
	NT	Northern Territory Local Court Supreme Court of the Northern Territory	
	Qld	Queensland Magistrates' Court Queensland District Court Queensland Supreme Court	Supreme and District Courts Criminal Directions Benchbook
	SA	Magistrates' Court of South Australia District Court of South Australia Supreme Court of South Australia	South Australian Criminal Trials Bench Book
	Tas	Magistrates' Court of Tasmania Supreme Court of Tasmania	
	Vic	Magistrates' Court of Victoria County Court of Victoria Supreme Court of Victoria	<ul style="list-style-type: none"> • Case Summaries – 03 – Sexual Offences (Judicial College of Victoria) • Criminal Charge Book (Judicial College of Victoria) • Criminal Proceedings Manual (Judicial College of Victoria) • Disability Access Bench Book (Judicial College of Victoria) • Family Violence Bench Book (Judicial College of Victoria) • Victorian Sentencing Manual (Judicial College of Victoria)
	WA	Magistrates' Court of Western Australia District Court of Western Australia Supreme Court of Western Australia	Equal Justice Bench Book (Department of Justice Western Australia)
	Other		<ul style="list-style-type: none"> • National Domestic and Family Violence Bench Book (Australasian Institute of Judicial Administration) • Managing Sexual Assault Hearings – Judicial Education Program (The National Judicial College of Australia)

Table B below depicts some of the specialist sexual assault services that may assist in responding to sexual assault matters in each jurisdiction as at 31 May 2024.

Table B: Specialist sexual assault services

Jurisdiction	Title
Court-based support	
ACT	The Witness Assistance Service Victim Support ACT
NSW	ODPP Witness Assistance Service
NT	Witness Assistance Service
Qld	Victim Assist Queensland PACT
SA	Witness Assistance Team Victim Support Service
Tas	Witness Assistance Service Victims Support Services
Vic	Victims and Witness Assistance Service Victims Assistance Program Victims of Crime Helpline Court Network
WA	Victim Support Service Family Violence Service
External support	
ACT	Canberra Rape Crisis Centre
NSW	NSW Health Sexual Assault Services
NT	Ruby Gaea Darwin Centre Against Sexual Violence Inc
Qld	Queensland Sexual Assault Network Brisbane Rape and Incest Survivors Support Centre
SA	Yarrow Place Rape and Sexual Assault Service
Tas	Laurel House Sexual Assault Support Service
Vic	Sexual Assault Services Victoria
WA	King Edward Memorial Hospital, Sexual Assault Resource Centre

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Endnotes

Understanding sexual offences against adults

- 1 Recent changes: *Crimes (Consent) Amendment Act 2022* (ACT); *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW); *Criminal Code (Amendment) Consent Act 2004* (Tas); *Criminal Code Amendment Act 2022* (Tas); *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic); Prospective changes: *Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023* (NT); *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* (Qld). See also Stella Tarrant, Heather Douglas and Hilde Tubex, Law Reform Commission of Western Australia, *LRCWA Project 113: Sexual Offences: Background Paper* (Background Paper, Project 113: Sexual Offences, 2022) (WA) and The Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (Report, September 2023).
- 2 *Crimes Act 1900* (ACT) ss 50B, 67(1)(b)–(o), 67(2)(b); *Crimes Act 1900* (NSW) s 61HI(1); *Criminal Code 1983* (NT) s 192(1); *Criminal Code 1899* (Qld) s 348(1)–(2); *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 46(3) and 47; *Criminal Code Act 1924* (Tas) ss 2A(1) and 2A(2)(b)–(g), (h)–(i); *Crimes Act 1958* (Vic) ss 36(1), 36AA(1)(b)–(o); *Criminal Code Compilation Act 1913* (WA) s 319(2)(a).
- 3 Department of Social Services, Commonwealth of Australia, *The Commonwealth Consent Policy Framework* (2023) 7 ('*The Commonwealth Consent Framework*').
- 4 *The Commonwealth Consent Framework* (n 3) 10–11.
- 5 *Ibid* 11.
- 6 This is consistent with the definition used in the *National Plan to End Violence Against Women and Children 2022–2032*: Department of Social Services, Commonwealth of Australia, *The National Plan to End Violence against Women and Children 2022–2032* (2022) 37 ('*The National Plan*').
- 7 See, eg, the various forms of sexual violence discussed in Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence* (Web Page, 12 April 2024) <Sexual violence - Australian Institute of Health and Welfare (aihw.gov.au)> ('*Family, Domestic and Sexual Violence*'). See also Christine Coumarelos et al, Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Attitudes Matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia* (Research Report, February 2023) 167.
- 8 See, eg, the various impacts of sexual violence discussed in *Family, Domestic and Sexual Violence* (n 7).
- 9 Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (November 2023) <Australian and New Zealand Standard Offence Classification (ANZSOC), 2023 | Australian Bureau of Statistics (abs.gov.au)>.
- 10 Standing Council of Attorneys-General Working Group on Criminal Justice Responses to Sexual Assault, *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–27* (SCAG Work Plan, August 2022) 5.
- 11 Australian Law Reform Commission, *Justice Responses to Sexual Violence* (Issues Paper No 49, April 2024) ('*Justice Responses to Sexual Violence*').
- 12 Elaine Craig, *Putting Trails on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, 2018) 7.
- 13 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 120.
- 14 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 *Melbourne University Law Review* 539, 542.
- 15 *Dietrich v The Queen* (1992) 177 CLR 292, 299–300.
- 16 *Ragg v Magistrates Court of Victoria & Corcoris* [2008] VSC 1 [77], Bell J quoting Lord Steyn in the House of Lords in *Attorney General's Reference (No 3 of 1999)*.
- 17 For an illustration on how stereotypes can be legitimately relevant in some instances but illegitimate in others, see, eg, the following statement from Yvette Tinsley, Warren Young and Claire Baylis, 'I Think She's Learnt Her Lesson': Juror Use of Cultural Misconceptions in Sexual Violence Trials' (2021) 52(2) *Victoria University of Wellington Law Review* 463, 473: 'In some cases where jurors have doubts ... about whether the offence has been proved beyond reasonable doubt, it may be understandable and legitimate for them to take into account the absence of injuries or evidence of resistance. However, if that translates into a belief that a rape cannot be proved beyond reasonable doubt, or indeed, a belief that it is unlikely to have occurred in the absence of injuries or resistance, that is clearly ascribing undue weight to that evidence and results in fallacious reasoning.'
- 18 The Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 1) [1.21]–[1.27].
- 19 Our Watch, *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women in Australia (Second Edition)* (Framework, 2021) 26–45 ('*Change the Story*').
- 20 Australian Bureau of Statistics, *Recorded Crime – Victims* (June 2023) <Recorded Crime – Victims, 2022 | Australian Bureau of Statistics (abs.gov.au)> ('*Recorded Crime – Victims*').
- 21 *Change the Story* (n 19) 27–47; Kate Fitz-Gibbon et al, Monash Gender and Family Violence Prevention Centre, Monash University, *National Plan Victim-Survivor Advocates Consultation Final Report* (Report, February 2022) 34; Tarrant, Douglas and Tubex (n 1) 6–7; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 13 ('*Improving the Justice System Response to Sexual Offences*').
- 22 Joanne Hulley et al, 'Intimate Partner Violence and Barriers to Help-Seeking Among Black, Asian, Minority Ethnic and Immigrant Women: A Qualitative Metasynthesis of Global Research' (2023) 24(2) *Trauma, Violence & Abuse* 1000, 1008–9 and 1011–12; Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women: State of knowledge paper* (Landscape Issue DD01, December 2016) 12, 18.
- 23 Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on Equality and Non-Discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 5–6.
- 24 Australian Bureau of Statistics, *Sexual Assault – Perpetrators* (February 2022) <Retrieved from Sexual Assault – Perpetrators | Australian Bureau of Statistics (abs.gov.au)>.
- 25 *Change the Story* (n 19) 29–54.
- 26 See generally Coumarelos et al (n 7), and specifically at 170–6.

- 27 E.g. laypeople may use stereotypical frameworks to shift blame away from the accused: Blake M McKimmie, Barbara M Masser and Renata Bongiorno, 'What Counts as Rape? The Effects of Offense Prototypes, Victim Stereotypes, and Participant Gender on How the Complainant and Defendant are Perceived' (2014) 29(12) *Journal of Interpersonal Violence* 2273, 2283-2297 (in the context of Australia); Eva Mulder and Alice Kirsten Bosma, 'Filling in the (Gendered) Gaps: How Observers Frame Claims of Sexual Assault' (2022) 28(2) *International Review of Victimology* 215, 223, 229 (in the context of research conducted with community members in the UK).
- 28 Angie C Kennedy and Kristen A Prock, "'I Still Feel Like I am Not Normal': A Review of the Role of Stigma and Stigmatization Among Female Survivors of Child Sexual Abuse, Sexual Assault, and Intimate Partner Violence' (2018) 19(5) *Trauma, Violence, & Abuse* 512, 517.
- 29 See, eg, Mulder and Bosma (n 27) 217-18.
- 30 The idea that 'rape myths' and mythology can construct a framework to understand sexual assault has existed since (at least) 1980, when Martha R Burt (in the USA) defined 'rape myths' as 'prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists': Martha R Burt, 'Cultural Myths and Supports for Rape' (1980) 38(2) *Journal of Personality and Social Psychology* 217, 217.
- 31 Zoë D Peterson and Charlene L Muehlenhard, 'A Match-and-Motivation Model of How Women Label Their Nonconsensual Sexual Experiences' (2011) 35(4) *Psychology of Women Quarterly* 558, 559, briefly summarising findings from 12 peer-reviewed studies from the USA published between 1988-2009.
- 32 Denise Lieveore, Department of the Prime Minister and Cabinet, Office of the Status of Women, Commonwealth of Australia, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (Report, 2004) 46 ('*Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004)'): '[p]rosecutors perceived that juries take a moralistic view of victim behaviour that could be perceived as "rough", which includes drinking, acting provocatively, willingly going with a stranger, going with a man after others have warned her about him, or doing anything that showed that she was interested in him. Even where there is corroborating evidence, juries are likely to believe that "she asked for it".'
- 33 See generally Simon H Bronitt and Patricia L Easteal, *Rape Law in Context: Contesting the Scales of Injustice*. (Federation Press, 2018). See also Julia Cooper, 'Judges as Myth-Busters: A Re-Examination of Jury Directions in Rape Trials' (2022) 31(4) *Griffith Law Review* 485, 489-92.
- 34 Eg, a stereotypical 'forceful rape' may involve forensic evidence of physical injury that goes towards proving those facts. Judicial officers, lawyers, police and jurors often think this kind of evidence strengthens a case: Julia Quilter and Luke McNamara, NSW Bureau of Crime Statistics and Research, 'Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis' (Crime and Justice Bulletin Number 259, 2023) 13 and 16-17 ('Experiences of Complainants'); 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) *UNSW Law Journal* 707, 725. It is important to note that there are limitations associated with over-estimating or hyper-focusing on forensic evidence – some of which are discussed in Insight 2 and Insight 11. For a detailed discussion, see: Horan and Goodman-Delahunty (n 34) 725-8; Antonia Quadara, Bianca Fileborn and Debra Parkinson, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies (AIFS), *The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault* (Issue No. 15, 2013).
- 35 Eg, a stereotypical 'stranger rape' may involve a complainant whose perceived credibility is not negatively affected by the illusion of any prior motive or animosity towards the accused. Prosecutors may consider that this kind of prior motive may undermine the strength of a case by prosecutors: Lieveore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 43.
- 36 See generally Lara Flynn Hudspith et al., 'Forty Years of Rape Myth Acceptance Interventions: A Systematic Review of What Works in Naturalistic Institutional Settings and How This Can Be Applied to Educational Guidance for Jurors' (2023) 24(2) *Trauma, Violence & Abuse* 981, 982 ('Forty Years of Rape Myth Acceptance Interventions'), briefly summarising findings from 12 peer-reviewed studies from Australia, New Zealand, the UK and the USA published between 2005-2020. See also, eg, Alisha C Salerno-Ferraro and Sandy Jung, 'To Charge or Not to Charge? Police Decisions in Canadian Sexual Assault Cases and the Relevance of Rape Myths' (2022) 23(5) *Police Practice & Research: An International Journal* 539, 547; Amelia Erin Retter, 'Thinking Outside the (Witness) Box: Integrating Experts into Juries to Minimise the Effect of Rape Myths in Sexual Violence Cases' (2018) 49(1) *Victoria University of Wellington Law Review* 157, 162-163; Ashley K Fansher and Bethany Welsh, 'A Decade of Decision Making: Prosecutorial Decision Making in Sexual Assault Cases' (2023) 12(6) *Social Sciences, 12(6)* 348, 363-365; Courtney A Franklin et al, 'Police Decisions in a Rape Scenario: The Effect of Trauma Response, Forensic Evidence, Stranger-Perpetrators, and Rape Mythology' (2023) 29(15/16) *Violence Against Women* 3024, 3038-3041 ('Police Decisions in a Rape Scenario'); Lieveore *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 48-9, 50-51; Rachel M Venema, 'Making Judgments: How Blame Mediates the Influence of Rape Myth Acceptance in Police Response to Sexual Assault' (2016) 34(13) *Journal of Interpersonal Violence* 1, 12-17. Notably, false assumptions and stereotypes are not necessarily influential on prosecutors' or police officers' decisions due to personal beliefs; rather, it may be due to anticipation of jurors (or other professionals in the justice system) believing in them (this is sometimes referred to as the 'downstream orientation of justice': Lisa Frohmann, 'Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking' (1997) 31(3) *Law & Society Review* 531, 535).
- 37 See, eg, KPMG and Centre for Innovative Justice, RMIT, *This is My Story. It's Your Case, But it's My Story: Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (Report, July 2023) 22, 42 ('*This is My Story*'); Women's Safety and Justice Taskforce, *Hear Her Voice* (Report 2, Volume 1, 2022) 50, 52, and 55-6 ('*Hear Her Voice* (2022)').
- 38 Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27, 34-7.
- 39 Australian research findings indicate that incidents that involve non-stereotypical perpetrators may attract less blame or believability: Kate Minter, Erin Carlisle and Christine Coumarelos, Australia's National Research Organisation for Women's Safety Limited (ANROWS) '*Chuck Her on a Lie Detector: Investigating Australians' Mistrust in Women's Reports of Sexual Assault* (Issue 4, Research Report, November 2021) 7; Enhance Research, Women's Safety and Justice Taskforce, *Community Attitudes to Sexual Consent* (Research Report, 2022) 47 ('*Community Attitudes to Sexual Consent*'). See also Fansher and Welsh (n 36) 13 for findings that indicate that prosecutors in the USA were more likely to accept a case that involved perpetrators with a prior sexual assault charge on their criminal record (69.44%), or multiple types of offenses on their record (44.68%), or one type of offense on their record (33.33%), than no criminal record at all (27.41%). Note also that researchers have identified stereotypical scripts that perpetrators of sexual assault are 'losers' with few social ties: Peterson and Muehlenhard (n 31) 567.
- 40 See, eg, *Hear Her Voice* (2022) (n 37) 274 citing the speech given by the Hon Kris Faafoi, Minister of Justice (NZ), discussing the *Sexual Violence Legislation Bill 2021* (NZ): 'Trial fairness is non-negotiable, and it gives our justice system its legitimacy. It is not in anyone's interests to jeopardise the fairness and robustness of verdicts, but I do not think justice is a zero sum game. Improving complainants' experiences procedurally does not automatically entail restricting defendants' fundamental rights. The interests of justice and the right to a fair trial are paramount... The flip side must be: if a procedure is not contrary to the interests of justice and the circumstances of the case, and if it does not risk the fairness of a trial, how can we deny complainants...better treatment...? Complainants have an integral role in bringing perpetrators to justice, thereby reducing future harm, a societal benefit. They do so despite the harm that they have experienced. We have a positive duty to support them on that unavoidably difficult journey...'. See also Victims of Crime Commissioner, Submission No 45 (updated May 2022) to Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 3 for a call for 'a justice and service system response that recognises victims of sexual assault as active participants in the criminal justice system with different – although no less important – rights and entitlements to the accused.'

- 41 *Dietrich v The Queen* (1992) 177 CLR 292, 299–300; Bowden, Henning and Plater (n 14) 542; *Ragg v Magistrates Court of Victoria & Corcoris* [2008] VSC 1 [77], Bell J quoting Lord Steyn in the House of Lords in *Attorney General's Reference (No 3 of 1999)*.
- 42 This approach is recommended in Norbert Schwarz, Eryn Newman and William Leach 'Making the Truth Stick and the Myths Fade: Lessons from Cognitive Psychology' (2016) 2(1) *Behavioural Science & Policy* 85, 90–1.

Insight 1

- 43 See, eg, the judgment of Judge Wheeler in *C v The State of Western Australia* [2006] WASCA 261 [32]–[35].
- 44 Including: *Crimes Act 1900* (ACT), ss 51(1), 52 (1), 53(1), 54(1); *Crimes Act 1900* (NSW) s 61i; *Criminal Code 1983* (NT) ss 188, 192; *Criminal Code Act 1899* (Qld) s 352(1); *Criminal Law Consolidation Act 1935* (SA) ss 49(6), 56(1); *Criminal Code Act 1924* (Tas) ss 126(1), 127, 185; *Crimes Act 1958* (Vic) ss 38, 39, 52B; *Criminal Code Compilation Act 1913* (WA), 323, 324, 325, 326, 330(2).
- 45 Including: *Crimes Act 1900* (ACT), ss 51(1), 52 (1), 53(1), 54(1); *Crimes Act 1900* (NSW) s 61i; *Criminal Code 1983* (NT) ss 188, 192; *Criminal Code Act 1899* (Qld) s 352(1); *Criminal Law Consolidation Act 1935* (SA) 51(1), 56(1); *Criminal Code Act 1924* (Tas) s 127; *Crimes Act 1958* (Vic) ss 40, 41, 42, 44, 45, 48, 52C; *Criminal Code Compilation Act 1913* (WA) ss 323, 324, 327, 328, 330(3)–(5).
- 46 Shannon M Stuart, Blake M McKimmie and Barbara M Masser, 'Rape Perpetrators on Trial: The Effect of Sexual Assault-Related Schemas on Attributions of Blame' (2019) 34(2) *Journal of Interpersonal Violence* 310, 328–29. See, eg, *R v Makary* [2018] QCA 258 [28], where the court notes submissions made by the appellant's counsel as to the 'romantic atmosphere' that gave rise to an honest and reasonable but mistaken belief of consent to sexual intercourse.
- 47 Shaez Mortimer, Anastasia Powell and Larissa Sandy, 'Typical Scripts' and Their Silences: Exploring Myths About Sexual Violence and LGBTQ People from the Perspectives of Support Workers' (2019) 31(3) *Current Issues in Criminal Justice* 333, 341; Ashlee Gore, 'It's All or Nothing: Consent, Reasonable Belief, and the Continuum of Sexual Violence in Judicial Logic' (2020) 30(4) *Social and Legal Studies* 522, 533–7.
- 48 This false assumption has been found in Australian and international research: Mortimer, Powell and Sandy (n 47) 340–2 (in relation to community attitudes and police responses in Australia with regard to LGBTQIA+ people's experiences of sexual assault); T. K. Logan, Robert Walker and Jennifer Cole, 'Silenced Suffering: The Need for a Better Understanding of Partner Sexual Violence' (2015) 16(2) *Trauma, Violence & Abuse* 111, 120 (in relation to victims and survivors in the USA).
- 49 *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43, 62 Kirby J, citing C. Smart, *Law, Crime and Sexuality: Essays in Feminism*. (Sage, 1995) 110–12.
- 50 Tarrant, Douglas and Tubex (n 1) 5.
- 51 Shannon Russell, *Exploring the Role Of Penetration in Sexual Offences in Canada* (PhD Thesis, The University of British Columbia, 2020) 2–3, 29–30, 43.
- 52 *Family, Domestic and Sexual Violence* (n 7).
- 53 Australian Institute of Health and Welfare, *Sexual Assault in Australia* (Media Release, Cat. No: FDV 5, 28 August 2020) <Sexual assault in Australia, Summary – Australian Institute of Health and Welfare (aihw.gov.au)> ('*Sexual Assault in Australia*') 1.
- 54 *Sexual Assault in Australia* (n 53) 7.
- 55 *Family, Domestic and Sexual Violence* (n 7).
- 56 *Sexual Assault in Australia* (n 53) 6–7.
- 57 Ibid 6.
- 58 *Family, Domestic and Sexual Violence* (n 7).
- 59 *Sexual Assault in Australia* (n 53) 7; *Family, Domestic and Sexual Violence* (n 7).
- 60 Kaitlin A Chivers-Wilson, 'Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments' (2006) 9(2) *McGill Journal of Medicine* 111, 112.
- 61 Ibid 111.
- 62 Kerry J Ressler et al, 'Post-Traumatic Stress Disorder: Clinical and Translational Neuroscience from Cells to Circuits' (2022) 18(5) *Nature reviews. Neurology* 273, 273–6.
- 63 *Hear Her Voice* (2022) (n 37) 49–57; *This is My Story* (n 37) 100–3.
- 64 *Sexual Assault in Australia* (n 53) 2.
- 65 *This is My Story* (n 37) 46.
- 66 See generally Joyce E Williams and Karen A Holmes, *The Second Assault: Rape and Public Attitudes* (Greenwood Press, 1981).
- 67 This kind of 'hierarchy ordered by perceived seriousness' is found and discussed in Mortimer, Powell and Sandy (n 47) 341.
- 68 Note that the acronym 'LGBTQIA+' is used throughout this resource as this is consistent with the language used by one of Australia's peak bodies for LGBTQIA+ interests, *Pride Foundation Australia*. We acknowledge that other variations of this acronym exist, including LGBTQ+ (as used by another peak body, *LGBTQ+ Health Australia*), and acronym choice can vary depending on individual preferences and the groups or issues being discussed.
- 69 Mortimer, Powell and Sandy (n 47).
- 70 Ibid 341.
- 71 Gemma Hamilton et al., RMIT University, *Family Violence and Sexual Harm* (Research Report, 2023) 36.
- 72 *R v Hibberd* [2009] NSWCCA 20 [56].
- 73 Ibid.
- 74 *R v AJP* [2004] NSWCCA 434; *C v The State of Western Australia* [2006] WASCA 261.
- 75 *C v The State of Western Australia* [2006] WASCA 261 [35].

Insight 2

- 76 Australian Bureau of Statistics, *Sexual Violence*. (August 2023) <Sexual violence, 2021–22 financial year | Australian Bureau of Statistics (abs.gov.au)> ('*Sexual Violence*, 2021–22').
- 77 Julia Quilter, 'Getting Consent 'right': Sexual Assault Law Reform in New South Wales' (2020) 46(2) *The Australian Feminist Law Journal* 225, 238 citing the 'real rape' construct explored in Susan Estrich, *Real Rape* (Harvard University Press, 1987).

- 78 This false assumption has been found in Australian and international research: Coumarelos et al (n 7) 139, 140, 146, 172 (in relation to community attitudes in Australia); Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 46 (in relation to real jurors in Australia); Salerno-Ferraro and Jung (n 36) 546 (in relation to police in Canada); James Chalmers et al., 'Three Distinctive Features, But What is the Difference? Key Findings from the Scottish Jury Project' (2020) 11 *Criminal Law Review* 1012 1028–9 (in relation to real juries in Scotland); Tinsley, Young and Baylis (n 17) 473 (in relation to mock jurors in NZ).
- 79 This false assumption has recently been found in Australian research: Rachel Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *The British Journal of Criminology* 296 (in relation to rape trials in Victoria). See Minter, Carlisle and Coumarelos (n 39) 37–9 for a discussion about this false assumption being less pervasive than ones about resistance, which 'reveals an underlying expectation that women must make their refusals of consent abundantly clear, and that this can best be achieved and proved through physical resistance.'
- 80 This false assumption has been found in Australian and international research: Coumarelos et al (n 7) 143, 146, 172 (in relation to community attitudes in Australia); Chalmers et al (n 78) 1028–9 (in relation to real juries in Scotland); Tinsley, Young and Baylis (n 17) 473 (in relation to mock jurors in NZ).
- 81 *Sexual Assault in Australia* (n 53) 6; *Sexual Violence*, 2021–22 (n 76).
- 82 Quilter and McNamara, 'Experiences of Complainants' (n 34) 13; Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 13; Quadara, Fileborn and Parkinson (n 34) 28.
- 83 Patrick Tidmarsh, 'Training Sexual Crime Investigators to Get the "Whole Story"' (PhD Thesis, Deakin University, 2016) 39.
- 84 Ibid 39–40.
- 85 Ibid 39–45.
- 86 Alix Woolard, 'What is "Fawning"? How is it Related to Trauma and the "Fight or Flight" Response?', *The Conversation* (online, 6 July 2023) <What is 'fawning'? How is it related to trauma and the 'fight or flight' response? (theconversation.com)>.
- 87 Ibid.
- 88 Ibid.
- 89 Ibid.
- 90 Patrick Tidmarsh and Gemma Hamilton, 'Misconceptions of Sexual Crimes Against Adult Victims: Barriers to Justice' (2020) (no. 611) *Trends and Issues in Crime and Criminal Justice*, 6.
- 91 For a discussion of the legacy of superseded common law conceptions of sexual assault that did involve force, see Cooper (n 33) 489.
- 92 76 (52%) complainants involved in 141 sexual assault cases referred for prosecution in the ACT, NSW, NT, Tasmania or WA between 1 July 1999 and 30 June 2001 did not involve evidence of physical injury: Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 26.
- 93 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 32.
- 94 *This is My Story* (n 37) 13–17.
- 95 See, eg, Peterson and Muehlenhard (n 31) 559, briefly summarising findings from 6 peer-reviewed studies from the USA published between 1996–2009.
- 96 Australian Bureau of Statistics, *Sexual Violence – Victimisation* (August 2021) <Sexual Violence - Victimisation | Australian Bureau of Statistics (abs.gov.au)> ('*Sexual Violence – Victimisation*').
- 97 *Crimes Act 1900* (ACT) ss 50B, 67(1)(b)–(o), 67(2)(b); *Crimes Act 1900* (NSW) s 61HI(1); *Criminal Code 1983* (NT) s 192(1); *Criminal Code 1899* (Qld) s 348(1)–(2); *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 46(3), 47; *Criminal Code Act 1924* (Tas) ss 2A(1), 2A(2)(b)–(g), (h)–(i); *Crimes Act 1958* (Vic) ss 36(1), 36AA; *Criminal Code Compilation Act 1913* (WA) s 319(2)(a).
- 98 *Crimes Act 1900* (ACT) ss 50B, 67(2)(a); *Crimes Act 1900* (NSW) s 61HI(4); *Criminal Code 1899* (Qld) s 348(3); *Criminal Code Act 1924* (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36(2); *Criminal Code Compilation Act 1913* (WA) s 319(2)(b).
- 99 *Criminal Procedure Act 1986* (NSW) s 292C; *Evidence Act 1977* (Qld) s 103ZU; *Jury Directions Act 2015* (Vic) s 47D.
- 100 *R v HCB* [2020] QCA 164 [54].
- 101 Ibid.

Insight 3

- 102 *Sexual Violence*, 2021–22 (n 76).
- 103 Ibid.
- 104 *Recorded Crime – Victims* (n 20).
- 105 See, eg, Peta Cox, Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-Victimisation: State of Knowledge Paper* (Landscapes Issue 13, October 2015) 47 citing McOrmond-Plummer, Eastaer AM and Levy-Peck (eds) *Intimate Partner Sexual Violence: A Multidisciplinary Guide to Improving Services and Support for Survivors of Rape and Abuse* (Jessica Kingsley Publishers, 2014) 31 in relation to the lack of community recognition of intimate partner sexual violence being 'one of the most injurious aspects of IPSV'.
- 106 See, eg, Sofia Persson and Katie Dhingra, 'Attributions of Blame in Stranger and Acquaintance Rape: A Multilevel Meta-Analysis and Systemic Review (2022) 23(2) *Trauma, Violence & Abuse* 795, 804, reporting findings from a meta-analysis of 30 peer-reviewed studies from Australia, Germany, Japan, Norway, Slovenia, Sweden, Turkey, the UK and USA published between 1976 and 2019 (and 1 non-published thesis from the USA), stating 'a woman who knows her perpetrator even in the slightest is blamed significantly more for the assault than someone who does not know her perpetrator.'
- 107 This false assumption has been found in Australian research: Coumarelos et al (n 7) 174, 175 (in relation to community attitudes in Australia).
- 108 Related false assumptions have recently been found in Australian research: Coumarelos et al (n 7) 139–140, 162, noting 9% of respondents to the National Community Attitudes Survey in 2021 agreed with the statement: 'If a woman keeps going back to her abusive partner, then the violence can't be very serious'; 25% agreed with the statement: 'A female victim who does not leave an abusive partner is partly responsible for the abuse continuing'; and 10% of respondents agreed with the statement: 'It's easy for a woman to leave an abusive relationship'.
- 109 Related false assumptions about consent not being required and/or being implied through the nature of an intimate relationship have been found in Australian and international research: Coumarelos et al (n 7) 175 (in relation to community attitudes in Australia); *Community Attitudes to Sexual Consent* (n 39) 44 (in relation to community attitudes in Queensland); Ipsos, The Global Institute for Women's Leadership, King's College London, *International Women's Day 2022* (Report, March 2022) 4, 10 (in relation to community attitudes in 30 countries, including Australia).

- 110 This false assumption has been found in international resource: Kellie R Lynch et al., "'She is his Girlfriend - I Believe this is a Different Situation': Differences in Perceptions of the Legality of Intimate Partner Rape" (2019) 34 *Journal of Family Violence* 213, 226 (in relation to mock jurors in the USA); Virginie Cailleau et al., 'Is Intimate Partner Sexual Violence a Singular Violence?' (forthcoming) *L'Encéphale* (in a literature review from France). See also Logan, Walker and Cole (n 48) 125, noting limitations in research into intimate partner sexual violence may indicate an ambivalence towards it.
- 111 Ibid. This false assumption may arise given that sexual violence is often treated in isolated, context-specific ways (unlike other forms of family and domestic violence): Cailleau et al (n 110); Cox (n 105) 57–58.
- 112 Tidmarsh (n 83) 39.
- 113 *Sexual Violence*, 2021–22 (n 76). Notably, this resource lists a wide range of people that may fall into the category of reports involving an 'other known person' (ie not a 'stranger' or 'intimate partner'), including 'friend or housemate, acquaintance or neighbour, employer/manager/supervisor, co-worker, teacher/tutor, client/patient/customer, medical practitioner (e.g. doctor, psychologist, nurse, counsellor), priest/minister/rabbi or other spiritual advisor, carer (includes non-family paid or unpaid helper) and other unspecified known person'.
- 114 Ibid.
- 115 *The Commonwealth Consent Framework* (n 3) 10.
- 116 *Crimes Act 1900* (ACT) ss 50B, 67(1)(b)–(o), 67(2)(b); *Crimes Act 1900* (NSW) s 61H(1); *Criminal Code 1983* (NT) s 192(1); *Criminal Code 1899* (Qld) s 348(1)–(2); *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 46(3), 47; *Criminal Code Act 1924* (Tas) ss 2A(1), 2A(2)(b)–(g), (h)–(i); *Crimes Act 1958* (Vic) ss 36(1), 36AA; *Criminal Code Compilation Act 1913* (WA) s 319(2)(a).
- 117 Minter, Carlisle and Coumarelos (n 39) 15.
- 118 Hamilton et al (n 71) 39, reporting on 127 responses to a survey conducted in 2022 with stakeholders working in family violence, sexual assault and allied services, noting: 'Most surveyed stakeholders (90%) responded that, in their professional experience, victim survivors of family violence also experience sexual harm from the same perpetrator 'most of the time' (65%) or 'about half the time' (25%). Only 3% indicated that co-occurrence of family violence and sexual harm from the same perpetrator was rarely an issue'. See also Royal Commission into Family Violence, *Report and Recommendations* (Vol II) (Report, March 2016) 215–18. See also generally Cox (n 105); Meredith E Bagwell-Gray, Jill Theresa Messing and Adrienne Baldwin-White, 'Intimate Partner Sexual Violence: A Review of Terms, Definitions and Prevalence' (2015) 16(3) *Trauma, Violence and Abuse* 316; Meredith E Bagwell-Gray, 'Women's Experiences of Sexual Violence in Intimate Relationships: Applying a New Taxonomy' (2021) 36(13–14) *Journal of Interpersonal Violence* NP7813.
- 119 Australian Attorney-General's Department, Commonwealth of Australia, *National Principles to Address Coercive Control in Family and Domestic Violence* (2023) ii.
- 120 Women's Safety and Justice Taskforce, *Hear Her Voice* (Report 1, Volume 2, 2021) 6 ('*Hear Her Voice* (2021)').
- 121 Hamilton et al (n 71) 8.
- 122 Ibid 20–22.
- 123 Jasmine B MacDonald et al., Australian Institute of Family Studies (AIFS), *Reproductive Coercion and Abuse* (Practice Guide, 2023) 3; *Hear Her Voice* (2021) (n 120) 35.
- 124 *Hear Her Voice* (2021) (n 120) 34, citing Children By Choice, Submission to Women's Safety and Justice Taskforce, *Discussion Paper 1 – Options for Legislating Against Coercive Control and the Creation of a Standalone Domestic Violence Offence* (July 2021).
- 125 Renate R Zilkens et al., 'Sexual Assault and General Body Injuries: A Detailed Cross-Sectional Australian Study of 1163 Women' (2017) 279 *Forensic Science International*, 279, 117–19; T. K. Logan, Jennifer Cole, and Anita Capillo, 'Differential Characteristics of Intimate Partner, Acquaintance, and Stranger Rape Survivors Examined by a Sexual Assault Nurse Examiner (SANE)' (2007) 22(8) *Journal of Interpersonal Violence* 1066, 1071. Notably, these findings do not necessarily mean intimate partner sexual assaults are more physically violent than other forms of sexual assault, rather they 'might be due to escalation in repeated incidents in partner physical and/or sexual violence that led the survivor to seek legal intervention': Logan, Cole and Capillo (n 125) 1072.
- 126 *Family, Domestic and Sexual Violence* (n 7); Hamilton et al (n 71) 22–25; Nicola Helps et al., Monash Gender and Family Violence Prevention Centre, Monash University and No to Violence, *Let's Talk About Sex: Exploring Practitioners' Views on Discussing Intimate Partner Sexual Violence in Domestic and Family Violence Perpetrator Intervention Programs* (Report, 2023) 9, briefly summarising findings from 4 peer-reviewed studies from Australia and the USA published between 2013 and 2021.
- 127 Zilkens et al (n 125) 117–18. See also Helps et al (n 126) 7, briefly summarising findings from 3 peer-reviewed studies from Australia and the USA published between 2012 and 2015.
- 128 Royal Commission into Family Violence (n 118) 217, citing Rochelle Braaf, Australian Domestic and Family Violence Clearinghouse, *Preventing Domestic Violence Death: Is Sexual Assault a Risk Factor?* (Research and Practice Brief 1, October 2011) and Department of Human Services, Victoria State Government, *Family Violence Risk Assessment and Risk Management: Framework and Practice Guides 1–3 (Edition 2)* (2012). See also Australian Domestic and Family Violence Death Review Network, Australia's National Research Organisation for Women's Safety, *Intimate Partner Violence Homicides 2010–2018 (Second Edition)* (Data Report, 2022), finding that sexual violence was a feature in 16% of 311 cases of intimate partner violence-related homicide between July 2010 and June 2018: 57; and noting that 'any relationship that exhibits domestic violence, whether physical or non-physical, is embedded with a risk of lethality: 58.
- 129 Eg, a woman may experience more sexual violence while or after she is attempting to leave the intimate relationship, due to a partner's attempts to possess, retaliate or reconcile with her: Cox (n 105) 35, citing Walter S DeKeseredy and Martin D Schwartz 2008, 'Separation/Divorce Sexual Assault in Rural Ohio: Survivors' Perceptions' 36(1–2) *Journal of Prevention & Intervention in the Community*, 105 and Walter S DeKeseredy, 'Separation/Divorce Sexual Assault' in McOrmond-Plummer, Eastaer and Levy-Peck (eds) (n 105). For a discussion of some of the related barriers women may face to seeking support and safety from violent relationships in general, see Corina Backhouse and Cherie Toivonen, Australia's National Research Organisation for Women's Safety, Commonwealth Department of Social Services, *National Risk Assessment Principles for Domestic and Family Violence: A Summary of the Evidence-Base Supporting the Development and Implementation of the National Risk Assessment Principles for Domestic and Family Violence* (Companion Resource, 2018) 15–16; Caroline Lilley et al., 'Intimate Partner Rape: A Review of Six Core Myths Surrounding Women's Conduct and the Consequences of Intimate Partner Rape' (2023) 12(1) *Social Sciences* 34, 39–40.
- 130 Tidmarsh (n 83) 40–2.
- 131 *Hear Her Voice* (2022) (n 37) 52; Helps et al (n 126) 37–8, quoting one research participant (family and domestic violence practitioner) who said: 'There is a barrier where there is a[n] intimate relationship as it's harder for the [affected family member] to identify sexual violence as they are often coerced or told it falls under "being in the relationship."'.
- 132 *This is My Story* (n 37) 18.
- 133 Ibid 18.
- 134 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 30.
- 135 Ibid.

- 136 Eg, *This is My Story* (n 37) 15 cites a victim and survivor saying: 'It actually took two years to speak to my GP about it. And it was a moment of crises with my mental health ... And a lot of trauma not only from the sexual assault but my own experience of domestic violence was coming up for me.'
- 137 Rodney F Kingsnorth and Randall C Macintosh, 'Domestic Violence: Predictors of Victim Support for Official Action' (2004) 21(2) *Justice Quarterly* 301, 322.
- 138 Logan, Cole and Capillo (n 125) 1074.
- 139 *Hear Her Voice* (2022) (n 37) 80.
- 140 *Ibid* 77.
- 141 Lievore *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 32.
- 142 *Hear Her Voice* (2022) (n 37) 101.
- 143 *This is My Story* (n 37) 18.
- 144 Peterson and Muehlenhard (n 31) 559, briefly summarising findings from 2 peer-reviewed studies from the USA published between 1988–2003, and quoting a research participant (victim and survivor): 'I never labelled it as [rape] until recently... Up until then, I didn't know what to call it because he was my friend and everyone loved it': 562
- 145 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 29.
- 146 *Ibid* 37. Relatedly, international research involving mock jurors found that participants were less likely to attribute guilt to an accused person who was married to the complainant than an accused person who was an acquaintance of the complainant in a sexual assault case: Kirsty Osborn et al., 'Juror Decision Making in Acquaintance and Marital Rape: The Influence of Clothing, Alcohol, and Preexisting Stereotypical Attitudes' (2021) 36(5–6) *Journal of Interpersonal Violence* NP2675, NP2688.
- 147 *Ibid* 45.
- 148 *Ibid* 48.
- 149 *Ibid* 49.
- 150 Osborn et al (n 146) 2688.
- 151 *Criminal Procedure Act 1986* (NSW) s 292A; *Evidence Act 1977* (Qld) s 103ZS; *Jury Directions Act 2015* (Vic) s 47H.
- 152 *Criminal Procedure Act 1986* (NSW) s 292A; *Evidence Act 1977* (Qld) s 103ZS; *Jury Directions Act 2015* (Vic) s 47H.
- 153 *R v VN* [2023] QCA 184 [184].
- 154 *Di Giorgio v The Queen* [2016] VSCA 335 [70].
- 155 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74A(1).
- 156 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74A(2)(b).
- 157 Lievore *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 40, 49.
- 158 *R v Cortese* [2013] NSWCCA 148 [55], noting that a pre-existing relationship does not mitigate criminality; *Kiss v R* [2021] NSWCCA 158 [79]–[102], noting that the seriousness of each case of sexual assault must turn on its own facts and there is no principle that dictates that a sexual assault committed in the context of a prior existing relationship is any less serious than a sexual assault committed by a stranger.
- 159 *Heine v R* [2008] NSWCCA 61 [40]; *Raczkowski v R* [2008] NSWCCA 152 [46].
- 160 *PGA v The Queen* (2012) 245 CLR 355.
- 161 *PGA v The Queen* (2012) 245 CLR 355 [64].

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- 162 *Crimes Act 1900* (ACT) ss 50B, 67(1)(b)–(o) and 67(2)(b); *Crimes Act 1900* (NSW) s 61HI(1); *Criminal Code 1983* (NT) s 192(1); *Criminal Code 1899* (Qld) s 348(1)–(2); *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 46(3), 47; *Criminal Code Act 1924* (Tas) ss 2A(1), 2A(2)(b)–(g), (h)–(i); *Crimes Act 1958* (Vic) ss 36(1) and 36AA; *Criminal Code Compilation Act 1913* (WA) s 319(2)(a); *The Commonwealth Consent Framework* (n 3) 10.
- 163 Coumarelos et al (n 7) 174.
- 164 Elizabeth McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with Those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 433–440; Tinsley, Young and Baylis (n 17) 476.
- 165 Lisa Featherstone et al., *The Limits of Consent: Sexual Assault and Affirmative Consent* (Palgrave Macmillan, 2023) 48–53, 56; Minter, Carlisle and Coumarelos (n 39) 38.
- 166 Featherstone et al (n 165) 48–53, 56; Minter, Carlisle and Coumarelos (n 39) 38.
- 167 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 44, 49.
- 168 This false assumption has been found in Australian and international research: Coumarelos et al (n 7) 143, 146, 173 (in relation to community attitudes in Australia); Mortimer, Powell and Sandy (n 47) 343–4 (in relation to community attitudes and police responses in Australia with regard to LGBTQIA+ people's experiences of sexual assault). See also generally the related discussion of sexual objectification in Coumarelos et al (n 7) 141–2.
- 169 This false assumption has been found in Australian research: Coumarelos et al (n 7) 143, 146, 172 (in relation to community attitudes in Australia).
- 170 This false assumption has been found in international research: Alexandra M Zidenberg et al., 'Tipping the Scales: Effects of Gender, Rape Myth Acceptance, and Anti-Fat Attitudes on Judgments of Sexual Coercion Scenarios' (2021) 36(19–20) *Journal of Interpersonal Violence* NP10178, NP1081, NP10182.
- 171 This false assumption has been found in international research: Jeremy Robson, Lucy Newman and Andrew O'Hagan, 'Redrawing the Boundaries: The Adequacy of the Sexual Offences Act in Addressing Female Sexual Offending' (2021) 85(4) *The Journal of Criminal Law* 253, 262–263.
- 172 *Crimes Act 1900* (ACT) ss 50B, 67(1)(b)–(o), 67(2)(b); *Crimes Act 1900* (NSW) s 61HI(1); *Criminal Code 1983* (NT) s 192(1); *Criminal Code 1899* (Qld) s 348(1)–(2); *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 46(3), 47; *Criminal Code Act 1924* (Tas) ss 2A(1), 2A(2)(b)–(g), (h)–(i); *Crimes Act 1958* (Vic) ss 36(1), 36AA; *Criminal Code Compilation Act 1913* (WA) s 319(2)(a).
- 173 *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld); *Criminal Code 1899* (Qld) 348AA.
- 174 *The Commonwealth Consent Framework* (n 3) 10.

- 175 Ibid.
- 176 Ibid.
- 177 Tidmarsh (n 83) 39.
- 178 Kelly D Suschinsky and Martin L Lalumière, 'Prepared for Anything? An Investigation of Female Genital Arousal in Response to Rape Cues' (2011) 22(2) *Psychological Science* 159, 164, noting that female research participants in a psychological study in Canada typically did not have discriminating sexual-arousal responses and showed similar genital arousal to most sexual stimuli. See also generally Hyun Ji Shun and Michael Salter, 'Betrayed by My Body: Survivor Experiences of Sexual Arousal and Psychological Pleasure During Sexual Violence' (2022) 6(3) *Journal of Gender-Based Violence* 581, discussing victims' and survivors' own reflections of experiences of arousal in the context of their lived experiences of sexual assault.
- 179 See generally Shun and Salter (n 178).
- 180 Note that these jurisdictions are considering affirmative consent provisions: The Senate Legal and Constitutional Affairs References Committee (n 1) [1.18].
- 181 *The Queen v Senge* [2021] NTSC 80 [59]–[88]; *R v Makary* [2019] 2 Qd R 528 [49]–[50]; *R v Winchester* [2011] QCA 374 [126]; *R v Rahmanian* [2010] SASC 137 [32]; *Michael v The State of Western Australia* [2008] WASCA 66 [65].
- 182 The Senate Legal and Constitutional Affairs References Committee (n 1) [1.18].
- 183 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 46.
- 184 Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts* (Report to the Victorian Law Reform Commission, 2021) (forthcoming) 53 ('Qualitative Analysis Report').
- 185 *This is My Story* (n 37) 19, 47–8.
- 186 *Crimes Act 1900* (ACT) ss 50B, 67(1)(b)–(o), 67(2)(b); *Crimes Act 1900* (NSW) s 61HI(1); *Criminal Code 1983* (NT) s 192(1); *Criminal Code 1899* (Qld) s 348(1)–(2); *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 46(3), 47; *Criminal Code Act 1924* (Tas) ss 2A(1), 2A(2)(b)–(g), (h)–(i); *Crimes Act 1958* (Vic) ss 36(1), 36AA; *Criminal Code Compilation Act 1913* (WA) s 319(2)(a).
- 187 *Crimes Act 1900* (NSW) s 61HJ(1)(a); *Crimes Act 1900* (ACT) ss 50B, 67(2)(b); *Criminal Code 1899* (Qld) s 348AA(1)(a); *Criminal Code Act 1924* (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36AA, s 36A.
- 188 *Crimes Act 1900* (NSW) s 61HI(1).
- 189 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 75; *Criminal Procedure Act 1986* (NSW) s 294CB(2); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(a); *Evidence Act 1977* (Qld) s 103ZG; *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 2001* (Tas) s 194M(a); *Criminal Procedure Act 2009* (Vic) s 341; *Evidence Act 1906* (WA) s 36B.
- 190 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.
- 191 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 76; *Criminal Procedure Act 1986* (NSW) s 294CB(3); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(b); *Evidence Act 1977* (Qld) s 103ZH; *Evidence Act 1929* (SA) s 34L(1)(b); *Evidence Act 2001* (Tas) s 194M; *Criminal Procedure Act 2009* (Vic) ss 342, 343; *Evidence Act 1906* (WA) ss 36BA, 36BC.
- 192 *Criminal Procedure Act 1986* (NSW) s 292E; *Evidence Act 1977* (Qld) s 103ZW; *Jury Directions Act 2015* (Vic) s 47G.
- 193 *Evidence Act 1977* (Qld) s 103ZW; *Jury Directions Act 2015* (Vic) s 47G.

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- 194 *Crimes Act 1900* (ACT) ss 5B, 67(1)(b)–(o), 67(2)(b); *Crimes Act 1900* (NSW) s 61HI(1); *Criminal Code 1983* (NT) s 192(1); *Criminal Code 1899* (Qld) s 348(1)–(2); *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 46(3), 47; *Criminal Code Act 1924* (Tas) ss 2A(1), 2A(2)(b)–(g), (h)–(i); *Crimes Act 1958* (Vic) ss 36(1), 36AA; *Criminal Code Compilation Act 1913* (WA) s 319(2)(a); *The Commonwealth Consent Framework* (n 3) 10.
- 195 Coumarelos et al (n 7) 141–5, 154. It is important to note that laypeople may conceptually understand consent but nevertheless be confused about how it can/should arise in practice: *Community Attitudes to Sexual Consent* (n 39) 22–7, 29, 33.
- 196 See, eg, Coumarelos et al (n 7) 174 for a discussion that indicates some respondents to the National Community Attitudes Survey in 2021 'did not appreciate the need to obtain consent at every stage of sexual activity'.
- 197 *The National Plan* (n 6) 38. See Coumarelos et al (n 7) 174 for a discussion that indicates some respondents to the National Community Attitudes Survey in 2021 'failed to recognise that consent can be withdrawn at any stage.'
- 198 Minter, Carlisle and Coumarelos (n 39) 12 citing Kim Webster et al, Australia's National Research Organisation for Women's Safety, *Australians' Attitudes to Violence Against Women and Gender Equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research Report, March 2018).
- 199 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 49.
- 200 Related false assumptions were found in Australian research in relation to community attitudes towards sexual consent in Queensland: *Community Attitudes to Sexual Consent* (n 39) 46, noting prior sexual behaviour was sometimes considered a basis for assuming consent (but this did not undermine either party's right to change their mind about consent).
- 201 *Crimes Act 1900* (ACT) ss 50B and 67(1)(b)–(o), 67(2)(b); *Crimes Act 1900* (NSW) s 61HI(1); *Criminal Code 1983* (NT) s 192(1); *Criminal Code 1899* (Qld) s 348(1)–(2); *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 46(3), 47; *Criminal Code Act 1924* (Tas) ss 2A(1), 2A(2)(b)–(g), (h)–(i); *Crimes Act 1958* (Vic) ss 36(1), 36AA; *Criminal Code Compilation Act 1913* (WA) s 319(2)(a).
- 202 All jurisdictions' consent provisions refer (in slightly different ways) to the fact that consent relates to an act or activity: *Criminal Code 1899* (ACT) s 348(2) notes 'an act'; *Crimes Act 1900* (NSW) s 61I notes 'a' sexual activity; *Criminal Code Act 1983* (NT) s 192(2) notes 'the act'; *Criminal Code 1899* (Qld) s 348(2) notes 'an act'; *Criminal Law Consolidation Act 1935* (SA) s 46(3) notes 'the' sexual activity; *Criminal Code Act 1924* (Tas) s 2A(2) notes 'an act'; *Crimes Act 1958* (Vic) ss 36(2), (3) note 'an act'; *Criminal Code Compilation Act 1913* (WA) s 319(2)(a) notes 'an act'.
- 203 *The National Plan* (n 6) 10.
- 204 See, eg, *R v BAS* [2005] QCA 97, *R v Tamawiyi (No 2)* [2015] ACTSC 302; *HES v The State of Western Australia* [2022] WASCA 151 where each of the appellants were convicted of fraudulently misrepresenting facts surrounding sexual acts, and where that consent was therefore found to be invalid (vitiating by fraud).
- 205 See, eg, Sumayya Ebrahim, 'I'm Not Sure This is Rape, but: An Exposition of the Stealthing Trend' (2019) 9(2) *SAGE Open* 1.
- 206 Gore (n 47) 533–4.
- 207 *Crimes Act 1900* (ACT) s 67(2); *Crimes Act 1900* (NSW) ss 61HI(5)–(6); *Criminal Code 1899* (Qld) s 348; *Crimes Act 1958* (Vic) s 36(3).

- 208 *Crimes Act 1900* (ACT) ss 50B, 67(1)(a); *Crimes Act 1900* (NSW) s 61HI(2); *Criminal Code 1899* (Qld) s 348(4); *Criminal Law Consolidation Act 1935* (SA) s 47; *Crimes Act 1958* (Vic) s 36AA(1)(p).
- 209 *Crimes Act 1900* (ACT) s 67(1)(j); *Crimes Act 1900* (NSW) s 61HI(5); *Criminal Code 1983* (NT) s 208GA(1)(h); *Criminal Code 1899* (Qld) s 348AA(1)(n); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(ga); *Criminal Code Act 1924* (Tas) s 2A(2A); *Crimes Act 1958* (Vic) s 36AA(1)(o).

Insight 6

- 210 Liz Wall and Antonia Quadara, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies (AIFS), *Under the Influence? Considering the Role of Alcohol and Sexual Assault in Social Contexts* (Issue No. 18, 2014). See, eg, Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 27, of the sexual assault cases referred for prosecution in the ACT, NSW, NT, Tasmania or WA between 1 July 1999 and 30 June 2001 that involved information about substance use at the time of the assault, 88% of accused people and 85% of complainants were reported to have been under the influence of a substance at the time.
- 211 Tidmarsh and Hamilton (n 90) 7.
- 212 See generally Wall and Quadara (n 210).
- 213 Coumarelos et al (n 7) 146, 173 for findings that some respondents to the National Community Attitudes Survey in 2021 agreed that 'If a woman is drunk and starts having sex with a man, but then falls asleep, it is understandable if he continues having sex with her anyway' (6% of respondents) and 'If a woman is raped while drunk or affected by drugs, she is at least partly responsible' (10% of respondents).
- 214 Coumarelos et al (n 7) 146, 173, noting 10% of respondents to the National Community Attitudes Survey in 2021 agreed 'If a woman is raped while drunk or affected by drugs, she is at least partly responsible'; Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 44, quoting a research participant (prosecutor) who said: 'Juries still see that if a woman is silly enough to get drunk that's enough cause to doubt her evidence and doubt lack of consent'; *Hear Her Voice* (2022) (n 37) 80, noting this is acute for women who are 'involved in illegal drugs'. See also Fansher and Welsh (n 36) 13, 14, 17, finding prosecutors were less likely to accept a case that involved the complainant being intoxicated (15.56%) than not (36.18%), even if that intoxication was involuntary.
- 215 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 44.
- 216 This false assumption has been found in relation to community attitudes in Australia: Coumarelos et al (n 7) 139, 141, 172; *Community Attitudes to Sexual Consent* (n 39) 47.
- 217 This false assumption has been found in relation to community attitudes in Australia: *Community Attitudes to Sexual Consent* (n 39) 39.
- 218 This false assumption has been found in Australian research: Coumarelos et al (n 7) 146, 173 (in relation to community attitudes in Australia).
- 219 This false assumption has been found in Australian research: Coumarelos et al (n 7) 135–6, 173 (in relation to community attitudes in Australia).
- 220 Wall and Quadara (n 210). See, eg, Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 27, of the sexual assault cases referred for prosecution in the ACT, NSW, NT, Tasmania or WA between 1 July 1999 and 30 June 2001 that involved information about substance use at the time of the assault, 88% of accused people and 85% of complainants were reported to have been under the influence of a substance at the time.
- 221 Tidmarsh and Hamilton (n 90) 7.
- 222 Wall and Quadara (n 210) 6–7. See also RAINN, *Drug-Facilitated Sexual Assault* (Web Page, 2024) <Drug-Facilitated Sexual Assault | RAINN>.
- 223 Fansher and Welsh (n 36) 16.
- 224 Ibid.
- 225 Quilter and McNamara, 'Experiences of Complainants' (n 34) 13, 16–17; Horan and Goodman-Delahunty (n 34) 725; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 340–1.
- 226 Logan, Walker and Cole (n 48) 123–4.
- 227 *Hear Her Voice* (2022) (n 37) 80; Logan, Walker and Cole (n 48) 123–4, quoting a research participant (victim and survivor) involved in unpublished pilot study data: 'He knew a little bit about my past. I explained to him that I do have an addiction to alcohol and drugs and that I black out easily and I pretty much do anything and everything in those blackouts. And I guess that's why he began to encourage me to go there. So that he could get me to do just what I didn't want to do.' For a detailed discussion of the many ways perpetrators may take advantage of victims' and survivors' histories and relationships with alcohol and other drugs, see Heather Phillips, Carole Warshaw, Orapan Kaewken, National Center on Domestic Violence, Trauma, and Mental Health, *Intimate Partner Violence, Substance Use Coercion, and the Need for Integrated Service Models* (Literature Review, September 2020).
- 228 Tidmarsh and Hamilton (n 90) 7.
- 229 Theo Jores et al., 'A Meta-Analysis of the Effects of Acute Alcohol Intoxication on Witness Recall' (2019) 33(3) *Applied Cognitive Psychology* 334.
- 230 Julia Quilter et al, 'Intoxication Evidence in Rape Trials in the County Court of Victoria: A Qualitative Study' (2023) 46(2) *UNSW Law Journal* 579, 583 ('Intoxication Evidence in Rape Trials').
- 231 Tidmarsh and Hamilton (n 90) 7 citing Heather D Flowe et al, 'Alcohol and Remembering a Hypothetical Sexual Assault: Can People Who Were Under the Influence of Alcohol During the Event Provide Accurate Testimony?' (2016) 24(8) 1042.
- 232 *The Commonwealth Consent Framework* (n 3) 11.
- 233 Ibid.
- 234 Julia Quilter, Luke McNamara and Melissa Porter, 'The Nature and Purpose of Complainant Intoxication Evidence in Rape Trials: A Study of Australian Appellate Court Decisions' (2022) 43(2) *Adelaide Law Review* 606, 612.
- 235 Faye T Nitschke et al., 'Intoxicated but not Incapacitated: Are There Effective Methods to Assist Juries in Interpreting Evidence of Voluntary Complainant Intoxication in Cases of Rape?' (2021) 36(9–10) *Journal of Interpersonal Violence* 4335, 4337.
- 236 Ibid 4337.
- 237 Ibid.
- 238 Quilter et al, 'Intoxication Evidence in Rape Trials' (n 230) 591.
- 239 Nitschke et al (n 235) 4337.
- 240 Ibid.

- 241 Ibid.
- 242 Ibid 4337, citing findings from the USA in Marjorie Carroll and M Diane Clark, 'Men's Acquaintance Rape Scripts: A Comparison Between a Regional University and a Military Academy' (2006) 55(7) *Sex Roles* 469.
- 243 Ibid 4351.
- 244 Ibid.
- 245 Quilter and McNamara, 'Experiences of Complainants' (n 34) 14.
- 246 Ibid.
- 247 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 35.
- 248 Salerno-Ferraro and Jung (n 36) 541, 547, finding that police may be less likely to thoroughly investigate a report of sexual assault if the complainant was intoxicated at the time of the incident; Venema (n 36) 2711, finding that police are less likely to call a detective or make an arrest if the victim and survivor reports sexual assault after they had been consuming alcohol.
- 249 Crimes Act 1900 (NSW) s 61HK(5)(b).
- 250 *Criminal Code 1924* (Tas) s 14A(1)(a)
- 251 *Criminal Code 1899* (Qld) s 348A(2).
- 252 *Crimes Act 1900* (NSW) s 61HJ(1)(c).
- 253 *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1958* (Vic) s 36(1)(g); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d); *Criminal Code 1924* (Tas) s 2A(2)(h); *Criminal Code 1983* (NT) s 192(2)(c).
- 254 *Criminal Code Act 1899* (Qld) s 348AA (1)(c), (d).
- 255 *Criminal Procedure Act 1986* (NSW) s 292E; *Evidence Act 1977* (Qld) s 103ZW; *Jury Directions Act 2015* (Vic) s 47G.
- 256 *R v Palmer* [2017] ACTSC 357 [29].
- 257 *R v Alenezi* [2021] NSWDC 718 [221]. See also *R v Balassis* [2009] VSC 127 [35], where the court notes that the defendant 'repeatedly preyed on women who were vulnerable either because of their age or their substance abuse.'

Insight 7

- 258 Tarrant, Douglas and Tubex (n 1) 20, citing Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind and Body in the Healing of Trauma* (Penguin, 2015).
- 259 Horan and Goodman-Delahunty (n 34) 721.
- 260 *This is My Story* (n 37) 10.
- 261 Chivers-Wilson (n 60) 112-113; Tarrant, Douglas and Tubex (n 1) 20, citing Bessel van der Kolk (n 258).
- 262 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 42-3; Tidmarsh and Hamilton (n 90) 6.
- 263 Maria Hartwig and Charles F Bond, 'Lie Detection from Multiple Cues: A Meta-Analysis' (2014) 28(5) *Applied Cognitive Psychology* 661, 667, 669.
- 264 Kimberley A Lonsway, Jim Hopper and Joanne Archambault, End Violence Against Women International, *Becoming Trauma-Informed: Understanding and Appropriately Applying the Neurobiology of Trauma* (Web Article, 2022) 6, 16.
- 265 This false assumption has been found in research with police in the USA: Franklin et al, 'Police Decisions in a Rape Scenario' (n 36) 3039 (in relation to police in the USA).
- 266 Lonsway, Hopper and Archambault (n 263) 6, 16; Tarrant, Douglas and Tubex (n 1) 20, citing van der Kolk (n 258).
- 267 Haskell, Lori and Melanie Randall, Department of Justice Canada, *The Impact of Trauma on Adult Sexual Assault Victims* (Report, 2019) 26.
- 268 Franklin et al, 'Police Decisions in a Rape Scenario' (n 36) 3027.
- 269 Faye T Nitschke, Blake M McKimmie and Eric J Vanman, 'The Effect of Trauma Education Judicial Instructions on Decisions About Complainant Credibility in Rape Trials' (2023) 29(1) *Psychology, Public Policy, and Law* 69, 70.
- 270 Franklin et al, 'Police Decisions in a Rape Scenario' (n 36) 3027-9, briefly summarising findings from 2 peer-reviewed studies from the USA published in 1992. For a more detailed, recent discussion of manifestations of distress, see van der Kolk (n 267).
- 271 Sarah E Ullman, Liana C Peter-Hagene and Mark Relyea 'Coping, Emotional Regulation, and Self-Blame as Mediators of Sexual Abuse and Psychological Symptoms in Adult Sexual Assault' (2014) 23 *Journal of Child Sexual Abuse* 74, 75
- 272 Tarrant, Douglas and Tubex (n 1) 20, citing van der Kolk (n 258).
- 273 Nitschke, McKimmie and Vanman (n 269) p 70.
- 274 Hartwig and Bond (n 263) 667, 669.
- 275 See, eg, Department of Families, Fairness and Housing, Victoria State Government, *Framework for Trauma-Informed Practice: Supporting Children, Young People and Their Families* (Publication, November 2022); Lonsway, Hopper and Archambault (n 263).
- 276 *This is My Story* (n 37) 43-5, 84-6.
- 277 Ibid 44.
- 278 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 42-3. See also international research that supports these findings cited in Tidmarsh and Hamilton (n 90); Franklin et al, 'Police Decisions in a Rape Scenario' (n 36). These markers of credibility are particularly problematic for disadvantaged complainants, for example because of language barriers, educational or intellectual disadvantage, or CALD background: Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 44.
- 279 *Criminal Procedure Act 1986* (NSW) s 292B; *Evidence Act 1977* (Qld) s103ZT; *Jury Directions Act 2015* (Vic) s 47E.
- 280 *Evidence Act 1977* (Qld) s 103ZV(a); *Criminal Procedure Act 1986* (NSW) s 292D (a); *Jury Directions Act 2015* (Vic) s 54K (5)(a).
- 281 *Evidence Act 1977* (Qld) s 103ZV(a); *Criminal Procedure Act 1986* (NSW) s 292D (a); *Jury Directions Act 2015* (Vic) s 54K (5)(a).
- 282 *Evidence Act 1977* (Qld) s 103ZV(b); *Criminal Procedure Act 1986* (NSW) s 292D (b); *Jury Directions Act 2015* (Vic) s 54K (5)(b).
- 283 Nitschke, McKimmie and Vanman (n 269) 88.
- 284 Ibid 87-8.

Insight 8

- 285 Jane Goodman-Delahunty, Natalie Martschuk and Mark Nolan, 'Memory Science in the Pell Appeals: Impossibility, Timing, Inconsistencies' (2020) 44(4) *Criminal Law Journal* 232, 234–5.
- 286 Kimberley Wake, James A Green and Rachel Zajac, 'Laypeople's Beliefs About Memory: Disentangling the Effects of Age and Time' (2020) 28(5) *Memory* 589, 589.
- 287 *Hear Her Voice* (2022) (n 37) 156.
- 288 Shazia Akhtar et al., 'The 'Common Sense' Memory Belief System and its Implications' (2018) 22(3) *The International Journal of Evidence & Proof* 289.
- 289 Goodman-Delahunty, Martschuk and Nolan (n 284) 234; Wake, Green and Zajac (n 286) 589–90.
- 290 See Akhtar et al (n 288) for findings from an English study, which involved 853 memory experts, police and members of the general public, discovered that police and laypersons believed that human memory works like a video camera that records its surroundings in a clear and linear way. This belief has been dubbed a 'neuromyth': see, eg, Torrijos-Muelas, Marta, Sixto González-Villora and Ana Rosa Bodoque-Osma, 'The Persistence of Neuromyths in the Educational Settings: A Systematic Review' (2021) 11 *Frontiers in Psychology* 591923.
- 291 Quilter and McNamara, 'Experiences of Complainants' (n 34) 22.
- 292 Tidmarsh and Hamilton (n 90) 6.
- 293 This false assumption has been found in Australian research: Minter, Carlisle and Coumarelos (n 39) (in relation to community attitudes in Australia, eg, the suggestion that an appropriate response to an allegation of sexual assault made by a woman was to 'chuck her on a lie detector': 9. See also Julia Quilter, Luke McNamara and Melissa Porter, 'Differences in Accounts and the 'Lying' Complainant: A Qualitative Study of Rape Trials in Victoria, Australia' (2023) 73 *International Journal of Law, Crime and Justice* 100593, 1–2 ('Differences in Account and the Lying Complainant'), citing international research that demonstrates that the practice of 'challenging the accuracy and honesty of the complainant's allegation of rape by pointing to differences ('inconsistencies') in how they have described the alleged rape at different points (from first complaint to trial) ... has been recognised as one which unfairly and inaccurately assumes that a "genuine" rape victim will describe their experience in the same terms every time they are asked to give an account, no matter the context or circumstance, citing Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan, 2018).
- 294 See generally Lori A Zoellner et al, 'Sexual Assault and Memory' in William T O'Donohue and Paul A Schewe (eds) *Handbook of Sexual Assault and Sexual Assault Prevention* (Springer Nature Switzerland AG, 2019).
- 295 Goodman-Delahunty, Martschuk and Nolan (n 285) 324–325; Jenny Ann Rydberg, 'Research and Clinical Issues in Trauma and Dissociation: Ethical and Logical Fallacies, Myths, Misreports, and Misrepresentations' (2017) *European Journal of Trauma & Dissociation* 89, 97.
- 296 See generally Zoellner et al (n 294).
- 297 Rydberg (n 295) 97.
- 298 Quilter and McNamara, 'Experiences of Complainants' (n 34) 22.
- 299 Jane Goodman-Delahunty and Mark A Nolan, 'The Quality of Autobiographical Memories of Sexual Assault' in Greg Byrne and Jacqueline Horan (eds), *Sexual assault trials: Challenges and innovations* (Lexis Nexis, forthcoming) 235–6.
- 300 Tidmarsh and Hamilton (n 90) 7.
- 301 Ibid.
- 302 See generally: Goodman-Delahunty, Martschuk and Nolan (n 285); Rydberg (n 295); Wake, Green and Zajac (n 286).
- 303 See *This is My Story* (n 37) 43–5, 81–6 for examples of victims' and survivors' experiences of police and judicial officers' misunderstanding trauma, including impacts on memory.
- 304 Ibid.
- 305 Mohammed M Ali et al., 'Australian Stakeholders' Views on Improving Investigative Interviews with Adult Sexual Assault Complainants' (2019) 26(5) *Psychiatry, Psychology and Law* 724.
- 306 Quilter and McNamara, 'Experiences of Complainants' (n 34) 22.
- 307 See, eg, Quilter, McNamara and Porter, 'Differences in Account and the Lying Complainant' (n 293) 4–14.
- 308 Goodman-Delahunty and Nolan (n 299).
- 309 Ibid.
- 310 *Evidence (Miscellaneous Provisions) Amendment Act 2019* (ACT) ch 1A; *Criminal Procedure Act 2009* (Vic) pt 8.2A; *Criminal Procedure Act 1986* (NSW) ss 294E–294S; *Evidence Act 1929* (SA) s 12AB; *Evidence Act 1977* (Qld) s 21AZS; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7K; *Evidence Act 1906* (WA) s 106R.
- 311 *This is My Story* (n 37) 86.
- 312 *Jury Directions Act 2015* (Vic) s 54D(2)(c)(i).
- 313 *Criminal Procedure Act 1986* (NSW) s 293A(2)(a)(i).
- 314 That is: after submissions made by the prosecution or defence have suggested a difference in the complainant's account of the offence that is relevant to the complainant's credibility or reliability.
- 315 See, eg, *DH v R* [2020] NSWCCA 2 [128]; *NM v R* [2012] NSWCCA 215 [27]–[28]; *Mohamed v R* [2008] NSWCCA 45 [18].
- 316 *Mohamed v R* [2008] NSWCCA 45 [18].
- 317 *HO v R* [2023] NSWCCA 245 [108].
- 318 *Reed v R* [2006] NSWCCA 314 [64].
- 319 *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 36 [117].
- 320 *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369 [183].

Insight 9

- 321 Tidmarsh and Hamilton (n 90) 3, briefly summarising findings from Canada and The Netherlands published between 2002–2015.
- 322 *Sexual Violence – Victimisation* (n 96).
- 323 Ibid.

- 324 Australian Bureau of Statistics, *Victims of Sexual Assault: Time to Report and Age at Incident* (April 2021) <Victims of sexual assault: time to report and age at incident | Australian Bureau of Statistics (abs.gov.au)> ('*Victims of Sexual Assault*').
- 325 Ibid.
- 326 Tidmarsh and Hamilton (n 90) 3.
- 327 Eg, *Victims of Sexual Assault* (n 324) found that, in the 2021-22 financial year, 92% of female victims and survivors who experienced sexual assault committed by a male perpetrator did not report the most recent incident to police.
- 328 Tidmarsh and Hamilton (n 90).
- 329 This false assumption has been found in Australian and international research: Coumarelos et al (n 7) 139-40, 172 (in relation to community attitudes in Australia); Tinsley, Young and Baylis (n 17) 472, 474-5 (in relation to mock jurors in NZ).
- 330 This false assumption has been found in Australian research: Coumarelos et al (n 7) 139-140, 172 and 178 (in relation to community attitudes in Australia).
- 331 Tidmarsh and Hamilton (n 90) 3.
- 332 *Hear Her Voice* (2022) (n 37) 51, 100.
- 333 Tidmarsh and Hamilton (n 90) 3.
- 334 *Hear Her Voice* (2022) (n 37) 51.
- 335 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 26.
- 336 Jillian Miller Purdue and Fredrick E Vars, 'Time to Heal: Trauma's Impact on Rape & Sexual Assault Statutes of Limitations' (2023) 11(1) *Texas A&M Law Review* 125, 145.
- 337 *This is My Story* (n 37) 138-9.
- 338 Ibid.
- 339 Ibid 52-5.
- 340 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 336-345; *Hear Her Voice* (2022) (n 37) 53.
- 341 Rachel Burgin and Jacqui Tassone, Swinburne University of Technology, *Beyond Reasonable Doubt? Understanding Police Attrition of Reported Sexual Offences in the ACT* (Report, March 2024) 108.
- 342 See, eg, Tidmarsh (n 83); Centre for Investigative Interviewing, What is Investigative Interviewing? (Web Page, 2024) <Centre for Investigative Interviewing | Improve Interview Techniques (investigativecentre.com)>. The Centre conducts research, practical advice and training in the conduct of investigative interviewing, including in forensic contexts and vulnerable witnesses: www.investigativecentre.com/. International resources are also available in relation to investigative interviewing in the context of sexual assault and trauma: see, eg, Lonsway, Hopper and Archambault (n 264).
- 343 Ali et al (n 305).
- 344 Ibid 793-4.
- 345 See Tidmarsh (n 83).
- 346 Nina Westera et al., 'Police Interviewing of Sexual Assault Victims' in Ray Bull and Iris Blandón-Gitlin (eds), *The Routledge International Handbook of Legal and Investigative Psychology* (Routledge, 2019).
- 347 Nina Westera et al., 'Police Investigators' Perceptions of the Challenges Associated with Interviewing Adult Sexual Assault Complainants' (2019) 29(2) *Violence Against Women* 276, 276, 282-291.
- 348 Ibid 292.
- 349 Ibid 292-3.
- 350 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 431-41; Australian Law Reform Commission, *Justice Responses to Sexual Violence* (n 11) 12-14.
- 351 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (Report, December 2017) 109-110.
- 352 *Evidence Act 1977* (Qld) s 103ZZ(2)(a).
- 353 *Jury Directions Act 2015* (Vic) s 52 (4).
- 354 *Criminal Procedure Act 1986* (NSW) s (2)(b); *Evidence Act 1977* (Qld) s 103ZZ(2)(b); *Jury Directions Act 2015* (Vic) s 52(4)(d).
- 355 *Evidence Act 1977* (Qld) s 103ZZ(2)(b).
- 356 Julia Quilter, Luke McNamara and Melissa Porter, 'The Most Persistent Rape Myth? A Qualitative Study of 'Delay' in Complaint in Victorian Rape Trials' (2023) 35(1) *Current Issues in Criminal Justice* 4 ('The Most Persistent Rape Myth?').
- 357 Ibid.
- 358 Ibid 21.

Insight 10

- 359 Claire E Ferguson and John M Malouff, 'Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates' (2016) 45(5) *Archives of Sexual Behavior* 1185, 1189, noting the average rate of false reporting found across 7 studies published in Australia, Canada, the UK and the USA between 1999 and 2014 was about 5%.
- 360 This has been found in Australian and international research: Coumarelos et al (n 7) 138-40, 172 (in relation to community attitudes in Australia); Tinsley, Young and Baylis (n 17) 465-6, 472 (in relation to defence counsel in NZ). Ipsos (n 109) 4 and 10 (in relation to community attitudes in 30 countries including Australia).
- 361 See, eg, Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 31, of 141 sexual assault cases referred for prosecution in the ACT, NSW, NT, Tasmania or WA between 1 July 1999 and 30 June 2001, only 45% of cases (n=64) resulted in a guilty conviction, and most of these (n=47) were by way of a guilty plea. 38% (n=53) of the cases were withdrawn prior to trial or sentencing. Of the cases that did proceed to trial or sentencing (62%, n=88), 27 (n=28) resulted in acquittal, were found not guilty, or dismissed, and 73% (n=64) of them resulted in a conviction of guilt.
- 362 Coumarelos et al (n 7) 171.
- 363 Ibid 252.

- 364 This false assumption has been found in Australian and international research: Coumarelos et al (n 7) 138–40, 172 (in relation to community attitudes in Australia); Tinsley, Young and Baylis (n 17) 465–6, 472 (in relation to defence counsel in NZ); Ipsos (n 109) 4 and 10 (in relation to community attitudes in 30 countries including Australia). See also generally Minter, Carlisle and Coumarelos (n 39).
- 365 This false assumption has been found in Australian and international research: Coumarelos et al (n 7) 24–5, 137–139, 141, 172 and 252 (in relation to community attitudes in Australia); *Community Attitudes to Sexual Consent* (n 39) 46 (in relation to community attitudes in Queensland); *Hear Her Voice* (2021) (n 120) 82 (in relation to community and professionals' experiences and attitudes in Queensland); Chalmers et al (n 78) 1029 (in relation to real juries in Scotland).
- 366 Ferguson and Malouff (n 359) 1187.
- 367 Ferguson and Malouff (n 359).
- 368 See, eg, Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 31, of 141 sexual assault cases referred for prosecution in the ACT, NSW, NT, Tasmania or WA between 1 July 1999 and 30 June 2001, only 45% of cases (n=64) resulted in a guilty conviction, and most of these (n=47) were by way of a guilty plea. 38% (n=53) of the cases were withdrawn prior to trial or sentencing. Of the cases that did proceed to trial or sentencing (62%, n=88), 27 (n=28) resulted in acquittal, were found not guilty, or dismissed, and 73% (n=64) of them resulted in a conviction of guilt.
- 369 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 30.
- 370 We do not intend to make or support generalisations about individuals' tendency to lie based on their gender, but for the purposes of counteracting the false assumption that women are statistically more likely to lie, see a recent meta-analysis of lies told in the context of sender-receiver game studies which found that females were less likely than men to tell black lies or altruistic white lies: Valerio Capraro, 'Gender Differences in Lying in Sender-Receiver Games: A Meta-Analysis' (2018) 13(4) *Judgment and Decision Making* 345. See also a recent deception game study which found that being female was not a statistically significant indicator of whether a participant was likely to be deceptive, regardless of the payoff: Radu Vranceanu and Delphine Dubart, 'Deceitful Communication in a Sender-Receiver Experiment: Does Everyone Have a Price?' (2019) 79 *Journal of Behavioural and Experimental Economics* 43.
- 371 *This is My Story* (n 37) 88–9.
- 372 Salerno-Ferraro and Jung (n 36) 540.
- 373 Minter, Carlisle and Coumarelos (n 39) 9, 10.
- 374 Tinsley, Young and Baylis (n 17) 466.
- 375 Ali et al (n 305) 729.
- 376 Kennedy and Prock (n 28) 513.
- 377 Ibid 518.
- 378 Ibid 517–8, 520.
- 379 Ibid 520.
- 380 *This is My Story* (n 37) vii, 34–5; Georgina Heydon and Anastasia Powell, 'Written-Response Interview Protocols: An Innovative Approach to Confidential Reporting and Victim Interviewing in Sexual Assault Investigations' (2016) 28(6) *Policing and Society* 631, 638.
- 381 *This is My Story* (n 37) 36.
- 382 *This is My Story* (n 37) 35–6.
- 383 Ibid.
- 384 Ibid 35.
- 385 Ali et al (n 305) 730.

Insight 11

- 386 Most cases of sexual assault are not reported; and, even if they are reported, police may not press charges; and, even if police do press charges, they are unlikely to reach a conviction: *Recorded Crime – Victims* (n 20); Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32); Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 9–10.
- 387 *Sexual Violence, 2021–22* (n 76).
- 388 *Sexual Violence – Victimisation* (n 96).
- 389 Ibid; Victims of Crime Commissioner (n 40) 8.
- 390 Ali et al (n 305) 724; Lievore *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 45–47.
- 391 Quilter and McNamara, 'Experiences of Complainants' (n 34) 13–14, 16–17; Tinsley, Young and Baylis (n 17) 479–82.
- 392 See generally Hudspith et al., 'Forty Years of Rape Myth Acceptance Interventions' (n 36) 982, briefly summarising findings from 12 peer-reviewed studies from Australia, New Zealand, the UK and the USA published between 2005–2020. See also Fansher and Welsh (n 36) 15–17; Franklin et al, 'Police Decisions in a Rape Scenario' (n 36) 3038–3041; Lievore *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 48–9; Retter (n 36) 162–163; Salerno-Ferraro and Jung (n 36) 547; Venema (n 36) 12–17. See also *This is My Story* (n 37) 15–16, 42, 47.
- 393 The idea that 'rape myths' can be a framework to understand sexual assault has existed since 1980, when Martha R Burt (in the USA) defined 'rape myths' as 'prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists': Burt (n 30) 217. Despite social change and progressive reforms, experts continue to accept that rape myths and rape mythology can influence understandings of sexual assault, including in the context of criminal justice: see, eg, Tidmarsh and Hamilton (n 90) (in Australia), Jacqueline M Gray and Miranda A H Horvath, 'Rape Myths in the Criminal Justice System' in Emma Milne et al. (eds), *Women and the Criminal Justice System* (Palgrave Macmillan, 2018) (in the UK) and Craig (n 12) (in the USA).
- 394 This false assumption may arise given the perception that false allegations of sexual assault are common, meaning they may be viewed as reasonably easy to make. See, eg, Coumarelos et al (n 7) 138–40, 172 and also generally Minter, Carlisle and Coumarelos (n 39).
- 395 Ibid.
- 396 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 28. See Debra Patterson, Megan Greeson and Rebecca Campbell, 'Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems' (2009) 34(2) *Health & Social Work* 127, 134, referring to the decision not to pursue justice as a 'self-protection' mechanism.
- 397 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 27.

- 398 Heather Lovatt and Bronwyn Honorato, Queensland Centre for Domestic and Family Violence Resource, *Prevention, Early Intervention and Support for Aboriginal and Torres Strait Islander People Who Have Experienced Sexual Violence: Practice Paper* (Practice Paper, February 2019) 5; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 27; *Hear Her Voice* (2022) (n 37) 130.
- 399 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 26; *Hear Her Voice* (2022) (n 37) 45, 51, 100; Helps et al (n 126) 37–8; Donna Chung et al., *Young Women from African Backgrounds and Sexual Violence* (Report to the Criminology Research Advisory Council; Criminology Research Grants, Grant CRG 07/12–13, 2018) 13; Sasha N Canan, Alejandra M Kaplan and Kristen N Jozkowski, 'A National US Study of 906 Women's Qualitative Accounts of Their Reactions During Sexual Assault' (2023) 20 *Sexuality Research and Social Policy* 977, 983, 985.
- 400 Lovatt and Honorato (n 397) 5.
- 401 Chung et al (n 399) 13; Lovatt and Honorato (n 398) 4; Connie McGilloway, David Smith and Rose Galvin, 'Barriers Faced by Adults with Intellectual Disabilities who Experience Sexual Assault: A Systematic Review and Meta-Synthesis' (2020) 33(1) *Journal of Applied Research in Intellectual Disabilities* 51, 52, 61; Mitra-Kahn, Newbiggin and Hardefeldt (n 22) 24.
- 402 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 28.
- 403 *Hear Her Voice* (2022) (n 37) 100–102.
- 404 Ibid 79; Tinsley, Young and Baylis (n 17) 478–9.
- 405 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 26.
- 406 Jodie Murphy-Oikonen and Rachel Egan, 'Sexual and Gender Minorities: Reporting Sexual Assault to the Police' (2021) 69(5) *Journal of Homosexuality* 773, 781; McGilloway, Smith and Galvin (n 401) 58, 61; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 26.
- 407 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 26.
- 408 Ibid 27; *Hear Her Voice* (2022) (n 37) 51; Kennedy and Prock (n 28) 517. See also *This is My Story* (n 37) 65, quoting a research participant (victim and survivor): '... you don't tell people, because you don't want to be rejected again and again and again. So, you just do it by yourself.'
- 409 Murphy-Oikonen and Egan (n 406) 782; *This is My Story* (n 37) 15.
- 410 Hudspeth et al., 'Forty Years of Rape Myth Acceptance Interventions' (n 36) 982.
- 411 Murphy-Oikonen and Egan (n 406) p 779.
- 412 Kennedy and Prock (n 28) 520.
- 413 Ibid; Chivers-Wilson (n 60) 114–115.
- 414 See generally Williams and Holmes (n 66).
- 415 See, eg, *This is My Story* (n 37) 38–40, 52, 57–60, 74.
- 416 Patterson, Gresson and Campbell (n 396) 135. See also Chivers-Wilson (n 60) 114–115.
- 417 Franklin et al., 'Police Decisions in a Rape Scenario' (n 36) 3025.
- 418 Ali et al (n 304) 724; Lievore *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 45–47.
- 419 Denise Lievore, Australian Institute of Criminology, 'Prosecutorial Decisions in Adult Sexual Assault Cases' (2005) 291 *Trends & Issues in Crime and Criminal Justice*, 1 ('Prosecutorial Decisions in Adult Sexual Assault Cases – 2005').
- 420 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 48.
- 421 Quilter and McNamara, 'Experiences of Complainants' (n 34) 16.
- 422 Tinsley, Young and Baylis (n 17) 480. This incorrect belief may reflect a legacy of common law obligations for judges to direct juries about the dangers of acting solely on the testimony of a complainant: Law Reform Commission of Western Australia, *Legislated Jury Directions About Delay and the Longman Direction* (Issues Paper No 6.4, February 2023).
- 423 Ali et al (n 305) 725–6.
- 424 Quilter and McNamara, 'Experiences of Complainants' (n 34) and 16–17; Horan and Goodman-Delahunty (n 34) 725; *This is My Story* (n 37) 52–5; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 340–1.
- 425 *This is My Story* (n 37) 53–4; *Hear Her Voice* (2022) (n 37) 175–6.
- 426 Note that delays and/or inefficiencies in gathering physical evidence in sexual assault cases may relate to factors that may cause complainants to delay reporting sexual assault (see Insight 10) and/or complainants feeling uncomfortable or unprepared to undergo a forensic examination: *This is My Story* (n 37) 52–6; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 341–3.
- 427 *This is My Story* (n 37) 53, 55–6; Helps et al (n 126) 35–7; Ranit Mishori et al., 'The Little Tissue That Couldn't – Dispelling Myths About the Hymen's Role in Determining Sexual History and Assault' (2019) 16(1) *Reproductive Health* 74, 78–79.
- 428 Quilter and McNamara, 'Experiences of Complainants' (n 34) 13; Tidmarsh and Hamilton (n 90) 6.
- 429 Mishori et al (n 427) 78.
- 430 Ibid 78.
- 431 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 27, 430; See also generally Mulder and Bosma (n 27).
- 432 Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases' (2005) (n 419) 1.
- 433 See generally Hudspeth et al., 'Forty Years of Rape Myth Acceptance Interventions' (n 36) 982, briefly summarising findings from 12 peer-reviewed studies from Australia, New Zealand, the UK and the USA published between 2005–2020.
- 434 Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases' (2005) (n 419) 1.
- 435 Rachel Lovell et al., 'The Bureaucratic Burden of Identifying Your Rapist and Remaining 'Cooperative': What the Sexual Assault Kit Initiative Tells Us About Sexual Assault Case Attrition and Outcomes (2021) 46(3) *American Journal of Criminal Justice* 528, 531, 548; Eryn Nicole O'Neal and Cassia Spohn, 'When the Perpetrator is a Partner: Arrest and Charging Decisions in Intimate Partner Sexual Assault Cases – A Focal Concern Analysis' (2017) 23(6) *Violence Against Women* 707, 709, 719–720.
- 436 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) (n 32) 40, 49; *This is My Story* (n 37) 62–63.
- 437 Burgin and Tassone (n 341) 108.
- 438 *This is My Story* (n 37) 88–9.
- 439 See, eg, Christopher Dowling, Australian Institute of Criminology, 'Police Training in Responding to Family, Domestic and Sexual Violence' (2024) 689 *Trends & Issues in Crime and Criminal Justice*.

- 440 Burgin and Tassone (n 341) 108.
- 441 Centre for Innovative Justice, RMIT, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions, April 2019) 11 ('*Communicating with Victims*'); *This is My Story* (n 37) 34–7.
- 442 *This is My Story* (n 37) 35.
- 443 Lara Flynn Hudspith, 'Justice for Rape Victim-Survivors: Exploring the Need for a Court-Based Intervention to Address Jurors' Rape Myth Acceptance, and Other Measures, in the Criminal Justice System' (PhD Thesis, The University of Huddersfield, 2022) 132 ('Justice for Rape Victim-Survivors').
- 444 *This is My Story* (n 37) 48–9.
- 445 Ali et al (n 305) 733–4; Hudspith et al., 'Forty Years of Rape Myth Acceptance Interventions' (n 36) 131–2; *This is My Story* (n 37) 35, 48–51; *Hear Her Voice* (2022) (n 37) 154.
- 446 *This is My Story* (n 37) 38, 64–5, 70.
- 447 *Communicating with Victims* (n 441) 11; Hudspith et al., 'Forty Years of Rape Myth Acceptance Interventions' (n 36) 131–3; *This is My Story* (n 37) 35, 48–51; *Hear Her Voice* (2022) (n 37) 154.
- 448 Ali et al (n 305) 731; *Communicating with Victims* (n 441) 9–11; *This is My Story* (n 37) 37.
- 449 Dowling (n 438) 8.
- 450 *This is My Story* (n 37) 86.
- 451 See *Libke v The Queen* (2007) 120 CLR 559 597–605.
- 452 *Evidence Act 2011* (ACT) s 41; *Evidence Act 1995* (NSW) s 41; *Evidence (National Uniform Legislation) Act 2011* (NT) s 41; *Evidence Act 2001* (Tas) s 41; *Evidence Act 2008* (Vic) s 41.
- 453 *Evidence Act 2011* (ACT) s 41; *Evidence Act 1995* (NSW) s 41; *Evidence (National Uniform Legislation) Act 2011* (NT), s 41; *Evidence Act 1977* (Qld) s 21; *Evidence Act 2001* (Tas) s 41; *Evidence Act 2008* (Vic) s 41.
- 454 *Evidence Act 1906* (WA) s 26.
- 455 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ch 4, pt 4.3; *Criminal Procedure Act 1986* (NSW) ch 6, pt 5, sub-div 5; *Evidence Act 1939* (NT) pt 3; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) pt 2, s 5; *Evidence Act 1977* (Qld) pt 2, divs 4, 6; *Evidence Act 1929* (SA) pt 2; *Criminal Law (Legal Representation) Act 2001* (SA) pt 2, s 6; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 5A; *Criminal Procedure Act 2009* (Vic) s 133; Part 2.A; *Evidence Act 1906* (WA) ss 25A, 106G, 106R, 106RA.
- 456 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52; *Evidence Act 1939* (NT) s 21B(2); *Evidence Act 1977* (Qld) s 21A(2)(e); *Evidence Act 1929* (SA) ss 13(2)(b), s 13A(2)(b); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 5A(3); *Evidence Act 1906* (WA) s 106RA.
- 457 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 68(2); *Criminal Procedure Act 1986* (NSW), 294B(3)(a); *Evidence Act 1939* (NT) s 21A(2); *Evidence Act 1977* (Qld) s 21A(2)(c)(i); *Evidence Act 1929* (SA) ss 13(2)(a), s 13A(2)(a); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2)(b)(ii); *Evidence Act 2008* (Vic) s 360(a); *Evidence Act 1906* (WA) s 106N(2)(a) via s 106R(4)(c).
- 458 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 49; *Criminal Procedure Act 1986* (NSW) s 294C; *Evidence Act 1939* (NT) s 21A(2AD)(a); *Evidence Act 1977* (Qld) s 21A(2)(d); *Evidence Act 1929* (SA) ss 13(2)(e), s 13A(2)(e)(i); *Evidence (Children and Special Witnesses) Act 2001* (Tas) 8(2)(b)(i); *Evidence Act 2008* (Vic) s 360(c); *Evidence Act 1906* (WA) s 106R(4)(a).
- 459 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50; *Criminal Procedure Act 1986* (NSW) ss 291, 294B(3)(b); *Evidence Act 1939* (NT) ss 21A(2AD)(b), 21F; *Evidence Act 1977* (Qld) ss 21A(2)(c)(ii), 21AAA(2); *Evidence Act 1929* (SA); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2)(b)(iii); *Evidence Act 2008* (Vic) s 360(d); *Evidence Act 1906* (WA).
- 460 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 47; *Criminal Procedure Act 1986* (NSW), 294B(3)(b); *Evidence Act 1939* (NT) s 21A(2B); *Evidence Act 1977* (Qld) s 21A(2)(a); *Evidence Act 1929* (SA) ss 13(2)(d) and s 13A(2)(d); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2)(b)(ii); *Evidence Act 2008* (Vic) s 360(b); *Evidence Act 1906* (WA) ss 106N(2)(b), s 106N(4)(a) via s 106R(4)(c).
- 461 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 48; *Criminal Procedure Act 1986* (NSW) s 294A; *Evidence Act 1939* (NT) s 21QA(2); *Evidence Act 1977* (Qld) s 21N; *Evidence Act 1929* (SA) s 13A(i); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A(1); *Evidence Act 2008* (Vic) s 356; *Evidence Act 1906* (WA) s 106G(1).
- 462 *Criminal Procedure Act 1986* (NSW) pt 5 div 1A sub-div 3; *Criminal Procedure Act 2009* (Vic) pt 8.2A div 2; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ch 1B.
- 463 *Evidence Act 1906* (WA) s 106R(4); *Evidence Act 1929* (SA) s 14A.
- 464 Department of Justice, Tasmanian Government, *Witness Intermediary Scheme* (Web Page, 15 February 2024) <Witness Intermediary Scheme | CARCRU (justice.tas.gov.au)>; The State of Queensland (Queensland Courts), *Queensland Intermediary Scheme* (Web Page, 5 October 2023) <Queensland Intermediary Scheme | Queensland Courts>.

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- 465 Most cases of sexual assault are not reported; and, even if they are reported, police may not press charges; and, even if police do press charges, they are unlikely to reach a conviction: *Recorded Crime – Victims* (n 20); Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 9–10.
- 466 Victims of Crime Commissioner (n 40) 7.
- 467 Commission for Gender Equality in the Public Sector, Victoria State Government, *Applying Intersectionality* (Web Page, 11 February 2022) <https://www.genderequalitycommission.vic.gov.au/applying-intersectionality>.
- 468 This false assumption may arise given the rule of law technically facilitates equal access to justice for all people, including by removing barriers to justice: Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People* (Report No 133, March 2018) [10.1], citing Justice Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' (Paper, Access to Justice Roundtable, Law and Justice Foundation of NSW, July 2002).
- 469 Lovatt and Honorato (n 398) 5.
- 470 Ibid.
- 471 *This is My Story* (n 37) 81–2; Lovatt and Honorato (n 398) 5; *Hear Her Voice* (2022) (n 37) 130.

- 472 Harry Blagg et al., Australia's National Research Organisation for Women's Safety Limited (ANROWS) '*Understanding the Role of Law and Culture in Aboriginal and Torres Strait Islander Communities in Responding to and Preventing Family Violence*', Ngarluma/Jaru/Gooniyandi (Hovane), Kimberley and Pilbara region, WA, Jabirr Jabirr/Bardi (Raye), Dampier Peninsula and Kimberley region, WA, Gooniyandi/Gija (Worrigal), Kimberley region, WA (Research to Policy & Practice Issue 19, June 2020) 48–9; *This is My Story* (n 37) 81–2; Lovatt and Honorato (n 398) 5; *Hear Her Voice* (2022) (n 37) 130.
- 473 Heather Nancarrow et al., Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Accurately Identifying the 'Person Most in Need of Protection' in Domestic and Family Violence Law* (Issue 23, Research Report, November 2020) 10, 26–33.
- 474 Marcia Langton et al., Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Improving Family Violence Legal and Support Services for Aboriginal and Torres Strait Islander Women* (Issue 25, Research Report, December 2020) 15, 36–40.
- 475 Chung et al (n 399) 11.
- 476 Lovatt and Honorato (n 398) 5.
- 477 Ibid 5–6, 12; *This is My Story* (n 37) 81–2.
- 478 Lovatt and Honorato (n 398) 5–6, 12.
- 479 Note that the label 'culturally and linguistically diverse' is used throughout this resource as this is the language used by one of Australia's peak bodies for culturally and linguistically diverse peoples' interests, *Federation of Ethnic Communities Councils of Australia*.
- 480 Mitra-Kahn, Newbiggin and Hardefeldt (n 22) 25.
- 481 Chung et al (n 399) 11.
- 482 Mitra-Kahn, Newbiggin and Hardefeldt (n 22) 25.
- 483 Ibid 24.
- 484 Hulley et al (n 22) 1007–8; Jane M Ussher et al., Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Crossing the Line: Lived Experience of Sexual Violence Among Trans Women of Colour from Culturally and Linguistically Diverse (CALD) Backgrounds in Australia* (Issue 14, Research Report, June 2020) 133.
- 485 Mitra-Kahn, Newbiggin and Hardefeldt (n 22) 24; *Family, Domestic and Sexual Violence* (n 7).
- 486 Mitra-Kahn, Newbiggin and Hardefeldt (n 22) 24.
- 487 See, eg, Chung et al (n 399) 28; Mitra-Kahn, Newbiggin and Hardefeldt (n 22) 24–5, 67 for findings that indicate victims and survivors from African backgrounds may minimise sexual violence and may be unaware that marital rape is a crime, including because it is not criminalised in their home countries.
- 488 Michael Salter et al., 'Gay, Bisexual and Queer Men's Attitudes and Understandings of Intimate Partner Violence and Sexual Assault' (2021) 36(23–24) *Journal of Interpersonal Violence* 11630, 11633.
- 489 *This is My Story* (n 37) 22.
- 490 House of Representatives Standing Committee on Social Policy and Legal Affairs, Commonwealth of Australia, *Inquiry into Family Domestic and Sexual Violence* (Report, March 2021) [5.68]–[5.82]; Murphy-Oikonen and Egan (n 406) 780, 784.
- 491 Murphy-Oikonen and Egan (n 406) 780; Salter et al (n 488) 11633.
- 492 Murphy-Oikonen and Egan (n 406) 781.
- 493 Patricia Cullen et al., Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Voices From the Frontline: Qualitative Perspectives of the Workforce on Transforming Responses to Domestic, Family and Sexual Violence* (Issue 21, Research Report, December 2022) 38, presenting findings from a national survey of the workforce (service providers, managers and researchers) in the domestic, family and sexual violence sector (n=95).
- 494 Murphy-Oikonen and Egan (n 406) 781.
- 495 *This is My Story* (n 37) 22.
- 496 McGilloway, Smith and Galvin (n 401) 60.
- 497 Ibid.
- 498 Ibid 52.
- 499 See, eg, Ibid.
- 500 Ibid 59, 61.
- 501 See, eg, Flynn, Eilíonóir, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities*. (Routledge, 2015).
- 502 JaneMaree Maher et al., Australia's National Research Organisation for Women's Safety Limited (ANROWS), *Women, Disability and Violence: Barriers to Accessing Justice: Final Report* (Horizons Issue 2, Research Report, April 2018) 5.
- 503 *Hear Her Voice* (2021) (n 120) 47.
- 504 McGilloway, Smith and Galvin (n 401) 61.
- 505 People with disability are entitled to this support as part of the 'equality' encompassed in Article 12(2) of the *Convention on the Rights of Persons with Disabilities*, as expressed in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, November 2014) [48]–[51], [108]–[109].
- 506 Note that the label 'sex workers' is used throughout this resource as this is consistent with the language used by one of Australia's peak bodies for sex workers' interests, *Scarlet Alliance*.
- 507 Rachel V Hirsch, Project Respect, *The Extent, Nature and Impact of Family, Domestic, and Sexual Violence (FDSV) Against Women in the Australian Sex Industry: A State of Knowledge Paper* (Report, 2022) 13.
- 508 Ibid 26.
- 509 Ibid 17.
- 510 Ibid 19.
- 511 P G Maciotti et al., Australian Research Centre in Sex, Health and Society, La Trobe University, *Understanding the Health and Social Wellbeing Needs of Sex Workers in Victoria* (Report, 2022) 33.
- 512 Lixia Qu et al., Australian Institute of Family Studies (AIFS), *National Elder Abuse Prevalence Study* (Final Report, July 2021) 161.
- 513 Ibid 13.
- 514 Ibid.
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- 516 Ibid.
- 517 Ibid.
- 518 Daisy Smith et al., 'A Systemic Review of Sexual Assaults in Nursing Homes' (2018) 58(6) *Gerontologist* e369, e369–e370.
- 519 *Recorded Crime – Victims* (n 20).
- 520 Mulder and Bosma (n 27) 226.
- 521 Kennath Widanaralage et al., 'I Didn't Feel I was a Victim': A Phenomenological Analysis of the Experiences of Male-on-Male Survivors of Rape and Sexual Abuse' (2022) 17(8) *Victims & Offenders* 1147, 1149, 1155–1156.
- 522 *This is My Story* (n 37) 42; Helps et al (n 126) 53–4; 67–8.
- 523 Helps et al (n 126) 53–4; 67–8.
- 524 *This is My Story* (n 37) 22.
- 525 McGilloway, Smith and Galvin (n 401) 58, 61.
- 526 *This is My Story* (n 37) 47.
- 527 See, eg, Ibid 39, 44 (quoting male victims and survivors).
- 528 Bianca Fileborn, 'Sexual Assault and Justice for Older Women: A Critical Review of the Literature' (2017) 18(5) *Trauma, Violence & Abuse* 496, 500–1.
- 529 The Magnolia Project and Aboriginal Legal Rights Movement, *Practice Guide for Preparing Mental Health Pre-Sentence Reports with Aboriginal People in the Criminal Justice System in South Australia* (2023) <20230816-The-Magnolia-ALRM-Practice-Guide.pdf (magnoliaproject.com.au)> 57–63.

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- 530 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 18–21.
- 531 McDonald (n 164) 18.
- 532 Minter, Carlisle and Coumarelos (n 39) 18.
- 533 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 116–119.
- 534 Coumarelos et al (n 7) 46–7.
- 535 The stereotype of a 'genuine victim' that can minimise or invalidate victims' and survivors' experiences if they do not match the stereotype has been found in Australian and international research: Coumarelos et al (n 7) 139–140, 171–172 (in relation to community attitudes in Australia), noting for example that 3% of respondents to the National Community Attitudes Survey 2021 agreed 'When lesbian or bisexual women claim to have been sexually assaulted by their partner, they probably shouldn't be taken too seriously' and 6% agreed 'Women with mental health issues who report being sexually assaulted are probably lying'; Mulder and Bosma (n 27) 229 (in relation to community attitudes in the UK); Widanaralage et al (n 521) 1155 (in relation to male victims and survivors in the UK).
- 536 Our Watch, Submission No 16 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Missing and Murdered First Nations Women and Children* (December 2022) 7.
- 537 Blagg et al (n 472) 19–20.
- 538 See generally Blagg et al (n 472); Coalition of Peaks, Submission No 14 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Missing and Murdered First Nations Women and Children* (November 2022) 2.
- 539 Closing the Gap, *National Agreement on Closing the Gap* (National Agreement between all Australian Governments (Governments) and the Coalition of Peaks, July 2020) <National Agreement on Closing the Gap | Closing the Gap> [19] ('Closing the Gap').
- 540 Ibid [2].
- 541 Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody – National Report* (Volume 2, 1991); Australian Institute of Health and Welfare, Indigenous Health and Wellbeing (Web Article, 7 July 2022) <Indigenous health and wellbeing - Australian Institute of Health and Welfare (aihw.gov.au)>; Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission), *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, April 1997); Yoorrook for Justice Commission, *Yoorrook for Justice: Report into Victoria's Child protection and Criminal Justice Systems* (2023).
- 542 *Closing the Gap* (n 539). The *National Agreement on Closing the Gap* has been developed and endorsed by Australian governments and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations.
- 543 Department of Social Services, *Commonwealth of Australia, Aboriginal and Torres Strait Islander Action Plan 2023–2023* (2023) 32.
- 544 Antoinette Braybrook, 'Family Violence in Aboriginal Communities' (2015) 2 *Domestic Violence Resource Centre Advocate* 18 (pp); Mitra-Kahn, Newbigin and Hardefeldt (n 22) 19–21.
- 545 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, Cat. no. FDV 2, 2018) 86.
- 546 This relates only to jurisdictions where data were sufficiently reliable (NSW, Queensland, SA and the NT). In 2022, Aboriginal and Torres Strait Islander people comprised: 1,116 victims in NSW (9% of total 12,412 total victims); 923 victims in Queensland (12% of 7,431 total victims); 171 victims in the NT (47% of 362 total victims); 99 victims in South Australia (5% of 1,816 total victims): *Recorded Crime – Victims* (n 20).
- 547 In 2021, Aboriginal and Torres Strait Islander people comprised 3.4% of the total population of NSW population; 4.6% of the total population of Queensland; 26.3% of the total population of the NT; 2.4% of the total population of South Australia: Australian Bureau of Statistics, *Australia: Aboriginal and Torres Strait Islander Population Summary: Census 2021* (June 2022) <Australia: Aboriginal and Torres Strait Islander population summary | Australian Bureau of Statistics (abs.gov.au)>.
- 548 Ussher et al (n 484) 92, citing a trans woman of color: '... When we talk about women of a colour as a term, it's always in the understanding that they're minorities in a white person society, so the lens of being a minority women and the elements of exoticised stereotypes ... and power that white sexual partners might have over them ... due to engrained beliefs about race and stuff ... sexual violence is often being driven by power imbalances.'
- 549 Ussher et al (n 484) 92.
- 550 Australian Bureau of Statistics, *Personal Safety, Australia 2021–22* (March 2023) <Personal Safety, Australia, 2021–22 financial year | Australian Bureau of Statistics (abs.gov.au)> cited in *Family, Domestic and Sexual Violence* (n 7).
- 551 Mortimer, Powell and Sandy (n 47) 341–4.
- 552 Denton Callander et al., The Kirby Institute, NSW Sydney, *The 2018 Australian Trans and Gender Diverse Sexual Health Survey: Report of Findings* (Report, 2019) 2, 4.

553 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 118.

554 *Sexual Violence*, 2021–22 (n 76); Callander et al (n 552) 10.

555 *Sexual Violence*, 2021–22 (n 76).

556 The survey period was in 2019 and findings were published in 2020: Adam O Hill et al., Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* (ARCSHS Monograph Series No. 122, Report, 2020).

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558 Callander et al (n 552) 10.

559 Our Watch and Women with Disabilities Victoria, *Changing the Landscape: A National Resource to Prevent Violence Against Women and Girls with Disabilities* (Report, 2022) 32, 41, 44.

560 *Sexual Violence*, 2021–22 (n 76).

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563 Hirsch (n 507) 13.

564 Ibid 19.

565 Ibid.

566 Ibid 17.

567 Macioti et al (n 511) 33.

568 Hirsch (n 507) 13–14, 20–3.

569 Smith et al (n 518) e373.

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571 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (n 21) 118; Qu et al (n 512) 161; Smith et al (n 518) e369–e370.

572 Qu et al (n 512) 33–4, 39–40.

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574 Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (1 March 2021) 140.

575 Mulder and Bosma (n 27) 226.

576 Salter et al (n 488) 11632.

577 Widanaralalage et al (n 521) 1148, 1155–1157.

578 Ibid. See also *This is My Story* (n 37) 39 quoting a male research participant (victim and survivor): ‘I ... had a police officer say to me, ‘well, you were a dude, why didn’t you just knock him out’ ...’

579 Widanaralalage et al (n 521) 1149.

580 Ngosa, Kambashi et al., ‘Adult Male Rape Myths in England Since 1994: A Systemic Mixed Methods Review’ (2023) 29(4) *Psychology, Public Policy, and Law* 497.

581 Tidmarsh and Hamilton (n 90) 10.

582 See generally Sarah Michal Greathouse et al., ‘Male Perpetrators Who Sexually Assault Male Victims’ in Sarah Michael Greathouse et al. (eds) *A Review of the Literature on Sexual Assault Perpetrator Characteristics and Behaviours* (RAND, 2015).

583 See, eg, a review of 15 peer-reviewed studies published between 1980–2014 found that a significant number of research participants identified as heterosexual: Mario Ioannou, Laura Hammond and Laura Machin, ‘Male-on-Male Sexual Assault: Victim, Offender and Offence Characteristics’ (2017) 14(2) *Journal of Investigative Psychology and Offender Profiling*, 189.

584 *Recorded Crime – Victims* (n 20).

585 Tidmarsh and Hamilton (n 90) 9–10; Robson, Newman and O’Hagan (n 171) 259–64.

586 Chung et al (n 399) 8–9.

587 Chung et al (n 399) 8–11; Mythili Rajiva, ‘A Comparative Analysis of White and Indigenous Girls’ Perspectives on Sexual Violence, Toxic Masculinity and Rape Culture’ (2023) 36(6) *International Journal of Qualitative Studies in Education* 1139, 1141.

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