



THE LAW REFORM COMMISSION  
*of*  
WESTERN AUSTRALIA

# Project 113

# Sexual Offences

## Background Paper

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## Disclaimer

This Paper was commissioned by the Law Reform Commission of Western Australia to assist it and stakeholders, including interested members of the public, to understand the issues in reforming Western Australia's sexual offences.

The content of the Paper and the views expressed by the authors of the Paper are not necessarily those of the Commission.

During the consultation phase of Project 113, the Commission invites stakeholders, including interested members of the public, to comment on the content of the Paper and the views expressed in it. As the Paper is published by the Commission as part of Project 113, submissions should be sent to the Commission and not to the authors directly.

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**The Commission respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky.**

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## FOREWORD

The Attorney General of Western Australia has asked the Law Reform Commission of Western Australia (the Commission) to review Western Australia's sexual offence laws (Project 113). The Commission has been asked to provide the Government with advice on possible amendments to enhance and update the provisions in Chapter XXXI of the *Criminal Code Compilation Act 1913* (WA) (the Code), as well as sections 186, 191 and 192 of the Code, having regard to contemporary understanding of, and community expectations relating to, sexual offences.

In carrying out this review, the Commission has been asked to consider whether there is a need for any reform and, if so, the scope of reform regarding the law relating to consent (including knowledge of consent) and, in particular:

- a. whether the concept of affirmative consent should be reflected in the legislation;
- b. how section 24 of the Code (dealing with mistake of fact) applies to the offences created by the above-mentioned provisions;
- c. how consent may be vitiated, including through coercion, fraud or deception, for example, through 'stealthing'; and
- d. whether special verdicts should be used.

Another review, separate from Project 113, currently being undertaken by the Office of the Commissioner for Victims of Crime, is examining the end-to-end criminal justice process for victims of sexual offending, from reporting an offence to the release from custody of the offender (the OCVO review). The OCVO review will examine the experience of adult victim-survivors; the factors which contribute to the under-reporting of sexual offences and the attrition of those who do report throughout the formal legal process; and alternative and innovative procedures for receiving, investigating and resolving sexual offence complaints.

While the focus of Project 113 is on sexual offence laws, the Commission appreciates that it is not possible to address the law in isolation. It considers it necessary to understand the environment in which the law operates, and the cultural, structural and systemic factors that contribute to sexual offending. For this reason, the Commission engaged Professor Heather Douglas and Associate Professors Stella Tarrant and Hilde Tubex, to draft this Background Paper, which discusses social issues relevant for considering sexual offence laws. It examines the issues from three perspectives: the harmfulness of sexual violence; common misconceptions about sexual violence; and complainants' experiences of the criminal justice system. The paper identifies relevant Western Australian data on sexual offending in each section. Additional Western Australian data is set out in an Appendix to the paper. The views expressed by the authors of the Background Paper are not necessarily those of the Commission.

The Commission thanks the authors for their work in preparing this Background Paper.

The Project 113 Discussion Paper, Volume 1 of which is available on the Commission's website, provides an overview of the issues the Commission intends to address in its review and asks various questions for your consideration. The Commission seeks submissions in response to the issues raised in the Discussion Paper and this Background Paper from anyone who has professional or personal experience in the area, or who has any ideas for reform. The process for making a submission is outlined in the Discussion Paper.

Following the publication of Volume 2 of the Discussion Paper, the Commission will conduct consultations with stakeholders in the area, including interested members of the public. Please let the Commission know if you want to be involved in these consultations by emailing [lrcwa@justice.wa.gov.au](mailto:lrcwa@justice.wa.gov.au).

The Law Reform Commission of Western Australia

## A NOTE ON LANGUAGE

In discussing the law in this area, it is important to be clear about the way in which language is used. This section outlines the key terms we use in this Background Paper.

We use the term **sexual violence** to refer to all sexual conduct that causes harm to another person. It does not matter if the conduct was reported to the police, charged as a criminal offence, or proceeded to trial. It also does not matter if the conduct involved physical violence and the injury caused need not be physical. We prefer 'sexual violence' because it includes a continuum of behaviours, however according to context we also use **sexual assault**, for example, where a specific instance of sexual violence is referred to. We use the term **sexual offence** to refer to sexual violence that is defined as a crime.

When discussing people who have experienced sexual violence/sexual assault we use the phrases **people who have experienced/been subjected to/targeted by sexual violence** or **people who have been sexually assaulted**. Depending on context, these phrases recognise sexual violence as something a person experiences or something done to them; it does not define the individual involved. The phrases also recognise that people who have been subjected to sexual violence do not have one shared identity.<sup>1</sup> For contextual reasons, or for the sake of readability, we sometimes use **victims** or **victim-survivors**, a term that recognises both victimisation and resilience.

Where criminal charges have been laid, we use the legal term **complainant** to describe the person against whom the sexual offence is alleged to have been committed (that is, the person who claims to have been subjected to the sexual violence).

We use the phrases **people who have committed sexual violence** or **people who have sexually assaulted** to refer to people who have been sexually violent, regardless of whether the matter has proceeded to court, or an individual has been found guilty. We use these phrases to recognise the agency of a person who harms another and to avoid the reductionist effect of the term 'perpetrator'. Where criminal charges have been brought, but not completed, we use the term **accused person** (or simply **the accused**) to refer to the person alleged to have committed the sexual offence.

We use the term **offender** to refer to people who have been convicted of sexual offences. Our use of this term is not intended to imply that offenders have a shared identity. We acknowledge that offenders are complex individuals who often come from disadvantaged backgrounds, and whose needs should also be considered in developing an appropriate response to sexual violence.

We use the term **rape** when we discuss studies or jurisdictions that use this term. In the State of Western Australia, the offence of rape has been replaced by the offence of sexual penetration without consent.

We use Western Australia Police Force (**WA Police**) when we refer specifically to Western Australian police. We use **police** when we refer generically to the police in Australia or to other police forces mentioned in the nearby text.

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<sup>1</sup> Victorian Law Reform Commission (VLRC), *Improving the Response of the Justice System to Sexual Offences* (Issues Papers A-H, October 2020) 8.

## INTRODUCTION

‘Before discussing solutions, one must understand the context in which violence occurs.’<sup>2</sup>

This paper discusses background social issues relevant for considering sexual offence laws. We examine the issues from three perspectives:

- The harmfulness of sexual violence;
- Common misconceptions about sexual violence; and
- Complainants’ experiences of the criminal justice system.

There is perhaps no other area of criminal law that is so ‘intimately related to social attitudes and behaviours’,<sup>3</sup> and few other criminal laws deal with more profound harm. Sexual offences operate at this profound level to reflect society’s assumptions and expectations about proper and improper, acceptable, and unacceptable behaviours, and to set the scope of citizens’ expectations about freedom of movement and inviolability.

The social issues that sexual violence throws up are pressing. It is evident that changes in expectations relating to sexual conduct and forms of accountability are an intense social focus at present. Joanne Conaghan observes that:

The politics of rape are inevitably more intense at a time when notions of sex and sexuality are being radically remade. Rape discourse has become a channel for debating what kinds of socio-sexual relations we are trying to promote or discourage, and the role law should play in this regard.<sup>4</sup>

Standards of fairness in socio-sexual relations are being re-formed through social media events such as the #MeToo movement,<sup>5</sup> media and political focus on institutional cultures such as those in the Commonwealth Parliament and other workplaces,<sup>6</sup> and formal inquiries and policy interventions such as those into institutional responses to child sexual abuse,<sup>7</sup> violence, abuse, neglect and exploitation of people living with disability,<sup>8</sup> and violence against women and children.<sup>9</sup>

The intense social scrutiny makes it clear that change requires a broad focus, involving deep changes in ways of thinking about sexual violence – how sexual misconduct should be understood, how it will be recognised socially and legally and where lines of accountability should be drawn. Rebecca Solnit describes ‘complexity’ relating to social change as the circumstance in which there is a need to hold inconsistencies together and observe them courageously.<sup>10</sup> This means avoiding impulses to discount

<sup>2</sup> Kyllie Cripps and Hannah McGlade, ‘Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward’ (2008) 14 *Journal of Family Violence* 240, 242 (‘Indigenous Family Violence and Sexual Abuse’).

<sup>3</sup> Joanne Conaghan, ‘The Essence of Rape’ (2019) 39 (1) *Oxford Journal of Criminal Law* 151, 153.

<sup>4</sup> Ibid 181.

<sup>5</sup> Begun by Tarana Burke to provide a channel for voicing child sexual abuse, see Tarana Burke, ‘What ‘Me Too’ Made Possible, (2018) *Time* 12 October <https://time.com/6221110/tarana-burke-me-too-anniversary/>.

<sup>6</sup> Australian Human Rights Commission (AHRC), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Australian Human Rights Commission, 2020) (*Respect@Work*).

<sup>7</sup> For example, the 2017 Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA).

<sup>8</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Report, Commonwealth of Australia, April 2019) <https://disability.royalcommission.gov.au/> (RCVANE PD).

<sup>9</sup> Commonwealth of Australia, *The National Plan to End Violence Against Women and Children 2022-2032* (2022) <https://www.dss.gov.au/ending-violence>; Commonwealth of Australia, Legal and Constitutional Affairs References Committee Inquiry into Missing and Murdered First Nations Women and Children [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/FirstNationswomenchildren](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FirstNationswomenchildren).

<sup>10</sup> Rebecca Solnit, *Hope in the Dark: Untold Stories, Wild Possibilities* (Nation Books, 2004).



complexities by applying simple or binary solutions. Solnit identifies a commitment to complexity and the uncertainties it entails as an ethical orientation in approaching important social change.<sup>11</sup>

The complexity of social and legal change relating to sexual violence is reflected in the re-appearance of themes through the sections of this report. The same themes appear as issues about the nature of the harm in sexual violence, misconceptions about sexual violence and the experiences of complainants in the criminal justice system. For example, the nature of the harmfulness in sexual violence as the exercise of control over another embedded in ongoing social relations discussed in section 1.1 is linked to the commonly held misconception of sexual violence as usually committed by a stranger in a dark isolated area discussed in section 2.1. In turn this misconception leads to the reluctance of complainants, discussed in section 3.1, to disclose their experiences because of their realistic prediction that they won't be believed. Social 'silencing' as a primary injury to victims of sexual violence (section 1.3) is perpetuated by the misconception that *genuine* victims of sexual violence will always give a thoroughly clear, coherent, detailed and specific account of the violence (section 2.10). This misconception in turn corresponds to complainants' experiences of traumatisation during cross examination in the trial process (section 3.3). We have cross-referenced paragraphs in the paper to indicate these connections and to show where Western Australian and national data relate to the research.

Intersectionality is also a theme that runs through the paper, that is, the reality that some people's risk of being the target of another person's sexual violence increases with different dimensions of their lives, for example through their gender, disability, place of residence, socio-economic status etc. Women and girls are disproportionately targeted by those committing sexual violence – but Aboriginal and Torres Strait Islander women and girls have a higher risk of being sexually assaulted than non-Aboriginal and Torres Strait Islander women and girls.<sup>12</sup> Women who are members of the LGBTIQ+ community live with a higher risk of sexual violence, for example, bisexual women report higher levels of sexual victimization than lesbian or heterosexual women.<sup>13</sup> Transwomen may experience higher rates of sexual violence than cisgender<sup>14</sup> women,<sup>15</sup> with transwomen of colour at highest risk.<sup>16</sup> Women living with disability experience a rate of sexual violence twice that of women living without disability, and there is the same increase in the rate of targeting men living with disability compared with men living without disability.<sup>17</sup> People living with psychological and cognitive impairment are

<sup>11</sup> Ibid 18; see also Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (Random House USA, 2014) 283-289.

<sup>12</sup> Trishima Mitra-Kahn, Carolyn Newbiggin and Sophie Hardfeldt, *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* (Report, ANROWS Landscapes, December 2016) 19-20 (Invisible Women); Janya McCalman et al, 'Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature' (2014) *Sage Open* 4(1) 1 ('Responding to Indigenous Australian Sexual Assault').

<sup>13</sup> Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crime Against Adult Victims: Barriers to Justice* (Report No 611, 12 November 2020) (*Misconceptions of Sexual Crime Against Adult Victims*), discussing Emily Rotham, Deineria Exner and Allyson Baughman, 'The Prevalence of Sexual Assault against People who Identify as Gay, Lesbian or Bisexual in the United States: A Systematic Review' (2011) *Sage Publications, Inc.* 12(2) 55 and Mikel Walters, Jieru Chen and Matthew Breiding, *National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation* (Report, National Center for Injury Prevention and Control, Centres for Disease Control and Prevention, 2013) <https://www.aic.gov.au/publications/tandi/tandi611>.

<sup>14</sup> A person whose gender identity is the same as their sex assigned at birth. See Aidan Ricciardo, *LGBTQI People and Inclusive Education* (UWA Law School, 2022).

<sup>15</sup> Jane Ussher et al, *Crossing the Line: Lived Experience of Sexual Violence among Trans Women of Colour from Culturally and Linguistically Diverse (CALD) Backgrounds in Australia* (Crossing the Line) (Report, ANROWS Research to Policy and Practice No 14, June 2020) 16.

<sup>16</sup> Ibid 6.

<sup>17</sup> Women with disability report an incident of sexual violence over their lifetime at twice the rate of women without disability (33 percent compared to 16 percent). Men with disability experience sexual violence at a much higher rate than men without a disability (9 percent compared with 4 percent). As discussed in Centre of Research Excellence in Disability and Health (CREHD), *Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia* (Report for RCVANEPD, Project 8, March 2021) 10 (*Nature and Extent of Violence*) <https://disability.royalcommission.gov.au/publications/nature-and-extent-violence-abuse-neglect-and-exploitation-against-people-disability-australia>.



subject to especially high rates of all forms of violence, including sexual violence: one in two women and 16 percent of men.<sup>18</sup> Children are disproportionately sexually abused, especially isolated and lonely children, those living with disability and those living in out-of-home care, including in institutions.<sup>19</sup>

We have included data and research relating to these and other groups disproportionately affected by sexual violence throughout the paper to emphasise these intersections. It is important to recognise that it is not a person's identity that attracts sexual violence but that those who inflict sexual violence are more likely to target some people and not others: 'it is important not to reduce the analysis to a list of who is "most vulnerable" to violence ... Doing so could mistakenly imply that *who* people are or *what* they do makes them victims'.<sup>20</sup>

Where available we have identified relevant Western Australian data on sexual offending in each section. Further Western Australian data is attached in an Appendix to the paper.

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<sup>18</sup> Ibid 14.

<sup>19</sup> Australasian Institute of Judicial Administration Incorporation (AIJAI), *Bench Book for Children Giving Evidence in Australian Court* (March 2020) 10 <https://aija.org.au/wp-content/uploads/2020/04/Child-Witness-BB-2020.pdf>.

<sup>20</sup> International Labour Organization, *Ending Violence and Harassment in the World of Work*, Report Vol 1 (International Labour Conference, 108<sup>th</sup> session, 2019) 119 (emphasis in original), quoted in AHRC, 'Respect@Work' (n 6) 162.

## PART 1: THE HARMFULNESS OF SEXUAL VIOLENCE

It is tempting to think of the harmfulness of sexual violence that laws have been designed to address as 'static and universal';<sup>21</sup> that it has remained constant through history. However in fact, the harm in sexual violence has been conceived differently over time. Early common laws of rape<sup>22</sup> sanctioned abduction and didn't concern husbands' misconduct at all. They were confined to penetrative sexual assaults and heterosexual conduct of men, and concerned amongst other things, 'illegitimate' births outside of (heterosexual) marriage both as moral transgressions and threats to inheritance.<sup>23</sup> These are not the same range of perceived harms sexual offence laws are concerned with today.

Relying on an essential idea of what the harm in sexual violence is in the abstract suggests there is a 'continuity of meaning and commonality of understanding', but this is 'more misleading than enlightening'.<sup>24</sup> Conaghan argues instead for an 'honest, creative and constructive engagement with the role of law in regulating sexual misconduct'.<sup>25</sup>

Today the harm that people who commit sexual violence inflict is often identified as the overriding of, or attack on, a person's autonomy or self-determination.<sup>26</sup> Unlawful non-sexual assaults or bodily harms, homicides and, indirectly, property offences are also attacks on the autonomy of another person. Sexual violence is an attack on a person's sexual autonomy or an attack on a person's autonomy using sexual conduct as the means.<sup>27</sup>

Research suggests that ways of thinking about what sexual violence *is* – the nature of the harm inflicted, and the injuries caused – need to change in fundamental ways to reflect today's concerns about fairness and human rights for all, including those whose interests have been traditionally largely unseen in the law.

Research suggests three areas of change that are needed to underpin a more accurate conceptualisation of the harm in sexual violence:

- Understanding sexual violence as controlling sexual behaviour embedded in on-going relations;
- Understanding the ways individual sexual violence perpetration aligns with broader social relations; and
- Understanding the real nature of the injuries sexual violence inflicts on people.

<sup>21</sup> Conaghan, 'The Essence of Rape' (n 3) 158.

<sup>22</sup> Major reform of sexual offence laws occurred in most common law jurisdictions in the 1980s. Some, including the State of Western Australia in 1985, removed the crime of 'rape', others broadened its definition but retained 'rape' because of its unique moral, political and social status. See Elisabeth McDonald, 'Gender Neutrality and the Definition of Rape: Challenging the Law's Response to Sexual Violence and Non-normative bodies' (2019) 45 *University of Western Australia Law Review* 166 and Conaghan, 'The Essence of Rape' (n 3) 156.

<sup>23</sup> Conaghan, 'The Essence of Rape' (n 3) 167, 172; Julia Quilter, 'Reframing the Rape Trial: Insights Critical Theory About the Limitations of Legislative Reforms' (2011) 35 *Australian Feminist Law Journal* 23, 29 ('Reframing the Rape Trial'); Matthew Hale, *Histories of the Pleas of the Crown* (1736) 629; Peter Rush, 'Jurisdictions of Sexual Assault: Reforming the Text and Testimony of Rape in Australia' (2011) 19(1) *Feminist Legal Studies* 47, 57.

<sup>24</sup> Conaghan, 'The Essence of Rape' (n 3) 156-57.

<sup>25</sup> Ibid 157.

<sup>26</sup> For example, New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, 2020) [3.20]; ALJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) 2; Standing Committee of Attorneys-General, *Chapter 5: Sexual Offences Against the Person - Model Criminal Code* (Discussion Paper, November 1996) 4; *R v Currier* [1998] 2 SCR 371, 374, 389; *DPP (NT) v WJI* [2004] HCA 47, [55], Kirby J.

<sup>27</sup> *R v Currier* [1998] 2 SCR 371, 374, 389; *DPP (NT) v WJI* [2004] HCA 47, [55], Kirby J, citing Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (Sage Publications, 1995) 110-112, with reference to discussion about the nature of sexual assault.

## 1.1 Sexual Violence as Controlling Sexual Behaviour Embedded in Ongoing Relations

Research demonstrates the importance of understanding sexual violence as behaviours embedded in ongoing relations.<sup>28</sup> This does not mean sexual or intimate 'relationships' but ongoing social, professional, institutional or familial relations. Confining an understanding of sexual violence to the idea of healthy sexual intercourse 'gone wrong' is problematic and fundamentally different from conceptualising sexual violence as controlling behaviour within a variety of social relations. Grace Tame points out the distortion of the conceptualisation of child sexual abuse where it is represented as occurring within a 'relationship'<sup>29</sup> and other scholarship shows the same for sexual violence against adults. To conceptualise intimate partner sexual violence or sexual assault in a workplace as 'bad sex' (in opposition to the 'positive, natural encounter'<sup>30</sup> of sexual intercourse) both minimises and reshapes the form of violence a person inflicts.<sup>31</sup>

Overriding a person's autonomy within the dynamics of ongoing relations or interactions (whether there is one or more instance of sexual assault), compounds the violation and causes different kinds of injuries such that the harm of sexual violence needs to be thought about differently. Public focus on sexual violence against children,<sup>32</sup> children living within institutions,<sup>33</sup> those living with disability,<sup>34</sup> the elderly,<sup>35</sup> of intimate partners and other family members<sup>36</sup> demonstrates a shifting understanding of sexual violence from sex acts 'gone wrong' to sexual misconduct as expressions of control and exploitation.<sup>37</sup>

In fact, sexual violence inflicted as part of a relationship or ongoing societal interaction in which a person's autonomy is violated through complex mechanisms of control are much more common than sexual assaults committed as a once-off against a stranger.<sup>38</sup> Yet a once-off conceptualisation of sexual assault remains the prototype for attempting to understand the misconduct. We discuss the misconception that sexual violence is usually committed by a stranger below (section 2.1). Here we focus on what research demonstrates the harm in sexual violence *is* – a socially embedded harm. The conscious or unconscious<sup>39</sup> idea that sexual violence is a once-off event 'atomises patterns of harm into instances'<sup>40</sup> (or repeated instances). The assumption that most sexual assaults are committed 'out of context' by a stranger is not only a misconception that puts practical barriers up in

<sup>28</sup> AHRC, 'Respect@Work' (n 6) 24-25, 129; Commonwealth, RCIRCSA, *Final Report – Impacts* (2017) vol 3, 10 [https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_3\\_impacts.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_3_impacts.pdf) (RCIRCSA *Final Report – Impacts Vol 3*); Hannah McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights* (Aboriginal Studies Press, 2012) (*Our Greatest Challenge*).

<sup>29</sup> 'The Harmony Campaign' *The Grace Tame Foundation* (Web Page) <https://www.thegracetamefoundation.org.au/the-harmony-campaign>.

<sup>30</sup> Conaghan, 'The Essence of Rape' (n 3) 162.

<sup>31</sup> With respect to intimate partner sexual violence, see Emma Henderson, 'Narrative, Theatre and the Disruptive Potential of Jury Directions in Rape Trials' (2014) 22(2) *Feminist Legal Studies* 155, 162; Stella Tarrant, Julia Tolmie and George Giudice, *Transforming Legal Understandings of Intimate Partner Violence* (Report, ANROWS June 2019), 11, 46, 83-85 (*Transforming Legal Understandings*). With respect to sexual assault in the workplace, see AHRC, 'Respect@Work' (n 6).

<sup>32</sup> AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) 3-4; Jane Goodman-Delahunty, Natalie Martschuk and Anne Cossins, 'What Australian Jurors Know and Do Not Know About Evidence of Child Sexual Abuse' (2017) 41 *Criminal Law Journal* 86.

<sup>33</sup> Commonwealth, RCIRCSA, *Final Report – Nature and Cause* (2017) vol 2, 157 [https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_2\\_nature\\_and\\_cause.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_2_nature_and_cause.pdf) (RCIRCSA *Final Report – Nature and Cause Vol 2*).

<sup>34</sup> Commonwealth of Australia, *RCVANE PD* (n 8).

<sup>35</sup> *Royal Commission into Aged Care Quality and Safety* (Final Report, Commonwealth of Australia, February 2021).

<sup>36</sup> Commonwealth of Australia, *The National Plan to End Violence against Women and Children 2022-2032* (n 9).

<sup>37</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 20.

<sup>38</sup> Though as data and research in this paper shows even sexual violence against strangers is committed in the context of broader social relations (section 1.2).

<sup>39</sup> Conaghan, 'The Essence of Rape' (n 3) 164.

<sup>40</sup> Julia Tolmie, 'Considering Victim Safety when Sentencing Intimate Partner Violence Offenders' in Kate Fitz-Gibbon et al (eds) *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Taylor & Francis, 2018) 199-217, 199 ('Considering Victim Safety').

the justice process (see Part 3) but results in the very nature of the harm in sexual violence being missed.

### 1.1.1 Coercive Control as a Model for Change

Understanding the harmfulness of sexual violence as embedded in relations is more complex than conceptualising it as a once-off separable event, especially for the criminal law which traditionally constructs liability for confined instances of time. However, failing to reflect important social harms accurately is a failing of the criminal law. A model of the complex changes in ways of thinking required for sexual violence is the change of thinking occurring around the violence of 'coercive control'.<sup>41</sup> It is becoming accepted progressively that an assault offence is inadequate to encapsulate the ongoing harm inflicted by controlling behaviours within intimate partnerships and other relationships.<sup>42</sup> The changes required for thinking about sexual violence can be seen as analogous. In addition, sexual violence relates directly to concepts of coercive control: research shows that sexual violence is a key strategy of coercion and control.<sup>43</sup>

One Australian State has followed international examples in criminalising coercive and controlling behaviours, another State has committed to criminalising such behaviours and Western Australia is considering legislative responses.<sup>44</sup> Coercive control has also been recognised in the context of sexual offences in the State of Victoria. Amendments to the *Crimes Act 1958* (Vic) provide that a person does not consent to an act in circumstances where the person submits to the act because of coercion or intimidation regardless of when the coercion or intimidation occurs; and whether it is, or is a result of, a single incident or is part of an ongoing pattern.<sup>45</sup>

This complex process of social and legal reform shows that fundamental changes in ways of thinking about harmful sexual behaviours can have implications not only for evidence law and the regulation of criminal justice processes, but also for substantive criminal offences.<sup>46</sup>

## 1.2 Sexual Violence Aligns with Broader Social Relations

Research consistently shows that the targeting of individuals with sexual violence aligns with broader social relationships of relative social power and status.<sup>47</sup> People who inflict sexual violence target women, children, the elderly, those living with disability (section 2.13), LGBTIQ+ people and others

<sup>41</sup> Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) (Coercive Control).

<sup>42</sup> Australian Government, Meetings of Attorneys-General, *Communique*, 12 August 2022, 2. <https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-august-2022>.

<sup>43</sup> Evan Stark, Coercive Control (n 41); Peta Cox, *Sexual Assault and Domestic Violence in the Context of Co-occurrence and Re-victimisation: State of Knowledge Paper* (Report, ANROWS Landscape October 2016) (Sexual Assault and Domestic Violence); Tarrant, Tolmie and Giudice, Transforming Legal Understandings (n 31) 23, 34, 83-85; Emerson Dobash et al, 'Lethal and Nonlethal Violence Against an Intimate Female Partner: comparing Male Murderers to Nonlethal Abusers' (2007) 13 (4) *Violence Against Women* 329.

<sup>44</sup> Crimes Legislation Amendment (Coercive Control) Act 2022 (NSW); Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce* (Report 1, May 2022); Government of Western Australia, *Legislative Responses to Coercive Control in Western Australia* (Discussion Paper, March 2022). Tasmania has recognised offences of economic abuse and emotional abuse since 2006 and these offences target controlling behaviours: see *Family Violence Act 2004* (Tas) ss 7,8.

<sup>45</sup> Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic) s36AA(1)(c).

<sup>46</sup> Peter Rush and Alison Young, 'A Crime of Consequence and a Failure of Legal Immigration: The Sexual Offences of the Model Criminal Code (1997) 9 *Australian Feminist Law Journal* 100, 100-103 ('A Crime of Consequence').

<sup>47</sup> AHRC, 'Respect@Work' (n 6) 141; VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 36; Commonwealth, *RCIRCSA Final Report – Nature and Cause Vol 2* (n 33) 16, explores that 'closed institutions' carry the most risk of child sexual abuse and 'children are more likely to be abused in institutional contexts where the community has an unquestioning respect for the authority of an institution'.

who are in positions of less social power.<sup>48</sup> Dobash and Dobash have referred to those whose victimisation aligns with their diminished social status as 'appropriate victims'.<sup>49</sup>

### 1.2.1 The Gendered Nature of Sexual Violence: An Example of Alignment with Broader Social Relations

Sexual violence is unequivocally gendered<sup>50</sup> but this does not mean only that, empirically, it is overwhelmingly males who perpetrate sexual violence and overwhelmingly females who experience violence, or that males do not experience sexual violence (section 2.12). It means also that, because individual behaviours 'both influence and are influenced by factors at the organisational and community and societal levels',<sup>51</sup> very broadly held, collective ideas about gender play a role in individuals' perpetration of sexual violence. The Victorian Law Reform Commission made the point that 'sexual violence is not perpetrated by a handful of wayward people on society's fringes'.<sup>52</sup> The connection between individual behaviour and societal norms is made by Conaghan:

Understanding ... rape is part of a political process of collectively recalibrating sexual norms in the context of significant change in women's social, economic and political status, empowering and impelling calls upon law to proscribe acts of sexual misconduct which, in earlier times, would not have been widely viewed as within the proper reach of criminal law.<sup>53</sup>

Relevantly here, Webster and Flood consider the root causes of violence against women:

A root cause is one that underlies and is responsible for initiating a problem. The root cause is not necessarily the only or even the main cause in every context. However, it is typically a general underlying condition or set of conditions that needs to be present for the problem to occur and is thus often referred to as a necessary condition.<sup>54</sup>

<sup>48</sup> AHRC, 'Respect@Work' (n 6) 161-198; VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 18-25.

<sup>49</sup> Emerson Dobash and Russell Dobash, 'Wives: The Appropriate Victims of Marital Violence' (1977-1978) 2(3-4) *Victimology* 426.

<sup>50</sup> In 2019-2020, 96.85 percent of sex offenders in Australia were male, 83.65 percent of sex offence victims were female. In 2016, 17 percent of women and 4.3 percent of men reported that they had been sexually assaulted since the age of 15. These percentages were retrieved from the Australian Bureau of Statistics (ABS) *Sexual Assault - Perpetrators* (2 February 2022) <https://www.abs.gov.au/articles/sexual-assault-perpetrators#data-download> and ABS, *Sexual Violence – Victimisation* (24 August 2021) <https://www.abs.gov.au/articles/sexual-violence-victimisation#key-statistics>. For the 2021 reference period, the number of female sexual assault victims were six times more than the number of male sexual assault victims, according to ABS, *Recorded Crime – Victims* (28 July 2022) <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/2021>. Similarly, the Australian Institute of Health and Welfare (AIHW) estimated that 1 in 5 women and 1 in 20 men in Australia report having been a victim of sexual violence since the age of 15 (see AIHW, *Family, domestic and sexual violence in Australia: continuing the national story: In brief* (Catalogue No FDV 4, 5 June 2019) 3 [https://www.aihw.gov.au/getmedia/b180312b-27de-4cd9-b43e-16109e52f3d4/aihw-fdv4-FDSV-in-Australia-2019\\_in-brief.pdf.aspx?inline=true](https://www.aihw.gov.au/getmedia/b180312b-27de-4cd9-b43e-16109e52f3d4/aihw-fdv4-FDSV-in-Australia-2019_in-brief.pdf.aspx?inline=true). See also Tidmarsh and Hamilton, *Misconceptions of Sexual Crime against Adult Victims* (n 13) 9; AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) 8. In WA specifically, 88 percent of sexual assaults were against females and 12 percent against males in 2020-2021, according to ABS, *Recorded Crime – Victims* (28 July 2022) <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release#western-australia>. For further analysis of WA data, see below, Appendix: Analysis of Sexual Offences in Western Australia, 42-43.

<sup>51</sup> Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It* (Companion Document to Framework, Our Watch, ANROWS and VicHealth, Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and their Children in Australia, November 2015), 13 (Framework Foundations).

<sup>52</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 36; AHRC, 'Respect@Work' (n 6) 141.

<sup>53</sup> Conaghan, 'The Essence of Rape' (n 3) 158

<sup>54</sup> Webster and Flood, *Framework Foundations* (n 51) 15.



Webster and Flood reviewed the evidence on the link between gender inequality<sup>55</sup> and violence against women showing that inequality is a root cause in this sense.<sup>56</sup> Numerous studies have found a correlation between various measures of gender inequality and violence against women, including sexual violence.<sup>57</sup> Specifically, Webster and Flood make connections between broader social inequality and individualised behaviours:

Gender inequality is expressed in different ways, each of which may increase the risk of violence. Key ways include women's lack of autonomy and male dominance of decision-making in public and private life, rigid and harmful constructions of masculinity and femininity; stereotypical gender roles and/or negative peer associations between men (e.g. highly masculinised peer cultures [and] peer cultures that promote sexual hostility towards women).<sup>58</sup>

### 1.2.1.1 The Role of Implicit Theories in Conceptualising Sexual Violence

The link between individualised sexual violence against women and broader social inequality is also shown in psychological studies of 'implicit theories'. Implicit theories go deeper than attitudes; they are underlying, usually unconscious, beliefs held by individuals about 'how the world works' which inform explicit beliefs and actions and 'shape later accounts of what occurred'.<sup>59</sup> In interviews with men who had been convicted of rape, including rapes of intimate partners, acquaintances and strangers, Poloschek and Gannon<sup>60</sup> found the most prominent implicit theories the men held were 'women are dangerous', 'women are sex objects' and 'entitlement' (a 'traditional idea about men being in charge of women').

Similarly, the Australian Human Rights Commission shows how individualised violence can be linked to broader, collective ideas about gender:

Some reasons why gender stereotypes may increase the risk of violence against women include that they contribute to:

- gender hierarchies based on men having power over women, which supports a sense of male entitlement over women (including sexual entitlement);
- the view that men are driven by uncontrollable sexual urges;
- the objectification and sexualisation of women, who are seen (according to gender stereotypes) to be 'naturally' passive and submissive; and/or
- the use of violence to reinforce divisions between gender roles or to 'punish' women who do not conform to expected gender roles.<sup>61</sup>

<sup>55</sup> Ibid. Gender inequality can be defined as the unequal distribution of power, resources, opportunity and value afforded to women and men in society due to prevailing social norms and structures. For further discussion see Our Watch, ANROWS and VicHealth, *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (Framework, November 2015) 73 <https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2021/11/18101814/Change-the-story-Our-Watch-AA.pdf>.

<sup>56</sup> Webster and Flood, *Framework Foundations* (n 51) 12, 15-16.

<sup>57</sup> Ibid 15; McCalman et al, 'Responding to Indigenous Australian Sexual Assault' (n 12); Kim Webster et al, 'Australians' Attitudes to Violence Against Women and Gender Equality – Findings from the 2017 National Community Attitudes towards Violence Against Women Survey (Report, ANROWS 03/2018) 15 (Australians' Attitudes to Violence Against Women and Gender Equality); AHRC, 'Respect@Work' (n 6) 18, 140-151. This understanding informs international bodies' approaches to violence against women, such as the General Assembly of the United Nations, *Ending Violence Against Women and Children: From Words to Action*, Study of the Secretary-General (United Nations, Geneva 2006) and the World Health Organisation, *Preventing Intimate Partner and Sexual Violence Against Women: Taking Action and Generating Evidence* (World Health Organisation, 2010). It has been proposed that responses to sexual violence against Indigenous women and children should include 'building the capacity of women to assume their rightful role as promoters and guardians of the public good': Cripps and McGlade, 'Indigenous family violence and sexual abuse' (n 2) 250.

<sup>58</sup> Webster and Flood, *Framework Foundations* (n 51) 14.

<sup>59</sup> Elizabeth Gilchrist, 'Implicit Thinking About Implicit Theories in Intimate Partner Violence' (2009) 15 *Journal of Psychology, Crime and the Law* 131, 133.

<sup>60</sup> Devon Poloschek and Theresa Gannon, 'The Implicit Theories of Rapists: What Convicted Offenders Tell Us' (2004) 16(4) *Sexual Abuse: A Journal of Research and Treatment* 299.

<sup>61</sup> AHRC, 'Respect@Work' (n 6) 146.

### 1.2.2 Sexual Violence Against Aboriginal and Torres Strait Islander Women: An Example of Alignment with Broader Social Relations

Aboriginal and Torres Strait Islander women are vastly overrepresented as targets of violence, including sexual violence. They are estimated to be sexually assaulted at a rate three times that of non-Aboriginal and Torres Strait Islander women,<sup>62</sup> and this is likely to be an under-estimation given that we know Aboriginal and Torres Strait Islander people are extremely reluctant to report sexual violence (section 3.1.4). Sexual violence is not only gendered, therefore, but also racialised. This is not only in the sense that Aboriginal and Torres Strait Islander women are, empirically, disproportionately targeted but because ideas about race, and related social and institutional practices, play a role in individuals' perpetration of the violence. Researchers emphasise the importance of understanding violence against Aboriginal and Torres Strait Islander women within the context of colonisation.<sup>63</sup>

Aboriginal and Torres Strait Islander women are subjected to sexual violence by non-Indigenous men from outside their communities and Indigenous men within their communities.<sup>64</sup> Colonisation is relevant in both contexts.

With respect to violence from outside their communities, Aboriginal and Torres Strait Islander women have been targets of sexual violence as expressions of individual racism and misogyny and racist colonial practices.<sup>65</sup> This is historical practice,<sup>66</sup> producing intergenerational trauma, and ongoing. Behrendt points out that 'the reality for black women is that in our experiences racism and sexism are inextricably linked together and cannot possibly be separated'.<sup>67</sup> This is a different historical and ongoing experience from that of white women.<sup>68</sup>

<sup>62</sup> Mitra-Kahn, Newbigin and Hardfeldt, *Invisible Women* (n 12) 19-20; McCalman et al, 'Responding to Indigenous Australian Sexual Assault' (n 12) 1. Neither ABS nor WA Police data allow an accurate assessment of the number of victims of recorded sexual offences who are Indigenous, see below, Appendix: Analysis of Sexual Offences in Western Australia, 36, 43.

<sup>63</sup> Mitra-Kahn, Newbigin and Hardfeldt, *Invisible Women* (n 12) citing Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press: Sydney, 2008), Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Crows Nest: Allen & Unwin, 2001) and Heather Nancarrow, 'Restorative Justice for Domestic and Family Violence: Hopes and Fears of Indigenous and Non-Indigenous Australian Women' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press: New York, 2009) 123-149. See also McGlade, 'Understanding Colonisation and Trauma' in *Our Greatest Challenge* (n 28) 33-65.

<sup>64</sup> 'Challenging Misconception about Violence Against Aboriginal and Torres Strait Islander Women' *Our Watch* (Web Page) <https://handbook.ourwatch.org.au/leadership-resource/challenging-misconceptions-about-violence-against-aboriginal-and-torres-strait-islander-women/>; VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 22; McCalman et al, 'Responding to Indigenous Australian Sexual Assault' (n 12); Heather Douglas, *Women, Intimate Partner Violence and the Law* (Oxford University Press, 2021), 228-233.

<sup>65</sup> McGlade, *Our Greatest Challenge* (n 28) 43-44.

<sup>66</sup> The significance of colonisation for Aboriginal women in their intergenerational trauma and the links between individualised sexual violence and institutional practices is captured by McGlade in an account of the Western Australian Royal Commission into the Condition and Treatment of Aborigines in 1934. The Commission heard evidence from Mary Bennett, that: 'for Aboriginal women and girls, sexual abuse was inevitable: "whether she struggles against degradation to which she is forced, or whether she loses heart and gives up, eventually in nine cases out of ten, despair and disease destroy soul and body". [The Commission], however, refused to accept Bennett's testimony and instead implied that Aboriginal women and girls were promiscuous and lacking in morality: "intercourse between the white man and the aboriginal woman [exists] to a degree which is as amazing as it is undesirable". According to the Royal Commission, white men's "desire for sexual intercourse is uppermost" and this could not be modified by legislation' (McGlade, *Our Greatest Challenge* (n 28) 43-44). See also 'Responding to Indigenous Australian Sexual Assault' (n 12) 2: McCalman et al report in 2014 that '[o]ften, to some extent, [Indigenous] women blamed themselves, and had taken on a narrative that they were an "easy lay" and particularly deserved this label if they had been drinking alcohol'.

<sup>67</sup> Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *Australian Feminist Law Journal* 27.

<sup>68</sup> Ibid.



Research also shows that the harm in sexual violence against Aboriginal and Torres Strait Islander women within their communities needs to be understood in the context of colonisation.<sup>69</sup> This means, within the framework of:

the continued social and personal impacts on Aboriginal and Torres Strait Islander people of practices such as displacement from traditional lands, forced removal of children, the loss of Indigenous languages, dispossession of culture, normalisation of violence and the resulting break down of enduring social bonds.<sup>70</sup>

This research is consistent with the experience of Indigenous communities internationally.<sup>71</sup>

The interplay of the factors underpinning the violence Aboriginal and Torres Strait Islander families experience is, Kyllie Cripps and Hannah McGlade write, 'exceedingly complex'. However, 'to ignore any of these factors and the role they played and continue to play in families is tantamount to not understanding family violence as it occurs in Indigenous communities'.<sup>72</sup> To gain a better understanding, Cripps proposes considering factors in two groups:

Group 1: factors including colonisation: policies and practices; dispossession and cultural dislocation; and dislocation of families through removal.

Group 2 factors include: marginalisation as a minority; direct and indirect racism; unemployment; welfare dependency; history of abuse; poverty; destructive coping behaviours; addictions; health and mental health issues; and low self-esteem and sense of powerlessness.<sup>73</sup>

#### 1.2.2.1. Sexual Violence Against Aboriginal Women, Children and Men

The factors Cripps identifies underpin the disproportionate representation of Aboriginal and Torres Strait Islander women, children and men in other groups that are disproportionately victimised by sexual violence, including people living with disability, those living with low incomes and unemployment.<sup>74</sup> For example, children in out-of-home care are more vulnerable than other children to sexual assault<sup>75</sup> and Aboriginal and Torres Strait Islander children are overrepresented in out-of-home care.<sup>76</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse ('RCIRCSA') reported that while Aboriginal and Torres Strait Islander children are not inevitably more vulnerable to sexual violence, they were 'more likely to encounter circumstances that increased their risk of abuse in institutions, reduce their ability to disclose or report abuse and if they did disclose or report, reduced their chances of receiving an adequate response'.<sup>77</sup>

<sup>69</sup> Mitra-Kahn, Newbigin and Hardfeldt, *Invisible Women* (n 12) 19-20; Judy Atkinson, *Trauma Trails, Recreating Song Lines: the Transgenerational Effects of Trauma in Indigenous Australia* (North Melbourne: Spinifex Press, 2002) (Trauma Trails); McGlade, 'Understanding Colonisation and Trauma' in *Our Greatest Challenge* (n 28); Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press: Sydney, 2008); Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Crows Nest: Allen & Unwin, 2001).

<sup>70</sup> Mitra-Kahn, Newbigin and Hardfeldt, *Invisible Women* (n 12) 19, citing Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (AIHW Cat No IHW 17 November 2006); Paul Memmott et al, *Violence in Indigenous Communities* (Report, Crime Prevention Branch of the Attorney-General's Department, January 2001).

<sup>71</sup> Douglas Brownridge et al, 'Child Mistreatment and Intimate Partner Violence Among Indigenous and Non-Indigenous Canadians' (2017) 32(6) *Journal of Family Violence* 607; Atkinson, *Trauma Trails* (n 69) 58-59.

<sup>72</sup> Cripps and McGlade, 'Indigenous Family Violence and Sexual Abuse' (n 2) 242-243.

<sup>73</sup> Kyllie Cripps, 'Indigenous Family Violence: From Emergency Measures to Committed Long-Term Action' (2007) 11 (2) *Indigenous Law Bulletin* 6, 8.

<sup>74</sup> Cripps and McGlade, 'Indigenous Family Violence and Sexual Abuse' (n 2); Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28) 3.

<sup>75</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 25.

<sup>76</sup> Secretariat of National Aboriginal and Islander Child Care (SNAICC), *The Family Matters Report 2020: Measuring Trends to Turn the Tide on the Over-representation of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in Australia* (Report, November 2020) 30 (Family Matters) [https://www.familymatters.org.au/wp-content/uploads/2020/11/FamilyMattersReport2020\\_LR.pdf](https://www.familymatters.org.au/wp-content/uploads/2020/11/FamilyMattersReport2020_LR.pdf).

<sup>77</sup> Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28) 3. Sections 2.13 and 3.1.3 below.

Research shows that family violence against Aboriginal and Torres Strait Islander children, including sexual abuse, should be understood within a broader social framework. McGlade writes, 'Aboriginal people locate child sexual assault within the wider definition of family violence, framing violence less as personal dysfunction than as a consequence of the impacts of colonisation, specifically historical and inter-generational trauma'.<sup>78</sup>

See also Aboriginal and Torres Strait Islander people and barriers to reporting discussed at section 3.1.4 below.

### 1.2.3 The Relevance of the Alignment of Sexual Violence with Broader Social Relations to the Criminal Law

Considering how individual attacks on a person's autonomy through sexual violence are aligned with broader social relations is a complex aspect of sexual violence law reform, especially reform of substantive criminal offences. This is in part because criminal offences define aberrant behaviours, and yet these alignments show that the community generally shares norms with individual perpetrators, norms which permit or even encourage such serious attacks.<sup>79</sup> Research on the social drivers of sexual violence is relevant to inform broad educational and awareness campaigns, which are usually characterised as primary prevention and distinguished from the individual accountability processes that the criminal justice system is responsible for. However, awareness of the alignments between broader social relations (including those surrounding gender and race) and individual sexual offending is directly relevant to the criminal law. The problem with not incorporating this awareness is that the very existence of harm in individualised sexual conduct can be difficult to perceive and/or its nature and extent go unquestioned.<sup>80</sup> Richard Delgado writes that collective, social understandings about expected behaviours:

...are like eyeglasses we have worn for a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves. Ideology – the received wisdom – makes current social arrangements seem fair and natural.<sup>81</sup>

Part 2 considers 13 socially endorsed but inaccurate assumptions about sexual violence (misconceptions that make 'current arrangements seem fair and natural'<sup>82</sup>) and Part 3 considers the effects of these misconceptions on criminal justice processes.

## 1.3 The Nature of the Injuries Sexual Violence Inflicts on People

Each person experiences sexual violence differently (section 2.8).<sup>83</sup> People often experience physical and psychological injuries<sup>84</sup> that extend beyond the immediate impact of sexual violence. Moreover, ongoing physical and mental injuries interact: mental trauma manifests physically and vice versa.<sup>85</sup>

<sup>78</sup> McGlade, *Our Greatest Challenge* (n 28) 33.

<sup>79</sup> For accounts of this complexity see Anna Krien, *Night Games: Sex, Power and Sport* (Scribe, 2013); Larissa Behrendt, 'Law Stories and Life Stories: Aboriginal Women, the Law and Australia' (2005) 20 *Australian Feminist Studies* 245; Thordis Elva and Tom Stranger, *South of Forgiveness* (Scribe, 2017).

<sup>80</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 37; Tarrant, Tolmie and Giudice, *Transforming Legal Understandings* (n 31) 4, 83-89.

<sup>81</sup> Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative', in Richard Delgado and J Stefancic (eds), *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University, 2000) 60-70, 61.

<sup>82</sup> Ibid.

<sup>83</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 20.

<sup>84</sup> 'Injury' is used in this section to distinguish the impacts on victims of sexual violence from the harms perpetrated by sexual violence discussed in the previous sections.

<sup>85</sup> Sigrun Sigurdardottir and Sigridur Halldorsdottir, 'Repressed and Silent Suffering: Consequences of Childhood Sexual Abuse for Women's Health and Well-being' (2013) 27 *Scandinavian Journal of Caring Sciences* 422 (*Repressed and Silent Suffering*); Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28); Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind and Body in the Healing of Trauma* (Penguin, 2015).

Only a minority of people cause physical injury to the person they sexually assault at the time of the assault (section 2.3).

### 1.3.1 Sexual Violence Causes Distinctive Injuries that are Often Deep and Long-Lasting.

Injuries caused by sexual violence are distinctive,<sup>86</sup> reflecting the nature of the harm discussed above. A person is usually not physically injured at the time of the sexual assault and yet often experiences deep and long-lasting harm as a result of it.

In an analysis of data on sexual violence collected by the Australian Longitudinal Study on Women's Health since 1996, published in 2022, Natalie Townsend and colleagues assessed the impact of sexual violence on women's physical and mental health across four generations.<sup>87</sup> They found that:

Regardless of age or generation, women who had experienced sexual violence reported worse physical and mental health than women who had never experienced sexual violence. This included poorer general health and increased risk of chronic conditions, sexually transmitted infections, anxiety, depression and psychological distress.<sup>88</sup>

The RCIRCSA reported that sexual abuse in childhood can cause injury in:

many areas of a person's life, including their:

- mental health;
- interpersonal relationships;
- physical health;
- sexual identity;
- gender identity;
- sexual behaviour;
- connection to culture;
- spirituality and religious involvement;
- interaction with society; and
- education, employment and economic security.

For some victims, child sexual abuse results in them taking their own lives.<sup>89</sup>

Research compiled in the Bench Book for Children Giving Evidence in Australian Courts shows that children who are victims of sexual assault can experience:

- Multiple psychiatric disorders, such as post-traumatic stress disorder, anxiety disorder, depression, eating disorders, acts of self-harm and emotional problems.
- Suicide attempts, self-mutilation and substance abuse.
- Feelings of hopelessness and hostility, low self-esteem and self-concept.
- Running away from home.
- Obsessive compulsive behaviour.
- Paranoid ideation.
- Pregnancy in adolescence
- Sexualised behaviour.
- Conduct disorders like obsessions, compulsions and eating disorders.
- Sexual promiscuity.
- Increased likelihood of perpetuating a cycle of violence, including sex crimes.

<sup>86</sup> Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28) 25; Conaghan, 'The Essence of Rape' (n 3) 156; Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), *Family Violence: A National Legal Response Vol 1* (Final Report ALRC No 114, NSWLRC Report No 128, October 2010), 1115 [https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114\\_WholeReport.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114_WholeReport.pdf) (*Family Violence*).

<sup>87</sup> Natalie Townsend et al, *A Life Course Approach to Determining the Prevalence and Impact of Sexual Violence in Australia: Findings from the Australian Longitudinal Study on Women's Health* (Report, ANROWS, August 2022). Women in this study were born between 1921 and 1995.

<sup>88</sup> Ibid 9.

<sup>89</sup> Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28) 10.

- Withdrawal from social interactions.
- Decreased likelihood of completing secondary studies due to learning difficulties or poor academic performance.
- Social relationship problems in later life, such as difficulty with intimate relationships and divorce.<sup>90</sup>

The injuries most commonly described by adults from their sexual abuse as a child are mental health impacts. The RCIRCSA reported that 94.9 per cent of survivors who provided information in private sessions told the Commission about mental health impacts.<sup>91</sup>

### 1.3.1.1. The Depth of Injury Caused by Sexual Violence

Many survivors of sexual violence speak about the depth of injury, for example, experiences of ‘deep and almost unbearable suffering’,<sup>92</sup> and ‘repressed and silent suffering’.<sup>93</sup> The RCIRCSA highlighted one survivor’s experience: ‘As a victim, I can tell you the memories, sense of guilt, shame and anger live with you every day. It destroys your faith in people, your will to achieve, to love, and one’s ability to cope with normal everyday living.’<sup>94</sup> Kovacs writes:

Sexualised violence is a personal experience most difficult to approach. A wound on a person’s sexuality is guarded by the strongest shame – it is often the case that even witnesses find it difficult to recall what they saw and even victims/survivors speak about it as if they were only witnesses to it. Those who manage to survive sexualised violence without visible consequences often strive to undo it even for themselves and conceal their wounds from the eyes of the other.<sup>95</sup>

The injuries caused by sexual violence can be cumulative (section 3.1.4), for example the RCIRCSA reported:

We heard that Aboriginal and Torres Strait Islander survivors have faced a heavier burden of cumulative harm due to a range of historical and contemporary factors. We also heard that because children with disability can face additional barriers to disclosure of child sexual abuse, they are vulnerable to further abuse and therefore cumulative harm.<sup>96</sup>

### 1.3.1.2. Being Silenced as an Injury Caused by Sexual Violence

Being muted, diminished, isolated or silenced feature in the accounts of ongoing impacts of sexual violence as well as core feelings of shame.<sup>97</sup> These injuries are centralised in many accounts. Credible threats of physical and/or social reprisals for disclosure (including threats of death or social ostracism) are the reasons for silence in some situations.<sup>98</sup> But even where there is no specific threat from the person who perpetrated the assault people very often do not speak to others about the sexual violence a person has subjected them to (section 3.1).

<sup>90</sup> AIJAI, Bench Book for Children Giving Evidence in Australian Court (n 19) 3.

<sup>91</sup> Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28) 10.

<sup>92</sup> Sigrun Sigurdardottir, Sigridur Halldorsdottir and Soley Bender, ‘Deep and Almost Unbearable Suffering: Consequences of Childhood Sexual Abuse for Men’s Health and Well-being’ (2012) 26 *Scandinavian Journal of Caring Sciences* 688, 688.

<sup>93</sup> Sigurdardottir and Halldorsdottir, *Repressed and Silent Suffering* (n 85) 422.

<sup>94</sup> Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28) 9.

<sup>95</sup> Eva Kovacs, ‘Parallel Readings: Narratives of Violence’, in Fazil Moradi, Maria Buchenhorst and Ralph Six-Hohenbalken (eds), *Memory and Genocide: On What Remains and the Possibility of Representation* (Routledge, 2017) 42, 43.

<sup>96</sup> Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28) 9.

<sup>97</sup> Maureen McGinley, Jan Breckenridge and Jane Mowll, ‘A Scoping Review of Adult Survivors’ Experiences of Shame Following Sexual Abuse in Childhood’ (2019) 27(5) *Health and Social Care in the Community* 1135.

<sup>98</sup> Commonwealth, *RCIRCSA Final Report – Nature and Cause Vol 2* (n 33) 10, 36, 46, 48, 52, 146. See also Tarrant, Tolmie and Giudice, *Transforming Legal Understandings* (n 31) 28-32; Jenny Tonsing and Ravinder Barn, ‘Intimate Partner Violence in South Asian Communities: Exploring the Notion of “Shame” to Promote Understandings of Migrant Women’s Experiences’ (2017) 60(3) *International Social Work* 628.

We discuss the misconception that genuine victims of sexual violence would report their experience immediately (section 2.6) and barriers to reporting and disclosure (section 3.1) below; here we emphasise that being compelled to be silent is itself an injury caused by sexual violence. Not having human connection with respect to their having been victimised; not having a 'voice' is central to many accounts of injuries.<sup>99</sup> For example, research on experiences of not being believed by police when reporting offences shows that it is itself a primary injury (section 3.2).<sup>100</sup>

Other research looks even more deeply into the injuries caused by the absence of language (or 'narratives') that fit survivors' experiences. Suzanne McKenzie-Mohr and Michelle Lafrance write: 'Narratives do not, as it were, spring from the minds of individuals but are social creations. We are born into a culture which has a ready stock of narratives which we appropriate and apply in our everyday social interactions' (see discussion of common misconceptions in Part 2).<sup>101</sup> McKenzie-Mohr and Lafrance refer to 'master narratives' that do not match the experiences of many victim-survivors:

In instances when master narratives are not helpful to those seeking to make sense of their experiences, the availability of alternative narratives is crucial. Without them, individuals may be left without accessible tools to make meaning in helpful ways. They may fall back on using dominant stories, even when they are harmful.<sup>102</sup>

This is not simply a matter of changing terminology, though language is important.<sup>103</sup> Mislabelling results from language that does not 'fit',<sup>104</sup> but this is not an individual's difficulty in finding the right words; rather it is an absence of cultural framing of the misconduct that would, if it were available, provide the space into which a person could speak (sections 1.1, 3.1 and 3.3).<sup>105</sup> Viewed this way, the experience of being silenced and shamed that is central to many survivors' accounts, is a primary injury of sexual violence, but not one caused by individual perpetrators. The inadequacy of cultural framings and the resistances to providing them may better be seen as the cause of these injuries.<sup>106</sup> (See also discussion of the trial process in section 3.2.) This makes sense of the idea that sexual violence is everybody's business.

<sup>99</sup> Commonwealth, *RCIRCSA Final Report – Impacts Vol 3* (n 28) 9.

<sup>100</sup> Karen McQueen, Jodie Murphy-Oikonen, Ainsley Milleri and Lori Chambers, 'Sexual Assault: Women's Voices on The Health Impacts of Not Being Believed by Police' (2021) 21 (217) *BMC Women's Health* 1, 8 <https://doi.org/10.1186/s12905-021-01358-6>.

<sup>101</sup> Suzanne McKenzie-Mohr and Michelle Lafrance, 'Telling Stories Without the Words: "Tightrope Talk" In Women's Accounts of Coming to Live Well After Rape or Depression' (2011) 21 (1) *Feminism & Psychology* 49, 50 ('Telling Stories') quoting Michael Murray 'The Storied Nature of Health and Illness' in Murray M and Chamberlain K (eds) *Qualitative Health Psychology* (London: Sage, 1999), 47-63.

<sup>102</sup> McKenzie and Lafrance, 'Telling Stories' (n 101) 50; McCalman et al, 'Responding to Indigenous Australian Sexual Assault' (n 12) 2.

<sup>103</sup> The concept of a 'delay' in reporting may be an example of language promoting a 'master narrative'. If the injuries of those who have been subjected to sexual assault are understood as they are experienced, there could be said to be simply a time at which an assault is reported. The idea of delay, suggesting they have not reported in a timely manner, fits neatly with the concept of sexual violence as a contained physical assault that caused physical injury. For further exploration, see Conaghan, 'The Essence of Rape' (n 3) 175.

<sup>104</sup> McKenzie and Lafrance, 'Telling Stories' (n 101) 65.

<sup>105</sup> Shaez Mortimer, Anastasia Powell and Larissa Sandy, 'Typical Scripts' and Their Silences: Exploring Myths About Sexual Violence and LGBTQ People from the Perspective of Support Workers' (2019) 33(3) *Current Issues in Criminal Justice* 333, 335, 345 <https://doi.org/10.1080/10345329.2019.1639287>; Webster and Flood discusses that successful society-wide change is based on moving the focus to a 'shared responsibility for addressing the problem' (see *Framework Foundations* (n 51) 60).

<sup>106</sup> Rush and Young, 'A Crime of Consequence' (n 46) 108-109; Quilter, 'Reframing the Rape Trial' (n 23).



## PART 2: COMMON MISCONCEPTIONS ABOUT SEXUAL VIOLENCE

Despite improved understanding about the realities of sexual violence (Part 1), misconceptions about the causes and contexts of sexual violence continue to be common. Martha Burt is credited with devising the term ‘rape myths’ which she defines as ‘prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists’.<sup>107</sup> Julia Quilter defines ‘rape myths’ as the common misconceptions surrounding acts of sexual violence, as well as the nature and impacts experienced by stereotypical victims and perpetrators of sexual violence.<sup>108</sup> These myths and misconceptions are underpinned by ‘implicit theories’ (section 1.1) and involve generalisations that are applied to all incidents of sexual violence.<sup>109</sup>

In essence, myths and misconceptions about ‘real’ sexual violence and the concept of ‘real rape’ operate as heuristics for police, legal professionals, judges, jury members and even people who are victimised by sexual violence, in interpreting information about sexual violence.<sup>110</sup> When a person accepts myths and misconceptions about ‘real’ sexual violence, consciously or unconsciously, they accept a general schema which guides and organises their interpretation of specific information about the incident of sexual violence.<sup>111</sup> Acceptance of myths and misconceptions about ‘real’ sexual violence has a significant impact on a person’s attitudes toward people who have been subjected to sexual violence, people who have perpetrated sexual violence and on judgments about sexual violence cases that reach the public sphere.<sup>112</sup>

Acceptance of myths and misconceptions about sexual violence can influence the initial confidence the victim has in reporting (section 3.1).<sup>113</sup> Depending on their role in the criminal justice process, police<sup>114</sup> and other legal professionals including judicial officers, may be influenced by misconceptions about sexual violence in determining whether to proceed with a charge,<sup>115</sup> their approach to taking statements, examination in chief and cross-examination of witnesses, their objections to particular lines of questioning and judicial interventions.<sup>116</sup> Misconceptions about the causes and contexts of sexual violence may inform and impact the juror’s perception of the victim/complainant’s credibility and the accused’s guilt<sup>117</sup> (Part 3).

<sup>107</sup> Martha Burt, ‘Cultural Myths and Support for Rape’ (1980) 38 *Journal of Personality & Social Psychology* 217-230, 217.

<sup>108</sup> Julia Quilter, ‘Getting Consent “Right”: Sexual Assault Law Reform in New South Wales’ (2020) 46(2) *The Australian Feminist Law Journal* 225, 237 <https://doi.org/10.1080/13200968.2021.1930434>.

<sup>109</sup> Elisabeth McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials in the Aotearoa Sexual Violence Court Pilot* (University of Canterbury, Christchurch, 2020) 45 (Rape Myths as Barriers); Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018), 101.

<sup>110</sup> Joanne Conaghan and Yvette Russell, ‘Rape Myths, Law, and Feminist Research: ‘Myths about Myths?’ (2014) 22 *Feminist Legal Studies* 25, 43–44.

<sup>111</sup> Gerd Bohnmer, Friederike Eyssel and Afroditi Pina, ‘Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator’ in Miranda Horvath, Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Willan Editors, 2009), 23 <https://doi.org/10.4324/9781843927129>.

<sup>112</sup> Ibid 37.

<sup>113</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 2.

<sup>114</sup> Benjamin Hine and Anthony Murphy, ‘The Influence of ‘High’ vs. ‘Low’ Rape Myth Acceptance on Police Officers’ Judgements of Victim and Perpetrator Responsibility, and Rape Authenticity (2018) 60 *Journal of Criminal Justice* 100 (‘Influence of ‘High’ vs. ‘Low’ Rape Myth Acceptance’).

<sup>115</sup> Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (Canberra: Office of the Status of Women, 2004), 5.

<sup>116</sup> See generally McDonald, *Rape Myths as Barriers* (n 112).

<sup>117</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 2; Louise Ellison and Vanessa Munro, ‘Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation’ (2009) 18 *Social & Legal Studies* 291; Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, London and New York, 2019) (*Just Sex?*); Blake McKimmie, Barbara Masser and Renata Bongiorno, ‘What Counts as Rape? The Effect of Offense Prototypes, Victim Stereotypes, and Participant Gender on How the Complainant and Defendant are Perceived’ (2014) 29 *Journal of Interpersonal Violence* 2273; Natalie Taylor, *Juror Biases and Attitudes in Sexual Assault Cases* (Report No 344, 2007, 15 August 2007).

In this section, we further explore and discredit some common myths and misconceptions held about the causes and context of sexual violence.<sup>118</sup>

## 2.1 Sexual Violence is Usually Committed by a Stranger in a Dark Isolated Area

Most sexual violence is committed by someone the victim knows. As highlighted earlier, sexual violence is commonly inflicted against adults as part of an on-going relationship (section 1.1), it is frequently committed by an intimate partner or other family members.<sup>119</sup> Similar to adults, children usually experience sexual violence from a person they know and often trust has been built up over time by the person using sexual violence through the use of grooming behaviours and techniques.<sup>120</sup>

In most instances of sexual violence, the victim knows the person who has sexually assaulted them as an acquaintance, work associate, friend or sexual partner.<sup>121</sup> Australian Bureau of Statistics (ABS) analysis identified that over a quarter (26 percent) of all sexual assaults reported to police in Australia in 2021 were family or domestic violence related and over half of these sexual assaults were committed by an intimate partner.<sup>122</sup> For people aged 15 years or more, the person who sexually assaulted them was a stranger only 23 percent of the time and known to the victim in 77 percent of the cases and 35 percent of those who sexually assaulted the person they knew were classified as a family member.<sup>123</sup>

Most sexual violence is perpetrated in a private residential address.

ABS analysis of 31,118 sexual assaults reported to police in Australia in 2021 identified that most reported sexual assaults occurred at a residential location (67 percent in Australia; 74 percent in Western Australia) and most commonly the residential location was a private dwelling (63 percent in Australia).<sup>124</sup>

## 2.2 Only Sexual Violence by a Stranger is Really Traumatic, Sexual Violence by People Known to the Victim Such as a Partner is Not

Similar to other contexts, sexual violence in the context of intimate partner violence often results in high levels of posttraumatic stress.<sup>125</sup> The deep and long-lasting effects on children who have experienced sexual violence, usually from people they know and trust, are well-documented.<sup>126</sup>

<sup>118</sup> Our list primarily draws on and adapts the list developed in the following sources: Jennifer Temkin, “‘And Always Keep A-hold of Nurse, For Fear of Finding Something Worse’: Challenging Rape Myths in the Courtroom” (2010) 13(4) *New Criminal Law Review* 710-734 <https://doi:10.1525/nclr.2010.13.4.710> (‘Challenging Rape Myths in the Courtroom’); Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (Resource, Australian Institute of Family Studies and Victoria Police, 2017).

<sup>119</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 5.

<sup>120</sup> Stephen Smallbone and Richard Wortley, *Child Sexual Abuse: Offender Characteristics and Modus Operandi* (Report No 193, 15 February 2001) 1.

<sup>121</sup> Judith Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* (Basic Books, 2015) 58 (Trauma and Recovery).

<sup>122</sup> ABS, *Recorded Crime – Victims: National Statistics About Victims of a Range of Personal, Household and Family and Domestic Violence Offences as Recorded by Police* (28 July 2022) <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>.

<sup>123</sup> AIHW, *Sexual Assault in Australia*, (Catalogue No FDV 5, August 2020) 8 <https://www.aihw.gov.au/getmedia/0375553f-0395-46cc-9574-d54c74fa601a/aihw-fdv-5.pdf.aspx?inline=true>.

<sup>124</sup> ABS, *Recorded Crime – Victims: National Statistics About Victims of a Range of Personal, Household and Family and Domestic Violence Offences as Recorded by Police* (n 122).

<sup>125</sup> Ann Coker et al, ‘PTSD Symptoms Among Men and Women Survivors of Intimate Partner Violence: The Role of Risk and Protective Factors’ (2005) 20 *Violence & Victims* 625. Renate Zilkens et al, ‘Sexual Assault and General Bodily Injuries: A Detailed Cross-sectional Australian Study of 1163 Women’ (2017) 279 *Forensic Science International* 112.

<sup>126</sup> For references to relevant studies, see AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) 3-4. Helen Hailes, Rongqin Yu, Andrea Danese and Seena Fazel, ‘Long-term Outcomes of Childhood Sexual Abuse: An Umbrella Review’ (2019) 6(10) *Lancet Psychiatry* 830–9.



As we have explored earlier (section 1.3), most victims of sexual violence experience a range of serious and long-lasting effects including emotional, psychological, educational, vocational and financial repercussions regardless of their prior relationship with the person who subjected them to the violence.<sup>127</sup> The effects of sexual violence on victims are often long-term.<sup>128</sup>

### 2.3 People Who Use Sexual Violence Usually Use Physical Force and the Victim Does All They Can to Physically Resist and the Victim is Consequently Injured

Research shows that rather than resisting sexual violence, many victims freeze or cooperate with the perpetrator's demands.<sup>129</sup> Despite this research, there remains a formative misconception that 'real victims' will physically resist a person who is sexually assaulting them during an incident of sexual violence<sup>130</sup> by expressing explicit 'non-consent'.<sup>131</sup> Often victims will make a constrained, rational choice to have sex with someone because they are frightened and hope to avoid the consequences of refusing or resisting.<sup>132</sup> Many victims will appreciate, often based on experience, the risks of resistance and often lack the opportunity to refuse.<sup>133</sup>

Notably, in the context of intimate partner sexual violence, a refusal to engage in sexual acts can increase the risk of homicide, which may be motivated by anger, jealousy and sexual entitlement.<sup>134</sup> As we observed earlier, people who use sexual violence often target people who have less power and status (section 1.2). On a practical level, McDonald observes that given the disparities in strength between most men and most women, the suggestion that a woman can fight off her assailant is, in general, irrational.<sup>135</sup>

Many people who use sexual violence operate strategically to gradually close down another person's resistance by conditioning them through a process of coercive control or trust building.<sup>136</sup> When a victim has been gradually groomed to comply, they may have normalised the sexual violence and may not think anything inappropriate is occurring and as a result they may not resist.<sup>137</sup> This gradual manipulation also wears down the victim's confidence in their ability to leave the abuse or disclose what has occurred.<sup>138</sup> Children who are groomed and manipulated into sexual activity often feel trapped.<sup>139</sup>

<sup>127</sup> Laura Russo, *Date Rape: A Hidden Crime* (Report No 157, 1 June 2000) 3.

<sup>128</sup> Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Australian Institute of Criminology Archive, 15 June 2003) 2 <https://www.aic.gov.au/publications/archive/archive-135> (Non-Reporting and Hidden Reporting).

<sup>129</sup> Herman, Trauma and Recovery (n 121) 42; Tidmarsh and Hamilton, Misconceptions of Sexual Crime Against Adult Victims (n 13) 5; 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 <https://uk.westlaw.com/Document/IB5DF0470037911EBA538808A19323CA7/View/FullText.html> ('Three Distinctive Features'); Kasia Kozłowska, Peter Walker, Loyola McLean, Pascal Carrière, 'Fear and the Defense Cascade: Clinical Implications and Management' (2015) 23(4) *Harvard Review of Psychiatry* 263.

<sup>130</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 5.

<sup>131</sup> Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*. (Catalogue No J4-92/2019E-PDF, 2019) (*The Impact of Trauma*) [https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf).

<sup>132</sup> Louise Ellison and Vanessa Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 *British Journal of Criminology* 202, 206.

<sup>133</sup> Raymond Arthur and Lisa Down, 'Preventing the Criminalisation of Children who Have Been Victims of Group-Based Sexual Exploitation Involving Grooming Tactics – Understanding Child Sexual Exploitation as Enslavement' (2019) 83(5) *The Journal of Criminal Law* 370, 376 <https://doi.org/10.1177/0022018319879013> ('Preventing the Criminalisation of Children').

<sup>134</sup> Marika Guggisberg, 'Aboriginal Women's Experiences with Intimate Partner Sexual Violence and the Dangerous Lives they Live as a Result of Victimization' (2019) 28(2) *Journal of Aggression, Maltreatment and Trauma* 186, 188 ('Aboriginal Women's Experiences') <https://doi.org/10.1080/10926771.2018.1508106>.

<sup>135</sup> McDonald, *Rape Myths as Barriers* (n 112) 45.

<sup>136</sup> Tolmie, 'Considering Victim Safety' (n 40) 201.

<sup>137</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 8.

<sup>138</sup> Ibid; Cox, *Sexual Assault and Domestic Violence* (n 43) 28-30.

<sup>139</sup> Arthur and Down 'Preventing the Criminalisation of Children' (n 133) 375-376.

As noted above (section 1.3) most sexual violence does not result in physical injuries to the victim and incidents of sexual violence do not usually involve a weapon.

When people use psychological tactics associated with coercive control, grooming and threats to carry out sexual violence, the need for physical violence or weapons to coerce compliance from the victim is eliminated.<sup>140</sup> In a study in Perth, Western Australia, hospital data was analysed to determine the injuries sustained by victims of sexual assault seen by the hospital staff during a 12-month period. The study found that 83 per cent of the victims had minor or no physical injuries at all.<sup>141</sup> ABS analysis of 31,118 sexual assaults reported to police in Australia in 2021 identified that most (94 percent) did not involve use of a weapon.<sup>142</sup>

## **2.4 A Person Can Always Be Clear That They Do Not Consent to Sex – No Matter How Intoxicated or Drug-Affected They Are**

In some situations, a person may be so intoxicated by alcohol or other drugs that they are unable to express lack of consent by words or actions.<sup>143</sup> However, there is a persistent misconception that if the person is conscious, then their level of intoxication does not render them incapable of expressing dissent to sex.<sup>144</sup>

People who have ingested certain drugs, for example Rohypnol and GHB (gamma hydroxybutyrate), rarely lose consciousness. The effect of these drugs tends to induce euphoria, passivity and a relaxed state increasing the victim's likelihood of engaging in sex.<sup>145</sup> These drugs also induce an amnesiac effect which results in the victim being unable to remember the events clearly. As Finch and Munro state, such drugs:

facilitate rape ...because they lead to a dissociation between mind and body that renders the victim receptive to sexual activity that she may have found unwelcome in other circumstances... [they eradicate] the victim's ability to make meaningful choices about participation in sexual activity.<sup>146</sup>

## **2.5 A Person Only Has Themselves to Blame for Sexual Violence Because of Their Clothes, Use of Alcohol or Other Drugs, Previous Sexual Relationships, 'Flirting' and 'Risky' Behaviour**

Whether a person consents to sexual contact cannot be determined by the person's choice of clothing, the person's decision to drink alcohol or take other drugs, their previous sexual relationships, their 'flirting' or 'risky' behaviour.

Despite this, research has identified that many people have an inclination to blame the victim for the sexual violence the victim has been subjected to because of these behaviours.

<sup>140</sup> Lievore, *Non-Reporting and Hidden Recording* (n 128) 20.

<sup>141</sup> C Lincoln, 'A Descriptive Study of Recent Sexual Assault Cases in Perth, 1 November 1994–31 October 1995', in *Balancing the Scales: National Conference on Sexual Assault*, June 1996, Sexual Assault Referral Centre, Perth, cited in Bree Cook, Fiona David and Anna Grant, *Sexual Violence in Australia* (Report No 36, 1 June 2002) 27.

<sup>142</sup> ABS, *Recorded Crime – Victims: National Statistics About Victims of a Range Of Personal, Household and Family and Domestic Violence Offences as Recorded by Police* (n 122).

<sup>143</sup> Temkin, 'Challenging Rape Myths in the Courtroom' (n 118) 716.

<sup>144</sup> Emily Finch & Vanessa Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants' (2005) 45 *British Journal of Criminology* 25, 33.

<sup>145</sup> *Ibid* 27.

<sup>146</sup> *Ibid* 27-28.

Some studies have identified that women dressed more revealingly are more likely to be blamed for the sexual violence they experience.<sup>147</sup> Finch and Munro found that there was ‘a general inclination’ for their mock juror study participants to ascribe responsibility for sex to a complainant who was intoxicated, unless there was evidence of other wrongdoing (such as drink spiking) on the part of the accused.<sup>148</sup> They also found that in considering whether the complainant consented to the sexual contact on the particular occasion, the mock jury participants wanted information about the past sexual history of the complainant.<sup>149</sup> Similarly, in her analysis of rape trial transcripts, McDonald highlights the trial focuses on the complainant’s underwear choices, possession of sex toys, her use of contraception and, especially where she was a sex worker, her work.<sup>150</sup> McDonald’s analysis shows that many complainants are asked about these issues by legal counsel, and while the counsel submissions she examined fell short of explicitly labelling the complainant as responsible for the sexual violence, nevertheless submissions had the ‘flavour of that sentiment’ at times.<sup>151</sup>

## 2.6 Genuine Sexual Violence Victims Would Report Their Experience Immediately. If They Take Time to Report They are Likely to be Lying

Most people who experience sexual violence do not report their experience immediately or they never disclose it. Most children who have experienced sexual violence report their abuse one or more years after it occurred or not at all (see discussions on the depth of injury and silencing in section 1.3, and barriers to reporting in section 3.1.3).<sup>152</sup> Yet in her research analysing 164 police files involving sexual violation offences in New Zealand, Jan Jordan found 86 percent of complainants who had reported sometime after the assault, rather than ‘immediately’, were viewed suspiciously.<sup>153</sup>

The ABS’s 2016 Personal Safety Survey (PSS) found that: ‘Approximately nine out of ten women who experienced sexual assault by a male (87 percent or 553,900) did not contact the police about the most recent incident’.<sup>154</sup> Women who have been sexually assaulted by someone they know are more likely to take a longer time to report it or seek legal assistance than those who are sexually assaulted by a stranger<sup>155</sup> and most people who are sexually assaulted, are assaulted by someone they know (section 2.1). Many people find it difficult to report family members who have used sexual violence because they fear getting their family members in trouble with the police.<sup>156</sup>

In part because of the kinds of injuries experienced as a result of sexual violence (section 1.3) and the use of coercive control, grooming tactics and threats by people who commit sexual violence, many victims, both children and adults, may take some time to report, or never report sexual violence.<sup>157</sup> Notably, up to 90 percent of incidents of violence perpetrated against Aboriginal and Torres Strait

<sup>147</sup> Steve Loughllan, Afroditi Pina, Eduardo Vasquez and Elisa Puvia, ‘Sexual Objectification Increases Rape Victim Blame and Decreases Perceived Suffering’ (2013) 37(4) *Psychology of Women Quarterly* 455, 456.

<sup>148</sup> Emily Finch and Vanessa Munro, ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants’ (2005) 45(1) *British Journal of Criminology* 25, 36.

<sup>149</sup> Ibid 36; Louise Ellison and Vanessa Munro ‘Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17(4) *International Journal of Evidence & Proof* 299.

<sup>150</sup> McDonald, *Rape Myths as Barriers* (n 112) 356, 358, 432, 434.

<sup>151</sup> Ibid 441, 287; Hine and Murphy, ‘Influence of ‘High’ vs. ‘Low’ Rape Myth Acceptance’ (n 114).

<sup>152</sup> See Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan UK, 2020); AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) part 1.4.1.

<sup>153</sup> Jan Jordan, ‘Beyond Belief?: Police, Rape and Women’s Credibility’ (2004) 4(1) *Criminology and Criminal Justice* 29, 37.

<sup>154</sup> ABS, *Personal Safety – Australia* (8 November 2017) <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release#experience-of-violence>.

<sup>155</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 3.

<sup>156</sup> Arthur and Down, ‘Preventing the Criminalisation of Children’ (n 136) 375.

<sup>157</sup> AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19); David Finkelhor et al, ‘Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors’ (1990) 14(1) *Child Abuse & Neglect* 19. For further discussion and references see above section 1.1.

Islander women are unreported (section 3.1.4).<sup>158</sup> Many women who are serving prison sentences have never reported their experiences of sexual violence.<sup>159</sup>

A significant proportion of people who have experienced sexual violence do not label their experience as a criminal offence; they may have normalised the sexual violence as part of their life (section 2.3) and/or they may not be aware that a crime has been committed against them.<sup>160</sup> For example, many women are reported not to know that what was done to them was an offence.<sup>161</sup> One of the recognised barriers for children reporting abuse is a lack of understanding that the abuse is wrong or abnormal.<sup>162</sup>

We discuss obstacles to reporting sexual violence further at section 3.1.

## **2.7 True Victims Have Not Reported Sexual Violence More Than Once – A Person Who Reports Sexual Violence More Than Once Should Be Treated with Suspicion**

Many people experience multiple incidents of sexual violence.<sup>163</sup> Having been sexually assaulted is a known risk factor for further victimisation.<sup>164</sup> Judith Herman identifies that while the risk of sexual violence is high for women, the risk of sexual violence is approximately double for survivors of child sexual violence.<sup>165</sup>

## **2.8 Genuine Victims of Sexual Violence Would be Distressed When Reporting Rape to Police or Discussing it in Court**

People who have experienced sexual violence respond in diverse ways (section 1.3).<sup>166</sup>

While some victims of sexual violence respond by becoming hypervigilant, some become shut down and/or become numb.<sup>167</sup> Victims also recount what has happened to them in diverse ways. For example, some victims have a controlled response and mask their feelings, appearing calm and composed, others may become hysterical and tearful (section 3.3.6).<sup>168</sup>

## **2.9 Genuine Victims of Sexual Violence Would Discontinue Any Relationship They Have With the Person Who Has Perpetrated the Sexual Violence**

Many victims maintain contact with the person who sexually assaulted them after the incident of sexual violence.

<sup>158</sup> ANROWS, *Improving Family Violence Legal and Support Services for Aboriginal and Torres Strait Islander Peoples: Key Findings and Future Directions* (Report, ANROWS Research to Policy and Practice, No 25-26, December 2020) 3 (Improving Family Violence Legal and Support Services) <https://anrowsdev.wpenginepowered.com/wp-content/uploads/2019/02/ANROWS-Langton-RtPP-Improving-services.pdf>.

<sup>159</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 23. Furthermore, a high proportion (70-90 percent) of women in prison have a history of family violence including sexual violence, according to ANROWS, *Women's Imprisonment and Domestic, Family and Sexual Violence* (Research Synthesis, ANROWS Insights, 03/2020) 5.

<sup>160</sup> Lievore, *Non-Reporting and Hidden Recording* (n 128) 29.

<sup>161</sup> ALRC and NSWLRC, *Family Violence* (n 86) 1113; McKenzie and Lafrance, 'Telling Stories' (n 101) 56-57.

<sup>162</sup> Alison Cunningham and Linda Baker, *Little Eyes, Little Ears: How Violence against a Mother Shapes Children as They Grow* (The Centre for Children and Families in the Justice System, 2007) 36; AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) part [1.4.2].

<sup>163</sup> Cox, *Sexual Assault and Domestic Violence* (n 43) 22; Catherine Classen, Oxana Palesh and Rashi Aggarwal, 'Sexual Revictimization: A Review of the Empirical Literature' (2005) 6 *Trauma, Violence & Abuse* 103.

<sup>164</sup> Ibid 103-129.

<sup>165</sup> Herman, *Trauma and Recovery* (n 121) 96.

<sup>166</sup> Van der Kolk, *The Body Keeps the Score* (n 87).

<sup>167</sup> Ibid 99, 256.

<sup>168</sup> Liat Sayfan et al, 'Children's Expressed Emotions When Disclosing Maltreatment' (2008) 32 *Child Abuse & Neglect* 1026.



Research has highlighted that many victims stay with or return to the person who has sexually assaulted them. As we discussed earlier (section 1.1), sexual violence is most commonly inflicted as part of a relationship or ongoing interaction in which the autonomy of a person is violated through complex mechanisms of control. Despite this research, the misconception that ‘real victims’ discontinue contact with the person who assaulted them immediately after the sexual violence incident, remains formative.<sup>169</sup>

In the context of intimate partner sexual violence, there are many reasons why victims may stay living in proximity to their violent partner. These include fear of the repercussions of leaving, stigma and embarrassment, feelings of self-blame for the sexual violence and material reasons such as reduced financial circumstances.<sup>170</sup> They may fear worse consequences would follow by not maintaining the status quo, such as the loss of their children, community or contact with country (section 3.1.4). Furthermore, leaving a relationship where there is intimate partner violence and coercive control, is identified as a risk factor for future serious harm and fatality.<sup>171</sup>

## **2.10 Genuine Victims of Sexual Violence Will Always Give a Thoroughly Clear, Coherent, Detailed and Specific Account of the Sexual Violence.**

Many people who have experienced sexual violence are unable to give a thoroughly clear, coherent, detailed and specific account of the incident of sexual violence.

Research has found that memories associated with a traumatic event, such as sexual violence, are often fragmented, disorganised and confused, inconsistent and lack internal coherence and specificity (section 3.3.1).<sup>172</sup> Such memories are not stored in a narrative form, nor are they stored as verbal memories – often victims remember only sensations and emotions rather than specific details of the event.<sup>173</sup> Some victims do not remember anything at all. Research also shows that people with Post Traumatic Stress Disorder (PTSD) (and PTSD is a common result of sexual violence: section 1.3) may have general deficits in memory.<sup>174</sup>

Given that memory can be so deeply affected by trauma, it cannot be assumed that inconsistency in recall is indicative of untruthfulness.

In addition to the psychological effects of trauma from incidents of sexual violence, many people report not being able to give a thorough, clear, coherent account of the sexual violence they have been subjected to because they are met with incomprehension or disbelief. We discussed in section 1.3 the silencing of victims of sexual violence because of the absence of social narratives

<sup>169</sup> McDonald, Rape Myths as Barriers (n 112) 455; Commonwealth, RCIRCSA, *Criminal Justice Report: Executive Summary and Parts I-II* (August 2017) 171 (Criminal Justice Report: Executive Summary and Parts I-II) [https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final\\_report\\_-\\_criminal\\_justice\\_report\\_executive\\_summary\\_and\\_parts\\_i\\_to\\_ii.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_executive_summary_and_parts_i_to_ii.pdf).

<sup>170</sup> Jessica Eckstein, ‘Reasons for Staying in Intimately Violent Relationships: Comparisons of Men and Women and Messages Communicated to Self and Others’ (2011) 26(1) *Journal of Family Violence* 21.

<sup>171</sup> Australian Domestic and Family Violence Death Review Network, *Data Report 2018* (Report, New South Wales Domestic Violence Review Team, May 2018) 12 <https://apo.org.au/node/174811>.

<sup>172</sup> Bessel van der Kolk and Rita Fisler, ‘Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study’ (1995) 8(4) *Journal of Traumatic Stress* 505; Shannon Tromp et al, ‘Are Rape Memories Different?: A Comparison of Rape, Other Unpleasant and Pleasant Memories among Employed Women’ (2006) 8(4) *Journal of Traumatic Stress* 607.

<sup>173</sup> Herman, *Trauma and Recovery* (n 121) 37-38; Charlotte Bishop and Vanessa Bettinson, ‘Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of “Controlling or Coercive Behaviour”’ (2018) 22(1) *The International Journal of Evidence & Proof* 3, 15-17; Jennifer Vasterling et al, ‘Attention and Memory Dysfunction in Posttraumatic Stress Disorder’ (1998) 12(1) *Neuropsychology* 125. It is salient to note that coherence of memories may depend on the conditions under which a memory is retrieved, such as whether the person is asked specific questions in relation to the memory or simply asked to describe what happened (as explored in Andrea Taylor et al, ‘Judgments of Memory Coherence Depend on the Conditions Under Which a Memory Is Retrieved, Regardless of Reported PTSD Symptoms’ (2020) 9(3) *Journal of Applied Research in Memory and Cognition* 396).

<sup>174</sup> Vasterling et al, ‘Attention and Memory Dysfunction’ (n 178).

through which victims can make sense of their experiences. The misconceptions<sup>175</sup> discussed in this section render a victim-survivor's account of what happened incoherent (see discussion of trial processes in section 3.3).

## **2.11 False Allegations of Sexual Violence Are Very Common and Constitute a Large Proportion of Sexual Violence Incidents Reported to the Police**

The rate of false allegations of sexual violence is very low. Research suggests that between 2 percent and 10 percent of allegations are false.<sup>176</sup> It is a misconception that false allegations of sexual violence are high<sup>177</sup> and that rape complainants are uniquely likely to lie.<sup>178</sup> Rather much more common in this context is underreporting (section 2.6 and Part 3). Most incidents of sexual assault are not reported to the police.<sup>179</sup>

However, the assumption that false allegations are common persists.<sup>180</sup> The 2017 National Community Attitudes towards Violence against Women Survey, found that 16 percent of Australians believe that 'many allegations of sexual assault made by women are false'<sup>181</sup> and that it is common for sexual assault allegations to be used as a way of 'getting back' at men or gaining a tactical advantage in their relationships with men.<sup>182</sup>

The incorrect assumption that allegations of sexual violence are commonly false contributes to under-reporting of sexual violence, as victims often believe they will be met by disbelief (sections 2.6 and 3.1).<sup>183</sup>

## **2.12 Men are Rarely Victims of Sexual Violence**

Many men experience sexual violence.

Surveys of male sexual victimisation reveal it is quite common with rates varying from 14 percent to 22 percent.<sup>184</sup> Men living with psychological or cognitive disability are sexually assaulted at the same rates as all Australian women (16 percent).<sup>185</sup> A study of self-report and parent-report data from Australia, New Zealand, Canada and the United States of America (USA) found that 5 to 15 percent

<sup>175</sup> Referred to in section 1.3 as 'master narratives'; McKenzie and Lafrance, 'Telling Stories' (n 101) 50.

<sup>176</sup> However, this figure may be misleading because the notion of false allegation is not well-defined. See Liz Wall and Cindy Taczon, *True or False? The Contested Terrain of False Allegations* (Research summary, Australian Centre for the Study of Sexual Assault, November 2013) 3 (*True or False?*).

<sup>177</sup> Annie Cossins, 'Cross-Examination in Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' in *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan UK, 2020) 339, 341 ('Cross-Examination in Sexual Assault Trials') <https://ebookcentral.proquest.com/lib/uwa/detail.action?docID=6381317>; Louise Ellison and Vanessa Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) *New Criminal Law Review* 781.

<sup>178</sup> Lisa Dufraimont, 'Myth, Inference and Evidence in Sexual Assault Trials' (2019) 44(2) *Queen's Law Journal* 316, 331.

<sup>179</sup> AIHW, *Sexual Assault in Australia* (n 123) 5.

<sup>180</sup> Chalmers et al, 'Three Distinctive Features' (n 129).

<sup>181</sup> Ibid 4.

<sup>182</sup> Webster et al, *Australians' Attitudes to Violence Against Women and Gender Equality* (n 57) 1; Wall and Taczon, *True or False?* (n 176) 7.

<sup>183</sup> Ibid.

<sup>184</sup> Michelle Davies and Paul Rogers, 'Perceptions of Male Victims in Depicted Sexual Assaults: A Review of the Literature' (2006) 11(4) *Aggression and Violent Behavior* 367, 368 ('Perceptions of Male Victims in Depicted Sexual Assaults').

<sup>185</sup> CREDH, *Nature and Extent of Violence* (n 17).

of men experienced a form of sexual abuse as a child.<sup>186</sup> Gay and bisexual men report higher levels of sexual victimisation than heterosexual men.<sup>187</sup>

Extending beyond the misconception that male victims are few,<sup>188</sup> research suggests that men tend to be blamed for the sexual violence they experience for failing to ‘overpower’ the person who has perpetrated the violence.<sup>189</sup> The assumption that men, as a result of their biology, are physically strong and thus able to resist sexual advances is influential and often untrue.<sup>190</sup> As a result of these misconceptions, many male victims may feel ashamed and isolated in disclosing abuse in fear of not living up to expected norms of masculinity that expect men to be sexually dominant and authoritative.<sup>191</sup> These same norms sustain the belief that men are ‘always up for sex’,<sup>192</sup> and people who use sexual violence may draw on these norms to justify coercing men into submitting to sex.<sup>193</sup>

Research demonstrates that the effects of sexual violence on male victims are often severe (section 1.3).<sup>194</sup>

## **2.13 People Who Are Living with a Cognitive or Psychological Disability Rarely Experience Sexual Violence**

People living with a disability of any kind are more likely to experience sexual violence than those who are not living with a disability. People who are living with a cognitive or psychological disability are at an even higher risk of experiencing sexual violence.

From the age of 15, 46 percent of women who are living with a cognitive disability and 50 percent of women living with a psychological disability have experienced sexual violence, compared to 16 percent of women who are not living with a disability.<sup>195</sup> Women who are living with a disability are twice as likely to experience sexual violence over one year compared to women who are not living with a disability.<sup>196</sup> As noted earlier (section 2.12), men living with a psychological or cognitive disability are sexually assaulted at the same rates as all Australian women.<sup>197</sup> Consistent with the fact that sexual violence usually occurs in a private residential space (section 2.1), people who are living with an intellectual impairment are at heightened risk of experiencing sexual violence from a co-habiting partner.<sup>198</sup>

<sup>186</sup> This was compared to 15-30 percent of women. See Ruth Gilbert et al, ‘Burden and Consequences of Child Maltreatment in High-Income Countries’ (2009) 373(9657) *The Lancet* 68, 71.

<sup>187</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13), citing Emily Rotham, Deineria Exner and Allyson Baughman, ‘The Prevalence of Sexual Assault Against People who Identify as Gay, Lesbian or Bisexual in the United States: A Systematic Review’ (2011) *Sage Publications, Inc.* 12(2) 55 and Mikel Walters, Jieru Chen and Matthew Breiding, *National Intimate Partner and Sexual Violence Survey (NVIS): 2010 Findings on Victimization by Sexual Orientation* (Report, National Center for Injury Prevention and Control, Centres for Disease Control and Prevention, 2013).

<sup>188</sup> Scott Walfield, “‘Men Cannot Be Raped’: Correlates of Male Rape Myth Acceptance” (2021) 36(13-14) *Journal of Interpersonal Violence* 6391, 6392 <https://doi.org/10.1177/0886260518817777>.

<sup>189</sup> Natasha McKeever, ‘Can a Woman Rape a Man and Why Does It Matter?’ (2018) 13(4) *Criminal Law and Philosophy* 599, 604 <https://doi.org/10.1007/s11572-018-9485-6>.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid 612.

<sup>193</sup> Ibid.

<sup>194</sup> Davies and Rogers, ‘Perceptions of Male Victims in Depicted Sexual Assaults’ (n 184) 368.

<sup>195</sup> CREDH, *Nature and Extent of Violence* (n 17) 14.

<sup>196</sup> Brain Injury Australia, Monash University and Domestic Violence Victoria, No to Violence, Centre for Excellence in Child and Family Welfare, *The Prevalence of Acquired Brain Injury Among Victims and Perpetrators Of Family Violence* (2018) <https://www.braininjuryaustralia.org.au/wp-content/uploads/BRAININJURYAUSTRALIAfamilyviolencebraininjuryFINAL.pdf>.

<sup>197</sup> CREDH, *Nature and Extent of Violence* (n 17) 14.

<sup>198</sup> ABS, *Disability and Violence – In Focus: Crime and Justice Statistics* (13 April 2021) <https://www.abs.gov.au/statistics/people/crime-and-justice/focus-crime-and-justice-statistics/disability-and-violence-april-2021>.



Victims who are living with an intellectual impairment may be viewed as not credible due to two long-standing misconceptions: firstly, that a person with an intellectual impairment has the mental capacity of a child (and children cannot be believed),<sup>199</sup> or secondly, a person with an intellectual impairment who has or is assumed to have capacity to consent may be perceived as ‘oversexed’ (and discredited for their choice of sexual partner).<sup>200</sup>

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<sup>199</sup> Janine Benedet and Isabel Grant ‘Sex-Assault Prosecutions Often Fail Women with Mental Disabilities’, *Policy Options* (online 7 February 2020) <https://policyoptions.irpp.org/magazines/february-2020/sex-assault-prosecution-often-fails-women-with-mental-disabilities/>; Janine Benedet and Isabel Grant, ‘Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues’ (2007) 52(3) *McGill Law Journal* 515, 517 (‘Hearing the Sexual Assault Complaints’). See section 3.1.3 on barriers to children reporting sexual violence.

<sup>200</sup> Ibid.

## PART 3: COMPLAINANTS' EXPERIENCES IN THE CRIMINAL JUSTICE SYSTEM

Issues surrounding the conceptualisation of the harm that is inflicted by sexual violence discussed in Part 1 and the specific misconceptions about sexual violence outlined in Part 2 underpin the problems experienced by complainants in the criminal justice system.

In Western Australia, between 2010-2011 and 2020-2021, sexual offences had the lowest conviction rate compared with other offences: 80.34 percent compared with the highest conviction rate of 99.82 percent for traffic and vehicle regulatory offences.<sup>201</sup> In Victoria, the conviction rate for sexual offences, between 2015 and 2017, was 67 percent.<sup>202</sup> The conviction rate measures those cases that are proceeded with by a state prosecutor, comparing people who are charged with and then found guilty (at trial or by pleading guilty before a trial commences) with people who are charged and subsequently acquitted. These conviction rates, in spite of being low relative to other offences, do not represent the most significant attrition in sexual offence cases.<sup>203</sup> Conviction rates mask a much higher disproportionate attrition during the criminal justice process before the point at which a person is charged and tried (or pleads guilty).

Another phase in the justice process that is measured for attrition is that between the reporting of violence and the decision to charge a person for an offence. By this measure, in Western Australia, in 2021, sexual offences had the highest attrition rate compared with other offences; 30 days after the report only about one in eight reports of sexual violence were proceeded with.<sup>204</sup> In Victoria, between 2015 and 2017, one in four reports of sexual violence were proceeded with.<sup>205</sup> The disproportionate attrition at this phase is consistent with other jurisdictions and over time. Between 2010-2011 and 2020-2021 in Western Australia and nationally sexual offence cases were withdrawn at a high rate.<sup>206</sup>

Relative rates of reporting violence are also a measure of how well a justice system is working. Crime statistics from police reporting data cannot show how many people do not report being subjected to violence. However, other data such as surveys of crime victimisation and public inquiries provide bases from which to estimate non-reporting. As we have discussed (sections 1.3 and 2.6) non-reporting and even non-disclosure of being subjected to sexual violence is very common. In other words, a high percentage of sexual violence does not even enter the criminal justice system.

In this Part, of the myriad problems experienced by complainants in the criminal justice process, we focus on some of the issues that arise within three areas: (1) barriers to reporting; (2) police practices and attitudes; and (3) trial processes and implications.

### 3.1 Barriers to Reporting and Disclosure

As noted earlier (sections 1.3 and 2.6) many people do not report their experience of sexual assault to the police,<sup>207</sup> or take a long time to report it. The misconceptions we have outlined in Part 2 operate as barriers to reporting.

<sup>201</sup> See below, Appendix: Analysis of Sexual Offences in Western Australia, 49-50.

<sup>202</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 9.

<sup>203</sup> Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39(1) *Crime and Justice* 565, 568 <https://doi.org/10.1086/653101>; Cassia Spohn, 'Sexual Assault Case Processing: The More Things Change, the More They Stay the Same' (2020) 9(1) *International Journal of Crime, Justice and Social Democracy* 86, 89-90 <https://doi.org/10.5204/ijcjsd.v9i1.1454>.

<sup>204</sup> See below, Appendix: Analysis of Sexual Offences in Western Australia, 44-46.

<sup>205</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 9.

<sup>206</sup> See below, Appendix: Analysis of Sexual Offences in Western Australia, 51-52; Daly and Bouhours (n 208).

<sup>207</sup> ABS, *Personal Safety – Australia* (8 November 2017) <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release#experience-of-violence>.

In Australia, Canada, England, Wales, Scotland and the USA,<sup>208</sup> surveys indicate that across these countries only around 14 percent of people who have experienced sexual violence report it to the police. Additionally, victims who do report are often repeat victims (especially in the intimate partner context), suffering multiple sexual assaults before reaching out to the police (section 2.7).<sup>209</sup>

Reasons underlying non-reporting are complex and include:<sup>210</sup>

- Confusion, shame, embarrassment, guilt or shock.<sup>211</sup>
- Fear of the person who has perpetrated sexual violence and the consequences of reporting.
- Fear that they will not be believed.
- Victims themselves may accept misconceptions about sexual violence believing that what they experienced is not defined as a sexual offence.<sup>212</sup> Some victims may compare their experiences to preconceived 'scripts' thus precluding themselves 'victim status',<sup>213</sup> or they may blame themselves for its occurrence.<sup>214</sup>
- Victims may not regard the incident as a serious offence.<sup>215</sup>
- Victims feeling that they could deal with it themselves.<sup>216</sup>
- Victims lack trust in the justice system.<sup>217</sup> Many people may be aware that sexual violence, even when formally reported, infrequently results in charges being laid when there is no evidence of physical injury or witnesses.<sup>218</sup>

Research also shows that, consistent with misconceptions about sexual violence, if the victim was intoxicated, they may not report at all or may not report immediately (section 2.4).<sup>219</sup>

For people from culturally and linguistically diverse communities, cultural interpretations of violent behaviour, lack of culturally appropriate services, language differences and lack of trust in police may be some of the explanations why reporting does not occur.<sup>220</sup> Some victims from culturally and linguistically diverse communities may not report or take time to report because they are not aware of available resources or may not know where to report.<sup>221</sup>

### 3.1.1 Ongoing or Past Relationship with the Person Who Committed the Sexual Violence

The misconception that 'real' sexual violence is perpetrated by a stranger (section 2.1) directly impacts on decisions about reporting. As observed earlier (section 1.1), the harm in sexual violence can best be understood as an attack on a person's autonomy by behaviours embedded within ongoing

<sup>208</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 4.

<sup>209</sup> Tolmie, 'Considering Victim Safety' (n 40) 208.

<sup>210</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 3.

<sup>211</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 26-27. AIWH reports that one in 4 women (26 percent, or 143,000) who did not contact the police also said it was because they felt ashamed or embarrassed about the incident (AIHW, *Sexual Assault in Australia* (n 123) 5).

<sup>212</sup> Gavey, *Just Sex?* (n 117) 136-165.

<sup>213</sup> Rachel Thompson, 'Unacknowledged Rape: The Sexual Assault Survivors Who Hide Their Trauma – Even from Themselves', *The Guardian* (online 26 August 2021) <https://www.theguardian.com/society/2021/aug/26/unacknowledged-the-sexual-assault-survivors-who-hide-their-trauma-even-from-themselves>.

<sup>214</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 3.

<sup>215</sup> ABS, *Sexual Violence – Victimization* (n 50).

<sup>216</sup> AIHW, *Sexual Assault in Australia* (n 123) 5.

<sup>217</sup> VLRC, *Improving the Justice System Responses to Sexual Violence* (n 1) 27.

<sup>218</sup> Cossins, 'Cross-Examination in Sexual Assault Trials' (n 177) 452; Wendy Lacombe et al, 'I think It's Rape and I Think He Would Be Found Not Guilty': Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611.

<sup>219</sup> Courtney Ahrens, Janna Stansell and Amy Jennings, 'To Tell or Not to Tell: The Impact of Disclosure on Sexual Assault Survivors' Recovery' (2010) 25(5) *Violence and Victims* 631 ('To Tell or Not to Tell') <https://doi.org/10.1891/0886-6708.25.5.631>.

<sup>220</sup> Mitra-Kahn, Newbigin and Hardfeldt, *Invisible Women* (n 12) 19-20.

<sup>221</sup> Ahrens, Stansell and Jennings, 'To Tell or Not to Tell' (n 219); Georgia Winters et al, 'Why Do Child Sexual Abuse Victims Not Tell Anyone About Their Abuse? An Exploration of Factors that Prevent and Promote Disclosure' (2020) 38(6) *Behavioral Sciences & the Law* 586 <https://doi.org/10.1002/bsl.2492>.

relations. Sexual violence is often perpetrated by intimate partners and family members at home.<sup>222</sup> The fact that the victim and the person who used sexual violence have had previous (consensual) sexual intercourse is also commonly identified as a barrier to reporting.<sup>223</sup>

### 3.1.2 Lack of Physical Injuries

Despite the fact that sexual violence rarely involves the use of physical force (sections 1.3 and 2.3) whether force was used influences victims' reporting decisions. When a person used physical force, victims are more likely to report sexual violence.<sup>224</sup> The PSS found that women were more likely to report the most recent sexual assault if they sustained physical injury (33 percent reported, compared to 7.5 percent for those who were not physically injured)<sup>225</sup> and consulted a health professional on the physical injuries sustained (67 percent, compared with 18 percent who did not consult a health professional).<sup>226</sup>

As observed earlier, since people who are convicted of or charged with a sex offence often have had, or continue to have, a relationship with the victim, they often do not use physical violence when committing the sexual offence, rather they rely on coercive control, including through psychological tactics, threats and grooming to perpetrate sexual violence (sections 1.1, 2.2-2.3).<sup>227</sup>

### 3.1.3 Children reporting

It may be especially difficult for child victims to report sexual violence. The PSS found that the average age at which the reported childhood sexual abuse commenced was 8.8 years and for children who experienced both physical and sexual abuse, the age was lower, at 6.8 years old.<sup>228</sup> Young children often do not recall the precise details of the violence.<sup>229</sup> Adults are more likely to report sexual abuse of a child than the child themselves.<sup>230</sup> As previously mentioned (section 2.6) most children who have experienced sexual violence report their abuse one or more years after it occurred or not at all.<sup>231</sup> A recent report observed that taking time to report was particularly common in situations where the child was abused in an institutional context where the perpetrator was in a position of trust or authority.<sup>232</sup> Difficulties in reporting for Aboriginal and Torres Strait Islander children and children living with disability can be compounded (section 1.3.1).

<sup>222</sup> ABS, *Sexual Violence – Victimization* (n 50).

<sup>223</sup> Ahrens, Stansell and Jennings, 'To Tell or Not to Tell' (n 219); Oona Brooks-Hay, 'Doing the "Right Thing"? Understanding Why Rape Victim-Survivors Report to the Police' (2020) 15(2) *Feminist Criminology*, 17 <https://doi.org/10.1177/1557085119859079>; Jeffrey Jones et al, 'Why Women Don't Report Sexual Assault to the Police: The Influence of Psychosocial Variables and Traumatic Injury' (2009) 36(4) *The Journal of Emergency Medicine* 41 <https://doi.org/10.1016/j.jemermed.2007.10.077>.

<sup>224</sup> Patrick Tidmarsh, Gemma Hamilton and Stefanie Sharman, 'Changing Police Officers' Attitudes in Sexual Offense Cases: A 12-Month Follow-Up Study' (2020) 47(9) *Criminal Justice and Behaviour* 1176, 1176-1177 ('Changing Police Officers' Attitudes') <https://doi.org/10.1177/0093854820921201>.

<sup>225</sup> Australian Bureau of Statistics 2021, *Sexual Violence – Victimization* (24 August 2021).

<sup>226</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime* (n 1) 9.

<sup>227</sup> Tidmarsh, Hamilton and Sharman, 'Changing Police Officers' Attitudes' (n 229) 1176-1177.

<sup>228</sup> ABS, *Characteristics and Outcomes of Childhood Sexual Abuse* (6 May 2019) <https://www.abs.gov.au/articles/characteristics-and-outcomes-childhood-abuse>.

<sup>229</sup> AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) 3. See section 2.8 for discussion and further references.

<sup>230</sup> Commonwealth, RCIRCSA, *Criminal Justice Report: Executive Summary and Parts I-II* (n 169) 19.

<sup>231</sup> Cossins, 'Cross-Examination in Sexual Assault Trials' (n 177) 452; AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) 3, see [1.4.1].

<sup>232</sup> Commonwealth, *RCIRCSA Final Report – Nature and Cause Vol 2* (n 33) 67.

### 3.1.4 Aboriginal and Torres Strait Islander People and Reporting

It has been estimated that up to 90 percent of incidents of violence perpetrated against Aboriginal and Torres Strait Islander women are unreported.<sup>233</sup> Aboriginal and Torres Strait Islander women face particular barriers in relation to reporting and disclosure, including:<sup>234</sup>

- Privacy concerns in close communities.<sup>235</sup>
- Fear of reprisal/isolation from their family and community.<sup>236</sup>
- Lack of confidence in contacting the justice system.<sup>237</sup>
- If located in regional/rural Australia, a lack of support services.<sup>238</sup>
- Systemic racism.
- Fear of child removal.<sup>239</sup>

The fear of child removal is an especially prominent barrier for reporting for Aboriginal and Torres Strait Islander women, due to the intergenerational trauma of forced child removal from families<sup>240</sup> and current practices of child removal. Aboriginal and Torres Strait Islander children in Western Australia are 16.7 times more likely to be removed from their families by child protection services than non-Indigenous children, the highest rate across all States and Territories.<sup>241</sup>

Some research suggests that Aboriginal and Torres Strait Islander children interviewed by police may be reluctant to speak due to fear of having a community member arrested due to the disclosure, the child being removed to protective services, or feelings of shame,<sup>242</sup> timidity, language barriers and fear of disapproval from their community.<sup>243</sup> The adversarial nature of the police interview style can also create a barrier to disclosure.<sup>244</sup>

Aboriginal people have high levels of distrust and reservations about police.<sup>245</sup> As we considered above (section 1.2.2), sexual violence involving Aboriginal and Torres Strait Islander people and communities must be considered within the context of colonisation.<sup>246</sup>

## 3.2 Police Practices and Attitudes

As discussed in section 1.3, police practices and attitudes that employ inaccurate narratives such as the misconceptions about sexual violence identified in (sections 2.1-2.13) themselves cause primary injuries to complainants. In addition, those practices and attitudes can create obstacles for complainants in criminal justice processes.

<sup>233</sup> ANROWS, *Improving Family Violence Legal and Support Services* (n 158) 3.

<sup>234</sup> Guggisberg, 'Aboriginal Women's Experiences' (n 134) 197

<sup>235</sup> Ibid.

<sup>236</sup> Ibid; ANROWS, *Improving Family Violence Legal and Support Services* (n 158) 3.

<sup>237</sup> Guggisberg, 'Aboriginal Women's Experiences' (n 134) 188.

<sup>238</sup> ANROWS, *Improving Family Violence Legal and Support Services* (n 158) 2.

<sup>239</sup> Ibid 3.

<sup>240</sup> Harry Blagg et al, *Innovative Models in Addressing Violence Against Indigenous women: Key Findings and Future Directions* (Report, ANROWS Research to Policy and Practice No 1, January 2018) 2 <https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/4.3-Blagg-Key-Findings-and-Future-Directions.pdf>.

<sup>241</sup> SNAICC, *Family Matters* (n 77) 30.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Meaghan Danby, Belinda Guadagno and Stefanie Sharman, 'Interviewers' Perceptions of Interviewing Aboriginal Australian Children' (2021) 22(4) *Police Practice and Research* 1356, 1356 <https://doi.org/10.1080/15614263.2020.1865957>.

<sup>246</sup> Mitra-Kahn, Newbiggin and Hardfeldt, *Invisible Women* (n 12) 19-20; Atkinson, *Trauma Trails* (n 69); McGlade, 'Understanding Colonisation and Trauma' in *Our Greatest Challenge* (n 28); Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press: Sydney, 2008); Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Crows Nest: Allen & Unwin, 2001).

The quality of the complainant's initial contact with the police can determine whether the complainant will continue to interact with the criminal justice system.<sup>247</sup> As we have shown (Part 3), sexual offence cases have high attrition rates, especially at the police investigative stage.<sup>248</sup>

There are mixed results in evaluations regarding how police acceptance of misconceptions about sexual violence impacts their decision-making in sexual violence matters.<sup>249</sup> A Danish study by Hansen and colleagues<sup>250</sup> hypothesised that there are four main characteristics that significantly predict if a case will continue to prosecution once reported to police:

1. The perpetrator is a stranger;
2. The victim has physical injuries;
3. The victim resisted; and
4. The victim was not intoxicated.

All four characteristics correspond directly to the misconceptions about sexual violence we have already highlighted (sections 2.2-2.5).

Misconceptions about sexual violence influence police views of the victim's credibility and impact on the way police exercise their discretion to decide to investigate and pursue charges.<sup>251</sup> In their review of studies in the United Kingdom and USA, Tidmarsh, Hamilton and Sharman found that high levels of police acceptance of misconceptions about sexual violence led to a higher attribution of victim responsibility for the sexual violence,<sup>252</sup> and impacted on the likelihood of police questioning the victim's credibility (for example, if victims were physically assaulted (section 2.2.3) their credibility was less likely to be questioned by police).<sup>253</sup>

Police are often influenced by misconceptions about people with intellectual and psychological disabilities and their experience of sexual violence (section 2.13). For example, research suggests that police may choose not to take a sexual assault complaint from a victim or witness with a disability for two main reasons. First, due to doubts about the ability of the person to provide the truth, and second, belief that although they accept the person is telling the truth, the police officer doubts that the report will lead to a conviction. Because of these doubts, the choice not to proceed with a charge may be made.<sup>254</sup>

People who have psychological or intellectual disabilities and experience sexual violence are especially vulnerable to having their complaints not investigated by police, due to a decision to not prioritise allegations made by people with disabilities. This may result from police privileging the claims of support staff/disability service providers about the sexual violence over the claims made by the person with a disability.<sup>255</sup> People living with disability often lack the required support systems to make

<sup>247</sup> Commonwealth, RCIRCSA, Criminal Justice Report: Executive Summary and Parts I-II (n 169) 20; Douglas, Women, *Intimate Partner Violence and the Law* (n 64) 121-123.

<sup>248</sup> Tidmarsh, Hamilton and Sharman, 'Changing Police Officers' Attitudes' (n 229) 1176; Appendix: Analysis of Sexual Offences in Western Australia, 46, 51-52.

<sup>249</sup> Tidmarsh, Hamilton and Sharman, 'Changing Police Officers' Attitudes' (n 229) 1177.

<sup>250</sup> Nina Hansen et al, 'Are Rape Cases Closed Because of Rape Stereotypes? Results from a Danish Police District' (2018) 71(1) *Nordic Psychology* 51 <https://doi.org/10.1080/19012276.2018.1470552>, as discussed in Tidmarsh, Hamilton and Sharman, 'Changing Police Officers' Attitudes' (n 229) 1177.

<sup>251</sup> Tidmarsh, Hamilton and Sharman, 'Changing Police Officers' Attitudes' (n 229) 1177.

<sup>252</sup> Hine and Murphy, 'Influence of 'High' vs. 'Low' Rape Myth Acceptance' (n 114).

<sup>253</sup> Eryn O'Neal, "'Victim is Not Credible": The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants' (2019) 36(1) *Justice Quarterly* 127, as discussed in Tidmarsh, Hamilton and Sharman, 'Changing Police Officers' Attitudes in Sexual Offense Cases' (n 224) 1178.

<sup>254</sup> Commonwealth, RCIRCSA, Criminal Justice Report: Executive Summary and Parts I-II (n 169) 30; Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 11.

<sup>255</sup> Ibid.



the report in the first place<sup>256</sup> and at the investigative stage, police may determine, based on the person's reliance on a support person, that the person's credibility is reduced.<sup>257</sup>

### 3.3 Trial Processes and Implications

American psychiatrist Judith Herman has vividly distilled the shortcomings of the trial process from the victim's perspective.<sup>258</sup> She highlights how the wishes and needs of victims are often diametrically opposed to what legal proceedings require:

Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience. Victims often fear direct confrontation with their perpetrators; the court requires a face-to-face confrontation between a complaining witness and the accused. Indeed, if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.<sup>259</sup>

Thus, trial processes that respond to the needs of victims are likely to improve the process for people who have experienced sexual violence. One of the aspects of the trial that continues to be highlighted as particularly stressful for victims, in part for the reasons identified by Herman, is cross-examination and attacks on the victim's credibility through this process.

#### 3.3.1 Cross-Examination is a Stressful Experience.

Given that sexual violence often takes place in private (section 2.2) and the victim often is not physically injured (sections 1.3 and 2.3), the victim is frequently the key witness for the prosecution and the focus of the trial is on the credibility and reliability of the complainant's testimony.<sup>260</sup> Accurately recalling and recounting details of the incident is difficult enough for many victims and these difficulties are exacerbated in the high-pressured circumstances of cross-examination (section 2.10).<sup>261</sup> Research has consistently found that complainants in sexual offence trials, regardless of age, report that the interrogative, complex questioning of cross-examination is one of the most stressful aspects of the trial process.<sup>262</sup>

Research has also found that complainants in sexual offence trials are more prone than complainants in other types of trials to making errors and response inaccuracy can be exacerbated by cross-examination questions that are closed, leading, repeated and/or complex.<sup>263</sup> In effect, the accuracy of witness/complainant recounts can be adversely impacted by the typical methods used in cross-

<sup>256</sup> Ibid.

<sup>257</sup> See generally, Benedet and Grant, *Hearing the Sexual Assault Complaints* (n 199) 537.

<sup>258</sup> Judith Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571.

<sup>259</sup> Ibid 574.

<sup>260</sup> Commonwealth, RCIRCSA, Criminal Justice Report: Executive Summary and Parts III-VI (August 2017) 423, discussing Justice Simpson's reasoning in *R v XY* [2013] NSWCCA 121 [167], [170]; (2013) 84 NSWLR 363, 400 [https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final\\_report\\_-\\_criminal\\_justice\\_report\\_-\\_parts\\_iii\\_to\\_vi.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_iii_to_vi.pdf); Nicholas Cowdery, Inquiry into Child Sexual Assault Matters (Submission No 27) (2002) Submission to the NSW Legislative Council, Standing Committee on Law and Justice, DPP: Sydney, 2 cited in AIJAI, *Bench Book for Children Giving Evidence in Australian Court* (n 19) 16.

<sup>261</sup> Tolmie, 'Considering Victim Safety' (n 40) 210.

<sup>262</sup> Martine Powell et al, 'An Evaluation of the Question Types used by Criminal Justice Professionals with Complainants in Child Sexual Assault Trials' (2022) 55(1) *Journal of Criminology* 106, 118 ('An evaluation of the Question Types') <https://doi.org/10.1177/26338076211068182>.

<sup>263</sup> Ibid 109.



examination to elicit information.<sup>264</sup> Inaccurate accounts may be assumed to be less credible or to result from false claims, when it may often be the process of cross-examination itself that contributes to the inaccuracy of the testimony (sections 2.10 and 3.3.3).

The complainant's cognitive capacity linked to their age (section 3.3.2) and the presence of any impairments will also amplify the risks for inaccurate evidence to be drawn out in cross-examination.<sup>265</sup> A 2019 systematic review of the research, found that people living with intellectual disability are at risk of higher levels of suggestibility following delays between the initial incident and the questioning.<sup>266</sup> Participants living with an intellectual disability may simply agree with the statement due to being unable to fully understand the question.<sup>267</sup>

### 3.3.2 Children and Cross-Examination

Child complainants of sexual violence often do not have an accurate memory of specific details about the incident(s) of sexual violence such as dates and locations and their response accuracy is particularly susceptible to the way criminal justice professionals ask questions.<sup>268</sup> Children in sexual offence trials may answer questions incorrectly or comply with requests asked of them, even if they do not understand the question.<sup>269</sup> This can stem from several factors such as children assuming adults will ask honest and genuine questions, wanting to be compliant and feelings of inferiority.<sup>270</sup> Repeated questions can encourage children to change responses due to feeling their original response was incorrect,<sup>271</sup> they often want to please the interviewer and/or want the process to be over with (especially since children tire rapidly and have developmentally shorter attention spans).<sup>272</sup> Additionally, feelings of powerlessness may lead children to change their answers to give what they think is the correct response. This can be informed by the hierarchical dynamics of adult-child and adversary-complainant relationships.<sup>273</sup>

Child complainants may be particularly likely to change their answers.<sup>274</sup> Annie Cossins suggests that these shifting answers can further discredit child complainants of sexual assault, as they affirm the long-standing misconception that children have a propensity for lying.<sup>275</sup>

In Powel and colleagues' study of 156 court transcripts, court professionals were observed to rarely adapt their questioning to children.<sup>276</sup> In international research, children have been found to make fewer errors/confabulation/'don't know' responses when interviews are supportive, rather than adversarial and involving cross-examination style questions, but all children are vulnerable to the pressure of questioning that challenges the information they have provided, with children changing their mind on at least half of their answers during cross-examination.<sup>277</sup> In their analysis of interviews

<sup>264</sup> Anne Cossins, 'Judicial Intervention: The Best Control of Cross-Examination?' in *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan UK, 2020) 425, 438.

<sup>265</sup> Ibid 108.

<sup>266</sup> Joanne Morrison et al., 'Communication and Cross-examination in Court for Children and Adults with Intellectual Disabilities: A Systematic Review' (2019) 4(23) *The International Journal of Evidence and Proof* 366, 384 ('Communication and Cross-examination') <https://doi.org/10.1177/1365712719851134>.

<sup>267</sup> Ibid.

<sup>268</sup> Royal Commission into Institutional Responses to Child Sexual Abuse (n 10) 39.

<sup>269</sup> See generally, Powell et al, 'An Evaluation of the Question Types' (n 262).

<sup>270</sup> Ibid 108.

<sup>271</sup> Ibid 109.

<sup>272</sup> Ibid.

<sup>273</sup> Cossins, 'Cross-Examination in Sexual Assault Trials' (n 177) 343.

<sup>274</sup> Ibid 341.

<sup>275</sup> Ibid.

<sup>276</sup> Powell et al, 'An Evaluation of the Question Types' (n 262) 120.

<sup>277</sup> Morrison et al, 'Communication and Cross-examination' (n 266) 387.

with 43 criminal justice professionals, Westera and colleagues found that developmentally inappropriate questioning was frequent and adaptation was limited.<sup>278</sup>

### 3.3.3 Trauma and Memory

Generally, research about sexual violence, trauma and memory has found that the responses of victims vary and the impact of trauma on the accuracy of recollection is diverse, ranging from fragmented and impaired, to an intensified memory.<sup>279</sup> Victims of one-off traumatic events do not usually recall all details clearly; they may only recall 3 to 5 details clearly.<sup>280</sup> Meanwhile, if the abuse occurs repeatedly, it can make it difficult for the victim to describe the distinct situational details.<sup>281</sup>

The memory of distinct details is often called into question to test the credibility of a sexual violence complainant (section 2.10). However, this approach contradicts the research that shows that during threatening events, the brain will only focus on central details for survival and will not encode peripheral details such as the words or narrative surrounding the memory, or the context and time sequence information.<sup>282</sup> As a consequence of sexual violence trauma, memories can be impaired by amnesic gaps or amnesia, leading to differences in the victim's accounts and memory inconsistencies.<sup>283</sup> However, some victims of sexual violence may have vividly accurate memories and recall significant details.<sup>284</sup>

Although some research highlights the difficulty victims of sexual violence may have in recollecting details after lengthy delays between the incident and reporting, and reporting and trial, research also identifies that memories take some time to stabilise and the victim may not be able to retrieve everything encoded in their brain due to stress/trauma immediately following an incident of sexual violence.<sup>285</sup> Some trauma-informed police officers who operate in Canada will only conduct a brief initial interview when the sexual assault is first reported, then a much more detailed interview several days later, to allow the victim to consolidate memories of the experience.<sup>286</sup>

Notably in research involving mock jury trials, some jurors were suspicious of complainants who had a detailed recall of the details of the sexual violence, believing that it had been rehearsed or was deceptive.<sup>287</sup>

### 3.3.4 Intoxication

People who use sexual violence are more likely to target victims who are intoxicated.<sup>288</sup> However, the victim's alcohol or drug consumption is often an intense focus in the investigative stage as part of the victim's credibility (section 2.5).

In contrast, an accused's use of alcohol in executing the sexual assault is rarely in focus regarding the possibility of their opportunistically taking advantage of the situation or using mutual drinking as a 'tool' to excuse their actions. Research involving men detained by police for sexual assault found

<sup>278</sup> Nina Westera et al, 'Courtroom Questioning of Child Sexual Abuse Complainants: View of Australian Criminal Justice Professions' (2019) 7(1) *Salus Journal* 20 [https://researchoutput.csu.edu.au/ws/portalfiles/portal/37552994/37552725\\_published\\_article.pdf](https://researchoutput.csu.edu.au/ws/portalfiles/portal/37552994/37552725_published_article.pdf).

<sup>279</sup> Haskell and Randall, *The Impact of Trauma* (n 131) 20.

<sup>280</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 7.

<sup>281</sup> Commonwealth, RCIRCSA, Criminal Justice Report: Executive Summary and Parts I-II (n 169) 38.

<sup>282</sup> Haskell and Randall, *The Impact of Trauma* (n 131) 21.

<sup>283</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 7.

<sup>284</sup> Haskell and Randall, *The Impact of Trauma* (n 131) 20.

<sup>285</sup> Ibid 14.

<sup>286</sup> Ibid 19.

<sup>287</sup> James Chalmers, Fiona Leverick and Vanessa Munro, 'Handle with Care: Jury Deliberation and Demeanour-based Assessments of Witness Credibility' (2022) 26(4) *The International Journal of Evidence and Proof* 1, 4 ('Handle with Care') <https://doi.org/10.1177/13657127221120955>.

<sup>288</sup> Guggisberg, 'Aboriginal Women's Experiences' (n 134) 195; Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 7.

that many of the men felt that their own use of illicit drugs and/or alcohol contributed to the offence for which they were detained. Of about 3,900 male police detainees interviewed throughout 2017 and 2018, 125 were detained for sexual assault. Of these 125:

- 8 percent believed drug use contributed to the offence;
- 28 percent believed alcohol contributed to the offence; and
- 4 percent believed both drugs and alcohol contributed.<sup>289</sup>

Findings on the impact of intoxication on memory are mixed. Studies show that intoxication can lead to memory discrepancies, blackouts and other consequences that prevent details from entering long-term memory.<sup>290</sup> The credibility of intoxicated victims is further harmed by the wider misconceptions that victims who are intoxicated have often consented to the sex but are later regretful and choose to falsely complain about sexual violence (sections 2.4 and 2.11).<sup>291</sup>

### 3.3.5 Victim's Delivery of Evidence

Research suggests that people's accuracy in identifying when another person is lying is poor, mainly due to inaccurate beliefs about the cues of deception, such as avoiding eye contact, fidgeting, blinking more, using filler words (such as "umm" and "ahh") as well as certain bodily and facial movements.<sup>292</sup> This is especially concerning for adults who may have a psychological or cognitive impairment that exacerbates this behaviour, (for example, people with autism may be judged as deceptive due to their fidgeting and lack of eye contact).<sup>293</sup>

Research suggests that victims are expected to be emotionally consistent if they are to be believed,<sup>294</sup> but this expectation is contrary to psychological evidence that highlights that emotional inconsistency is not unusual (section 2.8).<sup>295</sup> In mock jury trials, rape complainants with distressed emotional demeanour were perceived as more credible than their emotionally-controlled counterparts and complainants who displayed other types of emotions (for example, anger).<sup>296</sup>

<sup>289</sup> AIHW, *Sexual Assault in Australia* (n 126) 11.

<sup>290</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 7.

<sup>291</sup> Ibid.

<sup>292</sup> Chalmers, Leverick and Munro, 'Handle with Care' (n 287).

<sup>293</sup> Ibid 7.

<sup>294</sup> Tidmarsh and Hamilton, *Misconceptions of Sexual Crime Against Adult Victims* (n 13) 6.

<sup>295</sup> Ibid.

<sup>296</sup> Faye Nitschke, Blake McKimmie and Eric Vanman, 'A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complainants: Does Complainant Distress Influence Credibility?' (2019) 145 (10) *Psychological Bulletin* 953.

## CONCLUSION

Compelling social questions are being asked about what we *should* consider fair and just in the ways we act sexually towards others and also about how we can effectively bring to account those who act in ways that we have no reasonable doubt is harmful sexual conduct. Both these problems are the concern of criminal law reform.

In Part 1, we discussed the nature of the harmfulness in sexual violence. The law must adjust itself to social demands for accountability for sexual conduct that hurts others. That new kinds of behaviours are being called to account does not mean the hurt – very often crippling hurt – is new. Standards of fairness and access to justice are being insisted upon in ways that present complex problems for the law. If research is looked at honestly and creatively<sup>297</sup> it shows that the harmfulness in sexual violence is only possible to understand within relational settings, both on an individual and societal level – and that it often causes astronomical injuries.

The misconceptions we discussed in Part 2 demonstrate that detailed – but empirically inaccurate – cultural ideas about sexual violence are creating obstacles to a clear conceptualisation of sexual violence as it actually occurs. The 13 misconceptions we identified about the causes and contexts of sexual violence act as heuristics for interpreting information, including for police, legal professionals, judges, jury members and even sometimes for people who have been subjected to sexual violence. These misconceptions provide focal points for operationalising change.

In Part 3, we discussed some of the myriad problems experienced by sexual offence complainants in the criminal justice process in three areas: barriers to reporting, police practices and attitudes, and trial processes. Obstacles faced by complainants through these phases of the process are reflected in the disproportionate attrition rates of sexual offence matters. Yet, it is clear the problems faced by complainants cannot be seen in isolation as only procedural problems; rather they arise from the substantive social and criminal law problems discussion in Parts 1 and 2.

While procedural and evidentiary principles aimed at ensuring a fair trial process are important, the criminal law has a crucial role to play in denouncing sexual violence in such a way that accurately captures the harm that is inflicted on and experienced by victim-survivors and in ensuring those who perpetrate it are held accountable.

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<sup>297</sup> Conaghan, 'The Essence of Rape' (n 3) 157.

## APPENDIX

### Analysis of Sexual Offences in Western Australia

16 December, 2022

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#### Abstract

This report analyses sexual offences in Western Australia (WA), and in some instances across Australia, using data collected from the Western Australia Police Force (WA Police) and the Australian Bureau of Statistics (ABS). Recent sexual offences are more prevalent than historical sexual offences, although the combination represents a small proportion of the total selected offences charged by the WA Police. However, the application of the Western Australia Crime Harm Index (WACHI) shows the greatest disparity between the volume of sexual offences and harm associated with this kind of offending. As such, sexual offences in WA can be seen to inflict considerable harm on the community. Most sexual offenders are male and aged between 25 to 44 years. In addition, Indigenous prisoners represent less than a third of those sentenced for sexual offences in WA. Victims of sexual offences are mostly female and aged between 10 to 17 years. Neither the WA Police nor the ABS record victims of sexual violence by reference to Indigenous/non-Indigenous status in Western Australia as the data is not of sufficient quality. Reports of sexual offences in WA represent a small proportion of all offences that are reported. Of the sexual offences reported, most were reported within six months of the date of the offence. Police proceed with a comparatively low number of sexual offences compared to other types of reported offences. Sexual offences that are proceeded with have a low conviction rate and one of the highest withdrawal rates in WA compared to other offence types. Most defendants who are convicted of a sexual offence are convicted as a result of pleading guilty rather than after a trial.

At the commencement of each section we identify the source of the data we report on.



## Prevalence of Sexual Offending

Table 1 below shows both the number of sexual offences and sexual offences as a percentage of all offences that were reported to police or otherwise became known to police each year in Western Australia between January 2007 – June 2022. The data for 2022 is only for the first 6 months. The 'selected offences' are those chosen by the [WA Police](#) (Western Australia Police Force, 2022a). Offences are classified as follows:

- Selected Offences Against the Person:
  - Homicide, Sexual Offences, Assault, Threatening Behaviour, Deprivation of Liberty and Robbery.
- All offences:
  - All of the above, Burglary, Stealing of Motor Vehicle, Stealing, Property Damage, Arson, Drug Offences, Receiving and Possession of Stolen Property, Regulated Weapons Offences, Graffiti, Fraud & Related Offences and Breach of Violence Restraint Order.

Table 1 shows the number of Sexual Offences and other offences against the person have increased over time. Therefore, the proportion of sexual offences in the total selected offences against the person has remained relatively unchanged. There is a sharp increase in both the total number of sexual offences and the total number of selected offences against the person from 2014-15. The proportion of sexual offences in the total of both selected offences against the person and all offences has remained constant with a slight increase in 2020 and 2021.

**Table 1: Count and Proportion of Sexual Offences Reported to or Otherwise Made Known to WA Police Each Year**

Year	Total Sexual Offences	Total Selected Offences Against the Person	Percent of Sexual Offences in the Total Selected Offences Against the Person	Total of all Offences	Percent of Sexual Offences in the Total of all Offences
2007	4211	32143	13.10	253185	1.66
2008	3921	31416	12.48	257191	1.52
2009	3933	32375	12.15	240163	1.64
2010	4409	31322	14.08	221452	1.99
2011	3740	31514	11.87	237554	1.57
2012	3953	33493	11.80	247861	1.59
2013	4363	35944	12.14	250983	1.74
2014	4844	36494	13.27	261383	1.85
2015	5463	42643	12.81	299748	1.82
2016	5732	47361	12.10	311557	1.84
2017	6040	45278	13.34	289017	2.09
2018	6247	44817	13.94	287493	2.17
2019	6035	46309	13.03	289700	2.08
2020	7858	51881	15.15	251905	3.12
2021	7099	53936	13.16	259578	2.73
2022	2852	26474	10.77	127147	2.24

The time series graphs below (Figures 1A, 1B, 2A, 2B, 3A and 3B) show the variation in numbers of reported sexual offences in Western Australia recorded by the WA Police from January 2007 – June 2022.

Sexual offences are grouped by metropolitan and regional locations (see Figures 2A and 2B). These locations are based on the Australian Bureau of Statistics Estimated Resident Population as at June 2020, with the population of the WA Metropolitan Region being 2,142,569 and the population of the Regional region being 539,688 (Western Australian Police Force, 2022b, 4, 7).

Sexual offences are also grouped by recent and historical sexual offences (see Figures 3A and 3B):

- Recent sexual offences refer to sexual offences that were reported within 90 days of the offence occurring.
- Historical sexual offences refer to sexual offences that were reported more than 90 days after the offence occurred (Western Australian Police Force, 2022a).

Sexual offences are further grouped by sexual assault and non-assaultive sexual offences:

- Sexual assault refers to offences resulting in physical contact, or the intent of contact, of a sexual manner that is non-consensual.
- Non-assaultive sexual offences refer to offences other than sexual assault (Western Australian Police Force, 2022a). Further information regarding the division of sexual assault and non-assaultive sexual offences can be found on the ABS website [here](#).

## WA Overall

There are some notable spikes in numbers of both recent and historical non-assaultive sexual offences (see Figures 1A and 1B). The first spike in Figure 1A (recent offences) occurs in the first month of 2010 in which 556 offences were recorded, following the last month of 2009 in which only 46 offences were recorded. The second spike in Figure 1A occurs in June of 2020 in which 844 offences were recorded, following the previous month of May in which only 224 offences were recorded. In Figure 1B (historical offences), the spike occurs in February of 2016 in which 287 offences were recorded following the previous month of January in which only 11 offences were recorded.

Sexual Offences in Western Australia Between January 2007 - June 2022

Fig. 1A

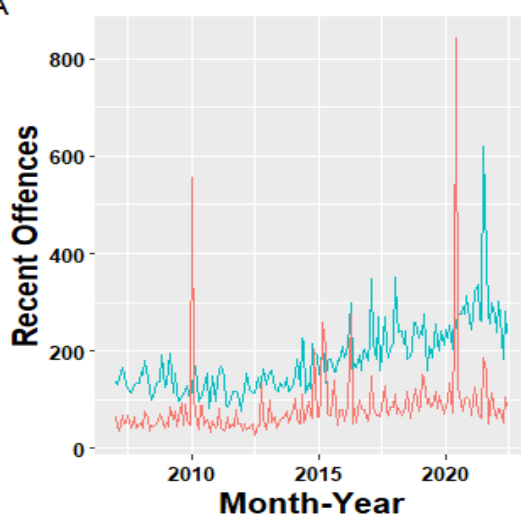
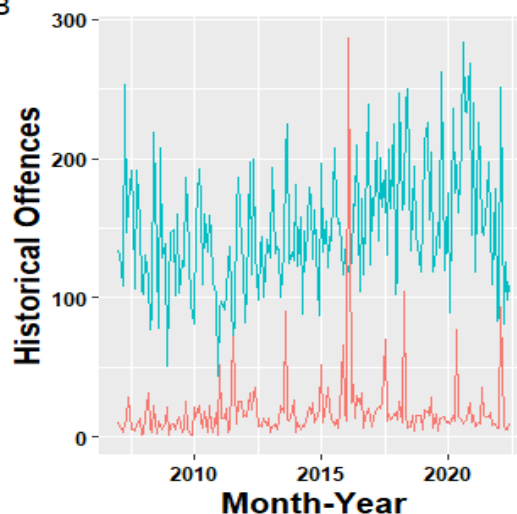


Fig. 1B



— Non-Assaultive — Assaultive

## Metropolitan Region

Given the metropolitan region data represented in Figure 2A are a subset of the data represented in Figure 1A, it is not surprising that the same spikes in numbers are identified. However, the spike identified above in Figure 1B does not occur in Figure 2B. Therefore this spike in numbers must have occurred outside the metropolitan area.

Sexual Offences in the Metropolitan Area Between January 2007 - June 2022

Fig. 2A

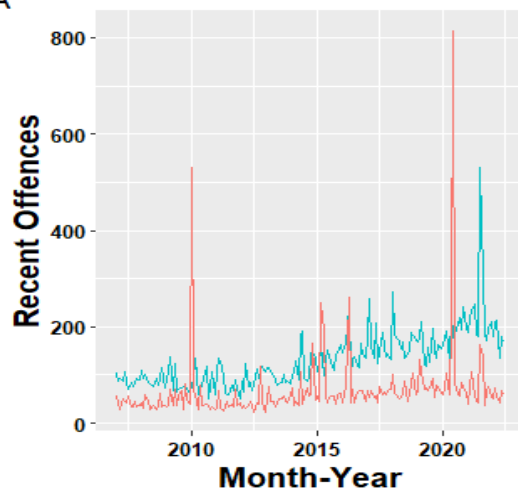
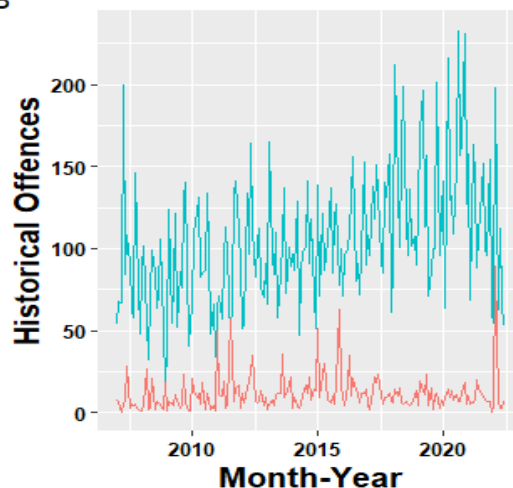


Fig. 2B



— Non-Assaultive — Assaultive

## Regional WA

As expected, the spike in reported historical non-assaultive sexual offences in 2016 occurred in regional WA. In addition, Figure 3A shows there are considerably fewer reports of recent sexual offences in the regional areas of WA compared with the metropolitan area.

Sexual Offences in Regional WA Between January 2007 - June 2022

Fig. 3A

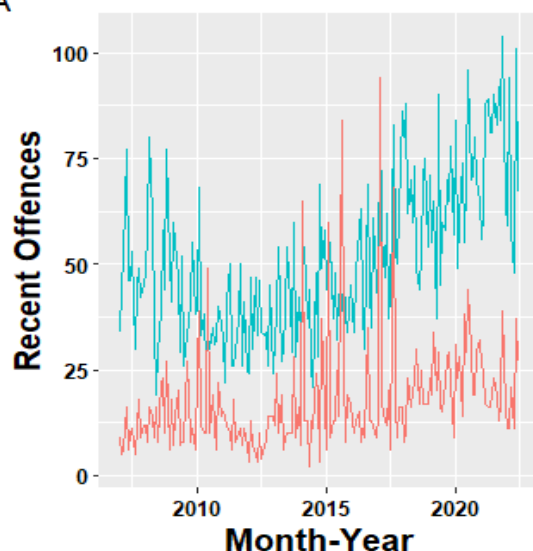
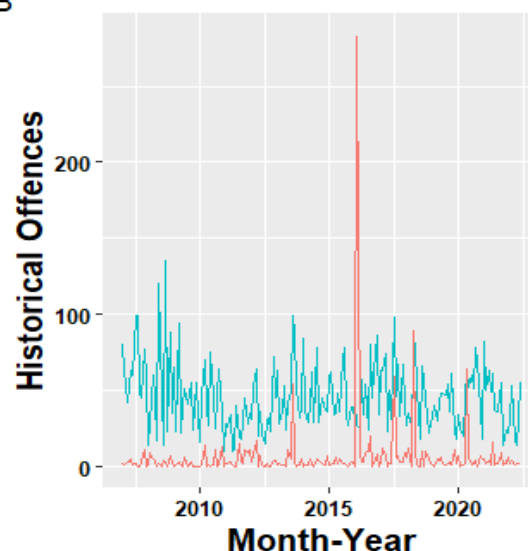


Fig. 3B



— Non-Assaultive — Assaultive

## Harmfulness of Sexual Offending

This section suggests one way of conceptualising the harm to the community from sexual offending compared with the harm to the community from other kinds of offending, using a Crime Harm Index (House & Neyroud, 2018). The offence data in this section is taken from the [WA Police](#) page (Western Australia Police Force, 2022a).

A crime harm index contains weighted values that represent the relative harm for each offence type using a numeric value. For example, a burglary offence is assigned the value of 39 and a sexual assault is 1140. These weighted harm values (**crime harm score**) were calculated from the median sentence length that a first-time offender would receive for such an offence in Western Australian courts (House & Neyroud, 2018).

**Harm to the community** for each offence type is calculated by multiplying the number of reported offences with the corresponding crime harm score.

Figure 4A shows the frequency (crime count) of a range of reported offences. The data represented in Figure 4A is used to show the total harm for the same offence types in Figure 4B.

Comparing the Frequency of Different Crime Types

Fig. 4A

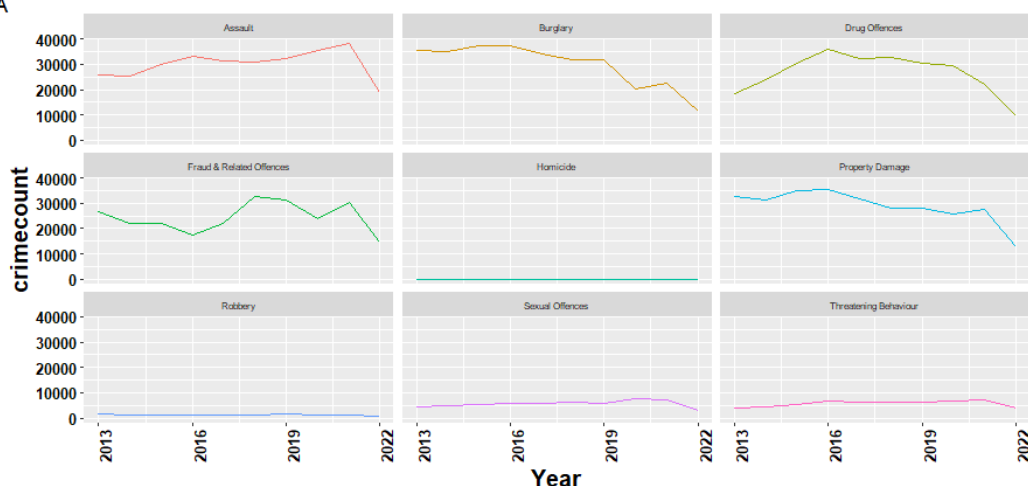


Figure 4A shows that reports of sexual offences are relatively uncommon, far less common for example, than assault, property offences and drug offences.

## Comparing Crime Harm of Different Crime Types

Fig. 4B

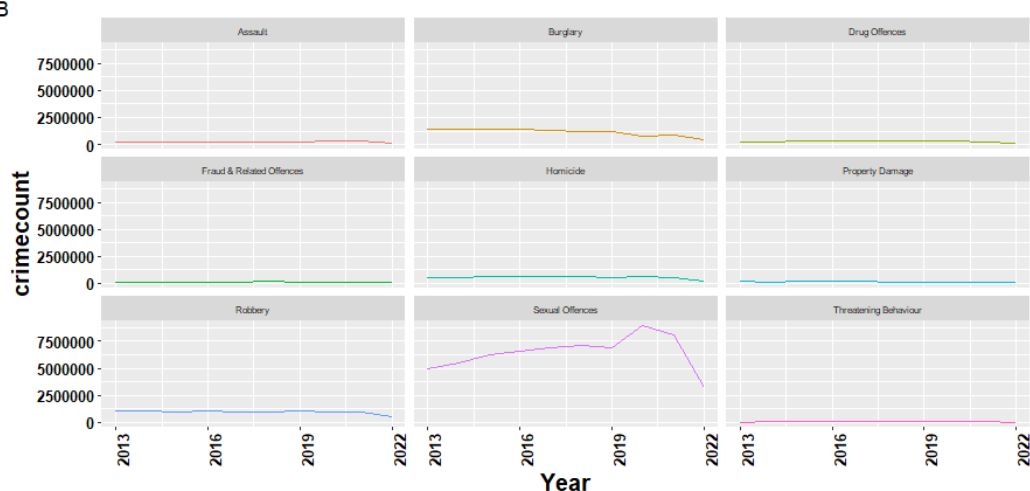


Figure 4B shows total harm for selected offence types. It shows that although reports of sexual offences are relatively uncommon, compared to all these other offence types, the community impact is greatest from sexual offending.

Note, however, that the total harm to the community in each year from sexual offences determined in this way is affected by the different reporting rates of historical sex offences because the harm to the community incurred by historical offences was incurred in a year before the reporting year.

The high total harm from sexual offences is similarly shown using the New Zealand Crime Harm Index (Curtis-Ham & Walton, 2018, 462). Further, there is likely to be a disproportionately lower reporting rate for sexual offences compared with other offences leading necessarily to lower levels of successfully prosecuted offences (above, sections 1.3 and 2.6). If this is taken into account it may be predicted that the total harm from sexual offences is even higher than reflected in these data.

Combining crime counts and crime harm scores in this way allows for an alternative method for allocating resources, evaluation of policing initiatives and priority assessment (House & Neyroud, 2018).



## Demographics

The demographic characteristics of sexual offenders represented in Figures 5A, 6A and 7 are sourced from the offenders table on the ABS *Sexual Assault - Perpetrators* page (Australian Bureau of Statistics, 2022a). The demographics of victims of sexual assault are sourced from the ABS *Sexual Violence - Victimization* page (Australian Bureau of Statistics, 2021a). Both are national statistics.

Figure 5A shows that most sexual offenders in Australia are aged between 25 and 44 years, and are male. The distribution of ages among sex offenders appears relatively equal.

Age and Gender of Sex Offenders in Australia 2019-2020

Fig. 5A

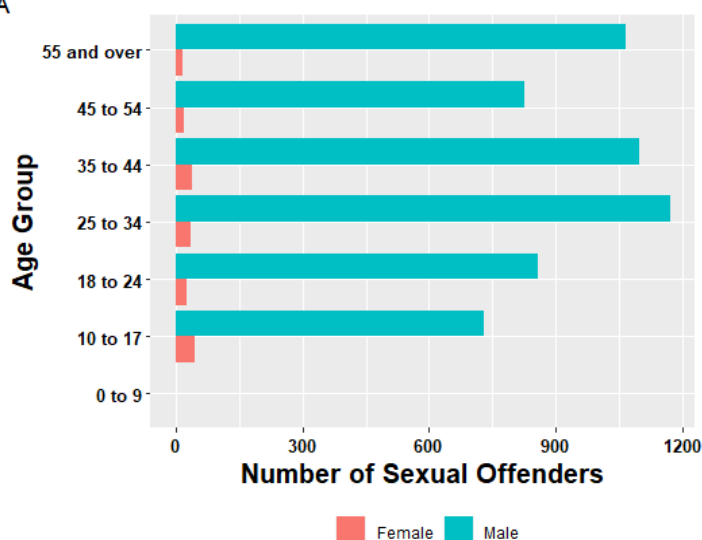
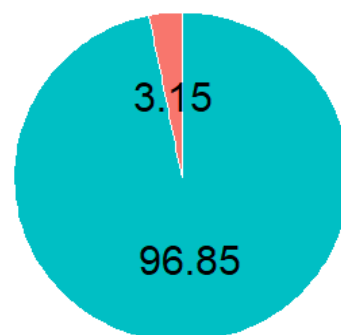


Fig. 5B



Figures 6A and 6B show most victims of sexual violence in Australia are aged between 10 and 17 years, and are female. Unlike the similar age distribution among sexual offenders (Figure 5A), there is an unequal distribution of ages among victims of sexual assault with a high proportion of victims being aged 10 to 17 years and female.

Age and Gender of Victims of Sexual Assault in Australia 2019-2020

Fig. 6A

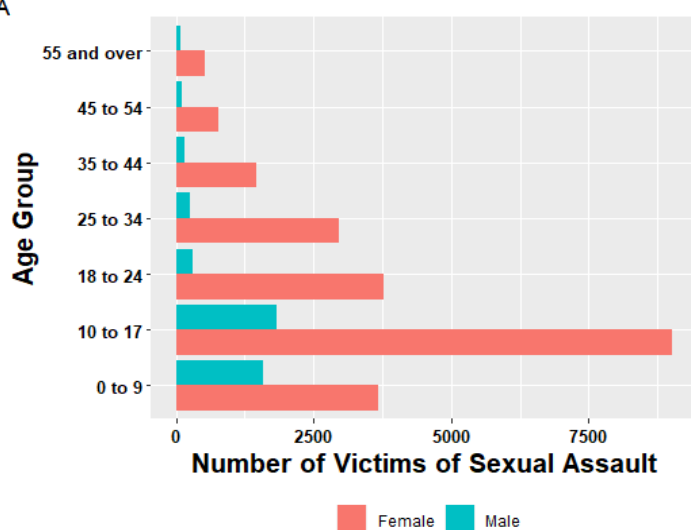


Fig. 6B

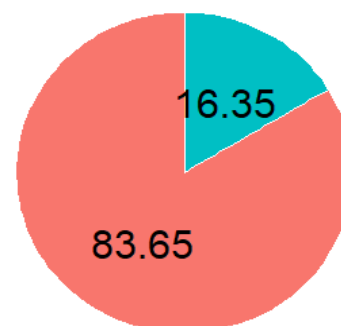
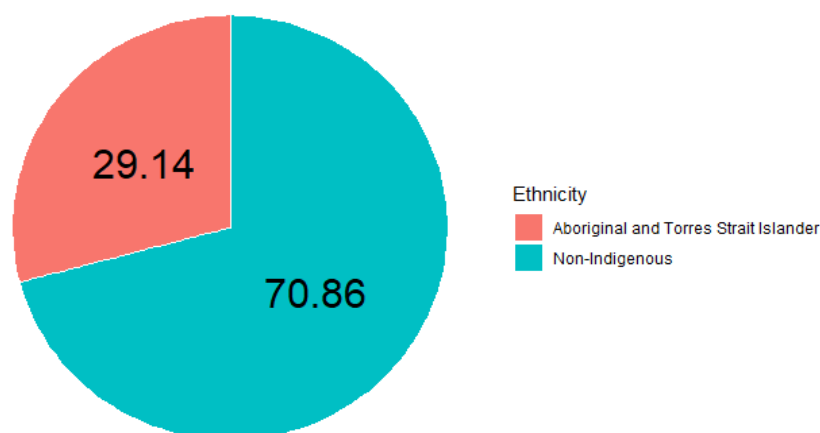


Figure 7 shows the proportion of Indigenous and non-Indigenous prisoners in WA in 2021 whose most serious charge was a sexual assault. This data was sourced from the ABS [Prisoners in Australia, 2021](#) page (Australian Bureau of Statistics, 2021b).

Figure 7 shows most prisoners in WA with a most serious charge of sexual assault as being non-Indigenous.

Proportion of Indigenous and Non-Indigenous Prisoners in Western Australia  
2021 with a Most serious Charge of Sexual Assault and Related Offences  
Fig. 7



Data on victims of sexual assault by reference to Indigenous/non-Indigenous status is not recorded effectively in Western Australia by WA Police or the ABS, as the data is not of sufficient quality. [Aboriginal and Torres Strait Islander Victims of Crime](#).

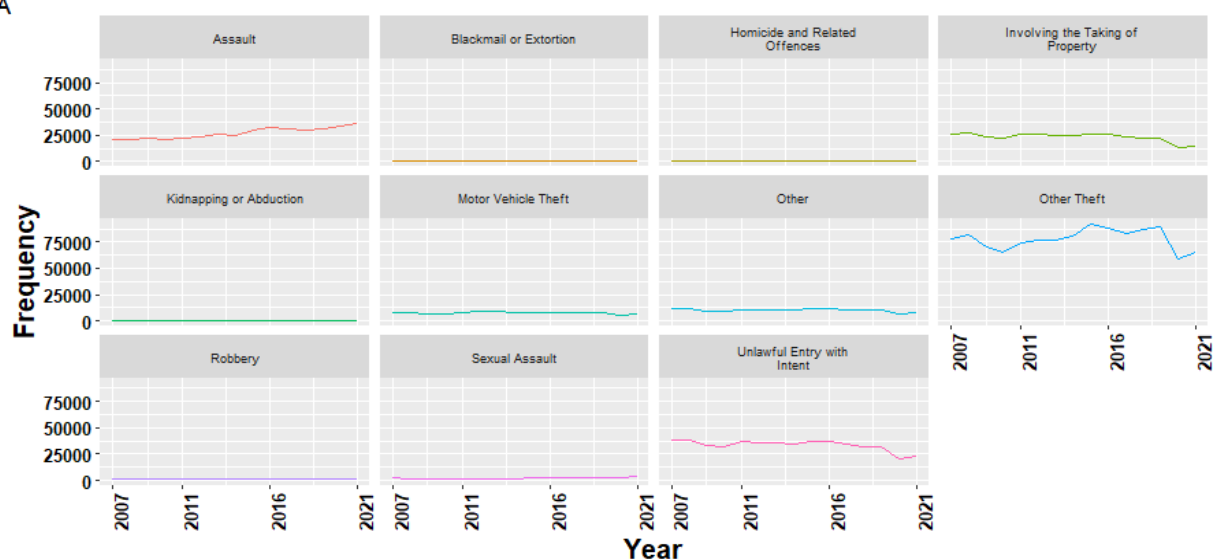
## Reporting

In this section data on reporting of sexual assaults compared to other offences in WA is sourced from the ABS Victims of Crime [Recorded Crime - Victims, Australia](#) page (Australian Bureau of Statistics, 2021c). Reported victimisation includes incidents reported by a direct victim, witness or another person to the police and offences detected by police (Australian Bureau of Statistics, 2021d).

Whilst the data go back to 1993, the National Crime Recording Standard was implemented in 2007-2010 for WA. Only data from 2007 and onwards is used. Furthermore, sexual assault reporting data before 2017 may be understated due to changes in recording and practices implemented by WA in that year - [Recorded Crime – Victims Methodology](#) (Australian Bureau of Statistics, 2022c).

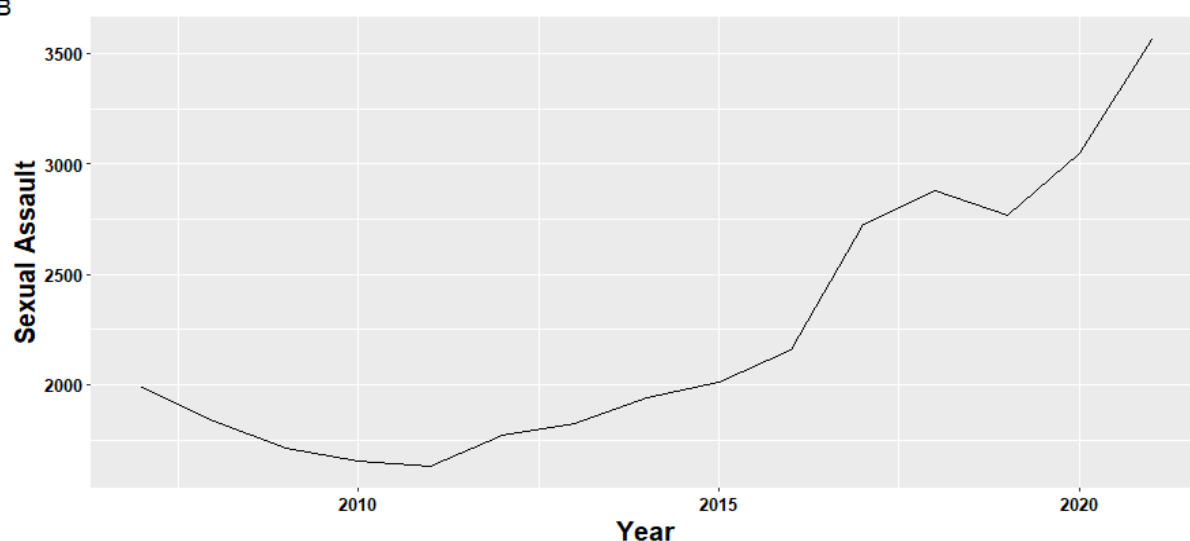
Total Reports of Selected Offences in WA from 2007-2021

Fig. 8A



Total Reports of Sexual Offences in WA from 2007-2021

Fig. 8B



**Table 2: Reported Selected Offences in WA from 2007-2021**

Year	Homicide and Related Offences	Assault	Sexual Assault	Kidnapping or Abduction	Robbery	Blackmail or Extortion
2007	45	21442	1991	39	1848	102
2008	41	21144	1834	31	1685	98
2009	33	21965	1712	25	1590	101
2010	58	20925	1654	19	1626	90
2011	43	21597	1630	21	1771	80
2012	55	23120	1773	24	1636	84
2013	47	25307	1825	19	1439	78
2014	36	24996	1942	23	1295	83
2015	48	29351	2012	29	1291	81
2016	61	32252	2157	27	1301	100
2017	49	30578	2724	21	1063	139
2018	63	29858	2879	7	1162	101
2019	44	31097	2769	23	1335	108
2020	59	34191	3048	16	1126	88
2021	48	36177	3564	14	1191	70

**Table 2 Continued**

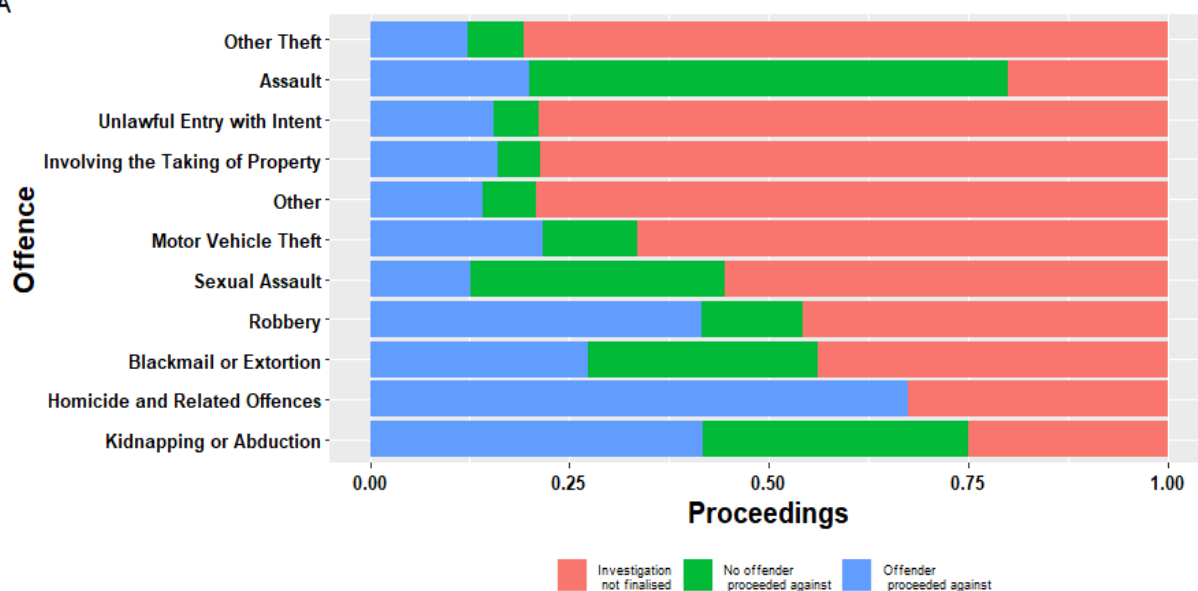
Year	Unlawful Entry with Intent	Involving the Taking of Property	Other	Motor Vehicle Theft	Other Theft
2007	37756	26365	11390	7303	78397
2008	37976	26801	11177	7776	81277
2009	33178	23594	9581	6452	70106
2010	31578	22415	9159	6489	64730
2011	36803	26115	10688	7668	74440
2012	36386	25800	10587	8879	77295
2013	35439	24850	10590	8701	76524
2014	35004	24637	10370	8067	81039
2015	37515	26311	11211	8416	92483
2016	37278	26019	11261	8357	88215
2017	33902	23170	10738	7764	82630
2018	31738	21517	10215	7330	87035
2019	31854	21519	10336	7664	89353
2020	20365	13132	7238	5338	59258
2021	22408	14649	7760	6577	65857

The [ABS Recorded Crime – Victims, Australia](#) data also shows the outcomes of investigations after 30 days and identifies whether an offender was either proceeded against, not proceeded against, or the investigation is not finalised.

The data represented in Figure 9A show that, compared to other offences, there is a lower proportion of instances where the offender was proceeded against for sexual offences.

Comparison of Proceedings per Type in WA 2021

Fig. 9A



Sexual Assault Proceedings per Type in WA 2021

Fig. 9B

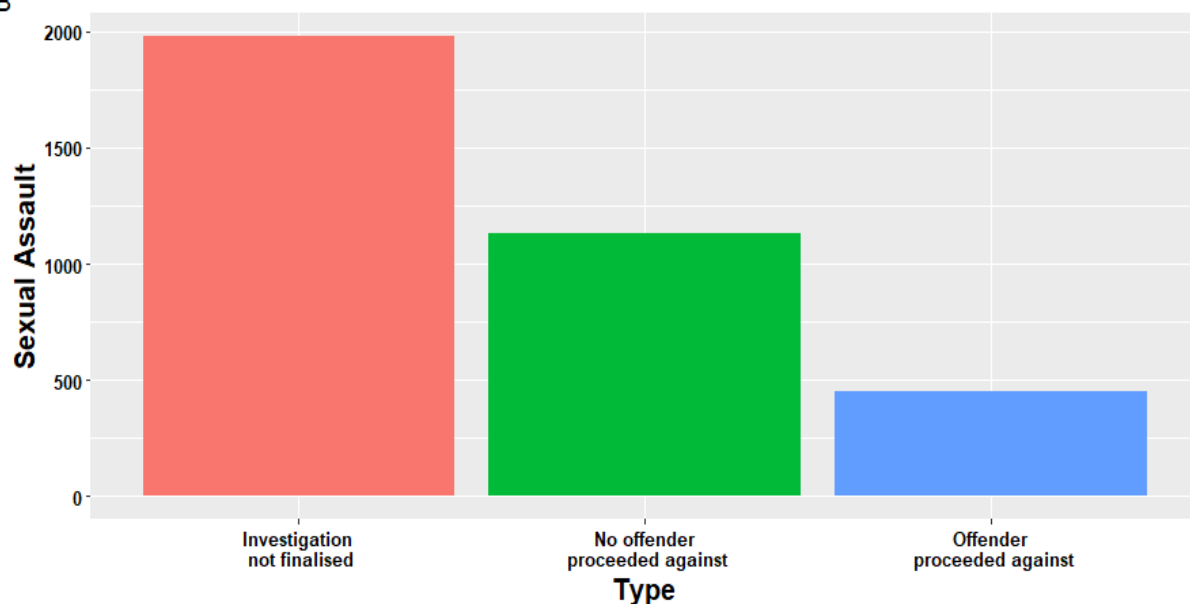




Figure 1B identified numbers of historical sexual offences. Data represented in Figures 10A and 10B show when a sexual assault was reported relative to the time the reported incident occurred, separated by gender. For both males and females, most victims of sexual assault report the incident within the first six months. Notably, there are some victims who report the incident after 20 years. In 2021, 2.7% (n86) of all women who reported incidents and 5.6% (n21) of all men who reported incidents reported the incident after 20 years.

Time to Report by Victims of Sexual Assault in WA from 2014 to 2021

Fig. 10A

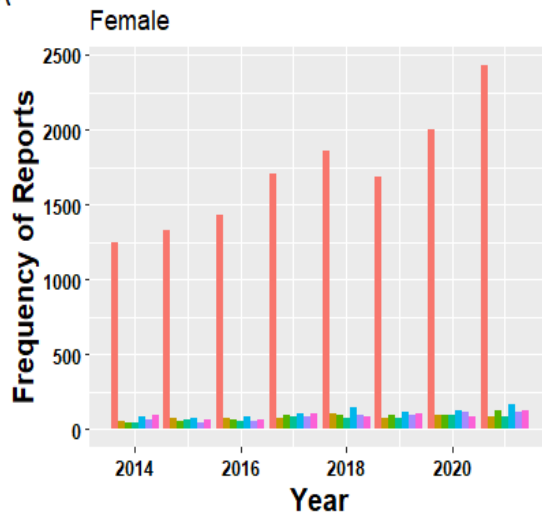
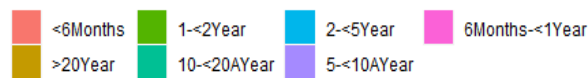
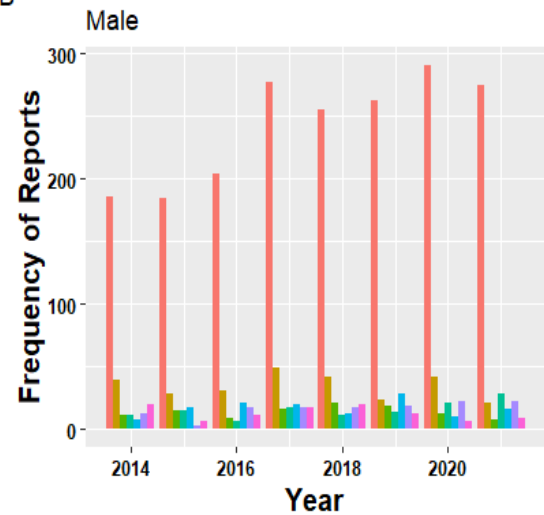


Fig. 10B



## Outcomes for Sexual Offences

### Total Finalisations

In this section Western Australian data are sourced from multiple previous releases of the *Criminal Courts, Australia* tables, aggregated from 2010-11 to 2020-21 financial years (Australian Bureau of Statistics, 2022b) (Criminal Courts data). The national data on defendants with a principal offence of sexual assault are sourced from the defendants table on the ABS *Sexual Assault - Perpetrators* page (Sexual Assault Perpetrators data). A principal offence refers to the most serious offence a person is charged with (Australian Bureau of Statistics, 2022a).

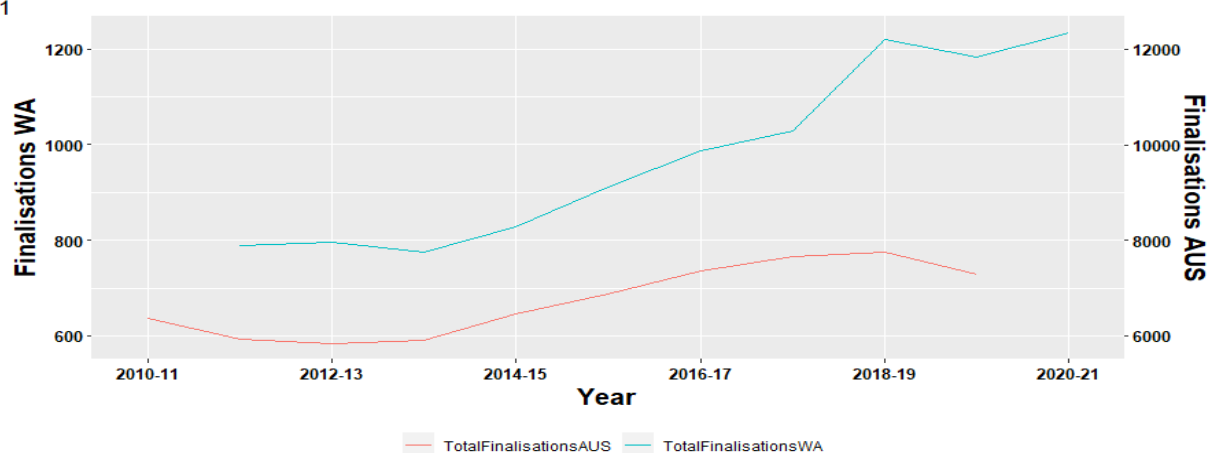
Finalisations refer to the following outcomes with respect to a principal offence:

- Guilty Outcome
- Acquitted
- Withdrawn
- Transferred to other court levels

Figure 11 shows a comparison of the total number of finalisations of sexual offences across Australia and in Western Australia. The most recent report for each year is utilised. The Sexual Assault Perpetrators data ranges from 2010-11 to 2019-20; the Criminal Courts data ranges from 2011-12 to 2020-21.

Total Finalisations of Sexual Offence Cases Between 2010-11 and 2020-21

Fig. 11



## Convictions

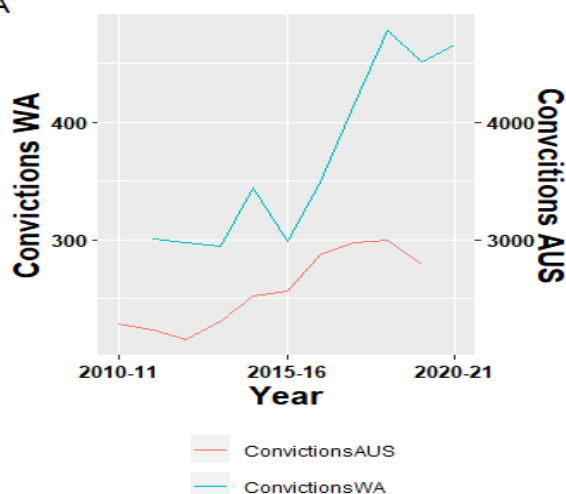
The **conviction rate** is calculated by dividing the number of guilty outcomes by the number of overall adjudicated cases (the sum of total guilty and acquitted outcomes).

While the ABS provides the total adjudicated cases per year for sexual assault perpetrators, these calculations are based on a calculated total of adjudicated outcomes. This is because of the random adjustment the ABS does to their data to minimise the risk of identifying individuals ([Criminal Courts – Australia Methodology](#), Australian Bureau of Statistics, 2022d).

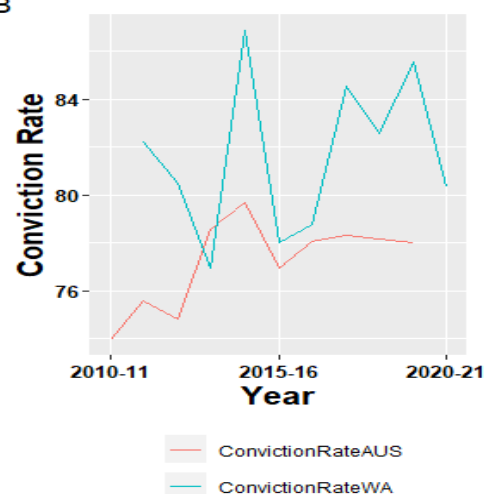
Conviction rates are represented in Figures 12A and 12B and Table 3.

**Total Convictions and Conviction Rate Between 2010-11 and 2020-21**

**Fig. 12A**



**Fig. 12B**



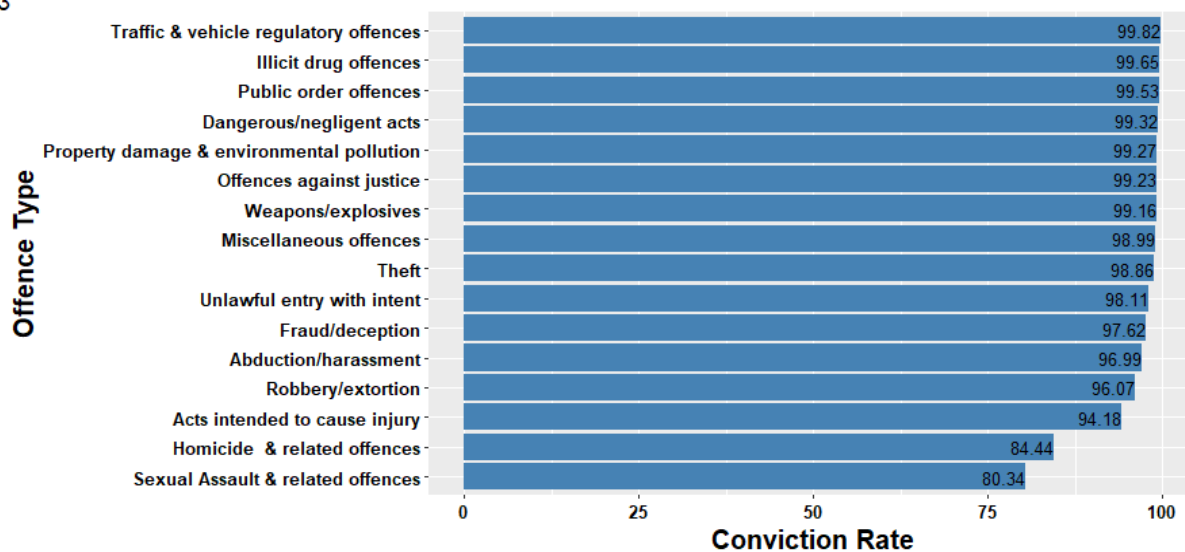
**Table 3: Conviction Count and Rate per Year**

Year	AUS Convictions	AUS Conviction Rate	WA Convictions	WA Conviction Rate
2010-11	2279	73.95	NA	NA
2011-12	2232	75.58	301	82.24
2012-13	2145	74.82	297	80.49
2013-14	2304	78.55	294	76.96
2014-15	2515	79.71	344	86.87
2015-16	2564	76.93	298	78.01
2016-17	2875	78.08	349	78.78
2017-18	2976	78.30	416	84.55
2018-19	2996	78.16	478	82.56
2019-20	2789	78.01	451	85.58
2020-21	NA	NA	466	80.34

Compared to other offence types, sexual offences have the lowest conviction rate (see Figure 13).

#### Conviction Rates in 2020-21 Across all Courts in Western Australia

Fig. 13



## Withdrawals

To calculate the **withdrawal rate** the number of withdrawals is divided by the total number of finalised cases. Withdrawal is not an adjudicated outcome but an outcome determined by the prosecution.

Notably, the ABS (2022a) provided total finalisations are used to calculate the withdrawal rate; the sum of guilty outcomes, acquitted, withdrawals and transferred to courts is not used.

Total withdrawals and withdrawal Rate Between 2010-11 and 2020-21

Fig. 14A

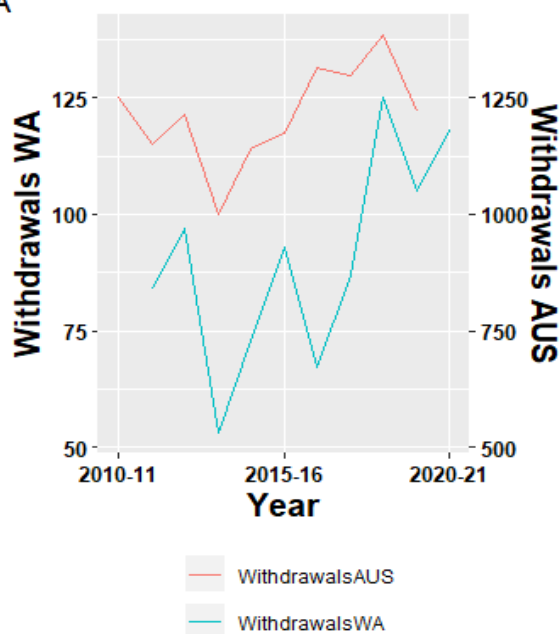


Fig. 14B

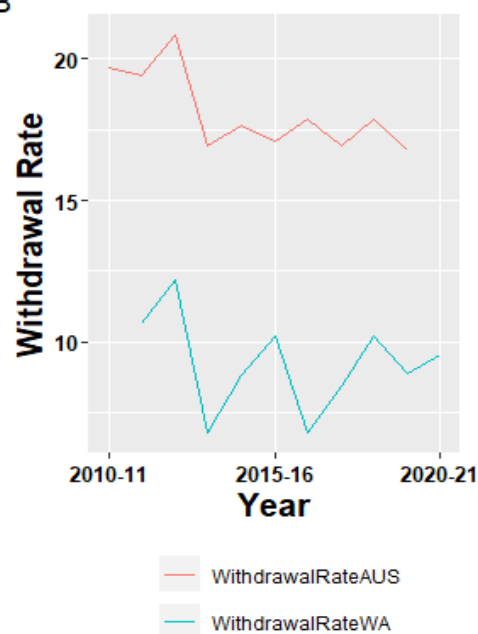


Table 4: Withdrawal Count and Rate per Year

Year	AUS Withdrawals	AUS Withdrawal Rate	WA Withdrawals	WA Withdrawal Rate
2010-11	1250	19.67	NA	NA
2011-12	1150	19.41	84	10.66
2012-13	1214	20.82	97	12.20
2013-14	1000	16.95	53	6.83
2014-15	1140	17.63	73	8.82
2015-16	1175	17.07	93	10.21
2016-17	1315	17.87	67	6.79
2017-18	1297	16.94	87	8.45
2018-19	1384	17.87	125	10.24
2019-20	1221	16.77	105	8.88
2020-21	NA	NA	118	9.55

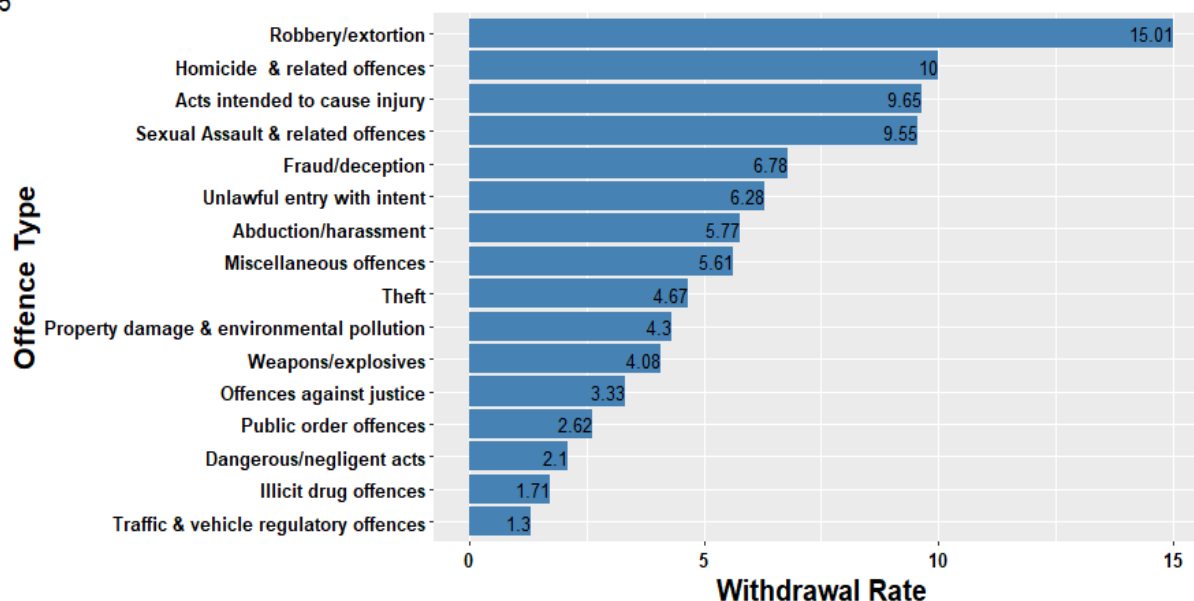
Compared to other offence types, sexual offences have a high withdrawal rate. The observation that withdrawal rates are high and conviction rates are low for sexual offences is noted in the literature



(Daly & Bouhours, 2010; Spohn, 2020). Tidmarsh and Hamilton (2020) suggest possible misconceptions about sexual offences and their impact on withdrawal rates. (See Parts 2 and 3 above). During the criminal justice process, there is the subjectivity of furthering cases based on whether a guilty outcome is expected and the complexity of achieving unanimous decisions particularly surrounding sexual offences (Tidmarsh & Hamilton, 2020). For example, the concept of downstream orientation suggests that police may not further cases with an expected result of a not guilty outcome to save resources (Pattavina et al., 2016). Prosecutors may not further cases that would impact their conviction rate negatively (Pattavina et al., 2016).

Withdrawal Rates in 2020-21 Across all Courts in Western Australia

Fig. 15



## Guilty Pleas Compared to Trials

National courts data of defendants falling into the category of either 'Guilty finding by court' or 'Guilty plea by defendant' with a principal offence of sexual assault is sourced from the defendants table on the ABS [Sexual Assault – Perpetrators](#) page (Australian Bureau of Statistics, 2022a).

Figure 16 and Table 5 show that most convictions of sexual offences are the result of guilty pleas, far fewer convictions follow a trial, and this relationship remains unchanged over time.

Guilty Outcomes Across all Courts in Australia Between 2010-11 and 2019-20

Fig. 16

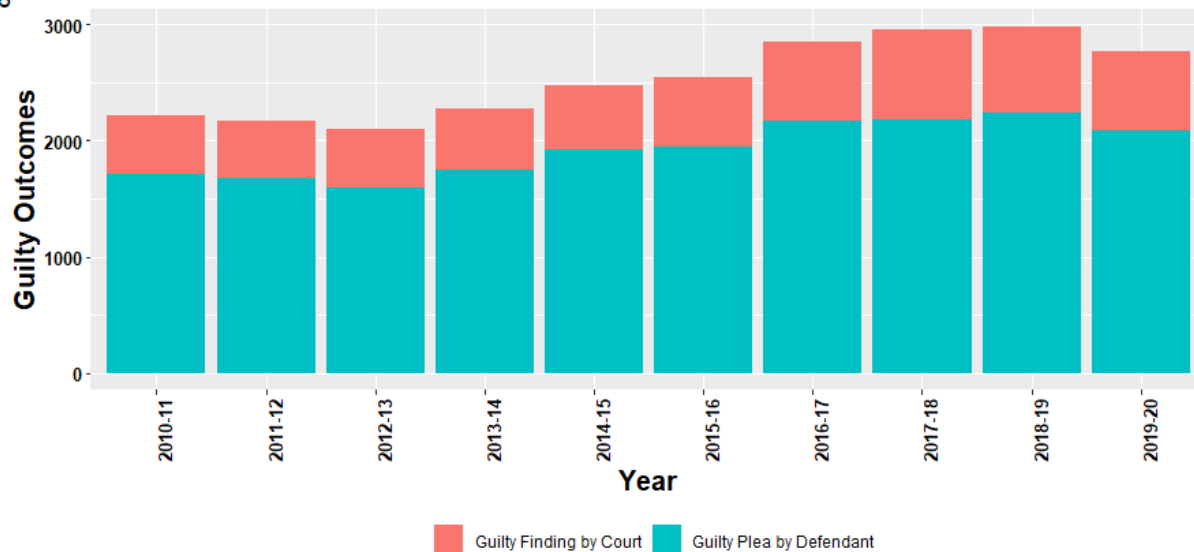


Table 5: Guilty Outcomes per Year in Australia

Year	Guilty Finding by Court	Guilty Plea by Defendant
2010-11	507	1710
2011-12	492	1680
2012-13	507	1592
2013-14	524	1748
2014-15	546	1926
2015-16	598	1943
2016-17	677	2174
2017-18	779	2178
2018-19	737	2241
2019-20	684	2083

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