BETWEEN REFORM AND REVOLUTION: THE ROLE OF INCREMENTAL ADJUSTMENTS IN CURBING SEXUAL ASSAULT CASE ATTRITION – AN AUSTRALIAN CASE STUDY

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Abstract

The attrition of sexual assault cases is a complex and pervasive problem within the Australian criminal justice system. Equal access to justice is a fundamental aspect of our legal system and society, but for sexual assault victim-survivors there exists a significant 'justice gap'. There is an urgent need to understand the various factors which contribute to sexual assault case attrition so that criminal justice responses to sexual assault can be improved.

Utilising a socio-legal methodology, this article identifies and analyses distinct points at which sexual assault cases fail to enter, or subsequently fall out of, the justice system. Using the Australian Capital Territory (ACT) as a case study, this research methodically maps various points of attrition throughout the socio-legal process and exemplifies the difficulty associated with this process as a whole. As an extension of this methodology, this article utilises Charles Lindblom's theory of policy incrementalism as a mechanism to provide a persuasive guide for victim-centered legal and policy reform. By breaking down a bigger, seemingly intractable problem into smaller parts

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and providing an incremental policy adjustment at each stage, this Article is designed to equip public decision makers with the information and tools necessary to better act in the interests of victim-survivors. These findings from Australia serve as a case study for other English (common law) jurisdictions within and outside the British Commonwealth, including the United States.

Keywords: Sexual Assault, Case Attrition, Socio-legal Methodology, Public Policy, Charles Lindblom, Incrementalism, Justice Gap, Feminist, Law Reform, Policy Reform, Criminal Justice

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I. INTRODUCTION & OVERVIEW

A. Problematising Sexual Violence and Case Attrition

1. The Prevalence and Impact of Sexual Violence

Sexual violence is a major social, health, and welfare issue in Australia and worldwide.[1] According to the Australian Bureau of Statistics' 2021-2022 Personal Safety Survey ('ABS 2021-2022 PSS'), approximately two-million women, and 500,000 men in Australia have experienced sexual assault since the age of 15.[2] This is a significant portion of the Australian population who have been victimised by violent crime, and who must deal with the aftermath of such violence.

Sexual violence has numerous adverse effects for both victim-survivors individually and society generally.[3] As a consequence of the assault, a victim-survivor might be physically injured, become afflicted with a sexually transmissible infection, or experience an unwanted pregnancy.[4] Mental health complications are likely, with most victim-survivors reporting intense psychological distress including fear, anxiety and depression.[5] Post Traumatic Stress Disorder (PTSD) is also common; the lifetime prevalence of PTSD for women who have been sexually assaulted is 50%, compared with a standard lifetime prevalence rate of 7.8%.[6] Sexual violence also increases a victim-survivor's vulnerability to other adverse health outcomes,

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[1] *New Report Sheds Light on Sexual Assault in Australia,* AUSTL. INST. OF HEALTH & WELFARE (Aug. 28, 2020), https://www.aihw.gov.au/news-media/media-releases/2020/august/new-report-sheds-light-on-sexual-assault-in-austra [https://perma.cc/F3A8-82XR]; Nasrin Borumandnia et al., *The Prevalence Rate of Sexual Violence Worldwide: A Trend Analysis*, 20 BMC PUB. HEALTH 1835 (2020).

[2] *Sexual violence, 2021-22 Financial Year*, AUSTL. BUREAU OF STAT. (Aug. 23, 2023) [hereinafter AUSTL. BUREAU OF STAT.], https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release [https://perma.cc/C5MD-7ZEL].

[3] People who have experienced sexual violence may use a range of different terms to describe themselves and their experiences. Throughout this article, the term 'victim-survivor' is used primarily. This author (echoing the preferences of victim-survivors and advocates within the sector) ultimately feels this is the most appropriate term to use as it acknowledges the harms caused by sexual victimisation, whilst simultaneously recognising the autonomy, resilience and power of those with lived experience. On occasion throughout this article the word 'victim' or 'complainant' may be used in place of 'victim-survivor' where doing so is contextually appropriate. To avoid confusion; the term 'victim', 'victim-survivor' and 'complainant' in this article all refer to a person who has experienced sexual violence.

[4] *See* Alex Waigandt et al., *The Impact of Sexual Assault on Physical Health Status*, 3 J. TRAUMATIC STRESS 93 (1990).

[5] Jenny Petrak, *The Psychological Impact of Sexual Assault, in* THE TRAUMA OF SEXUAL ASSAULT: TREATMENT, PREVENTION AND PRACTICE 19, 28, 31 (Jenny Petrack & Barbra Hedge eds., John Wiley & Sons 2003).

[6] This is when compared against people who have not experienced sexual assault. Mark Creamer et al., *Post-Traumatic Stress Disorder: Findings from the Australian National Survey of Mental Health and Well-being*, 31 PSYCH. MED. 1237, 1238 (2001).

including increased vulnerability to alcohol and substance dependence,[7] chronic diseases,[8] and suicidal behaviours.[9] Additionally, sexual assault victim-survivors are also acutely vulnerable to *re-victimisation*.[10]

As for society more broadly, sexual violence is dually problematic because of the *gendered nature* of such crime. This article takes the view that sexual violence is a form of gender-based violence,[11] given the disproportionate rates with which women experience sexual assault.[12] ABS data show that 1 in 16 men report sexual victimisation.[13] For women that number is much higher at 1 in 5.[14] Whilst sexual violence clearly effects individuals who are victimised, high prevalence rates affect *all* women who live in fear of sexual victimisation. Research consistently shows that gender is the strongest determinant for fear of violent crime.[15] Women's knowledge of the prevalence of sexual violence serves to reinforce their subordinate status in society by instilling in women a fear of public spaces, thereby denying women spatial mobility and social opportunity.[16] Adequately

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[7] Sarah Ullman et al., *Trauma Exposure, Posttraumatic Stress Disorder and Problem Drinking in Sexual Assault Survivors*, 66 J. STUD. ON ALCOHOL 610 (2005); Marisa Sturza & Rebecca Campbell, *An Exploratory Study of Rape Survivors' Prescription Drug Use as a Means of Coping with Sexual Assault*, 29 PSYCH. WOMEN Q. 353 (2005).

[8] Jacqueline Golding, *Sexual Assault History and Physical Health in Randomly Selected Los Angeles Women*, 13 HEALTH PSYCH. 130 (1994); Murray Stein & Elizabeth Barrett-Connor, *Sexual Assault and Physical Health: Findings from a Population-Based Study of Older Adults*, 62 PSYCHOSOMATIC MED. 838 (2000).

[9] Marjan Egmond et al., *The Relationship Between Sexual Abuse and Female Suicidal Behaviour*, 14 J. CRISIS INTERVENTION & SUICIDE PREVENTION 129, 129 (1993).

[10] Evidence shows that women who have been victims of sexual assault are at a higher risk than other women of being victimised again. *See* Hannah Walker et al., *The Prevalence of Sexual Revictimization: A Meta-Analytic Review*, 20 TRAUMA VIOLENCE & ABUSE 67, 70 (2019).

[11] *See* G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979); *see also Sexual and Gender-Based Violence in the Context of Transitional Justice*, OFF. OF THE HIGH COMM'R FOR HUM. RIGHTS (Oct. 2014), https://www.ohchr.org/documents/issues/women/wrgs/onepagers/sexual_and_gender-based_violence.pdf [https://perma.cc/R5S7-7FDF].

[12] *See* AUSTL. BUREAU OF STAT., *supra* note 2; *Personal Safety, 2021-22 Financial Year*, AUSTL. BUREAU OF STAT. [hereinafter *Personal Safety*], https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release [https://perma.cc/5UZR-KNPJ] (last visited Apr. 18, 2026). For the rates of violence against women on a global scale, *see also Facts and figures: Ending Violence Against Women*, U.N. WOMEN (Nov. 19, 2025), https://www.unwomen.org/en/what-we-do/ending-violence-against-women/factsandfigures [https://perma.cc/GQ3T-SKWQ].

[13] AUSTL. BUREAU OF STAT., *supra* note 2; *Personal Safety, supra* note 12.

[14] AUSTL. BUREAU OF STAT., *supra* note 2.

[15] Jodie Lane et al., *Fear of Violent Crime Among Men and Women on Campus: The Impact of Perceived Risk and Fear of Sexual Assault*, 24 VIOLENCE & VICTIMS 172, 188 (2009); Diederik Cops & Stefaan Pleysiar, *'Doing Gender' in Fear of Crime: The Impact of Gender Identity on Reported Levels of Fear of Crime in Adolescents and Young Adults*, 51 BRIT. J. CRIMINOLOGY 58, 59 (2011); Hille Koskela, *'Bold Walk and Breakings': Women's Spatial Confidence Versus Fear of Violence*, 4 GENDER, PLACE & CULTURE 301, 303 (1997).

[16] Rachel Pain, *Social Geographies of Women's Fear of Crime*, 22 TRANSACTIONS INST. BRIT. GEOGRAPHERS 231, 231 (1997); Rebecca Lennox, *"There's Girls Who Can Fight, and There's Girls Who*

responding to sexual violence is thus of paramount importance to ensure that victims' rights are upheld and to advance gender equality more broadly.

2. Problematising High Attrition Rates & the 'Justice Gap'

Although sexual violence is itself a problem, the subject of this article is the related problem posed by high rates of sexual assault case attrition. ABS data shows that the prevalence rate of sexual violence has risen dramatically since 2012,[17] but that across Australia, including in the Australian Capital Territory ('ACT'),[18] conviction rates are declining.[19] This is, in part, because of case attrition.

The term 'attrition,' as used in criminological literature, refers to the process by which criminal cases fail to progress through the justice system.[20] Barriers to case progression arise at numerous points throughout the justice process and the specific challenges associated with overcoming each attrition point are the subject of the remaining chapters of this article. The relevant point to be made at this early stage is that the significant gap between the incidence of crime and conviction represents a public policy problem.[21] Understanding the reasons why cases fall out of the system is 'vital to improving the legal and criminal justice response' to sexual violence,[22] as well as the public's trust in the justice system.[23]

Are Innocent": Gendered Safekeeping as Virtue Maintenance Work, 28 VIOLENCE AGAINST WOMEN 641, 642 (2021).

[17] AUSTL. BUREAU OF STAT., *supra* note 2; *see also* Gareth Hutchens, *Rate of Sexual Violence Against Women Has Risen Dramatically Since 2012, ABS Says,* GUARDIAN (Nov. 8, 2017), https://www.theguardian.com/australia-news/2017/nov/08/rate-of-sexual-violence-against-women-has-risen-dramatically-since-2012-abs-says [https://perma.cc/G7ML-6PNE].

[18] Austl. Cap. Territory Sexual Assault Prevention & Response Steering Comm., *Listen. Take Action to Prevent, Believe and Heal*, 35 (2021) (Austl.); Austl. Cap. Territory, Walter Sofronoff KC, *Board of Inquiry Criminal Justice System*, 98 (2023) [hereinafter Sofronoff KC]; Jasper Lindell, *Sex Offence Cases Decline in ACT a 'Concern': Director of Public Prosecutions*, THE CANBERRA TIMES (Oct. 27, 2021), https://www.canberratimes.com.au/story/7485224/sex-offence-cases-decline-a-concern-dpp/ [https://perma.cc/AV3M-YQED].

[19] Patrick Tidmarsh & Gemma Hamilton, *Misconceptions of Sexual Crimes Against Adult Victims: Barriers to Justice*, 611 AUSTL. INST. CRIMINOLOGY: TRENDS & ISSUES CRIME & CRIM. JUST. 1, 1 (2020); Wendy Larcombe, *Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law*, 19 FEMINIST LEGAL STUD. 27, 27-28 (2011).

[20] Susan Lea et al., *Attrition in Rape Cases. Developing a Profile and Identifying Relevant Factors*, 43 BRIT. J. CRIMINOLOGY 583, 583 (2003).

[21] *See* ANNE COSSINS, CLOSING THE JUSTICE GAP FOR ADULT AND CHILD SEXUAL ASSAULT: RETHINKING THE ADVERSARIAL TRIAL (2020) [hereinafter ADVERSARIAL TRIAL]; Kimberly Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 159 (2012).

[22] Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming*, 17 AGGRESSION & VIOLENT BEHAVIOR 443, 444 (2012).

[23] ADVERSARIAL TRIAL, *supra* note 21, at 6.

The ACT Government has acknowledged high rates of sexual assault case attrition within the territory. In the Sexual Assault Prevention and Response Committee's report entitled *Listen. Take Action to Prevent, Believe and Heal* (hereafter 'SAPR Report') clear evidence is provided of high rates of sexual assault case attrition over the last ten years.[24] However, whilst the SAPR Report clearly documents low rates of prosecution and conviction for sexual assault cases in the ACT, no attempts are made to discover the *reasons* for the reduction.[25]

B. Aim of Article

This article aims to uncover some of the reasons for sexual assault case attrition in the ACT *and* provide practical policy recommendations to address attrition. Thus, whilst this article may be joining a 'crowded field',[26] it intends to expand upon the issues identified by the ACT Government with the hope of making a tangible contribution towards conceptualising opportunities for reform. Additionally, existing analyses of case attrition tend to overly emphasise the role of the criminal trial itself in producing low conviction rates.[27] Whilst the trial is a crucial part of the justice process for some, excessive focus on victim-survivors' experiences in a criminal proceeding tend to obscure the significant rates of attrition which occur pre-trial. Consequently, this article intends to bring the necessary attention back to earlier stages of the socio-legal process where attrition is greatest.[28]

The overarching goal of this article is to produce a comprehensive analysis of the post sexual assault justice seeking process in the ACT. By methodically mapping the various points of attrition throughout the socio-legal process, this article aims to highlight the difficulty associated with that *process as a whole* and provide a persuasive guide for victim-centered legal and policy reform.

The main question of this article is: How can incremental policy adjustments at each stage of the justice process curb the attrition of sexual assault cases? In order to answer this question, the article will answer four distinct sub questions.

First, what are the reasons underlying attrition at each stage of the justice process and are any of these issues overarching? Second, how might these

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[24] Austl. Cap. Territory Sexual Assault Prevention & Response Steering Comm., *supra* note 18, at 67.

[25] Sofronoff KC, *supra* note 18, at 355.

[26] SIMON BRONITT & PATICIA EASTEAL, RAPE LAW IN CONTEXT: CONTESTING THE SCALES OF INJUSTICE 9 (2018).

[27] ADVERSARIAL TRIAL, *supra* note 21, at 95-97.

[28] Kathleen Daly & Brigitte Bouhours, *Rape and attrition in the legal process: A Comparative Analysis of Five Countries*, 39 CRIME & JUST. 565, 568 (2010).

challenges be addressed? Which policy options are merely 'possible', and which are practically implementable? Third, has previous sexual assault law reform had an observable impact on the outcomes for victim-survivors and lastly, are *incremental* adjustments adequate to address the justice gap faced by victim-survivors, or is more radical reform desirable?

This article will, *a posteriori*, utilise multiple research methodologies. It will primarily rely on a reform-oriented approach which 'intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting'.[29] It will also incorporate a significant interdisciplinary lens and adopt a socio-legal methodology. Law does not operate in a vacuum. It operates within, and on, society.[30] A socio-legal analysis examines how the law is directly linked to the analysis of the social situation to which it applies,[31] and provides a lens which can explain how law both reflects and shapes society.[32]

As a consequence of case attrition, there are an unknown number of victims who never formally engage with the criminal justice system. Since both doctrinal and reform-oriented methodologies are concerned with rules and procedures within a *legal* context,[33] a socio-legal methodology is necessary to capture the experiences of those otherwise excluded by a strict analysis of case law alone. As an extension of this socio-legal research paradigm, this article will also apply a feminist legal theoretical lens to interpret the interaction between law and social situations from a gendered perspective,[34] and will utilise terminology and concepts from the field of public policy in advocating for realistic and practical reform. It will utilise Charles Lindblom's *incremental model of decision-making* which is discussed at greater depth in the following chapter.

This article is ambitious in its aim of both mapping points of attrition *and* providing policy recommendations. Thus, narrowly confining this article is

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[29] TERRY HUTCHINSON, RESEARCH & WRITING IN LAW 7 (4th ed. 2018).

[30] Terry Hutchinson & Kylie Burns, *The Impact of 'Empirical Facts' on Legal Scholarship and Legal Research Training*, 18 LEGAL EDUC. DIG. 16, 9 (2010).

[31] David Schiff, *Socio-legal Theory: Social Structure and the Law*, 39 MOD. L. REV. 287, 287 (1976).

[32] Daniel Mandelker, *The Role of Law in Social Change*, 8 OSGOODE HALL L.J. 355, 355-56 (1970); Chief Justice Allsop AO, Fed. Ct. of Austl., Values in Law: How they Influence and Shape Rules and the Application of Law, Address delivered at Univ. of Hong Kong, Centre for Comparative and Public Law: 2016 Hoechelaga Lecture (Oct. 20, 2016).

[33] Hutchinson argues that following the evolution of 'research-oriented' methodologies that what was really being delineated was also a form of doctrinal research; 'Pure doctrinal research identifies and analyses the current law. Reform-oriented research recommends change'. Terry Hutchinson, *The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law*, 3 ERASMUS L. REV. 132, 132 (2015).

[34] Rosemary Hunter, *Feminist Approaches to Socio-legal Studies, in* ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie eds., 2019).

crucial to its success. This article is concerned with the *systems* and *processes* which act as a barrier to justice for sexual assault victim-survivors. Relatedly, whilst it is acknowledged that 'getting justice' for many people extends beyond merely securing a conviction, it is not intended to explore the concept of a 'kaleidoscope justice', often advanced within the general literature on sexual violence.[35] This is because such an exploration has the potential to dilute the central argument advanced by this article: that victim-survivors should be empowered with the *choice* to engage with the criminal justice system.

II. CONCEPTUALISING PUBLIC POLICY THEORY

A. Situating 'Incrementalism' within the Public Policy Literature

Since Harold Laswell's articulation of the policy sciences seventy years ago, public policy theorists have concerned themselves with whether policy making should be, or even *can* be, a rational process.[36] Policy rationalism, sometimes referred to as 'the rational comprehensive decision-making model', can be characterised by methods and processes which 'objectively identify problems, collect all possible relevant information, rank values, evaluate alternatives, and select the objectively 'best' policy'.[37] Popular examples of rationalist policy models include Laswell's 'policy cycle',[38] or the current trend towards 'evidence based policy making' (EBPM).[39]

In the 1950s, Charles Lindblom, an influential American political scientist, first expounded his theory of 'incrementalism' which counters the assumptions of policy rationalism.[40] His theory has since influenced several

[35] Clare McGlynn & Nicole Westmarland, *Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice*, 28 SOC. & LEGAL STUD. 179, 180 (2019).

[36] Peter DeLeon, *The Stages Approach to the Policy Process: What Has It Done? Where Is It Going?*, *in* THEORIES OF THE POLICY PROCESS 19-34 (Paul A. Sabatier ed., 1999).

[37] John Forester, *Bounded Rationality and the Politics of Muddling Through*, 44 PUB. ADM. REV. 23, 23 (1984).

[38] Harold Lasswell, The Decision Process: Seven Categories of Functional Analysis, Speech delivered at the University of Michigan in Public Affairs (May 11, 1956) (Digitised Nov. 4, 2004); *see also* HAROLD LASSWELL, THE POLICY SCIENCES: RECENT DEVELOPMENTS IN SCOPE AND METHOD 3 (Daniel Lerner & Harold D. Lasswell eds., 1951); Harold Lasswell, *The Emerging Conception of the Policy Sciences*, 1 POL'Y SCI. 3 (1970).

[39] Christian Leuz, *Evidence-Based Policymaking: Promise, Challenges and Opportunities for Accounting and Financial Markets Research*, 48 ACCT. & BUS. RES. 582, 582 (2018); *see also* Linda Botterill & Andrew Hindmoor, *Turtles All the Way Down: Bounded Rationality in an Evidence-Based Age*, 33 POL'Y STUD. 367 (2012); Ian Sanderson, *Making Sense of 'What Works': Evidence Based Policy Making as Instrumental Rationality?*, 17 PUB. POL'Y & ADMIN. 61, 61 (2002).

[40] Charles Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 81, 81, 84 (1959).

generations of thinking about public policy decision-making,[41] and is the subject of ongoing contention within the public policy literature.[42] In his 1959 article 'The Science of Muddling Through', Lindblom argued that, contrary to popular belief at the time, policy makers are boundedly (not comprehensively) rational,[43] meaning that their policy thinking and decision-making does not always happen in the manner envisaged by policy rationalists. Crucially, Lindblom argued that most policy change actually happens through a process of *incremental adjustment* at the margins of existing policies (as opposed to policymakers starting afresh on an issue each time they consider it).[44]

Lindblom adduces numerous limitations upon policymakers which make perfect rationality unattainable. Decision-makers are 'bounded' (i.e. *constrained*) by numerous factors including their own cognitive abilities, social differentiation, the opportunity cost of comprehensive information gathering, pluralist conflict, political considerations, and an inability to separate 'facts' from values.[45]

In the Rational Model, the decision maker:	**In the Incremental Model, the decision maker:**
Acknowledges a problem	Acknowledges a problem
Develops goals and objectives for its resolution	Limits the number of alternatives considered
Generates all of the possible alternative solutions	Considers only those that closely approximate to the current situation (major change is eliminated)

[41] Andrea Migone & Michael Howlett, *Charles E. Lindblom, "The Science of Muddling Through," in* THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 80 (Martin Lodge, Edward C. Page & Stevan J. Balla eds., 2015).

[42] *E.g.*, Michael Howlett & Andrea Migone, *Charles Lindblom is Alive and Well and Living in Punctuated Equilibrium Land*, 30 POL'Y & SOC'Y 53, 53-54 (2011); Jonathan Bendor, *Incrementalism: Dead yet Flourishing*, 75 PUB. ADMIN. REV. 194, 194 (2015); Christian Adam et al., *On Democratic Intelligence and Failure: The Vice and Virtue of Incrementalism Under Political Fragmentation and Policy Accumulation*, 35 GOVERNANCE 525, 526 (2022); Christine Rothmayr-Allison & Denis Saint-Martin, *Half a Century of "Muddling": Are we There yet?*, 30 POL'Y & SOC'Y 1, 1 (2011).

[43] 'Bounded rationality' is a behavioural economics term which is increasingly being utilised within the field of public policy. The concept posits that rationality is limited and that rational individuals make decisions which may be satisfactory, but not optimal. DANIEL KAHNEMAN, THINKING FAST AND SLOW (2013); Lindblom, *supra* note 40, at 84.

[44] Lindblom, *supra* note 40, at 84.

[45] Forester, *supra* note 37, at 26.

Considers the consequences of each alternative	Reduces the complexity of decision-making so as to be manageable
Reviews all the alternatives in terms of their capacity to meet the goals and objectives	Makes the most of experience and minimizes the need for new knowledge
Selects the best alternative – the one that maximizes the achievement of the goals and objectives	Increases the accuracy of predicted consequences
	Conserves time and energy
Implements the decision and monitors the implementation process	Promotes modest courses of action
	Minimizes risk

Based on Hoy and Miskel, 1996 pp. 267 and 280.[46]

The latter two points relating to political and values-based considerations are the most immediately relevant to this article because of the political nature of sexual assault law reform, and the ongoing struggle for gender equality.[47] Whilst rationalist comprehensive ideals obfuscate this fact, policymaking is an inherently political process.[48]

Comprehensively rational models proceed on the assumption that goals and objectives are set at the outset of the policy process, and that policy-makers themselves are (and ought to be) objective, independent and non-partisan.[49] Indeed, the institution of the Australian Public Service is designed to provide 'frank and fearless advice' to the Government of the day whilst remaining 'apolitical' and acting in 'the public interest'.[50] Normative questions about how we should structure our society, and what a 'good' policy outcome even looks like, rest upon ultimately subjective value judgments.[51] Such value judgments are seen as the antithesis of impartial,

[46] Ronald Mackay & Douglas Horton, *Expanding the use of Impact Assessment and Evaluation in Agricultural Research and Development*, 76 AGRIC. SYS. 143, 148 (2003).

[47] Joanna Kantola & Judith Squires, *The New Politics of Gender Equality*, *in* NEW DIRECTIONS IN POLITICAL SCIENCE 88-108 (Bloomsbury ed., 2007).

[48] PAUL CAIRNEY, UNDERSTANDING PUBLIC POLICY THEORIES AND ISSUES 98, 189-90 (2nd ed. 2019); *see* GIANDOMENICO MAJONE, EVIDENCE, ARGUMENT, AND PERSUASION IN THE POLICY PROCESS (1989); PHILIPPE ZITTOUN, THE POLITICAL PROCESS OF POLICYMAKING: A PRAGMATIC APPROACH TO PUBLIC POLICY (2014).

[49] Jonathan Gershuny, *Policymaking Rationality: A Reformulation*, 9 POL'Y SCIS. 295, 295 (1978).

[50] Richard Mulgan, *Public Servants and the Public Interest*, 36 PAPERS ON PARLIAMENT 49, 55 (2000).

[51] Which, under the Australian institutional model, are the preserve of elected 'Ministers of the Crown' rather than appointed officials.

apolitical policy-making by public servants. Thus, normative questions are broadly considered to be inappropriate questions for public servants to make decisions about.[52] Policy rationalism's emphasis on the neutral ranking of policy objectives and the consideration of all possible alternatives 'keeps the lid' on what some have called the 'dirty little secret of public administration' - the fact that public servants can, and frequently do, make policy.[53]

Lindblom's rejection of the fact-value dichotomy espoused by rationalist-comprehensive theorists is crucial to this article in two ways: 1) it reflects the reality of how public policy is usually made, thereby providing a basis for realistic recommendations to be formulated within this article, and 2) it allows for normative values to be adequately considered, discussed, debated, and compared.[54]

B. Reconciling 'Incrementalism' with Social Justice

Between the two theoretical underpinnings utilised within this article (feminism and incrementalist public policy), there is a tension. Whilst feminist perspectives diverge, many feminists call for radical reforms to address sexual violence.[55] Conversely, incrementalism is the opposite of 'revolutionary' change; it advocates for smaller-scale and continuous change. Under incrementalism, existing policies are reviewed and adjusted 'at the margins' to account for a range of factors which may not have been considered appropriately at the beginning of the policy-making process (e.g. values, political considerations, budget factors, implementation issues, public reception etc.). Whilst people may juxtapose revolution and incrementalism as opposites, I argue that they are complementary. If revolution is characterised by sudden and fundamental change, incrementalism paves the way for revolutionary change.[56]

Lindblom himself mobilises this argument in his 1964 defence against claims that incrementalism is concerned with stability and status quo maintenance; 'Logically speaking, one can make changes in the social structure as rapidly through a series of incremental steps as through drastic

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[52] Denis Saint-Martin & Christine Rothmayr-Allison, *Rationalism and Public Policy: Mode of Analysis or Symbolic Politics?*, 30 POL'Y & SOC'Y 19, 20 (2011).

[53] Saint-Martin, *supra* note 52, at 20 (citing ROBERT BEHN, RETHINKING DEMOCRATIC ACCOUNTABILITY 64 (2001)).

[54] Leslie A. Pal, *Assessing Incrementalism: Formative Assumptions, Contemporary Realities*, 30 POL'Y & SOC'Y 50 (2011).

[55] Barbara Collins & Mary Whalen, *The Rape Crisis Movement: Radical or Reformist?*, 34 SOC. WORK 61, 61 (1989).

[56] Rebecca Solnit, *Feminists Have Slowly Shifted Power. There's No Going Back*, GUARDIAN (Mar. 8, 2018), https://www.theguardian.com/commentisfree/2018/mar/08/feminists-power-metoo-timesup-rebecca-solnit [https://perma.cc/5BKW-29MD].

– hence less frequent – alterations'.[57] He explains that as policy-makers are typically risk-averse, they may be more likely to opt for less radical (i.e. incremental) changes, which can still have a significant *cumulative* effect over time.[58] Additionally, when accounting for partisan politics, incremental adjustments are more likely to be within the 'Overton window' - the range of policies considered politically acceptable to the mainstream public and policy-makers.[59]

So, whilst incrementalism could be seen as a defence of the status quo, incremental policy adjustments have real power to make a difference, as short-term continuity may 'mask', and thus make possible, fundamental social change happening cumulatively over the longer term.[60] It is for this reason that incrementalism is utilised within this article. Incremental policy adjustments in the context of sexual assault law reform are not only realistic but may have a transformative power to better reflect the interests and needs of sexual assault victim-survivors.

III. DISCLOSURE: TO REPORT OR NOT TO REPORT? THAT IS THE QUESTION

A. Why do so Few People Disclose Sexual Assault?

Australian and international research demonstrates that sexual offences are under-reported,[61] and that rape specifically is the most underreported violent crime.[62] Whilst it is widely acknowledged that the police represent a point of attrition,[63] the following section is concerned with an earlier (and

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[57] DAVID BRAYBROOKE & CHARLES LINDBLOM, A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS 157 (1963).

[58] *Id.*

[59] Elliott Johnson et al., *Breaking the Overton Window: On the Need for Adversarial Co-Production*, 20 EVID. & POL'Y 393 (2023).

[60] CAIRNEY, *supra* note 48, at 102.

[61] AUSTRALIAN INSTITUTE OF FAMILY STUDIES & VICTORIA POLICE, CHALLENGING MISCONCEPTIONS ABOUT SEXUAL OFFENDING: CREATING AN EVIDENCE-BASED RESOURCE FOR POLICE AND LEGAL PRACTITIONERS 3 (Sep. 2017); *see* Borumandnia, *supra* note 1 (citing sexual violence as being generally under-reported).

[62] David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. ASS'N J. 623 (2007).

[63] *E.g.*, Olivia Sinclair, *The Attrition Problem: The Role of Police Officer's Decision Making in Rape Cases*, 19 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 135, 135-36 (2022); Melinda Tasca et al., *Police Decision Making in Sexual Assault Cases: Predictors of Suspect Identification and Arrest*, 28 J. INTERPERSONAL VIOLENCE 1157, 1158 (2013); Ericka Wentz & Kelsey Keimig, *Arrest and Referral Decisions in Sexual Assault Cases: The Influence of Police Discretion on Case Attrition*, 8 J. SOC. SCIS. 180, 180 (2019); Ericka Wentz, *Funneled Through or Filtered Out: An Examination of Police and Prosecutorial Decision-Making in Adult Sexual Assault Cases*, 26 VIOLENCE AGAINST WOMEN 1919, 1926 (2019); Holly Johnson, *Why Doesn't She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police*, 29 CAN. J. WOMEN & L. 36, 38 (2017).

often overlooked) step in the post-assault justice seeking process: the initial disclosure.

According to recent ABS data, only 57% of people surveyed sought any form of support after their sexual assault.[64] Of those who sought support, the vast majority sought support from an informal source, which the ABS 2021-2022 PSS define to include a 'friend or family member, work colleague or boss, and a priest/minister/rabbi/other spiritual advisor'.[65] For most victim-survivors, the first, and sometimes only, support they seek is informal.[66] Even amongst victim-survivors who go on to report their assault to police, they typically disclose to an informal source first.[67] Consequently the people who first hear disclosures of sexual assault play a key role in responding to sexual violence. Although people who informally support their friends or family members may not consider themselves as such, they are 'first-responders' in that they are the first point of contact and support for a victim-survivor post assault.[68]

Whilst the below will examine first-responders' behaviour, it's necessary to recall the inverse of the above statistic. If only 57% of people surveyed sought any form of support after their most recent assault, that means a significant portion of respondents (43%) did not seek any support at all. Thus, it is also important to interrogate the factors associated with a victim-survivor's decision to tell/not tell *anyone*. Per the socio-legal methodology adopted by this article, the values, attitudes, and beliefs held by victim-survivors, and society more broadly, will be analysed to better understand how they contribute to case attrition. The first section below deals with 'unacknowledged sexual assault' and 'rape myths'. The second section deals with the role and responsibility of first responders.

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[64] *Sexual Violence, 2021-2022 Financial Year*, AUSTL. BUREAU OF STAT. (Aug. 23, 2023) [hereinafter *Sexual Violence, 2021-2022*], https://www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/latest-release [https://perma.cc/C5MD-7ZEL].

[65] Conversely 'formal support' includes; a general practitioner, other health professional, counsellor or support worker, telephone helpline, refuge or shelter, police, legal service, government housing or community services and financial services. AUSTRALIAN BUREAU OF STATISTICS, *supra* note 2, at 10-11.

[66] Sarah Ullman & Henrietta Filipas, *Correlates of Formal and Informal Support Seeking in Sexual Assault Victims*, 16 J. INTERPERSONAL VIOLENCE 1028, 1029 (2001).

[67] Ullman & Filipas, *supra* note 66, at 1029; *see also* DENISE LIEVORE, NO LONGER SILENT: A STUDY OF WOMEN'S HELP-SEEKING DECISIONS AND SERVICE RESPONSES TO SEXUAL ASSAULT (Austl. Inst. of Criminology for the Austl. Gov't Off. for Women ed., 2005); Denise Lievore, *Non-reporting and Hidden Recording of Sexual Assault: An International Literature Review* (A report produced by the Australian Institute of Criminology for the Commonwealth Office of the Status of Women, 2003).

[68] LIEVORE, *supra* note 67, at 13.

1. Recognising Sexual Assault & Rejecting 'Rape Myths'

(a) Unacknowledged Sexual Assault

An important pre-requisite to reporting sexual violence, is recognition of victimisation. It is widely acknowledged,[69] that a significant percentage of sexual assault victim-survivors are what Mary Koss[70] terms 'unacknowledged rape victims'.[71] An 'unacknowledged rape victim' is someone who reports an experience meeting researchers' operational definitions of 'rape' but who does not label their experience as such.[72] Instead they may use more benign labels like 'bad sex' or declare a 'miscommunication'.[73]

Although not widely discussed, unacknowledged sexual assault is a common phenomenon, with prevalence rates ranging between 40% to 70%.[74] The occurrence of unacknowledged sexual violence is important for three main reasons. The first is that the improper classification of experiences as 'bad sex' when they are actually instances of sexual violence, demonstrates the scale and magnitude of unreported sexual violence. The second reason is because of the outcomes for victim-survivors. Victims of unacknowledged rape are: less likely to seek support such as medical treatment or mental health care, less likely to participate in research on the topic (thereby contributing to the systemic underestimation of sexual violence), less likely to communicate with people in their lives about their

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[69] *E.g.*, Zoe Peterson & Charlee Muechlenhard, *A Match-and-Motivation Model of How Women Label Their Non-Consensual Sexual Experiences*, 35 PSYCH. WOMEN Q. 558, 558 (2011); Mary Koss et al., *Stranger and Acquaintance Rape: Are There Differences In the Victim's Experience?*, 12 PSYCH. WOMEN Q. 1, 2 (1988); Melissa Layman, Christine Gidycz & Jay Lynn, *Unacknowledged Versus Acknowledged Rape Victims: Situational factors and Posttraumatic Stress*, 105 J. ABNORMAL PSYCH. 124 (1996); Heather Littleton et al., *Sexual Assault Victims' Acknowledgment Status and Revictimization Risk*, 33 PSYCH. WOMEN Q. 34, 34-35 (2009); Mary Koss, *Hidden, Unacknowledged, Acquaintance, and Date Rape: Looking Back, Looking Forward*, 35 PSYCH. WOMEN Q. 348, 350 (2011).

[70] Mary Koss is an American Regents' Professor in the Mel and Enid Zuckerman College of Public Health at the University of Arizona and much of her work is dedicated to understanding, conceptualising and combatting gender-based violence.

[71] Mary Koss, *The Hidden Rape Victim: Personality, Attitudinal, and Situational Characteristics*, 9 PSYCH. WOMEN Q. 193, 195 (1985).

[72] Peterson & Muechlenhard, *supra* note 69, at 558.

[73] Laura Wilson & Katherine Miller, *Meta-Analysis of the Prevalence of Unacknowledged Rape*, 17 TRAUMA, VIOLENCE & ABUSE 149, 149 (2016).

[74] Heather Littleton et al., *Unacknowledged Rape: How Much Do We Know About the Hidden Rape Victim?*, 14 J. AGGRESSION, MALTREATMENT & TRAUMA 57 (2007). It is worth also noting that despite the provision of the above statistic, the exact prevalence of unacknowledged rape is difficult to assess because of challenges related to measurement and definitions. For further discussion on prevalence rates and the unique challenges in assessing the frequency of an 'unacknowledged' crime, see Wilson and Miller, *supra* note 73.

experience, and are much less likely to make a formal police report.[75] They are also vulnerable to re-victimization.[76] The third reason why unacknowledged rape is significant is because the failure to call it sexual violence leads to the associated failure to hold perpetrators to account.

(b) Rape Myths

There are innumerable reasons why victim-survivors may not acknowledge their assault, decline to seek support, or never make a formal complaint. Some (non-exhaustive) reasons include: a victim's fear of further violence,[77] confusion or guilt,[78] socio-cultural barriers,[79] language barriers,[80] and 'rape myths' which lead a victim to doubt their own experience, or whether they will be believed.[81] Whilst there are multifarious reasons which contribute to the under acknowledgement and underreporting of sexual violence, this section will focus primarily on the persistence of 'rape myths'. This is because of the pervasiveness of rape myths and their ability to affect sexual assault case attrition at multiple stages of the justice seeking process.

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[75] Heather Littleton et al., *Rape Acknowledgment and Post Assault Experiences: How Acknowledgment Status Relates to Disclosure, Coping, Worldview, and Reactions Received From Others*, 21 VIOLENCE & VICTIMS 764 (2006).

[76] Heather Littleton et al., *Unacknowledged Rape and Re-Victimization Risk: Examination of Potential Mediators*, 41 PSYCH. WOMEN Q. 437, 438 (2017).

[77] PETA COX, AUSTL. NAT'L RSCH. ORG. WOMEN'S SAFETY, VIOLENCE AGAINST WOMEN IN AUSTRALIA: ADDITIONAL ANALYSIS OF THE AUSTRALIAN BUREAU OF STATISTICS' PERSONAL SAFETY SURVEY, 2012 (2016).

[78] Jennifer Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases,* J. NAT'L DIST. ATT'Y ASS'N, 6 (2006).

[79] For instance, Indigenous women are more likely to becomes victims of sexually violent crimes, but rates of non-disclosure to police are much higher in Indigenous communities than in non-Indigenous communities. MATTHEW WILLIS, AUSTL. INST. CRIMINOLOGY, NON-DISCLOSURE OF VIOLENCE IN AUSTRALIAN INDIGENOUS COMMUNITIES 405 (2011). The barriers for Indigenous women in reporting sexual assault can be explained by factors such as different cultural interpretations of violence, lack of culturally appropriate services, language barriers and, particularly, the general distrust of police in Indigenous communities. AUSTL. INST. HEALTH & WELFARE, SEXUAL ASSAULT IN AUSTRALIA 3 (2020). Similarly, women who experience, homelessness, disability or identify as LGBTQIA+ are more likely to become victims of sexual assault, but rates of reporting by women who fall into these categories does not adequately reflect their higher rate of victimisation. Grace Sinstead-Reid, *'How does the improper treatment of female sexual assault complainants perpetuate low conviction rates? What are the solutions?'* (Legal Research Essay Submitted for 11467 - Gender and the Legal System, May 7, 2021) (citing TRISBIMA MITRA-KAHN, CAROLYN NEWBIGIN & SOPHIE HARDEFELDT, AUSTL. NAT'L RSCH. ORG. WOMEN'S SAFETY, 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 (2016)).

[80] AUSTL. HUM. RTS. COMM'N, CHANGE THE COURSE: NATIONAL REPORT ON SEXUAL ASSAULT AND SEXUAL HARASSMENT AT AUSTRALIAN UNIVERSITIES 91, 153 (2017).

[81] Shana Maier, *The Complexity of Victim Questioning Attitudes by Rape Victim Advocates: Exploring some Gray Areas*, 18 VIOLENCE AGAINST WOMEN 1413 (2013); *see also* Kimberly Lonsway & Louise Fitzgerald, *Rape Myths in Review,* 18 PSYCH. WOMEN Q. 133 (1994).

'Rape myths' are attitudes and generally false beliefs about rape that are widely and persistently held, and which serve to deny and justify male sexual aggression against women.[82] Common rape myths include the belief that women lie about rape,[83] that they secretly want to be raped,[84] that most rapes are committed by a stranger,[85] that 'real rape' involves physical injury,[86] or the use of a weapon,[87] that raping a partner is impossible,[88] that you can't rape a friend,[89] and that women are 'asking for it' when they are: drunk,[90]

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[82] Maier, *supra* note 81.

[83] According to research conducted by Australia's National Research Organisation for Women's Safety (ANROWS), as many as 4 in 10 Australians believe that women lie about rape. Kate Minter, Erin Carlisle & Christine Coumarelos, "*Chuck Her on a Lie Detector": Investigating Australians' Mistrust in Women's Reports of Sexual Assault,* ANROWS (Apr. 2021), https://www.anrows.org.au/publication/chuck-her-on-a-lie-detector-investigating-australians-mistrust-in-womens-reports-of-sexual-assault/read/ [https://perma.cc/B4WP-CKGU]; *see also* Kylie Weston-Scheuber, *A Prosecutorial Perspective on Sexual Assault*, AUS'T INS. OF JUD. ADMIN. CONF (Sep. 7, 2011), https://aija.org.au/wp-content/uploads/2017/08/WestonScheuber.pdf [https://perma.cc/ML2M-PTSN] (referencing DEPARTMENT FOR WOMEN (NSW), HEROINES OF FORTITUDE: THE EXPERIENCES OF WOMEN IN COURT AS VICTIMS OF SEXUAL ASSAULT (1996)).

[84] Jiun-Yih Huang, *Rape Myths and Rape by Juveniles*, 27 J. FORENSIC PSYCH. & PSYCH. 489 (2016); BONNIE FISHER & VERONIQUE JACQUIER, CRITICAL ISSUES ON VIOLENCE AGAINST WOMEN: INTERNATIONAL PERSPECTIVES AND PROMISING STRATEGIES (2014).

[85] FRANCES REDDINGTON & BETSY WRIGHT KREISEL, SEXUAL ASSAULT: THE VICTIMS, THE PERPETRATORS, AND THE CRIMINAL JUSTICE SYSTEM (Carolina Academic Press, 2nd ed. 2009); Shellie Patscheck & Sharon Shears, *The Effects of Acquaintance Versus Stranger Rape and Gender on Rape Myth Acceptance and Attitudes Toward Rape in College Students*, 14 MOD. PSYCH. STUD. 1, 57 (2008).

[86] Kieran Kennedy, *The Relationship of Victim Injury to the Progression of Sexual Crimes Through the Criminal Justice System*, 19 J. FORENSIC & LEGAL MED. 309, 309 (2012).

[87] *See* Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come*, 84 J. CRIM. L. & CRIMINOLOGY 554, 555 (1993); Ronet Bachman, *The Factors Related to Rape Reporting Behavior and Arrest*: *New Evidence from the National Crime Victimization Survey*, 8 CRIM. JUST. & BEHAV. 2 (1998); Genevieve F. Waterhouse, Ali Reynolds & Vincent Egan, *Myths and legends: The Reality of Rape Offences Reported to a UK Police Force*, 8 EUR. J. PSYCH. APPLIED TO LEGAL CONTEXT 1, 2 (2016).

[88] In fact, previously in Australia, raping a partner was legally impossible. This was on the basis that a husband could not be found guilty of raping his wife because the wife 'impliedly consented to all further acts of intercourse within the course of the marriage'. This rule has since been abolished at common law (*see R v L* (1991) 174 CLR 379 (Austl.)) and by statute in all jurisdictions in which the presumption of consent applied. *See* Crimes Act 1900 § 69 (Austl. Cap. Terr.), Crimes Act 1900 § 61KA (N.S.W.), Criminal Law Consolidation Act 1935 § 73(3) (S. Austl.), & Crimes Act 1958 § 62(2) (Vict.)); *see also* Fisher & Jacquier, *supra* note 84.

[89] *See* Sofia Persson & Katie Dhingra, *Attributions of Blame in Stranger and Acquaintance Rape: A Multilevel Meta-Analysis and Systematic Review*, 23 TRAUMA, VIOLENCE & ABUSE 795, 796 (2022); Claire R. Gravelin, Monica Biernat & Caroline E. Bucher, *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, 21 FRONTIERS IN PSYCH. 1, 2 (2019).

[90] *See* Vanessa Munro & Emily Finch, *Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants*, 45 BRIT. J. CRIMINOLOGY 25, 33 (2005).

dressed provocatively,[91] or even unconscious.[92] Rape myths are believed by people of all ages, sexes, and across races/ethnicities.[93] Rape myth acceptance occurs amongst both perpetrators,[94] and victim-survivors,[95] of sexual violence, as well as those working professionally with victim-survivors (such as police).[96]

However, despite their pervasiveness, rape myths are indeed myths. Most sexual violence does not fit the common trope of sexual assault by a 'stranger in a dark alley'.[97] The ABS 2021-2022 PSS demonstrates that most women know their attacker (85%), that sexual assault most commonly occurs in a residential location (69%), and that physical injuries are only evident in a minority of cases (23%).[98] Adherence to an inaccurate cultural narrative which dictates 'what counts' as sexual assault perpetuates both the under acknowledgement and underreporting of sexual violence. This in turn plays a role in case attrition, as innumerable women never share their experiences, and never formally participate in the justice system.

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[91] *See* Vincent Egan & Giray Cordan*, Barely legal: Is Attraction and Estimated Age of Young Female Faces Disrupted By Alcohol Use, Make Up, and the Sex of the Observer?*, 100 BRIT. J. PSYCH. 415, 424 (2011); *see also* Rebecca Hayes, Katherine Lorenz & Kristin A. Bell, *Victim Blaming Others: Rape Myth Acceptance and the Just World Belief,* 8 FEMINIST CRIMINOLOGY 202, 206 (2013).

[92] *See* Kennedy, *supra* note 86.

[93] Martha Burt, *Cultural Myths and Supports For Rape*, 38 J. PERSONALITY & SOC. PSYCH. 217, 217 (1980); Barbara E. Johnson, Douglas L. Kuck & Patricia R. Schander, *Rape Myth Acceptance and Sociodemographic Characteristics: A Multidimensional Analysis*, 36 SEX ROLES 693, 693 (1997); Waterhouse, Reynolds & Egan, *supra* note 87, at 2 (citing Eliana Suarez & Tahany Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 J. INTERPERSONAL VIOLENCE 2010, 2011 (2010)).

[94] William Marshall & Laura Hambley*, Intimacy and Loneliness, and Their Relationship to Rape Myth Acceptance and Hostility Toward Women Among Rapists*, 11 J. INTERPERSONAL VIOLENCE 586 (1996).

[95] Zoë D. Peterson & Charlene L. Muehlenhard, *Was It Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labelling Their Own Experiences*, 51 SEX ROLES 129, 130 (2004).

[96] *E.g.*, Rachel M. Venema, *Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias*, 33 VIOLENCE & VICTIMS 176, 176 (2018); Amy Dellinger, *Behind the Blue Line: Investigating Police Officers' Attitudes Toward Rape*, 22 J. POLICE & CRIM. PSYCH. 22 (2007); Amy Dellinger, *True Colors: Police Officers and Rape Myth Acceptance*, 5 FEMINIST CRIMINOLOGY 315 (2010); Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample: Differences Between Police Officers With and Without Special Training*, 39 CRIM. JUST. & BEHAV. 646, 647 (2012).

[97] *See generally* Stacie Merken & Veronyka James, *Perpetrating the Myth: Exploring Media Accounts of Rape Myths on "Women's" Networks*, 41 DEVIANT BEHAV. 1179 (2019) (discussing the perpetuation of rape myths, including the 'stranger in a dark alley' narrative, through pop culture fictional crime shows like Law and Order: Special Victims Unit.).

[98] *Sexual Violence, 2021-2022*, *supra* note 64.

2. The Importance of Supportive First Responses to Sexual Assault Disclosure

(a) Voice and Powerlessness: Feminist Insights

"Feminist activists and scholars have long been interested in the dynamics that keep women" from talking about their experiences of violence.[99] Because feminist scholars view sexual violence as an act which serves to reinforce women's powerlessness and subservience,[100] women's silence about their experiences of it are emblematic of their powerlessness in society.[101] Rape myths perpetuate this powerlessness, as they both trivialise and deny the occurrence of sexual violence, and thereby have a silencing effect on victim-survivors.[102]

(b) The Variability of Responses

For those who do disclose sexual assault, typically they disclose informally to a social support before making any sort of formal complaint.[103] It's crucial that the first response a victim-survivor hears is supportive, and that it does not serve to uphold rape myths, apportion blame, or absolve the perpetrator. However, there is significant variability in the responses that a victim-survivor may hear upon disclosure, and negative responses are common.[104] Negative responses can vary, though one cross-case analysis outlined four subcategories of negative response: 1) being blamed; 2) receiving insensitive reactions; 3) experiencing ineffective disclosures; and 4) receiving inappropriate support.[105] In that same study researchers found that survey participants cited these negative responses as their reason for ceasing to disclose their experience to others.[106] Consequently negative

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[99] Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. CMTY. PSYCH. 263, 263 (2006).

[100] *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

[101] Ahrens, *supra* note 99, at 263.

[102] Burt, *supra* note 93, at 229.

[103] LIEVORE, *supra* note 67, at 12; Jaqueline Golding et al., *Social Support Sources Following Sexual Assault*, 17 J. CMTY. PSYCHOL. 92 (1989) (citing Ullman, *Correlates of Formal and Informal*, *supra* note 66, at 1029).

[104] Dehnad Hakimi et al., *Relationship Between Negative Social Reactions to Sexual Assault Disclosure and Mental Health Outcomes of Black and White Female Survivors*, 10 PSYCH. TRAUMA: THEORY, RSCH., PRAC. & POL'Y 270 (2018); Selime Salim et al., *Latent Profiles of Social Reactions to Sexual Assault Disclosure Among Undergraduate Women*, 46 PSYCH. WOMEN Q. 66, 68 (2022); Sarah Ullman & Liana Peter-Hagene, *Social Reactions to Sexual Assault Disclosure, Coping, Perceived Control and PTSD Symptoms in Sexual Assault Victims*, 42 J. CMTY. PSYCH. 495, 594 (2014).

[105] Ahrens, *supra* note 99, at 264.

[106] *Id.* at 272-73.

responses from first-responders can discourage further disclosure and can act as a barrier to sexual assault case progression.

(c) The Importance of Support

Receiving support following a disclosure is paramount. Demonstrating belief to a victim-survivor is recognised as being necessary to their healing process and has been found to correspond with reduced trauma.[107] There are also demonstrated links between supportive first responses and increased help-seeking behaviours.[108] In the context of case attrition, supportive first responses are necessary to empower victim-survivors to make formal reports to police, and to participate in justice system processes. Other people act as information sources and can help victim-survivors to make sense of their experiences, and to validate that what they have experienced is sexual victimisation.[109] Whilst seeking support from family and friends does not necessarily bring about justice-based solutions,[110] the reactions of these people can be highly influential on a victim-survivors future actions; including their decision to seek formal justice.[111]

B. Policy Response: Education & Training

1. Why Numbers Matter: Framing a Policy Problem

Unacknowledged sexual assault, rape myths and unsupportive first responses to sexual assault disclosures all contribute to case attrition as these factors play a role in the systemic under recording of sexual violence. The underestimation of sexual violence in Australia matters because statistics are central to understanding social problems. Indeed, "establishing the frequency of a problem has everything to do with how seriously it's

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[107] Haley Clark, "*What is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs*, 85 FAM. MATTERS 28, 32 (2010) (citing Rebecca Campbell, *Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference*?, 12 VIOLENCE AGAINST WOMEN 30 (2006)); MICHAEL FLOOD & BOB PEASE, THE FACTORS INFLUENCING COMMUNITY ATTITUDES IN RELATION TO VIOLENCE AGAINST WOMEN: A CRITICAL REVIEW OF THE LITERATURE 10-11 (2006); Lievore, *supra* note 67, at 15-16.

[108] Clark, *supra* note 107, at 29; LIEVORE, *supra* note 67, at 11-13.

[109] LIEVORE, *supra* note 67, at 30.

[110] Indeed, love and support are worthy ends in and of themselves. Catherine Kaukinen, *The Help-Seeking Decisions of Violent Crime Victims: An Examination of the Direct and Conditional Effects of Gender and the Victim-Offender Relationship*, 19 J. INTERPERSONAL VIOLENCE 432, 435 (2002).

[111] *Id.*; LIEVORE, *supra* note 67, at 11-13.

taken."[112] Consequently our ability to classify and categorise sexual violence as well as the prevalence of it, affects both resource allocation and resultant policies.[113]

For this reason, it's crucial that policymakers concern themselves with attrition at the earliest stages of sexual assault case progression. Because sexual assault case attrition is highest at the beginning of the justice seeking process,[114] for policies to be effective, policy instruments should be selected which address the specific issues at this stage: improper community understandings of sexual violence.

2. Improving Community Understandings of, and Response to, Sexual Violence

(a) Education: A National Campaign to Address Rape Myths

A pre-requisite to reporting sexual violence requires the person who has experienced it to be able to name it as such.[115] It also requires the community to understand what is and isn't sexual violence so that first-responders can provide appropriate and informed support. However, the above analysis demonstrates that this community understanding may be lacking.[116]

Consequently, it's necessary to address community understandings of sexual violence. The ABS 2021-2022 PSS showed that of the sexual assault victim-survivors surveyed, only 20% identified their experience as a crime at the time it was occurring.[117] However, of the 540,900 women who did not perceive the incident as a crime at the time, two-thirds (64% or 348,600) said

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[112] Laura Wilson & Katherine Miller, *Meta-Analysis of the Prevalence of Unacknowledged Rape*, 17 TRAUMA, VIOLENCE & ABUSE 149, 149 (2016) (citing Lucy Berliner, *Facts or Advocacy Statistics: The Case of Acquaintance Rape*, 7 J. INTERPERSONAL VIOLENCE 122 (1992)).

[113] *Id.*

[114] Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 CRIME & JUST. 565, 568 (2010).

[115] In situations where people are unable to recognise their victimisation, or articulate their experience of sexual violence, they may be victims of a form of epistemic injustice known as 'hermeneutical injustice'. Hermeneutical injustice is 'the injustice of having some significant area of one's social experience obscured from collective understanding owing to hermeneutical marginalisation'. In the context of sexual violence, the prevalence of rape myths encourages hermeneutical injustice and explain why some victim-survivors lack the tools and means to identify their own victimisation. For a further discussion on the concept of hermeneutical injustice, see MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 7 (Oxford Univ. Press 2007). For an analysis of epistemic injustice in the trial of sexual offences, see Emily Tilton, Epistemic Injustice in Sexual Assault Trials (May 2019) (M.A. Thesis, Georgia State University).

[116] KANTAR PUBLIC, AUSTL. GOV'T DEP'T OF SOC. SERVS., REDUCING SEXUAL VIOLENCE - RESEARCH INFORMING THE DEVELOPMENT OF A NATIONAL CAMPAIGN (Feb. 2022).

[117] AUSTL. BUREAU OF STATISTICS, *supra* note 2.

that their perception of it changed over time.[118] The main reasons these women gave for their change in perception included: self-education (39%), talking to a friend, family or another person (18%), an awareness campaign (15%), and engaging with a counsellor or support service (13%). [119]

This measurable change in perception is useful data because it demonstrates the value of educational resources as both self-education (39%) and awareness campaigns (15%) contributed to a victim-survivor perceiving their experience as a crime. Victim-survivors' understandings of sexual assault are shaped by numerous factors at the macro-level of social discourse, structures, institutions and norms.[120] As demonstrated above, these influences are most obvious in widespread rape myths which deter victims from disclosing and seeking support.[121] Because rape myths are widely believed, any instruments that policy-makers use to dispel these myths should take a *whole of population approach* and attempt to reach as many people as possible. Such an approach is consistent with the primary prevention domain of the National Plan to End Violence Against Women and Children (2022-2032) (henceforth 'National Plan').

Policy instruments should be problem-led in that they respond to a specific issue in a way that addresses the context in which it arises.[122] Consequently this article recommends the Australian Government implement a national campaign (the policy instrument), designed to address and dispel common rape myths. Whilst the method of delivery is important, it's also necessary to clarify the framing of the messaging. Since establishment of the National Plan, there have been numerous campaigns by both Governments and advocates designed to combat gender-based violence, however none of these campaigns have explicitly or methodically addressed rape myths and their impacts.[123]

A national campaign is an effective policy instrument because of its broad reach, and because it is a realistic policy option. Funding a campaign with this messaging would not require radical change, but an incremental adjustment to the Government's current approach. Whilst the National Plan does not use the words 'rape myth' anywhere in its 143 pages, the primary

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[118] *Id.*

[119] *Id.*

[120] DENISE LIEVORE, NO LONGER SILENT: A STUDY OF WOMEN'S HELP-SEEKING DECISIONS AND SERVICE RESPONSES TO SEXUAL ASSAULT, 119 (AUSTL. INST. OF CRIMINOLOGY FOR AUSTL. GOV'T'S OFF. FOR WOMEN, 2005).

[121] *Id.*

[122] Matthew Burke & Jennie Stephens, *Energy democracy: Goals and policy instruments for sociotechnical transitions*, 33 ENERGY RSCH. & SOC. SCI. 35, 45 (Nov. 2017).

[123] KANTAR PUBLIC, *supra* note 116, at 1.

intent of the plan is to eradicate gender-based violence in one generation.[124] Thus, combatting rape myths is an implied aspect of the National Plan and is something that should be addressed *explicitly*. Clearly and methodically addressing and dispelling rape myths in the form of a national campaign is well within the purview of the National Plan and complements the existing work being conducted by the Department of Social Services.

(b) Equipping First-Responders: Education & Training

In addition to the above whole of population approach, more targeted initiatives should be implemented. The people who first respond to disclosures of sexual violence have a significant impact on the subsequent actions taken by a victim-survivor.[125] For this reason, equipping first-responders with the tools necessary to validate and empower victim-survivors is essential. Whilst the ABS 2021-2022 PSS and the broader literature distinguish between informal and formal supports, due to the limited scope of this article, this section will only focus on equipping *informal* support providers with the necessary tools to respond. This is because informal support providers are usually lay people, often family and friends of the victim-survivor. Thus, empowering informal support providers with the necessary skills to respond to disclosures ensures consistency with the whole of population approach advocated for above.

In fact, 'training' these individuals to provide more supportive responses could be done *alongside* the above-mentioned national campaign through the provision of educational resources such as disclosure response toolkits. However, what this article most strongly recommends is that the Federal Government provide funding for sexual assault first-responder training.[126] Whilst within Australia, sexual assault first-responder training appears to be geared more towards professional service providers, other countries (such as in Singapore where I first undertook this training)[127] run elective training

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[124] DEP'T OF SOC. SERV., COMMONWEALTH GOV'T OF AUSTL., THE NATIONAL PLAN TO END VIOLENCE AGAINST WOMEN AND THEIR CHILDREN 2022-2032, 14 (Final Report, 2022).

[125] SEXUAL ASSAULT PREVENTION & RESPONSE STEERING COMM., ACT LEGIS. ASSEMBLY, LISTEN. TAKE ACTION TO PREVENT, BELIEVE AND HEAL, 42 (2021).

[126] The ACT Government have acknowledged the possibility of funding 'bystander training' which the SAPR report recommends be provided to select people working in frontline service roles. SEXUAL ASSAULT PREVENTION & RESPONSE STEERING COMM., *supra* note 125, at 42. Whilst this measure sounds promising for those in the ACT, this section recommends a *whole of population approach* and is thus urging the Federal Government to take action (which is also appropriate given the Federal Government's National Plan commitments).

[127] When working in Singapore in a small, feminist NGO I was able to first participate in and then deliver "sexual assault first responder training." The organisation I worked for delivered these workshops to other NGO's, embassies and to migrant communities who experience disproportionate levels of sexual violence in Singapore. *See* Laura Vitis, *Private, Hidden and Obscured: Image-Based Sexual Abuse in*

sessions for lay people which emphasise their role as friends, family members and colleagues. These sessions are designed to leverage existing interpersonal relationships as a basis for psychological safety which better enable a victim-survivor to disclose.[128] There is limited evidence available to indicate whether these training sessions are effective or not.[129] Given the clear policy rationale for encouraging supportive first responses, it's important that the Government build an empirical evidence base to establish whether this would work for the Australian population. This article recommends the Government trial and evaluates the efficacy of sexual assault first-responder training. This could be done via a grant process administered by the Department of Social Services. Specific sections of the community could be targeted to receive the training, or training could simply be made available via existing institutions like technical colleges. Funding such an initiative would not only ensure that first-responders are better equipped to assist victim-survivors but would allow the Government to build a more informed evidence base in the area of sexual assault prevention and response.

IV. DISTRUST IN POLICE AND THE IMPORTANCE OF VICTIM-CENTERED POLICING

A. Why Don't Victim-Survivors Report to Police?

The vast majority of victim survivors (92%) do not report their sexual assault to law enforcement.[130] The reasons why individuals may choose not

Singapore, 15 ASIAN J. OF CRIMINOLOGY 25 (2020); Tine Van Bortel et al., *Perceived Stressors and Coping Mechanisms of Female Migrant Domestic Workers in Singapore*, 14 PLOS ONE 20 (Mar. 20, 2019); Lenore Lyons, *Dignity Overdue: Women's Rights Activism in Support of Foreign Domestic Workers in Singapore,* 35 WOMEN'S STUDIES Q. 106 (2007); Angelia Poon, *MAID VISIBLE: Foreign Domestic Workers and the Dilemma of Development in Singapore*, 17 CROSSROADS: INTERDISC. J. SE. ASIAN STUD. 1 (2003).

[128] Sarah Singletary-Walker et al., *Reporting Sexual Harassment: The Role of Psychological Safety Climate*, 12 INDUS. & ORG. PSYCH.: PERSPECTIVES ON SCI. & PRAC. 106 (2019).

[129] There have been studies and evaluations on the efficacy of sexual harassment training and bystander intervention programs, but this author was unable to find any recent/relevant evaluations of responder training sessions. *See generally* Heather Hensman Kettrey, Robert Marx & Emily Tanner-Smith, *Effects of Bystander Programs on the Prevention of Sexual Assault Among Adolescents and College Students: A Systematic Review*, 15 CAMPBELL SYSTEMIC REVIEWS 1013 (2019); Nicole Jeffery et al., *Evaluation of the Transfer of Training for a Sexual Assault Resistance Program Enhanced with Sexuality Education*, 19 SEXUALITY RSCH. & SOC. POL'Y 2007 (2022); Mala Htun et al., *Effects of Mandatory Sexual Misconduct Training on University Campuses*, SOCIUS 8 (2022).

[130] AUSTL. BUREAU OF STAT., *supra* note 2. Victim-survivors who chose not to report to police were asked why they declined to engage with police. Some common reasons that victim-survivors gave for not reporting to police included: feeling they could deal with it themselves (34%), not regarding the incident as a serious offence (33%) and feeling ashamed or embarrassed (31%).

to report sexual assault are complex and varied.[131] Given the plenitude of these reasons, this chapter will focus specifically on the role of police within the broader context of sexual assault case progression, as research demonstrates that police practice and processes, as well as a victim-survivor's *perceptions* about police, can deter reporting.[132]

Police represent the first point of contact with the justice system, and are the ultimate 'gatekeepers' of justice.[133] Police represent the interface between victim-survivors and the criminal justice system, and they have the ability to prevent or promote access to that system.[134] In the context of sexual assault, police must record a disclosure and commence an investigation in order for charges to be laid.[135] Thus there are numerous points of attrition embedded *within* the policing stage. These potential points of attrition are examined below.

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[131] Georgina Heydon et al., *Alternative Reporting Options for Sexual Assault: Investigating Their Use, Purpose and Potential*, Report to CRIMINOLOGY RSCH. ADVISORY COUNCIL 1 (Nov. 2023), https://www.aic.gov.au/sites/default/files/2023-11/crg_25_19_20_alternative_reporting_v4.pdf [https://perma.cc/8FCZ-UDL4].

[132] Kayleigh Stanek et al., *Who Can You Trust? The Impact of Procedural Justice, Trust, and Police Officer Sex on Women's Sexual Assault Victimization Reporting Likelihood*, 29 VIOLENCE AGAINST WOMEN 860 (2023); Veronyka James & Daniel Lee, *Through the Looking Glass: Exploring How College Students' Perceptions of the Police Influence Sexual Assault Victimization Reporting*, 30 J. INTERPERSONAL VIOLENCE 2447 (2014); Lievore, *supra* note 67, at 31; Shana Maier, *"I Have Heard Horrible Stories . . .": Rape Victim Advocates' Perceptions of the Revictimization of Rape Victims by the Police and Medical System*, 14 VIOLENCE AGAINST WOMEN 786 (2008); Katalin Parti & Robin Robinson, *What Hinders Victims from Reporting Sexual Violence: A Qualitative Study with Police Officers, Prosecutors, and Judges in Hungary*, 10 INT'L J. FOR CRIME, JUSTICE & SOC. DEMOCRACY 158 (2021).

[133] *E.g.*, Wayne Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women*, 81 THE J. CRIM. L. & CRIMINOLOGY 267 (1990); SUSAN ESTRICH, REAL RAPE (1987); Olivia Sinclair, *The attrition problem: The Role of Police Officer's Decision Making in Rape Cases*, 19 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 135 (2022); Jessica Shaw et al., *Beyond Surveys and Scales: How Rape Myths Manifest in Sexual Assault Police Records*, 17 PSYCH. VIOLENCE 602 (2017); Melinda Tasca et al., *Police Decision Making in Sexual Assault Cases: Predictors of Suspect Identification and Arrest*, 28(6) J. INTERPERSONAL VIOLENCE 1157 (2013); Ericka Wentz & Kelsey Keimig, *Arrest and Referral Decisions in Sexual Assault Cases: The Influence of Police Discretion on Case Attrition*, 8 SOC. SCIS. 180 (2019); Katherine Lorenz et al., "*I Was Worried I Wouldn't Be Believed": Sexual Assault Victims' Perceptions of the Police in the Decision to Not Report*, 36 VIOLENCE & VICTIMS 1891 (2021).

[134] Caroline Taylor & Leigh Gassner, *Stemming the Flow: Challenges for Policing Adult Sexual Assault With Regard to Attrition Rates and Under-Reporting of Sexual Offences*, 11 POLICE PRAC. & RSCH. 240 (2010) (citing Wayne Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 THE J. CRIM. L. & CRIMINOLOGY 267-31 (1990)).

[135] Katrin Hohl & Betsy Stanko, *Complaints of Rape and the Criminal Justice System*, 12 EUR. J. CRIM. 324, 327 (2015).

B. Why do Police Rarely Lay Sexual Assault Charges?

"There is very limited research on police decision-making in sexual assault cases, and much of the research that does exist is dated."[136] Few studies have sought to address the numerous points of attrition involved within the policing stage distinctly, instead the literature predominately focuses on the legal, and extra-legal factors,[137] which influence investigation and case referral.[138] It is necessary to consider attrition *throughout* the policing process because assumptions made by officers in preliminary stages can affect the progression of that matter.

1. Recording a Statement

For a complaint to progress, a victim-survivor needs to have their account of events recorded. In the ACT, a formal statement is normally obtained via an audio-video recorded interview.[139] Making a formal report can take several hours and involves police asking questions of the victim-survivor which may sound as if they are attributing judgement or blame (even when they are not).[140]

Mapping attrition at the point of reporting is somewhat difficult as there is a lack of evidence available to indicate whether, and to what extent, this process results in 'filtering out'. Despite this, victim-survivors often describe making a formal report as a traumatic experience.[141] Police, much like the general public, are susceptible to rape myth acceptance,[142] and have been

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[136] Cassia Spohn & Katharine Tellis, *Sexual Assault Case Outcomes: Disentangling the Overlapping Decisions of Police and Prosecutors*, 36 JUST. Q. 383, 385 (2019).

[137] *See* Eryn O'Neal et al., *Prosecuting Intimate Partner Sexual Assault: Legal and Extra-Legal Factors That Influence Charging Decisions*, 21 VIOLENCE AGAINST WOMEN 1237 (2015) (discussing legal versus extra-legal factors).

[138] Danielle Soulliere, *Pathways to Attrition: A Qualitative Comparative Analysis of Justifications for Police Designations of Sexual Assault Complaints*, 10 QUALITATIVE REP. 416 (2005); Ericka Wentz & Kelsey Keimig, *Arrest and Referral Decisions in Sexual Assault Cases: The Influence of Police Discretion on Case Attrition*, 8 SOC. SCIS. 180 (2019).

[139] Sexual Assault Victim Brochure, ACT POLICING, [https://perma.cc/8494-9TNJ].

[140] *Id.*

[141] Jodie Murphy-Oikonen et al., *Unfounded Sexual Assault: Women's Experiences of Not Being Believed by the Police*, 37 J. INTERPERSONAL VIOLENCE 8916 (2022); Karen Rich, *Trauma-Informed Police Responses to Rape Victims*, 28(8) J. AGGRESSION MALTREATMENT & TRAUMA 1 (2018); Lievore, *supra* note 67.

[142] Rachel Venema, *Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias*, 33 VIOLENCE & VICTIMS 176 (2018); Amy Dellinger, *Behind the Blue Line: Investigating Police Officers' Attitudes Toward Rape*, 22 J. POLICE & CRIM. PSYCH. 22 (2007); Amy Dellinger, *True Colors: Police Officers and Rape Myth Acceptance*, 5 FEMINIST CRIM. 315(2010); Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample: Differences Between Police Officers With and Without Special Training*, 39 CRIM. JUST. & BEHAV. 646 (2012).

found to overemphasise the importance of victim credibility (even at the reporting stage),[143] and overestimate the likelihood of false reports.[144] Thus, it is not unsurprising if negative attitudes pervade official processes and deter victim-survivors from continuing with their report. Even amongst victim-survivors who successfully complete their report, they may choose not to proceed to investigation or may choose to withdraw their report at a later point in time.[145]

One study of attrition which examined the reporting stage found that 36% of cases fell out of the justice system in this manner.[146] In that study, numerous reasons were cited by victim-survivors some relating to the justice process (and others entirely unrelated).[147] A victim-survivor's decision to withdraw their report is often labelled by police as a 'failure to cooperate',[148] which unfortunately does not explain *why* they choose to withdraw. However, distrust in the justice system and poor treatment by police are often cited as reasons for disengaging with the justice process.[149] Victim-survivors who report positive and reaffirming police interactions tend to have higher levels of justice system engagement when compared with those who experience negative police interactions.[150] Consequently whilst negative police responses during the reporting stage can lead to harms including

[143] Lilly Yu et al., *The Link Between the SAMFE and Police Perceptions of Victim Credibility* 17 FEMINIST CRIM. 26, 30 (2022).

[144] Charlie Huntington et al., *False Accusations of Sexual Assault: Prevalence, Misperceptions, and Implications for Prevention Work with Men and Boys, in* ENGAGING BOYS AND MEN IN SEXUAL ASSAULT PREVENTION 379, 380 (Lindsay Orchowski & Alan D. Berkowitz eds., Academic Press 2022) [https://perma.cc/8XZV-VX2G]; Kimberly Lonsway, *Trying to Move the Elephant in the Living Room: Responding to the Challenge of False Rape Reports*, 16 VIOLENCE AGAINST WOMEN 1356 (2010); Rachel Venema, *Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias*, 33 VIOLENCE & VICTIMS 176 (2018); Stacy Dewald & Katherine Lorenz, *Lying About Sexual Assault: A Qualitative Study of Detective Perspectives on False Reporting*, 32 POLICING & SOC'Y 179 (2022).

[145] Cassia Spohn & Katherine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18(2) VIOLENCE AGAINST WOMEN 169, 171(2012).

[146] *Id.*

[147] Such as for hospitalisation for unrelated health issues. *Id.*

[148] Sharon Murphy et al., *Police Reporting Practices for Sexual Assault Cases in which "The Victim Does Not Wish to Pursue Charges,"* 29 J. INTERPERSONAL VIOLENCE 144, 151 (2014).

[149] Jodie Murphy-Oikonen et al., *Sexual Assault Case Attrition: The Voices of Survivors*, 12 SAGE OPEN 20, 22 (2022) (citing Stacy Dewald & Katherine Lorenz, *Lying About Sexual Assault: A Qualitative Study of Detective Perspectives on False Reporting*, 32 POLICING & SOC'Y 179 (2022)).

[150] Debra Patterson, *The Impact of Detectives' Manner of Questioning on Rape Victims' Disclosure* 17 VIOLENCE AGAINST WOMEN 1349 (2011); *see also* Kayleigh Stanek et al., *Who Can You Trust? The Impact of Procedural Justice, Trust, and Police Officer Sex on Women's Sexual Assault Victimization Reporting Likelihood*, 29 VIOLENCE AGAINST WOMEN 860, 864 (Apr. 2023).

secondary victimisation,[151] and decreased justice system engagement,[152] supportive responses can, at the very least, encourage the victim-survivor to consent to investigation.

2. Investigating a Claim

Besides recording the initial disclosure, the primary responsibility upon law enforcement is to investigate allegations of sexual violence.[153] Yet, research suggests that law enforcement officers often make their own assessments about the truthfulness of sexual assault reports *prior* to commencing investigation.[154] Police, as with other actors in the criminal justice system, are influenced by a range of legal and extra-legal factors in making the decision to treat any particular claim as legitimate.[155] There is substantial evidence to suggest that police are unduly influenced by extra-legal factors in deciding to take claims seriously and to investigate them thoroughly.[156] Extra-legal factors can include *inter alia* individual characteristics of the victim,[157] individual characteristics of the perpetrator,[158] the relationship between the victim and suspect,[159] the

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[151] Megan Greeson et al., *"Nobody Deserves This": Adolescent Sexual Assault Victims' Perceptions of Disbelief and Victim Blame from Police*, 44 J. CMTY. PSYCH. 90, 92 (2016); Debra Patterson, *The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes*, 26 J. INTERPERSONAL VIOLENCE 328, 329 (2011).

[152] Patterson, *The Impact of Detectives*, *supra* note 150.

[153] Murphy-Oikonen et al., *supra* note 141 (citing Rachel Venema, *Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports*, 31 J. INTERPERSONAL VIOLENCE 872 (2016)).

[154] Lucy Maddox et al., *The Impact of Psychological Consequences of Rape on Rape Case Attrition: The Police Perspective*, 27 J. POLICE & CRIM. PSYCH. 33 (2012); Murphy-Oikonen et al., *supra* note 141.

[155] Emma Sleath & Ray Bull, *Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systematic Review*, 34 AGGRESSION & VIOLENT BEHAV. 103 (2017); *see generally* O'Neal et al., *supra* note 137, at 1240 (showing that legally relevant factors such as evidence strength and offense seriousness strongly influence prosecutorial charging decisions).

[156] Suzanne George et al., *Detectives' Descriptions of Their Responses to Sexual Assault Cases and Victims: Assessing the Overlap Between Rape Myths and Focal Concerns*, 25 POLICE Q. 90, 91 (2022); Soulliere, *supra* note 138, at 417; Wentz & Keimig, *supra* note 138, at 3.

[157] Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64(1) AM. J. CMTY. PSYCH. 256 (2019); Liza Zvi, *Police Perceptions of Sex-worker Rape Victims and Their Offenders: A Vignette Study*, 37(15) J. INTERPERSONAL VIOLENCE 14189 (2022); Shaez Mortimer et al., *'Typical Scripts' and Their Silences: Exploring Myths about Sexual Violence and LGBTQ People from the Perspectives of Support Workers*, 31(3) CURRENT ISSUES CRIM. JUST. 333 (2019).

[158] Katy Colon et al., *The Impact of Race and Extra-Legal Factors in Charging Defendants with Serious Sexual Assault: Findings from a Five-Year Study of one Pennsylvania Court Jurisdiction*, 16 J. ETHNICITY CRIM. JUST. 99, 100 (2018); Tasca et al., *supra* note 133, at 1159.

[159] Jeffrey A. Bouffard, *Predicting Type of Sexual Assault Case Closure from Victim, Suspect, and Case Characteristics*, 28 J. CRIM. JUST. 527, 527 (2000); Jessica C. Fleming & Cortney A. Franklin, *Predicting Police Endorsement of Myths Surrounding Intimate Partner Violence*, 36 J. FAM. VIOLENCE 407 (2020); Eryn N. O'Neal & Cassia Spohn, *When the Perpetrator is a Partner: Arrest and Charging*

behaviour of the victim prior to the assault,[160] how quickly a report is made,[161] whether the victim physically resisted,[162] and numerous factors relating to the victim's overall credibility.[163]

This emphasis on extra-legal factors is significant for two primary reasons relating to investigation. The first is that increased attention to extra-legal factors can lead to inadequate or ineffective investigations. The second is because police may 'unfound' a sexual assault claim as a consequence of extra-legal factors.

(a) Inadequate Investigations

Research has found that increased victim-blaming and judgement during the investigation phase results in fewer investigative steps being taken by law enforcement.[164] Because police, like policymakers, are 'bounded' in their decision-making abilities,[165] heuristics and biases to assist in their decision-making, as well as to overcome resource scarcity.[166] Consequently, law enforcement may be selective about the way they allocate investigative resources because of the biases they adhere to.[167]

Decisions in Intimate Partner Sexual Assault Cases—A Focal Concerns Analysis, 23 VIOLENCE AGAINST WOMEN 707, 708 (2017).

[160] Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20(6) L. & HUM. BEHAV. 607, 611 (1996).

[161] Eryn N. O'Neal, *"Victim is Not Credible": The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants*, 36(1) JUST. Q. 127, 140 (2019); Patterson, *supra* note 151.

[162] Julie Horney & Cassia Spohn, *The Influence of Blame and Believability Factors on the Processing of Simple Versus Aggravated Rape Cases*, 34(2) CRIMINOLOGY 135, 137 (1996).; Eryn N. O'Neal & Kimberly Kaiser, *Resistance Strategies and Sexual Assault Outcomes: Do Measurement Decisions Influence Empirical Findings?*, 16 CRIMINOLOGY, CRIM. JUST., L., & SOC'Y 56, 56 (2015).

[163] O'Neal, *supra* note 161; Jane Goodman-Delahunty & Kelly Graham, *The Influence of Victim Intoxication and Victim Attire on Police Responses to Sexual Assault*, 8(1) J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 22, 25 (2011); *see also* Wentz, *supra* note 63, at 1922; Megan Alderden & Sarah Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18(5) VIOLENCE AGAINST WOMEN 525, 528 (2012).

[164] Shaw et al., *supra* note 133, at 611.

[165] Brent Snook & Richard M. Cullen, *Bounded Rationality and Criminal Investigations: Has Tunnel Vision Been Wrongfully Convicted?*, *in* CRIM. INVESTIGATIVE FAILURES 71, 74 (Dr. Kim Rossmo ed., Routledge 2008).

[166] *Id.* at 78.

[167] Tasca et al., *supra* note 133, at 1159 (citing Janice Du Mont et al., *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9(4) VIOLENCE AGAINST WOMEN 466 (2003)); Cassia Spohn & Katherine Tellis, *The Sexual Stratification Hypothesis Revisited: Testing Assumptions About Simple Versus Aggravated Rape*, 36 J. CRIM. JUST. 252 (2008); Wayne Kerstetter & Barrik Van Winkle, *Who Decides?: A Study of the Complainant's Decision to Prosecute in Rape Cases*, 17(3) CRIM. JUST. & BEHAVIOR 268 (1990).

(b) Unfounded Sexual Assault Claims

In addition to improper investigations, extra-legal factors may result in police making the decision to 'unfound' a sexual assault claim. 'Unfounding' refers to a method of investigative case closure, although there is some confusion within the literature regarding what 'unfounded sexual assault' means and whether it is synonymous with false allegations.[168] Although a full discussion of the various sub-categories of unfounded sexual assault is outside the scope of this work,[169] generally unfounded sexual assault includes a claim which is found to be false *or* baseless.[170] Thus whilst unfounded sexual assault can include false allegations, the two terms are not synonymous.[171]

Whilst rates of unfounded sexual assault are much higher than other crimes,[172] rates of false allegations of sexual assault are consistent with other crimes.[173] This suggests then, that decisions to 'unfound' claims are justified on the basis of being baseless, not false. Despite this distinction, police *perceptions* about the commonality of false allegations still contribute to high rates of unfounding.[174] Officially a claim can only be 'unfounded' when

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[168] Cassia Spohn et al., *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Report*s, 48 L. & SOC'Y REV. 161 (2014) (providing a review of the literature on unfounded sexual assault and false allegations and explaining that confusion regarding the difference between 'unfounded' sexual assault and false allegations can result in multifarious harms including the overestimation of rates of false reporting, and bias within data about police decision-making).

[169] *Id.* at 171 (although generally 'unfounded sexual assault' seems to comprise three sub-types of unactionable claims: 1) a report which does not reach the requisite threshold to lay a charge, 2) a report which might have reasonable grounds, but which the victim-survivor does not want investigated or actioned in any further way, and 3) an allegation which is false).

[170] *Id.* (defining a baseless claim as one which is not supported by sufficient evidence to prove the incident occurred, whereas a false allegation is one which is proven to have been fabricated or where the person making the report admits its falsehood); *see also* Huntington et al., *supra* note 144, at 381.

[171] Spohn et al., *supra* note 168, at 171; David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) VIOLENCE AGAINST WOMEN 1318, 1321.

[172] Soulliere, *supra* note 138, at 418; *see also* Inga Ting et al., *Rough Justice: How Police are Failing Survivors of Sexual Assault*, ABC NEWS (Jan. 27, 2020), https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364 [https://perma.cc/NU3S-H84X] (presenting the findings of an ABC investigation into the progression of sexual assault reports across the Australian states and territories. In their investigation, the ABC revealed that figures suggest that one in 12 sexual assault reports are unfounded, rising to one in four in some regions. The ACT had the fastest growing rate of cases receiving a designation of 'unfounded').

[173] Jacqueline Horan, *#Letherspeak. Victims as Catalysts for Law Reform in Sexual Assault Trials*, 47(2) MONASH U.L. REV. 48, 61 (2021) (citing Kimberly Lonswayet al., *False Reports: Moving beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 43(1) PROSECUTOR 10); *see also* Liz Kelly, *The (In)credible Words of Women: False Allegations in European Rape Research*, 16 VIOLENCE AGAINST WOMEN 1345, 1352 (2010); Kimberly Lonsway, *Trying to Move the Elephant in the Living Room: Responding to the Challenge of False Rape Reports*, 16 VIOLENCE AGAINST WOMEN 1356, 57 (2010).

[174] O'Neal, *supra* note 163, at 128; Huntington et al., *supra* note 144, at 380; Soulliere, *supra* note 138, at 432.; Lonsway, *supra* note 173, at 17.

an investigation reveals a report to be baseless, yet in practice, claims may be deemed unfounded when police merely suspect a victim-survivor is lying.[175]

3. Laying Charges & Referring a Matter to the Department of Public Prosecutions

Few studies examine how police discretion influences attrition at the point of arrest and case referral,[176] however, as with the above, a range of legal and extra-legal factors may inform police decision-making.[177] Some legally relevant factors can include: the police's ability to identify a suspect,[178] aggravating factors like weapon use,[179] and the availability of forensic evidence.[180]

A prerequisite to laying charges is suspect identification. Logic dictates that suspect identification should be more likely when the victim-survivor knows the suspect, such as in the case of acquaintance rape, or intimate partner violence. However, research suggests that victim-survivors who experience sexual assault by a non-stranger have their credibility more closely questioned,[181] and that police prefer to allocate investigative resources to stranger rapes.[182] This behaviour is somewhat at odds with the data which demonstrates that women are more likely to experience sexual violence by someone known to them,[183] and exemplifies police bias towards claims which reflect 'real rape myths'.[184]

In addition to the issues identified within the general literature, submissions made to the ACT Board of Inquiry into the Criminal Justice

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[175] Danielle Soulliere, *Pathways to Attrition: A Qualitative Comparative Analysis of Justifications for Police Designations of Sexual Assault Complaints*, 10 QUALITATIVE REP. 416, 418 (2005) (citing Alan Lizotte, *The Uniqueness of Rape: Reporting Assaultive Violence to the Police*, 31 CRIME & DELINQUENCY 169 (1985)).

[176] Wentz & Keimig, *supra* note 138.

[177] O'Neal, *supra* note 163; Wentz & Keimig, *supra* note 138, at 184; Alderden & Ullman, *supra* note 163.

[178] Gary LaFree, *Official Reactions to Social Problems: Police Decisions in Sexual Assault Cases*, 28 SOC. PROBS. 582 (1989); Tasca et al., *supra* note 133; Jeffrey Bouffard, *Predicting Type of Sexual Assault Case Closure from Victim, Suspect, and Case Characteristics*, 28 J. CRIM. JUST., 527 (2000).

[179] Wentz & Keimig, *supra* note 138 (citing April Pattavina, Melissa Morabito & Linda Williams, *Examining Connections Between the Police and Prosecutors in Sexual Assault Case Processing: Does the Use of Exceptional Clearance Facilitate a Downstream Orientation?*, 11 VICTIMS & OFFENDERS 315 (2016)).

[180] Tasca et al., *supra* note 133, at 1170.

[181] Spohn et al., *supra* note 168, at 171.

[182] Megan Alderden & Sarah Ullman, *Gender Difference or Indifference? Detective Decision Making in Sexual Assault Cases*, 27 J. INTERPERSONAL VIOLENCE 3 (2012).

[183] In fact, according to the ABS 2021-2022 PSS, 53% of reported perpetrators were an identifiable, intimate partner. *Sexual Violence, 2021-2022*, *supra* note 64.

[184] ESTRICH, *supra* note 133.

System (hereafter 'Board of Inquiry') identified some specific issues which affected police charging decisions in the ACT. Evidence from the ACT SAPR Report,[185] as well as an internal review conducted by the Australian Federal Police heard by the Board of Inquiry,[186] showed that ACT Police take a '*systemic approach to charging in sexual assault cases*'.[187] ACT Police tend to both overemphasise issues pertaining to victim credibility, and overstate the threshold of evidence required for charging.[188] This approach reflects the undue consideration of extra-legal factors cited above, as well as the potential for police to misunderstand/misinterpret relevant legal factors.

C. Policy Response: Examining Police Decision-Making Processes

1. The Policy Context

When writing about public policy, context is important.[189] The political environment surrounding an issue not only determines how seriously that issue is perceived as being, but dictates which policy instruments are realistically available to policy-makers.[190] Fortunately for policy-makers and activists alike, the ACT is currently particularly receptive to the topic of sexual assault law reform in the wake of the alleged rape of Brittney Higgins in Australian Parliament House in 2019, and the subsequent trial of her alleged rapist Bruce Lehrmann.[191]

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[185] SEXUAL ASSAULT PREVENTION & RESPONSE STEERING COMM., *supra* note 125.

[186] An internal review by the AFP of the ACT Criminal Investigations Sexual Assault and Child Abuse Teams in 2021 produced a report which was the subject of evidence before the Board of Inquiry. However, this review is not an attached exhibit to the Board of Inquiry's final report and is not publicly available (and thus cannot be explicitly cited). Nevertheless, references to it are made throughout the Board of Inquiry's final report. Walter Sofronoff KC, *Australian Capital Territory Board of Inquiry Criminal Justice System* (Final Report, July 31, 2023) [hereinafter *ACT Board of Inquiry*].

[187] *ACT Board of Inquiry*, *supra* note 186.

[188] *Id.* at 117.

[189] Bob Hudson, David Hunter & Stephan Peckham, *Policy Failure and the Policy-Implementation Gap: Can Policy Support Programs Help?*, 2 POL'Y DESIGN & PRAC. 1 (2019).

[190] *Id.*; *see also* Giliberto Capano & Andrea Lippi, *How Policy Instruments Are Chosen: Patterns of Decision Makers' Choices* 50 POL'Y SCIS. 269, 270 (2017).

[191] *R v Lehrmann* ACTSC 67 (16 Mar. 2022) (Austl.); *R v Lehrmann [No 2]* ACTSC 92 (29 Apr. 2022) (Austl.); *R v Lehrmann [No 3]* ACTSC 145 (21 June 2022) (Austl.); *DPP v Lehrmann [No 4*] ACTSC 282 (5 October 2022) (Austl.); *DPP v Lehrmann (No 5)* [2022] ACTSC 296 (Austl.); *Lehrmann v. Network Ten Pty Ltd,* 373 FLR 253 (Austl.); *DPP v Lehrmann (No 6)* [2022] ACTSC 334 (Austl.); [Case name] (2022) 373 FLR 412 (Austl.); *see also Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369 (Austl.) (J. Lee finding at [620] that *on the balance of probabilities*, Lehrman raped Higgins in Australian Parliament House in 2019).

Alleged misconduct by public officials in the handling of *R v Lehrmann*,[192] resulted in the establishment of a Board of Inquiry into the Criminal Justice System in the Australian Capital Territory.[193] Though the Board of Inquiry's terms of reference were specific to the Lehrman matter,[194] the final report and subsequent government commitments have broad reaching implications for the administration of justice in sexual assault matters within the ACT.

The Board of Inquiry's final report was published on the 31st of July 2023,[195] and the ACT Government published its final response (in which they agreed to all ten recommendations made by the Board of Inquiry) in early 2024.[196] Given the recency of the publication of both the report and the Government's response, what will come of these commitments remains to be seen. The desirability of some of these recommendations,[197] as well as some other areas for policy improvement, are considered below.

2. Cultures of Policing: Training & Specialisation

Although the Board of Inquiry does not specifically recommend that ACT policing address cultures which perpetuate disbelief in victim-survivors and perpetuate low charging rates, Shane Drumgold's submissions,[198] makes clear that a cultural shift is necessary.[199] With regard to police decision-making, some scholars have described the existence of a *'dominant mind set of suspicion'* underlying police responses to sexual

[192] *Lehrmann*, ACTSC 67.; *Lehrmann [No. 2], ACTSC 92.*; *Lehrmann [No. 3], ACTSC 145.*; *Lehrmann [No. 4], ACTSC 282*; *Lehrmann (No. 5), [2022] ACTSC 296.*; *Lehrmann, 373 FLR at 260.*

[193] *Inquiries* (*Board of Inquiry – Criminal Justice System*) Amendment Appointment 2023 (Notifiable Instrument NI2023-232) (Austl. Cap. Terr.).

[194] *Inquiries (Board of Inquiry – Criminal Justice System) Amendment Appointment 2023 (NI2023-232).*

[195] *See* Sofronoff KC, *supra* note 18.

[196] The ACT Government published an interim response on 7 August 2023 and published its final response 6 months later on 8 February 2024. *See id.*

[197] Given the limited scope of this article, a consideration of every recommendation made by the Board of Inquiry is not possible. Not all recommendations made by the Board of Inquiry pertain to the policing stage, and thus some may be included elsewhere within this submission, whilst others may not warrant specific mention at all. For further discussion on these recommendations. *See* Matthew Groves, *An inquiry to investigate a problem creates new problems: The ACT Board of Inquiry into Criminal Justice,* AUSTL. PUB. L. (Nov. 6, 2023), https://www.auspublaw.org/blog/2023/11/an-inquiry-to-investigate-a-problem-creates-new-problems-the-act-board-of-inquiry-into-criminal-justice [https://perma.cc/MZ2M-V5C6].

[198] In which he relied heavily on evidence from Sexual Assault Prevention and Response Committee as well as the AFP's internal review. *Id.*

[199] Sofronoff KC, *supra* note 18. Submissions of on behalf of Shane Drumgold SC to the Board of Inquiry, Part C - The Australian Federal Police / ACT Policing, 127.

assault reports.[200] To overcome these knowledge deficits and ingrained biases, police require specialist training to ensure they respond to victim-survivors in a way which is empathetic and understanding.[201]

Such a recommendation has already been made to the ACT Government by the Sexual Assault Prevention and Response Committee in their report entitled 'Listen. Take Action to Prevent, Believe and Heal' (the 'SAPR Report').[202] The ACT Government agreed in principle to the recommendation,[203] and have agreed to undertake consultation with relevant agencies and to review and improve the training those agencies already offer.[204] This approach is consistent with the theory of incrementalism advanced by this article as it seeks to adjust existing policy instruments (existing training programs) to ensure they are fit for purpose.

3. Police as Political Actors: Clarifying & Constraining Police Decision-Making

Acknowledging the fact that decision-makers, such as police, are engaging with policy is a necessary prerequisite to be able to analyse and critique the decisions that they make. 'Policy' is made, implemented, enforced, and adjusted in many ways and by many different people - not just politicians and public servants.[205] Criminal investigations present numerous opportunities for decision making.[206] When making decisions, police (like policymakers) face constraints. Central to Lindblom's theory of incrementalism is the fact that policy-makers are 'boundedly' (as opposed to comprehensively) rational.[207] Essentially, decision makers are limited in

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[200] Caroline Taylor & Leigh Gassner, *Stemming the Flow: Challenges for Policing Adult Sexual Assault With Regard to Attrition Rates and Under-Reporting of Sexual Offences*, 11 POLICE PRAC. & RSCH. 246 (2010) (citing JAN JORDAN, THE WORD OF A WOMAN? POLICE, RAPE AND BELIEF 135 (2004)).

[201] Jodie Murphy-Oikonen et al., *Gatekeepers to Justice: Police Officers' Experiences Responding to Sexual Assault*, 70(12) CRIME & DELINQ. 3450 (2024).

[202] Recommendations 16 and 17 call for the education of all stakeholders working in the criminal justice system, including police and other related law enforcement professionals. Sexual Assault Prevention and Response Steering Committee, ACT Legislative Assembly, *Listen. Take action to prevent, believe and heal*, (Report presented to the ACT Government, Dec. 2021) 69-70 [https://perma.cc/8YNK-THQT].

[203] ACT Legislative Assembly, Government Response to the Listen, Take Action to Prevent, Believe and Heal Report, (Report Presented by Ms Yvette Berry MLA, Minister for the Prevention of Domestic and Family Violence, June 2022) 14-15 [https://perma.cc/ZN8F-GP8N].

[204] *Id.*

[205] Stephen Ball et al., *Policy Subjects and Policy Actors in Schools: Some Necessary but Insufficient Analyses*, 32(4) DISCOURSE: STUD. CULTURAL POL. EDUC. 611, 622 (2011).

[206] Carl Jensen, A Test of Bounded Rationality in Police Decision-Making 1 (2003) (Ph.D. dissertation, University of Maryland) (citing Jan Chaiken, Peter Greenwood & Joan Petersilia, *The Criminal Investigation Process: A Summary Report* 3 POL'Y ANALYSIS 187 (1977)).

[207] Lindblom, *supra* note 40; *see also* Forester, *supra* note 37.

their knowledge, and in their capacities to learn and to solve problems.[208] As a consequence of these limitations, police officers may employ 'heuristics' or mental short-cuts,[209] to help overcome complexity and to limit the range of possibilities down to what is a likely possibility.[210] These mental short cuts can include *inter alia* rape myths,[211] stereotypes,[212] judgements about 'deservedness',[213] and suspicion.[214]

So, despite the numerous, non-legal heuristics and biases which may influence law enforcement, police are empowered by broad discretionary powers. The improper or uninformed exercise of this discretion can lead to the inequitable distribution of investigative resources, and thereby contribute to case attrition.[215] Fortunately, decision-making can be both clarified and constrained by the use of policy instruments like guidelines, frameworks and even simple checklists.[216] Clearer rules for how police should allocate investigative resources, as well as the relevant and irrelevant factors an officer should consider before charging, would be useful. Whilst the Board of Inquiry did not make any recommendations pertaining to the ways police allocate investigative resources,[217] Sofronoff acknowledged the need for clearer policy surrounding the threshold to charge for sexual assault.[218] The ACT Government committed to implementing this recommendation through consultation with ACT Policing and the Office for the Director of Public Prosecution.[219] This article recommends that the remit of this work be expanded to include the development of policy tools aimed at clarifying and

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[208] JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 157-58 (2d ed. 1993).

[209] Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185(4157) SCI. 1124 (1974).

[210] Scott Phillips*, The Formation of Suspicion: A Vignette Study*, 22(3) INT'L J. POLICE SCI. & MGMT. 274, 277 (2020).

[211] Amy Dellinger, *True Colors: Police Officers and Rape Myth Acceptance*, 5 FEMINIST CRIMINOLOGY 315 (2010); Jessica Shaw et al., *supra* note 133, at 602.

[212] Janya McCalman et al., *Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature* 4 SAGE OPEN 1, 5 (2014) [https://perma.cc/CCM8-Q7D4]; Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64(1) AM. J. CMITY. PSYCH. 256, 267 (2019); Michele Stacey, Kimberly Martin & Bradley Brick, *Victim and Suspect Race and the Police Clearance of Sexual Assault*, 7(3) RACE & JUST. 226, 229 (2017).

[213] Sarah Charman & Emma Williams, *Accessing Justice: The Impact of Discretion, 'Deservedness' and Distributive Justice on the Equitable Allocation of Policing Resources*, 22(3) CRIMINOLOGY & CRIM. JUST. 404 (2022).

[214] Phillips, *supra* note 210, at 277.

[215] Charman & Williams, *supra* note 213, at 407.

[216] Productivity Commission, *Strengthening Evidence-Based Policy in the Australian Federation*,1-8 (Austl.).

[217] Possibly because doing so would be outside the limited terms of reference governing the investigative powers of the Board of Inquiry. *ACT Board of Inquiry*, *supra* note 186, at 194-98.

[218] Walter Sofronoff KC, *Australian Capital Territory Board of Inquiry Criminal Justice System* (Final Report, 31 July 2023).

[219] Walter Sofronoff KC, *Final Report of the ACT Board of Inquiry - Criminal Justice System 31 July 2023 - Final Government Response* (Final Report, 8 February 2024).

constraining police decision-making *throughout* the policing stage, not just regarding the decision to charge.

4. Building the Evidence Base

By way of summary, the above indicates an absence of empirical research pertaining to attrition within the policing stage, *and* theoretical explanations of police decision-making processes.[220] Whilst ultimately the development/expansion of a body of literature is the task of researchers, the ACT Government, or even the Australian Government, could take a leadership role in this space by funding research and development which can be used to inform future policy decisions.

In response to recommendation 15 of the SAPR report,[221] the ACT Government have commenced a review into a number of sexual assault cases that were reported to ACT Policing between 1 July 2020 and 31 December 2021.[222] The purpose of the review is to understand the reasons for the low number of cases progressing to charge, including those deemed unfounded, uncleared or withdrawn. The review formally commenced in May 2022 and was finalised two years later in 2024.[223] This review should potentially produce relevant data and provide a substantial contribution to the literature on attrition (although this remains to be seen). Whilst 'evidence'[224] constitutes only one aspect of policymaking (besides interests, ideas, values,

[220] Whilst evidence and data collection are clearly important, the development of a theoretical context to situate that evidence in is necessary. It has been argued that 'without the generation of useful theoretical explanations, a field is intellectually bankrupt'. *See* FRANK HAGAN, ESSENTIALS OF RESEARCH METHODS FOR CRIMINAL JUSTICE 9 (Pearson, 3rd ed. 2022).

[221] Recommendation 15 calls upon the ACT Government to establish and fund an independent cross-agency taskforce to undertake a review of all sexual assault cases reported to ACT Policing that were not progressed to charge, including those deemed unfounded, uncleared or withdrawn. The initial phase of review suggested was reports made from 1 July 2020 to present (December 2021). SEXUAL ASSAULT PREVENTION & RESPONSE STEERING COMM., *supra* note 125, at 68.

[222] SEXUAL ASSAULT PREVENTION & RESPONSE STEERING COMM., *supra* note 125, at 8.

[223] Since writing the above, the Sexual Assault (Police) Review has been officially released. Although dated as having been completed in March, the review was only made publicly available on 30 April 2024, just a week before the submission deadline for this article. The report is 210 printed pages long and contains complex statistical analyses of case attrition within the territory. Consequently, this author has been unable to read, analyse and incorporate the findings of the report in advance of final submission. *See* ACT Government, *Sexual Assault (Police) Review Report* (Final Report, Mar. 2024); ACT Government 'Release of the Sexual Assault (Police) Review' (Joint Media Release, 30 Apr. 2024).

[224] It is worth briefly noting that within the field of public policy, the term 'evidence' has become a contested and politicised concept, in response to the rise of 'evidence-based policymaking'. *See* Lisel O'Dwyer, '*A critical review of evidence-based policy making*' (AHURI Final Report No. 58, May 2004) 8 (citing F. Reid, *'Evidence-based policy - where is the evidence for it?*' (Working Paper, University of Bristol, 2003)).

and beliefs),[225] evidence collection is still necessary to inform decision-making. Consequently, the ACT Government's move to obtain further evidence is commendable, as ultimately 'we need to be able to rely on social science and social scientists to tell us what works and why'.[226]

V. THE PROSECUTION PHASE: DISCRETION AND CASE ATTRITION

A. How Can Prosecutorial Discretion Affect Sexual Assault Case Progression?

The exercise of prosecutorial discretion within the criminal justice system is one of the most important, yet least understood aspects of the criminal justice process.[227] Prosecutors use their discretion daily,[228] and their exercise of this discretion goes relatively unchecked.[229] It has been suggested that the most significant gap in knowledge about criminal case progression is an understanding of prosecutorial discretion.[230] Consequently, understanding the factors which impact upon the exercise of prosecutorial discretion is necessary to identify how they can contribute to sexual assault case attrition.[231]

Due to the complexity associated with the Department of Public Prosecutions' (hereafter 'DPP') decision-making processes, there are relatively few Australian studies which evaluate the effect of prosecutorial discretion on sexual assault case progression.[232] However, one multi-jurisdictional study conducted in 2005 found that, on average, prosecutorial discretion accounted for a relatively large degree of case attrition, with 38

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[225] Holger Bahr, *Opportunities and Limitations of Evidence-Based Policy Advice for Evidence-Based Policymaking*, ELEPHANT IN THE LAB (Web Page, 10 May 2022); Linda Botterill & Andrew Hindmoor, *Turtles All the Way Down: Bounded Rationality in an Evidence-Based Age*, 33 POL'Y STUD., 367 (2012).

[226] Lisel O'Dwyer, *A Critical Review of Evidence-Based Policy Making*, AHURI Final Rep. No. 58, (May 2004); *see also* Sandra Nutley & Jeff Webb, *Evidence and the Policy Process*, *in* WHAT WORKS? EVIDENCE-BASED POLICY AND PRACTICE IN PUBLIC SERVICES (Sandra Nutley & Peter Smith eds., 2000).

[227] Eryn O'Neal, Katharine Tellis & Cassia Spohn, *Prosecuting Intimate Partner Sexual Assault: Legal and Extra-Legal Factors That Influence Charging Decisions*, 21(10) VIOLENCE AGAINST WOMEN 1237 (2015).

[228] *See id.* (determining which cases to accept, whether to agree with the police's classification of a crime, which files should be charged, whether to engage in plea bargaining, and in some cases, when recommending the sentence the offender should receive).

[229] Kenny Yang, *Public Accountability of Public Prosecutions*, 20 MURDOCH U.L. REV. 28, 29-34 (2013) (Austl.).

[230] O'Neal et al., *supra* note 137, at 1238 (citing Jeffery Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29(1) JUST. Q. 1, 25 (2012)).

[231] DENISE LIEVORE, AUSTL. INST. CRIMINOLOGY, PROSECUTORIAL DECISIONS IN ADULT SEXUAL ASSAULT CASES, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE NO. 291 (2005) (Austl.).

[232] *Id.*; *see also* Anna Talbot, *Criminal Justice: DPP Complaints and Oversight Mechanisms*, 136 PRECEDENT (AUSTL. L. ALL.) 40, 43 (2016) (Austl.) (discussing the lack of procedural review in Australia on decisions not to prosecute).

per cent of cases in the sample withdrawn from prosecution.[233] Thus even when charges are laid by police, prosecution is far from guaranteed.

For prosecutors, there are two essential elements to consider when determining whether to prosecute a matter.[234] First, there must be sufficient evidence to justify prosecution and a reasonable prospect of conviction.[235] Secondly, it must be in the 'public interest' to prosecute.[236] These two limbs are discussed below.

1. The First Hurdle: Sufficient Evidence

The first hurdle requires *prima facie* evidence of the elements of the offence,[237] and a reasonable prospect of conviction.[238] Researchers argue that legally relevant factors, such as the strength of the available evidence, are the strongest predictors of a prosecutors' decision to proceed.[239] Some evidential factors that the DPP typically consider in sexual assault matters

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[233] LIEVORE, AUSTL. INST. CRIMINOLOGY, *supra* note 67, at 5.

[234] *Id.* at 1 (citing Richard Refshauge, *Prosecutorial Discretion – Australia*, *in* THE CONVERGENCE OF LEGAL SYSTEMS IN THE 21ST CENTURY, 353-90 (G. Moens & R. Biffot eds., 2002)).

[235] *Id.*; *see* OFF. OF THE DIR. OF PUB. PROSECUTIONS, PROSECUTION POLICY OF THE AUSTRALIAN CAPITAL TERRITORY (2021).

[236] *Id.*

[237] Whilst the statutory definition of sexual assault differs across Australian jurisdictions, the offence generally comprises: a 'physical element' (the act of sexual touching), a 'circumstance' (the non-existence of consent), and a 'fault element' (knowledge or recklessness as to the lack of consent). *See* Criminal Code Act 1899 (Queensl.) § 349 (Austl.) (referring to sexual assault as rape in some jurisdictions); Criminal Law Consolidation Act 1935 (S. Austl.) § 48 (Austl.) (rape); Criminal Code Act 1924 (Tas.) § 185 (Austl.) (rape); Crimes Act 1958 (Vict.) § 38 (Austl.) (rape); Crimes Act 1900 (Austl. Cap. Terr.) § 54 (Austl.) (referring to the offence in the territories as "sexual intercourse without consent."); Criminal Code Act 1983 (N. Terr.) § 208H (Austl.) (sexual intercourse without consent); Crimes Act 1900 (N.S.W.) § 61I (Austl.) (referring to the offence in NSW as just 'sexual assault.'); *but see* Criminal Code Compilation Act 1913 (W. Austl.) § 325 (Austl.) (differing in WA, where the offense is labelled 'sexual penetration without consent.').

[238] OFF. OF THE DIR. OF PUB. PROSECUTIONS, *supra* note 234.

[239] Kris Henning & Lynette Feder, *Criminal Prosecution of Domestic Violence Offences: An Investigation of Factors Predictive of Court Outcomes*, 32(6) CRIM. JUST. BEHAV. 612 (2005); O'Neal et. al., *supra* note 137 (citing Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651 (2001) ("These studies suggest that although prosecutors' assessments of convictability are based primarily on legal factors such as the seriousness of the offense, the strength of evidence in the case, and the culpability of the defendant, legally irrelevant characteristics of the suspect and victim also come into play.")); Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact Of a Specialized Prosecution Unit*, 16(4) CRIM. JUST. POL'Y REV. 461, 464 (2005); Celesta Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 L. SOC'Y REV. 291, 293 (1987). *But cf.* Jeffrey Spears & Cassia Spohn, *The Effect of Evidence Factors and Victim Characteristics on Prosecutors Charging Decisions in Sexual Assault Cases*, 14(3) JUST. Q. 501 (1997) (finding through an empirical study of Detroit prosecutors' charging decisions in sexual assault cases that the *only* significant predictors of charging were victim characteristics, not legal factors).

include: the existence of DNA evidence,[240] or corroborating evidence,[241] an assessment of how well the victim-survivor is likely to give evidence in court,[242] the relationship between the victim and offender ('stranger rapes' have higher rates of progression to trial),[243] whether the victim suffered physical harm,[244] and evidence that the victim resisted the assault.[245] Which factors are given weight (and how much) depends on the circumstances of each case.[246]

With regard to evidence, it is necessary to recall the cultural context in which sexual violence occurs. Sexual assault most commonly occurs in a residential dwelling, at the hands of someone known to the victim,[247] and corroborating evidence (such as eyewitnesses) is often scarce.[248] Consequently, existing gendered power disparities can be reinforced in a 'he said, she said' situation,[249] where an accused person has the right to the

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[240] Michael Briody, *The Effects of DNA Evidence on Sexual Offence Cases in Court*, 14(2) CURRENT ISSUES CRIM. JUST. 159, 172 (2002); Lilly Yu, Kelly Walsh & Janine Zweig, *The Link Between the SAMFE and Police Perceptions of Victim Credibility*, 17(1) FEMINIST CRIM. 26, 29 (2022).

[241] Spear & Spohn, *supra* note 239, at 503; JESSICA HARRIS & SHARON GRACE, A QUESTION OF EVIDENCE? INVESTIGATING AND PROSECUTING RAPE IN THE 1990S, HOME OFFICE RESEARCH STUDY 196, at 26 (1999); Constance Backhouse, *Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History*, 29 W. AUSTL. L. REV. 79, 80 (2000) (Austl.).

[242] DENISE LIEVORE, AUSTL. INST. CRIMINOLOGY, VICTIM CREDIBILITY IN ADULT SEXUAL ASSAULT CASES, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE NO. 288 (2004) (Austl.).

[243] DENISE LIEVORE, AUSTL. INST. CRIMINOLOGY, PROSECUTORIAL DECISIONS IN ADULT SEXUAL ASSAULT CASES, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE NO. 291 (2005) (Austl.); Spohn & Holleran, *supra* note 239.

[244] Beichner & Spohn, *supra* note 239.

[245] Debra Patterson, *The Impact of Detectives' Manner of Questioning on Rape Victims' Disclosure*, 17 VIOLENCE AGAINST WOMEN 1349 (2011); Ashley Fansher & Bethany Welsh, *A Decade of Decision Making: Prosecutorial Decision Making in Sexual Assault Cases*, 12 SOC. SCIS. 348 (2023) (citing Sophie Heritage, Why Didn't She Fight Back? An Exploration of Victim Blaming Through Tonic Immobility Reactions to Sexual Violence (Sep. 2021) (M.A. dissertation, University of Worcester)).

[246] OFF. OF THE DIR. OF PUB. PROSECUTIONS, PROSECUTION POLICY OF THE AUSTRALIAN CAPITAL TERRITORY, § 2.9(a), 10 (2021) https://www.dpp.act.gov.au/__data/assets/pdf_file/0006/715506/Prosecution-Policy-2021.pdf [https://perma.cc/SG8U-AUUX].

[247] Genevieve Waterhouse et al., *Myths and legends: The Reality of Rape Offences Reported to a UK Police Force*, 8 EUR. J. PSYCH. APPLIED TO LEGAL CONTEXT 1, 7 (2016).

[248] Natalie Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, 3444 TRENDS & ISSUES CRIME & CRIM. JUST., 6 (Austl. Inst. of Criminology Aug. 2007); *see also* Constance Backhouse, *Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History*, 29 W. AUSTL. L. REV. 79 (2000).

[249] Georgi Gardiner, *The "She Said, He Said" Paradox and the Proof Paradox*, *in* THE SOCIAL EPISTEMOLOGY OF LEGAL TRIALS (Zachary Hoskins & Jon Robson eds., 1st ed. 2021); Ashley Fansher & Bethany Welsh, *A Decade of Decision Making: Prosecutorial Decision Making in Sexual Assault Cases*, 12 SOC. SCIS. 348 (2023); Claire Gravelin, Monica Biernat & Matthew Baldwin, *The Impact of Power and Powerlessness on Blaming the Victim of Sexual Assault*, 22 GRP. PROCESSES & INTERGROUP RELS. 98 (2019).

presumption of innocence,[250] as well as the privilege against self-incrimination.[251]

Additionally, research highlights the influence of a range of *extra-legal* factors on the DPP's decision to exercise its discretion.[252] Extra-legal factors considered by the DPP are similar to those cited in the previous chapter on police-decision making, and may include: whether the victim engaged in 'risky behaviour' (such as consuming alcohol, taking drugs or hitch-hiking),[253] whether they resisted the attack,[254] the victim-survivor's relationship to the defendant,[255] their age, occupation, and education,[256] and their overall credibility.[257] Consequently prosecutors may be influenced by a range of legal *and* extra-legal factors alongside the specific factual scenarios presented to them.

(a) Can Extra-Legal Considerations Become Legally Relevant?

It has been argued that prosecutors attempt to 'avoid uncertainty' by screening out sexual assault cases which might have reduced chances of conviction 'because of questions about the victim's character, behaviour and credibility'.[258] So, whilst factors such as the victim's character should be

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[250] *Envtl. Prot. Auth. v. Caltex Refining Co. Pty Ltd* (1993) 178 C.L.R. 477 (Austl.) (stating that the presumption of innocence is 'fundamental' to Australian criminal law); *Sorby v. Commonwealth* (1983) 152 C.L.R. 281, 294 (Austl.) (concluding that it is a "cardinal principle of our system of justice" that the prosecution bear the onus of proof); *see* Rebecca Harrison, The Presumption of Innocence in Sexual Violence Cases (2017) (Ph.D. dissertation, University of Melbourne) (on file with author); Stacey Pastel Dougan, *With Justice for Whom? The Presumption of Moral Innocence in Rape Trials*, 71(2) IND. L. J. 419 (1996); *see also* Anthony Gray, *Presumption of innocence in Australia: a threatened species*, 40 CRIM. L.J. 262 (2016) (explaining that although the presumption of innocence is fundamental in Australia, statutes threaten to undermine it).

[251] *See Reid v. Howard* (1995) 184 C.L.R. 1 (Austl.); *Lee v. New South Wales Crime Commission* (2013) 251 C.L.R. 196, 198 (Austl.) (holding that the privilege is a common law right and not a rule of evidence. Note however that this right is not absolute and could be qualified by parliament.). For further discussion on justifications for limiting the right against self-incrimination, see AUSTL. L. REFORM COMM'N, TRADITIONAL RIGHTS AND FREEDOMS - ENCROACHMENTS BY COMMONWEALTH LAWS (ALRC Report 129, Mar. 2016).

[252] Rebecca Campbell, *The Community Response to Rape: Victims' Experiences with the Legal, Medical, and Mental Health Systems*, 25 AM. J. CMTY. PSY. 355 (1998); LIEVORE, *supra* note 242; Spohn & Holleran, *supra* note 239; O'Neal et al., *supra* note 137; Spohn & Tellis, *supra* note 136, at 385.

[253] LaFree, *supra* note 178; Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48(2) SOC. PROBS. 206 (2001); Spohn & Holleran, *supra* note 239, at 651.

[254] Horney & Spohn, *supra* note 162; O'Neal & Kaiser, *supra* note 162; Wentz, *supra* note 63.

[255] Dawn Beichner & Cassia Spohn, *Modelling the Effects of Victim Behaviour and Moral Character on Prosecutors' Charging Decisions in Sexual Assault Cases*, 27 VIOLENCE & VICTIMS 3 (2012).

[256] O'Neal et al., *supra* note 137, at 1237.

[257] Horney & Spohn, *supra* note 162.

[258] Spears & Spohn, *supra* note 239, at 519.

irrelevant, they can take on a legal meaning as prosecutors attempt to decipher the ways in which judges and jurors may respond to any particular victim-survivor.[259]

To a significant extent, securing a conviction for sexual assault relies on a victim-survivor's ability to convince a jury beyond a reasonable doubt that the incident occurred.[260] Thus, a victim-survivor's character and credibility can become an integral factor for the prosecution to consider.[261] Research indicates that prosecutors who become preoccupied with convictability may actively look for extra-legal factors which discredit victim-survivors and provide a legal basis for not prosecuting their claim.[262] Even where prosecutors' assessments of convictability can be said to accurately reflect jurors' perceptions about sexual assault, this does not justify the consideration of extra-legal victim characteristics.[263] The DPP have an ethical obligation to file charges if they believe a crime has been committed,[264] and should not be unduly influenced by community (mis)understandings of sexual violence.

2. The Second Hurdle: The Public Interest

The 'public interest test' is complex and multifaceted, as there are countless factors to be considered and weighed in making the decision to prosecute any particular matter.[265] Some factors which prosecutors may consider include: the seriousness of the offence,[266] mitigating or aggravating circumstances,[267] the youth, age, physical health, mental health or special vulnerability of the accused, a witness or victim,[268] the background and prior convictions of the alleged offender,[269] the period of time elapsed since the

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[259] *See* O'Neal et al., *supra* note 137, at 1239 (citing Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213 (1991)) (this process of considering the decisions which may be made by criminal justice system actors at the next stage of the legal process has been referred to as a 'downstream orientation').

[260] LIEVORE, *supra* note 242, at 1.

[261] *Id.*

[262] Frohmann, *supra* note 259, at 216-24.

[263] Spears & Spohn, *supra* note 239, at 519.

[264] *Id.*

[265] Rachael Burgin, *Lehrmann Trial Discontinued: When Prosecution Isn't in the Public Interest*, CONVERSATION (Dec. 1, 2022, at 21:35 ET), https://theconversation.com/lehrmann-trial-discontinued-when-prosecution-isnt-in-the-public-interest-192495 [https://perma.cc/T5CX-XPUU].

[266] OFF. OF THE DIR. OF PUB. PROSECUTIONS, POLICY, *supra* note 246, at § 2.9(a).

[267] *Id.* at § 2.9(c).

[268] *Id.* at § 2.9(d); *see also* OFF. OF THE DIR. OF PUB. PROSECUTIONS, AUSTL. CAP. TERR., RE: DPP V LEHRMANN SCC 264 O021 (2022) (for a prominent and recent example where a consideration of the mental health of the victim-survivor resulted in the DPP declining to continue a prosecution.),

[269] OFF. OF THE DIR. OF PUB. PROSECUTIONS, POLICY, *supra* note 246, at § 2.9(e).

offence,[270] the availability and efficacy of any alternatives to prosecution,[271] the prevalence of the alleged offence and need for deterrence,[272] the attitude of the victim towards prosecution,[273] the likely outcome of the court in the event of a finding of guilt,[274] and the need to maintain public confidence in the administration of justice.[275]

DPP guidelines also typically specify factors which should not influence the decision to prosecute, such as; the race, ethnic origin, social position, marital status, sexual preference, sex, religion or political associations of anyone involved,[276] any personal feelings towards the parties,[277] any political advantage, disadvantage or embarrassment to the government,[278] or the possible personal or professional effect of the decision to prosecute.[279]

(a) Navigating Conflict and 'The Public Interest'

So, although the 'public interest' can be clearly distinguished from private interests,[280] the considerations cited above make what the DPP determines to constitute the 'public interest' in any particular matter somewhat elusive. So, who are 'the public' and what is in their interest? Australian society is not homogenous, and sections of the public may have distinct and competing interests.[281] Whilst a victim-survivor and an alleged offender will have a *private* interest in the outcome of any matter which involves them, they can both also be seen to belong to distinct social

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[270] *Id.* at § 2.9(f) (referred to within the ACT guidelines as the 'staleness' of the offence).

[271] *Id.* at § 2.9(k); *see also* Bronwyn Naylor, *Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternate Pathways*, 33 U.N.S.W.L.J. 662 (2010) ("propos[ing] an alternative pathway for appropriate cases based on principles of restorative justice and therapeutic jurisprudence").

[272] OFF. OF THE DIR. OF PUB. PROSECUTIONS, POLICY, *supra* note 246, at § 2.9(l).

[273] *Id.* § 2.9(q).

[274] *Id.* § 2.9(u).

[275] *Id.* § 2.9(w).

[276] *Id.* § 2.10(a).

[277] *Id.* § 2.10(b).

[278] *Id.* § 2.10(c).

[279] *Id.* § 2.10(d).

[280] *See generally McKinnon v. Secretary, Department of Treasury* [2005] FCAFC 142 [245] (Austl.) (Tamberlin J.) (noting that "public interest" may entail interests broader than private interests or individual concerns). For commentary on 'the public interest' in contrast with other rights and interests examining the competing meanings of "public interest" in administrative decision-making, see also Chris Wheeler, *The Public Interest: We Know It's Important, But Do We Know What It Means*, 48 AUSTL. INST. ADMIN. L.F. 12 (2006) (Austl.).

[281] Penny Martin, *Defining and Refining the Concept of Practising in 'the Public Interest'*, 28 ALT. L.J. 3 (2003) (Austl.); Wheeler, *supra* note 280, at 20.

groups.[282] Alongside the politicisation of sexual violence[283] and the rise of victim-survivor activism and advocacy,[284] 'men's rights activists' have emerged.[285] 'Men's rights activists' represent the peak of community backlash to anti-rape movements,[286] and they argue that feminist efforts to address and respond to sexual violence constitutes an 'abuse of due process that stigmatise(s) innocent young men'.[287] Within the Australian polity there are individuals situated within social groups (i.e. victim-survivor activists, feminists, men's rights activists) with inherently contradictory views about what may be in the 'public interest'. In situations such as these decision-makers need to balance competing interests, and typically this balancing exercise is based on questions of fact and degree.[288]

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[282] This is not to say that all victim-survivors become feminists or advocates, nor that all alleged offenders flock to the 'manosphere' and become men's rights activists. It is however necessary to think about the social situations and communities which both parties belong to, as these sections of the community can have distinct (and competing) interests which may affect policies pertaining to sexual assault prosecution.

[283] CAROL HARRINGTON, POLITICIZATION OF SEXUAL VIOLENCE: FROM ABOLITIONISM TO PEACEKEEPING (1st ed. 2010); Lise Gotell & Emily Dutton, *Sexual Violence in the 'Manosphere': Antifeminist Men's Rights Discourses on Rape*, 5 INT'L J. CRIME, JUST. & SOC. DEMOCRACY 65, 66 (2016).

[284] Charlotte Swanson & Dawn Szymanski, *From Pain to Power: An Exploration of Activism, the #Metoo Movement, and Healing From Sexual Assault Trauma*, 6 J. COUNS. PSYCH. 653 (2020); Brianna Delker, Rowan Salton & Kate McLean, *Giving Voice to Silence: Empowerment and Disempowerment in the Developmental Shift from Trauma 'Victim' to 'Survivor-Advocate'*, 21 J. TRAUMA & DISSOCIATION 242 (2020).

[285] An analysis of the rise of 'Men's Rights Activists' (hereafter 'MRAs') is beyond the limited scope of this article. However, the point which must be made here is that whilst the efforts of men to free themselves from patriarchy and restrictive masculinities is not inherently anti-feminist (and indeed is considered by many as an *extension* of feminist work), MRAs as a sub-group position themselves in ideological opposition to feminism. Scholars in the field posit that the MRA movement is inherently anti-feminist and built on the foundations of male supremacy. The movement aims to deny women resources, exclude women from male-dominated spaces, deny accountability for men's violence, and attribute to feminism any *genuine* problems faced by men. *See, e.g.*, Rachel Schmitz & Emily Kazyak, *Masculinities in Cyberspace: An Analysis of Portrayals of Manhood in Men's Rights Activist Websites*, 5 SOC. SCIS. 18 (2016); Michael Messner, *The Limits of "The Male Sex Role": An Analysis of the Men's Liberation and Men's Rights Movements'*, 12(3) GENDER & SOC'Y 255, (1998); Spase Karoski, Men on the Move: The Politics the Men's Movement (Apr. 2, 2007) (Ph.D. dissertation, University of Wollongong); MOLLY DRAGIEWICZ, EQUALITY WITH A VENGEANCE MEN'S RIGHTS GROUPS, BATTERED WOMEN, AND ANTIFEMINIST BACKLASH (Northeastern University Press 2011); Lise Gotell & Emily Dutton*, Sexual Violence in the 'Manosphere: Antifeminist Men's Rights Discourses on Rape*, 5(2) INT'L J. CRIME, JUST. & SOC. DEMOCRACY 65 (2016); Michael Messner, *Forks in the Road of Men's Gender Politics: Men's Rights vs Feminist Allies*, 5(2) INT'L J. CRIME, JUST. & SOC. DEMOCRACY 6 (2016).

[286] Gotell & Dutton, *supra* note 285.

[287] *Id.*

[288] Wheeler, *supra* note 280, at 20.

B. Policy Response: Shifting Objectives

1. Systems Thinking: The DPP as a Part of a Whole

It has been argued that poor justice system outcomes in sexual assault matters have resulted in a 'self-perpetuating cycle' wherein decisions made throughout the justice process are 'informed by anticipation of the decision which may be made at the next stage'.[289] Prosecutors are affected by this cycle as their decisions are constrained by an assessment of how judges and jurors may respond to any particular matter at trial.[290]

Conceiving of the role of prosecutors in this context is consistent with the concept of 'systems thinking'; a way of making sense of complexity by looking at wholes and relationships, rather than distinct parts.[291] Whilst ultimately this article delineates the problem of sexual assault case attrition into distinct and discrete phases, this is done with the aim of better understanding the *process as a whole*.[292] Similarly, prosecutors' decision-making makes most sense when viewed in the context of the system within which they operate. Whilst the above discussion may lead one to conclude that prosecutorial discretion should be limited, this overlooks the fact that discretionary decisions are made in the context of a justice system and society which misunderstands sexual violence.

(a) Judges and Jurors Perceptions as a Factor in Prosecutorial Discretion

Whilst judges are members of the legal profession,[293] jurors are lay people,[294] selected to represent and reflect community standards.[295] Consequently, jurors may bring their own beliefs and misconceptions about

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[289] Australian Law Reform Commission, *Family Violence – A National Legal Response* Report No. 114 ¶ 26.0, at 1185 (Nov. 2010) (citing Mary Heath, *Women and Criminal Law: Rape*, *in* WOMEN AND THE LAW IN AUSTRALIA (Patricia Easteal, ed.)).

[290] Frohmann, *supra* note 259.

[291] VIRGINIA ANDERSON & LAUREN JOHNSON, SYSTEMS THINKING BASICS: FROM CONCEPTS TO CAUSAL LOOPS (Kellie Wardman O'Reilly & Lauren Johnson eds., 1st ed. 2007).

[292] *Id.*

[293] Sir Gerard Brennan, The Role of the Judge, Speech at Nat'l Jud. Orientation Programme, Northbeach, Wollongong (Oct. 13, 1996); Randall Shepard, *Judicial Professionalism and the Relations Between Judges and Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223 (2000).

[294] For further discussion on decision-making in criminal trials by non-subject matter experts, see ANNE COSSINS, CLOSING THE JUSTICE GAP FOR ADULT AND CHILD SEXUAL ASSAULT: RETHINKING THE ADVERSARIAL TRIAL (2020).

[295] John Croucher & Stephnie Hon, *Judge or Jury? A Legal Conundrum*, 17 INT'L J. CRIM. JUST. 83 (2022) (comparing adjudication by the roles that judge and jury play); *see also* Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255 (2018) (explaining that juries reflect community values in criminal cases).

sexual violence with them into the courtroom, and judge matters through that lens.[296] It has been established that jurors who believe rape myths are less likely to find the defendant in a sexual matter guilty, and tend to place more accountability on the complainant.[297] Even though it is not normatively desirable for prosecutors to consider 'real rape myths', given the link between 'real rape criteria' and convictability,[298] it is not surprising that they do.

A policy response could be simply to direct prosecutors not to consider 'real rape myths' when making their decision to prosecute. However, given the correlation between juror beliefs, 'real rape criteria', and the likelihood of conviction,[299] this isn't realistic. A policy response which addresses the root of this issue (community understandings of sexual violence) is necessary. In chapter 3 of this article, two policy responses designed to raise community awareness about the reality, nature and extent of sexual violence in Australia were recommended (a national campaign, and first-responder training). Jurors, as members of the Australian population, would benefit from these policies and hopefully (eventually) begin to hold beliefs about sexual violence which would permit prosecutors to pursue a more diverse range of sexual assault matters.

2. An Inherent Issue? The Difficulty with Assessing Evidence

"Researchers often conclude that attrition of sexual assault cases at the prosecution stage is primarily related to evidentiary matters".[300] It is well documented how rare corroborating evidence is,[301] and the difficulties associated with obtaining DNA evidence (as well as the probative value of

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[296] Natalie Taylor, *Trends & Issues in crime and criminal justice, Juror Attitudes and Biases in Sexual Assault Cases,* No. 344, AUSTL. INST. CRIMINOLOGY (2007).

[297] Yazhi Pang et al., *Changes in Certitude, Adherence, and Attitude: Immediate Effects of Rape Myth Intervention on Jurors in a Mock Trial*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH 1, 3 (2022); Fiona Leverick, *What Do We Know About Rape Myths and Juror Decision Making?,* 24(3) INT'L. J. EVID. & PROOF 255, 256 (2020).

[298] Samantha Lundrigan et al*., Factors Predicting Conviction in Stranger Rape Cases,* 10 FRONTIERS IN PSYCH. 1, 9 (2019); Leverick, *supra* note 297; Jeffrey Spears & Cassia Spohn, *The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases,* 14 JUST. Q. 501, 519 (1997).

[299] Leverick, *supra* note 297; Pang et al., *supra* note 297; Kari Davies & Yong Liu, *Changes in Certitude, Adherence, and Attitude: Immediate Effects of Rape Myth Intervention on Jurors in a Mock Trial*, 19(16) INT'L J. ENV'T RSCH. & PUB. HEALTH 10345 (2022).

[300] Denise Lievore, *Trends & Issues in crime and criminal justice, Prosecutorial Decisions in Adult Sexual Assault Cases*, 291 AUSTRL. INST. CRIMINOLOGY 1, 2 (2005) (citing JESSICA HARRIS & SHARON GRACE, A QUESTION OF EVIDENCE? INVESTIGATING AND PROSECUTING RAPE IN THE 1990S HOME OFF. RES. STUDY NO. 196 (1999)).

[301] Taylor, *supra* note 296; Spears & Spohn, *supra* note 239.

such evidence).[302] Thus when it comes down to the word of a victim-survivor against an alleged offender, with no witnesses or supporting evidence, proving a case 'beyond a reasonable doubt' is an extremely challenging task.[303] Again, whilst this might lead one to conclude that lowering or adjusting the standard of proof in sexual assault matters is the necessary policy response, this article is extremely reluctant to advance this line of argument.[304] Criminal law and procedure, as well as the rules of evidence, are designed to reflect the community's sense of fairness, and this fairness underpins the criminal adversarial model.[305] Changes to fundamental features of the criminal justice system should not be undertaken lightly.[306] In a 2021 report the Victorian Law Reform Commission stated that changes to these fundamental aspects of criminal law would need to have strong support and evidence, and at that time, the Commission could not find evidence to support such change.[307] Consequently, prosecutors and policy-makers may have to 'sit with' this inherent difficulty in assessing evidence.[308]

Nevertheless, whilst prosecutors cannot overcome deficiencies in the availability or collection of evidence, they can commit themselves to prosecuting matters with integrity and rejecting rape myths. Whilst it's understandable that prosecutors must consider whether matters align with 'real rape' criteria, only prosecuting matters which fit the criterion reinforces

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[302] Michael Briody, *supra* note 240, at 159; Yu, Walsh & Zweig, *supra* note 240, at 41. Note also that DNA evidence in sexual assault matters can only be so useful. Whilst evidence of ejaculation for example can be used to prove that the *physical* element of the offence occurred, it does not speak to the existence (or otherwise) of consent. *See* BRI LEE, EGGSHELL SKULL (Allen & Unwin 2018).

[303] Taylor, *supra* note 296.

[304] That is not to say that such an argument could not be made. Indeed others (see proceeding citation) have already argued for a 'partial shift' in the burden of proof for sexual assault matters. However, such an argument is inconsistent with the incrementalist approach taken by this article and this author considers changing the burden of proof to be outside the scope of the 'Overton window' (range of political possibilities acceptable to the mainstream public) at this point in time. For further discussion on shifting the burden of proof for sexual assault, see Bridget Sinclair, A Discussion Regarding a Partial Shift in the Burden of Proof in Sexual Violence Offending in New Zealand: The Search for Justice on Behalf of Complainants (2015) (Honours Thesis, Victoria University of Wellington); *see also* Rolland Allen & Alex Stein, *Evidence, Probability and the Burden of Proof*, 55 ARIZ. L. REV. 557 (2013) (analyzing the burden of proof doctrine and its relationship to evidence and probability).

[305] Phoebe Bowden, Terese Henning & David Plater, *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*, 37 MELB. U.L. REV. 539, 545 (2014); VICTORIAN LAW REFORM COMMISSION, IMPROVING THE JUSTICE SYSTEM RESPONSE TO SEXUAL OFFENCES 412 (Sep. 2021) [hereinafter IMPROVING THE JUSTICE SYSTEM RESPONSE].

[306] IMPROVING THE JUSTICE SYSTEM RESPONSE, *supra* note 305, at 413.

[307] *Id.*

[308] Writing specifically about the role of prosecutors in balancing competing 'public interests', Chris Wheeler suggests that sometimes it may be most appropriate for decision-makers to choose the 'least worst' option. Chris Wheeler, *The Public Interest: We Know it's Important, but Do We Know What it Means*, 48 AIAL FORUM 12, 21 (2006).

its validity. It's been argued that 'without prosecutions which test and redefine understanding of the boundaries of rape legislation, opportunities to clarify the law and improve the chance of future convictions are lost'.[309] Prosecutors *should* advance cases (supported by sufficient evidence) even where they suspect jurors will dismiss them for non-adherence to 'real rape' criteria. Policy instruments to support this could include training prosecutors to identify, reject and address rape myths, or incorporating a statement of values into the Prosecution Policy of the Australian Capital Territory which acknowledges the cultural context in which rape myths occur.

3. More Up-to-Date and Relevant Data Is Needed

Finally, this article calls attention to the need for a better understanding of prosecutorial discretion in the context of sexual assault case attrition. In Australia, the most valuable data on the subject comes from a multi-jurisdictional study,[310] analysing 141 cases referred to the DPP between 1 July 1999 and 30 June 2001. That study was published in 2005, and is now substantially outdated.[311] Since 2005, jurisdictions across Australia have made significant modifications to substantive laws, and rules of evidence, pertaining to sexual assault.[312] Updated and relevant information is needed, not only to assist in addressing sexual assault case attrition, but also to shine a light on the role of some of the least understood actors within the criminal justice system.[313] Funding for the 2005 study was provided by an Australian Government initiative and administered by the Office of the Status of Women.[314] Funding for a new comprehensive study of this nature in 2024 (or thereafter) could come from numerous Federal Government departments

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[309] AUSTRALIAN LAW REFORM COMMISSION, *supra* note 289, at 1197 (quoting Heath, *supra* note 289).

[310] The jurisdictions subject to the study were: the Australian Capital Territory, New South Wales, the Northern Territory, Western Australia and Tasmania. Lievore, *supra* note 300, at 22.

[311] *Id.*

[312] *See* AUSTRALIAN LAW REFORM COMMISSION, *supra* note 289, at 1119-23; LAW COUNCIL OF AUSTRALIA, CURRENT AND PROPOSED SEXUAL CONSENT LAWS IN AUSTRALIA (2023), https://lawcouncil.au/publicassets/3d1a761d-41d4-ed11-947b-005056be13b5/2023%2004%2005%20-%20S%20-%20Current%20and%20Proposed%20Sexual%20Consent%20Laws.pdf?utm [https://perma.cc/KBC7-3HFA]; HAYLEY BOXALL, ADAM M. TOMISON, & SHANN HULME, HISTORICAL REVIEW OF SEXUAL OFFENCE AND CHILD SEXUAL ABUSE LEGISLATION IN AUSTRALIA: 1788–2013 (Special Report, Australian Institute of Criminology, 2014), https://www.aic.gov.au/sites/default/files/2020-05/Historical-review-sexual-offence-child-sexual-abuse.pdf [https://perma.cc/LK55-YP9E]; *see also* Jessica Kennedy & Patricia Easteal, *Shades of Grey: Indeterminacy and Sexual Assault Law Reform*, 13 FLINDERS L.J. 49 (2011) (examining a sample of sexual assault law reform provisions).

[313] Kenny Yang, *Public Accountability of Public Prosecutions*, 20 MURDOCH U.L. REV. 28, 36 (2013).

[314] Lievore, *supra* note 300, at 6.

who have overlapping interests and responsibilities pertaining to sexual violence.[315]

VI. THE TRIAL: INADEQUACIES, ADVOCACY, AND ACCOUNTABILITY

A. Do Poor Justice System Outcomes for Victim-Survivors Create a 'Self-fulfilling Prophecy'?

Research indicates that conviction rates for sexual assault in Australia are extremely low.[316] Whilst 'low prosecution rates are, in part, a result of the low chances of conviction',[317] the question remains: what exactly are the causes of low conviction rates, and how does the trial itself fit within the broader context of sexual assault case attrition? Anne Cossins[318] describes a sort of 'self-fulfilling prophecy' wherein conviction rates are lowered by a process of attrition, and low prospects of conviction contribute to case attrition.[319] Consequently, interrogating the role of the criminal trial is

[315] For instance, some of the following Government agencies/departments may have sufficient interest in such a new policy proposal: the Office for Women (part of the Department of Prime Minister & Cabinet), the Department of Social Services (who have primary policy responsibility for measures arising under and relating to the National Plan to End Violence against Women and Children 2022-2032), the Attorney-General's Department (who are responsible for programs and policies designed to maintain and improve Australia's law and justice framework) or the Australian Institute of Criminology (who are Australia's national research and knowledge centre on crime and justice). Ultimately, it would be for the Government of the day to decide which department or agency would have responsibility for such a review. *See generally Commonwealth entities and companies*, COMMONWEALTH OF AUSTL., https://www.directory.gov.au/commonwealth-entities-and-companies [https://perma.cc/YM2Y-FQ9M] (last visited Jan. 25, 2026) (providing a directory of Australian government agencies and departments).

[316] TIDMARSH & HAMILTON, *supra* note 19, at 1; Daly & Bouhours, *supra* note 28, at 565; Larcombe, *supra* note 19, at 28; Jacqueline Fitzgerald, *The attrition of sexual offenses from the New South Wales Criminal Justice System*, 92 NSW BUREAU OF CRIME AND STATISTICS RESEARCH (2006) https://bocsar.nsw.gov.au/documents/publications/cjb/cbj01-100/cjb92.pdf?utm [https://perma.cc/ES8K-C3U4].

[317] Larcombe, *supra* note 19, at 28.

[318] Pre-eminent Australian expert on sexual assault law reform. *Honorary Professor Anne Cossins*, UNSW SYDNEY, https://www.unsw.edu.au/staff/anne-cossins [https://perma.cc/N4MH-CK96] (last visited Jan. 25, 2026).

[319] ANNE COSSINS, CLOSING THE JUSTICE GAP FOR ADULT AND CHILD SEXUAL ASSAULT: RETHINKING THE ADVERSARIAL TRIAL 6 (2020).

necessary to address attrition occurring at this final stage,[320] *and* at earlier stages in the socio-legal process.[321]

Because of the intricacies involved in the successful prosecution of a criminal offence, as well as the innumerable aspects of criminal sexual assault trials which have become subject to critique,[322] this chapter does not purport to provide an exhaustive analysis of criminal sexual assault trials. Instead, in keeping with the aims of this article, it intends to highlight some of the *processes, practices* and *procedures* which undermine justice system participation by sexual assault victim-survivors, and which contribute to case attrition.

1. Evidence Law Issues and their Impacts

Some of the most difficult issues associated with the successful prosecution of sexual assault are evidentiary in nature.[323] Aside from the difficulty associated with obtaining and adducing evidence of sexual assault,[324] difficulty can arise because 'evidence law is not simply a body of neutral rules with general application',[325] but a set of doctrines which reflect particular interests and understandings of the world.[326] Consequently,

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[320] Although technically the trial is not the 'final' stage in the justice process because there is always the potential for re-trials and appeals, for the majority of matters the criminal trial represents the end of the justice process. *See* Julia Quilter & Luke McNamara, *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*, 259 NSW BUREAU OF CRIME AND STATISTICS RESEARCH (2023). For more on re-trials and appeals in sexual assault matters, see Susan Mills & Stefanie Sharman, *Characteristics of Successful and Unsuccessful Appeals Against Conviction for Child Sexual Abuse*, 24(5) PSYCHIATRY, PSYCH. & L. 655 (2017).

[321] Kathleen Daly & Brigitte Bouhours, *Rape and attrition in the legal process: A comparative analysis of five countries* 39(1) CRIME & JUST. 565, 567 (2010).

[322] Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners,* 18 JUST. Q. 651 (2001). *See* ELAINE CRAIG, PUTTING TRIALS ON TRIAL: SEXUAL ASSAULT AND THE FAILURE OF THE LEGAL PROFESSION (McGill-Queen's University Press 2018).

[323] Lisa Dufraimont, *Myth, Inference and Evidence in Sexual Assault Trials*, 44 QUEENS L.J. 316, 317 (2019) (citing Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 519-520 (1992)).

[324] Jeffrey Spears & Cassia Spohn, *The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases*, 14 JUST. Q. 501, 503 (1997); JESSICA HARRIS & SHARON GRACE, A QUESTION OF EVIDENCE? INVESTIGATING AND PROSECUTING RAPE IN THE 1990S, Home Off. Res. Study No. 196, 11-17 (1999); Michael Briody, *The Effects of DNA Evidence on Sexual Offence Cases in Court*, 14 CURRENT ISSUES CRIM. JUST 159, 173-179 (2002); Lilly Yu, Kelly Walsh & Janine Zweig, *The Link Between the SAMFE and Police Perceptions of Victim Credibility*, 17 FEMINIST CRIMINOLOGY 26, 31-32 (2022); Constance Backhouse, *Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History*, 29 W. AUSTL. L. REV. 79, 105 (2009).

[325] Elizabeth Sheehy, *Evidence Law and 'Credibility Testing' of Women: A Comment on the E Case*, 2 QUEENSLAND U. TECH. L. & JUST. J. 157, 157 (2002).

[326] Sheehy, *supra* note 325 (citing to Marilyn MacCrimmon, *Developments in the Law of Evidence: The 1995-96 Term: Regulating Fact Determination and Commonsense Reasoning*, 8 SUP. CT. L. REV. 367 (1997)); *see also*, IAN DENNIS, THE LAW OF EVIDENCE (Street & Maxwell 1999) (in which the author comments that the term 'evidence' is not specifically or even primarily legal in meaning).

feminist analyses of evidence law tend to argue that evidence law 'reflects, affects and instantiates patriarchal culture'.[327]

Investigating the nature of evidence in sexual assault proceedings,[328] the Australian Law Reform Commission identified the following areas of concern: evidence of sexual reputation and experience,[329] the disclosure of confidential counselling communications,[330] tendency and coincidence evidence,[331] relationship evidence,[332] and evidence of recent and delayed complaint.[333] Additionally, feminist scholars criticise the existence of double

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[327] MARY CHILDS & LOUISE ELLISON, FEMINIST PERSPECTIVES ON EVIDENCE 6 (Cavendish Publishing Ltd, 2000) (citing Andrew Taslitz, *Gender and Race in Evidence Policy: What Feminism has to Offer Evidence Law*, 28 SW. L. REV. 171, 178 (1999)).

[328] Australian Law Reform Commission, *Family Violence - Improving Legal Frameworks* (ALRC CPS 1, 2010) 1130.

[329] Note that evidence relating to a complainant's sexual reputation is now inadmissible in the ACT. Evidence Act 1991 (Austl. Cap. Terr.) § 75 (Austl.). https://www.legislation.act.gov.au/a/1991-34?utm [https://perma.cc/SGB3-ANZN]. However, whilst § 75 promulgates a general immunity, § 76 limits the scope of the exclusionary rule and stipulates that § 75 only applies to evidence about sexual activity with persons *other* than the accused (meaning prior sexual activity with the accused can be led as evidence). This limit to the scope of exclusion is not insignificant given the fact that sexual violence commonly occurs within the context of family violence, and as such, the parties may have had prior consensual interactions. *See* Australian Law Reform Commission, *Family Violence - Improving Legal Frameworks* (ALRC Report No. 114, Nov. 2010) 1236.

[330] 'Sexual assault communications' are communications made in the course of a therapeutic relationship between a sexual assault victim-survivor and their counsellor. In the event a matter proceeds to trial, the defence may wish to access the material to assist in cross-examining the victim-survivor. However, every Australian state and territory now recognises (to varying degrees) a privilege against the production of 'sexual assault communications.' For the rules pertaining to the protection of counselling communications in a family, domestic and sexual violence context in the ACT, see Evidence Act, *supra* note 329, at div 4.4.3. For broader discussion, see Rights Advocacy Project, Submission to the Australian Law Reform Commission, *Review of the Family Law System* (IP 48 Mar. 2018) 88-90.

[331] Tendency and coincidence evidence in criminal matters typically refers to evidence of a defendant's misconduct in other circumstances, which is adduced to support an inference that the defendant has a tendency towards certain (criminal) behaviour. In the ACT (and other Uniform Evidence Law jurisdictions) tendency evidence is excluded by the 'tendency rule.' *Evidence Act 2011* (ACT) § 97 (Austl.). Despite its general exclusion, it is possible to adduce tendency evidence where counsel is able to demonstrate the evidence has significant probative value and that this value substantially outweighs any risk of any unfairness. For further discussion on the admission of tendency evidence, see generally David Hamer, *Tendency Evidence and Coincide Evidence in the Criminal Trial: What's the Difference?' in* CRITICAL PERSPECTIVES ON THE UNIFORM EVIDENCE LAW 158 (Andrew Robers & Jeremy Gan eds., Federation Press 2017). For further discussion on the appropriateness of the exclusion of tendency evidence in the context of sexual assault prosecutions, see David Hamer, *The Significant Probative Value of Tendency Evidence*, 42 MELB. U.L. REV. 506 (2019).

[332] *Family Violence - Improving Legal Frameworks, supra* note 328, at 211-12.

[333] *Id.* at 212-13; *see also* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 UC DAVIS L. REV. 1013, 1015 (1991); Elaine Craig, *The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence*, 36 QUEENS L.J. 551, 4-6 (2011).

standards in relation to character evidence,[334] and credibility,[335] as well as the extent/ferocity of cross-examination processes (discussed below).

Whilst further analysis of the intricacies of each of these distinct areas of evidence law is not possible within the limited scope of this submission, the key takeaway is that the application of the rules of evidence can contribute to low prospects of conviction, as well as to sexual assault case attrition. It does so in three ways. Firstly, evidential standards which err in favour of the defendant make it challenging for the prosecution to adduce relevant, probative, and admissible evidence, thereby making it hard to meet the requisite standard of proof ('beyond a reasonable doubt').[336] Secondly, as discussed in chapter 4, evidential concerns are often cited by police as reasons for not progressing matters. Thus, the law of evidence can shape the attitudes and behaviours of other justice system actors at earlier stages in the justice-seeking process. Thirdly, victim-survivors may (very reasonably) be concerned about how they may be portrayed in court,[337] whether their personal information will be protected,[338] and whether the process will cause further trauma.[339] Consequently, they may refuse to proceed to trial or decline to continue participation in a trial once commenced.

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[334] *See* Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663 (1998).

[335] *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017); Ravinder Barn & Ved Kumari, *Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India*, 55 BRITISH J. CRIMINOLOGY 435 (2015); Melissa Morabito, April Pattavina & Linda Williams, *It All Just Piles Up: Challenges to Victim Credibility Accumulate to Influence Sexual Assault Case Processing*, 34 J. INTERPERSONAL VIOLENCE 3151, 3153 (2019).

[336] *See* Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases*; *Trends & Issues in Crime and Criminal Justice*, 291 AUSTL. INST. CRIMINOL. 1 (2005).

[337] Kerstin Braun, *Legal Representation for Sexual Assault Victims — Possibilities for Law Reform?*, 25 CURRENT ISSUES CRIM. JUST. 819, 822-24 (2014); Stacey Dougan, *With Justice for Whom? The Presumption of Moral Innocence in Rape Trials*, 71 IND. L.J. 420, 426-37 (1996); Melanie Randall, *Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming*, 22 CANADIAN J. WOMEN AND L. 397, 407-15 (2011); Melissa Morabito et al., *supra* note 335, at 3156-57.

[338] Wendy Murphy, *The Victim Advocacy and Research Group: Serving a Growing Need to Provide Rape Victims with Personal Legal Representation to Protect Privacy Rights and to Fight Gender Bias in the Criminal Justice System* 11 J. SOC. DISTRESS & HOMELESS 123, 131 (2001) [hereinafter *Protect Privacy Rights*]; Simon Bronitt, *'No Records. No Time. No Reason Protecting Rape Victims:' Privacy and the Fair Trial*, 8 CURRENT ISSUES CRIM. JUST. 130, 136 (1996).

[339] Jade Jeffrey, *The Criminal Injustice System: Professional Perspectives of Secondary-Victimisation in Relation to Female Victims of Male Violence and Abuse*, *in* RESEARCHING DOMESTIC ABUSE AND SEXUAL VIOLENCE 60, 66 (Claire McLoone-Richards ed., 2023).

2. Cross Examination and Improper Questioning

A fundamental principle of adversarial justice is the right to a fair trial.[340] The right to a fair trial is a bundle of rights,[341] which includes the right of a defendant (via a legal representative)[342] to cross-examine witnesses, including victims of the alleged offence.[343] The right to cross-examine is closely linked to the presumption of innocence,[344] and is considered "the ultimate means of demonstrating truth and of testing veracity."[345]

Despite the foundational importance of cross-examination, the cross-examination of victims of sexual offences is a contentious issue.[346] Victim-survivors who appear before a court tend to find cross-examination distressing, demeaning, and humiliating,[347] and explicitly state that cross-examination is the most distressing part of their court experience.[348] Many even argue that the trial process is 'worse than the original abuse,'[349] and akin to a 'second rape.'[350]

Yet despite the traumatic effects of cross-examination, defence counsel's ability to cross-examine is not just a right, but a *positive obligation*. The seminal case, *Browne v Dunn*,[351] promulgates that if an opposing counsel intends to rely on evidence that is contradictory to the testimony of a witness, they must put this evidence to the witness so that they may respond to,

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[340] *Dietrich v The Queen* (1992) 177 CLR 292 (Austl.); James Spigelman, *The Truth Can Cost Too Much: The Principle of a Fair Trial*, 78 AUSTL. L.J. 29 (2004).

[341] Bowden et al., *supra* note 305, at 557.

[342] Evidence Act [1995] s 48 (Austl.); *see also* Talina Drabsch, Cross-examination and Sexual Offence Complainants, N.S.W. PARL. LIBR. RSCH. SERV., Briefing Paper No. 18/03, 21-26 (2003) (discussing the importance of cross-examination to a defendant's fair trial rights).

[343] Bowden et al., *supra* note 305, at 550; *see also* Michael King, *Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Tria*l, 28 CRIM. L.J. 303 (2008) (discussing the tension between protecting complainants and preserving a defendant's cross-examination rights).

[344] *R. v. Osolin*, [1993] 4 S.C.R. 595 (Can.).

[345] *Id.*; *cf.* ANNE COSSINS, CLOSING THE JUSTICE GAP FOR ADULT AND CHILD SEXUAL ASSAULT: RETHINKING THE ADVERSARIAL TRIAL 340 (2020) (arguing that "[c]ross-examination of witnesses is based on the logically flawed assumption that cross-examination style questions will not affect the evidence of a witness who is telling the truth and that any change to a witness's examination-in-chief is a change towards the truth.").

[346] Drabsch, *supra* note 342, at 5 (noting that "[i]n one sense, it may be characterised as a *conflict* between the rights of a person accused of a serious crime with the rights of an alleged victim who may have already survived an extremely traumatic experience.").

[347] Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?* 57 BRIT. J. CRIMINOLOGY 551, 551 (2017).

[348] Mark Kebbell et al., *Rape Victims' Experiences of Giving Evidence in English Courts: A Survey*, 14 PSYCHIATRY PSYCHOL. & L. 111 (2007).

[349] INSIGHT: *Rape on Trial*, SBS AUSTL. (Feb. 27, 2018), https://www.sbs.com.au/ondemand/news-series/insight/insight-2018/insight-s2018-ep3/1160813635712 [https://perma.cc/75R5-7HRF].

[350] LOUISE MILLIGAN, WITNESS: AN INVESTIGATION INTO THE BRUTAL COST OF SEEKING JUSTICE 22 (Hachette Austl., 2020).

[351] 6 R 67, 70 (Austl.).

justify, or explain the contradiction.[352] Evidence obtained in breach of the rule in *Browne v Dunn* may be excluded in accordance with the general statutory discretions,[353] or in accordance with common law principles.[354] In this context, it is understandable that defence counsel would want to thoroughly cross-examine victim-survivors, not only to ensure the best possible outcome for their client, but to ensure their own compliance with evidence law and procedure.

Nevertheless counsel's right to cross-examine is not absolute,[355] and is constrained by rules governing both the substance and form of questions.[356] During cross-examination, no party should ask a witness 'improper questions'.[357] A question is 'improper' if it is: misleading or confusing,[358] unduly annoying, harassing, intimidating, offensive, oppressive, humiliating, or repetitive,[359] put to the witness in a manner or tone that is belittling, insulting, or otherwise inappropriate,[360] or that has no basis other than a stereotype.[361] If an improper question is put to a witness, the court must disallow the question,[362] or tell the witness that the question need not be answered.[363]

There is a clear policy rationale for disallowing improper questions as they can undermine the reliability of evidence and threaten the legitimacy of trial determinations.[364] However, there are numerous deficiencies in the effect of legislative provisions against improper questioning. Firstly, there remains an inescapably discretionary element to the provisions, as what may be deemed 'improper' in any particular case depends on the factual scenario before the court.[365] Additionally, judges are often reluctant to intervene

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[352] *Id.*; *see also* Allied Pastoral Holdings Pty. Ltd. v. Comm'r of Tax'n [1983] 1 NSWLR 1, 16 (Austl.) (describing the rule as a foundational principle of professional practice).

[353] *Evidence Act 2011* (ACT) s 135 (Austl.).

[354] For instance, where the probative value of the evidence is outweighed by the danger of unfair prejudice. *See Llewellyn v R* [2011] NSWCCA 66 at 137 (Austl.).; *see also R v McCormack* (No.3) [2003] NSWSC 645, ____.

[355] RETHINKING THE ADVERSARIAL TRIAL, *supra* note 21, at 72.

[356] *Id.*

[357] Whilst in the ACT (and other Uniform Evidence Law jurisdictions) 'improper questions' are extensively defined within the relevant statute. *See Evidence Act 2011* (ACT) s 41 (Austl.); *see also Libke v The Queen* (2007) 230 CLR 559 at 125-132 (Austl.) (Heydon, J., providing extensive commentary on what constitutes the proper vs improper form for questioning a witness).

[358] *Evidence Act 2011* (ACT) s 41(1)(a) (Austl.).

[359] *Evidence Act 2011* (ACT) s 41(1)(b) (Austl.).

[360] *Evidence Act 2011* (ACT) s 41(1)(c) (Austl.).

[361] *Evidence Act 2011* (ACT) s 41(1)(d) (Austl.).

[362] *Evidence Act 2011* (ACT) s § 41(1) (Austl.).

[363] *Id.*

[364] Terese Henning, *Control of Cross-Examination – A Snowflake's Chance in Hell?*, 20 CRIM. L.J. 133 (2006) (Austl.).

[365] *Id.*; *see* Phoebe Bowden, Terese Henning & David Platter, *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*, 37

during the cross-examination of witnesses.[366] Scholars have suggested this is likely due to the culture of adversarialism inherent in sexual assault trials which sees the autonomy of counsel, and a concern for fairness to the accused, as paramount considerations.[367]

Consequently, despite statutory prohibitions against improper questioning, provisions pertaining to improper questions are underutilised in practice,[368] and so such questions are rampant in criminal sexual assault trials.[369] In sexual assault trials, improper questions are often laced with 'real rape myths',[370] which can have the harmful effect of superimposing improper cultural constructions of sexual assault over the essential elements of the offence.[371] For this reason, improper questions can contribute to both low conviction rates and case attrition as improper questions uphold rape myths and deny just outcomes to victim-survivors.

MELB. U.L. REV. 539, 549 (2004) (citing ANNE COSSINS, ALTERNATIVE MODELS FOR PROSECUTING CHILD SEX OFFENCES IN AUSTRALIA, NATIONAL CHILD SEXUAL ASSAULT REFORM COMMITTEE 273-77 (2010)).

[366] Austl. Law Reform Comm'n, *Uniform Evidence Law,* Report No. 102, 152 (2010); *see also* Sarah Deck et al., *Are All Complainants of Sexual Assault Vulnerable? Views of Australian Criminal Justice Professionals on the Evidence-Sharing Process*, 26 INTL. J. EVIDENCE & PROOF 1, 19-20 (2022) (noting that judicial intervention during cross- examination is often limited in practice).

[367] *Id.* (citing David Caruso, *Proposed Reforms for the Cross-Examination of Child Witnesses and the Reception and Treatment of their Evidence*, J. JUD. ADMIN. 191 (2012)); *see* Anne Cossins, *Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?* 22 MELB. U.L. REV. 68, 81 (2009); Terese Henning, *Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments – "Plus Ça Change" or Prospects New?*, 37 CRIM. L.J. 155 (2013).

[368] Austl. Law Reform Comm'n, *Uniform Evidence Law, Report 102* (2010).

[369] Sinstead-Reid, *supra* note 354, at 8 (citing MILLIGAN, *supra* note 350).

[370] Sarah Deck et al., *supra* note 366 (citing Jacqueline Horan & Jane Goodman-Delahunty, *Expert Evidence to Counteract Jury Misconceptions About Consent in Sexual Assault Cases: Failures and Lessons Learned*, 43 U.N.S.W.L.J. 707, 708 (2020) (Austl.)); *see also* Rachel Zajac & Paula Cannan, *Cross-Examination of Sexual Assault Complainants: A Developmental Comparison,* 16 PSYCHIATRY, PSYCH. & L. 36 (2009) (discussing the use of stereotypical assumptions and credibility attacks during cross-examination of sexual assault complainants); Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?*, 57 BRIT. J. CRIMINOLOGY 551, 15 (2017) (examining how defense questioning continues to rely on rape myths and gendered stereotypes).

[371] Whilst the definition of 'sexual assault' differs across jurisdictions, generally speaking, 'sexual assault' comprises three distinct legal elements: 1) a 'physical element' (the act of sexual touching), 2) a 'circumstance' (typically the non-existence of consent - but could also be the reduced age of the other party as is the case with statutory rape) and, 3) a 'fault element' (knowledge or recklessness as to the circumstance of non-consent/young age).

3. Actors in the Criminal Trial Process

(a) Lawyers

When considering the problems arising in sexual assault prosecutions, the professional duties of legal professionals are often overlooked.[372] Whilst the paramount duty of any lawyer is to the court and the administration of justice,[373] a prosecutor and defence lawyer have distinct duties and interests.

Whilst defence lawyers have a professional obligation to act in the best interests of their clients,[374] and to ensure their case is presented 'fully and properly',[375] there is some debate about whether they also have certain *ethical* obligations when appearing in sexual assault matters.[376] It is well documented that when faced with uncertainty, people (including jurors) rely on heuristics and mental 'short-cuts' like stereotypes and ingrained biases, to make sense of uncertainty.[377] The pervasive and insidious 'rape myths' discussed throughout this article are a classic heuristic which fact-finders may rely on to make judgements.[378] Defence lawyers *should* refrain from strategies of questioning which invoke these assumptions.[379] Not only do questions laced with rape myths likely constitute 'improper questions' within the statutory definition,[380] they are also improper in the normative sense as they attribute significance to legally irrelevant factors. Thus, lawyers who intentionally invoke rape myths can distort the truth-seeking

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[372] Bowden et al., *supra* note 365, at 554.

[373] Legal Pro. (Solicitors) Conduct Rules 2015, (ACT) r 3.1 (Austl.).

[374] Legal Pro. (Solicitors) Conduct Rules 2015, (ACT) r 4.1 (Austl.); Legal Prof. (Barristers) Rules, (ACT) r 16 (Austl.).

[375] *Lewis v Ogden* (1984) 153 CLR 682, 689 (Austl.).

[376] Elaine Craig, *The Ethical Obligations of Defence Counsel in Sexual Assault Cases*, 51 OSGOODE HALL L.J. 427, 430 (2014); Robert Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICKSON L. REV. 563, 565 (1995); William Simon, *The Ethics of Criminal Defense*, 91(7) MICH. L. REV. 1703, 1705 (1993); MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 168 (Matthew Bender & Co., 6th ed. 1990). *But cf.* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 955 (2000).

[377] *The Ethical Obligations*, *supra* note 376, at 457 (citing Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 392 (2006)); Kristin Lane, Jerry Kang & Mahzarin Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCIS. 427, 429 (2007); Anders Kaye, *Schematic Psychology and Criminal Responsibility*, 83 ST. JOHN'S L. REV. 565, 569 (2009); *see* Barbara Krahé et al., *Prospective Lawyers' Rape Stereotypes and Schematic Decision Making About Rape Cases*, 14 PSYCH., CRIME & L. 461, 477 (2008).

[378] Estrich, *supra* note 323, at 513; COSSINS, *supra* note 365, at ch. 2.

[379] Craig, *supra* note 376, at 430.

[380] *Evidence Act 2011* (ACT) s 41 (Austl.).

process,[381] and may be falling short in their overarching duty to the court and the administration of justice.[382]

As for the role of prosecutors, it's necessary to recall that in an adversarial criminal justice system, the crime is contested between two parties: an accused person,[383] and the DPP who prosecute in the *public interest*.[384] So although sexual assault victim-survivors have certain statutory rights and recognised interests,[385] they are not a *party* to proceedings, and the DPP does not formally represent them. Consequently, public prosecutors owe no duties of loyalty to victim-survivors,[386] and may even act contrary to their interests. Thus, within the criminal trial, a victim-survivor is a mere witness for the Crown,[387] whose story is constrained by the rules of evidence and procedure,[388] and whose justice needs are *at best*, 'safeguarded' by the State.[389]

(b) Jurors

As discussed in the immediately preceding chapter, jurors are drawn from the general community,[390] and bring with them a lifetime of values, attitudes and experiences into a courtroom setting. Studies on the decision-making of mock jurors have found that their pre-existing attitudes (including deeply held belief in rape myths)[391] influence their perceptions of

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[381] Craig, *supra* note 376, at 451.

[382] Legal Profession Solicitors Conduct Rules, 3 A.B.A. (2015) (Austl.).

[383] Phoebe Bowden et al., *supra* note 365, at 554; *see also* Mary Iliadis & Kerstin Braun, *Sexual Assault Victims can Easily be Re-traumatised Going to Court - Here's One Way to Stop This*, THE CONVERSATION (Mar. 25, 2021), https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428 [https://perma.cc/5PH6-7VBE] (advocating for the reconceptualization of victim-survivors as parties not only to proceedings but justice-seeking processes more generally).

[384] Off. of the Dir. of Pub. Prosecutions, *supra* note 246.

[385] Within the ACT victim-survivors are afforded certain rights under the *Victims of Crime Act 1994*, and their interests are acknowledged within the ACT's prosecution policy. *See Victims of Crime Act 1994* (ACT) (Austl.).; Off. of the Dir. of Pub. Prosecutions, *supra* note 246, at cl 8.

[386] Conversely, an accused person is entitled to benefit from a duty of loyalty by their legal representative. R v. Neil [2002] 3 S.C.R. 631, para. 24 (Can.).; Moffat v. Westein [1996] 29 O.R. (3d) 371, 375 (Can.).

[387] Horan, *supra* note 173, at 52.

[388] *Id*.

[389] Sam Garkawe, *The Role of the Victim During Criminal Court Proceedings*, 17(2) U. NEW S. WALES L.J. 595, 612 (1994).

[390] *Cross-Examination*, *supra* note 367, at 88; Croucher & Hon, *supra* note 295, at 85; *see* Lee, *supra* note 302, at 1258.

[391] NATALIE TAYLOR & JENNY MOUZOS, COMMUNITY ATTITUDES TO VIOLENCE AGAINST WOMEN SURVEY 2006: A FULL TECHNICAL REPORT 65 (2006) (Austl.); MICHAEL FLOOD & BOB PEASE, *supra* note 107, at 26-27 (Austl.); *see also* NATALIE TAYLOR & JACQUELINE JOUDO, THE IMPACT OF PRE-RECORDED VIDEO AND CLOSED CIRCUIT TELEVISION TESTIMONY BY ADULT SEXUAL ASSAULT COMPLAINANTS ON JURY DECISION-MAKING: AN EXPERIMENTAL STUDY 59–68 (2005) (Austl.) (finding

complainant credibility,[392] and the likely guilt of the accused.[393] Perhaps most importantly, these studies have found that mock juror's pre-existing attitudes influenced their decisions *more* than the facts of the case provided.[394]

The effect of juror's pre-existing attitudes on sexual assault trial determinations cannot be understated.[395] Cross-examination processes involving improper questions which invoke rape myths arguably trigger a 'confirmation bias',[396] wherein jurors incorporate evidence into an existing ideological framework characterised by distrust and disbelief in victim-survivors.[397] Thus defence lawyers and jurors alike may rely on rape myths in their respective trial roles, and thereby uphold and reinforce rape myths.

(c) Judges

Whilst judges must be independent and impartial,[398] they must also deal with 'broad issues of social values and human rights and decide controversial moral issues which legislators cannot resolve'.[399] In the context of sexual assault, there exists a conflict for judges between constraining cross-examination procedures to protect witnesses, and their duty to protect the rights of the accused and ensure a fair trial is conducted.[400] Despite the fact that judges *must* disallow improper questions,[401] judges may be reluctant to intervene during cross-examination[402] for fear of jeopardising the defendant's right to a fair trial,[403] and because they are cognizant of the risk of an appeal.[404] Additionally, it has been suggested that aside from

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that men tended to hold 'less favourable attitudes towards rape victims in general' and were significantly less likely to perceive the complainant as credible compared to women).

[392] TAYLOR & JOUDO, *supra* note 391, at 56–68.

[393] *Id.*

[394] Taylor, *supra* note 296, at 2.

[395] Cossins, *supra* note 367, at 88.

[396] Confirmation bias refers to the tendency to seek out, and better recall information that confirms one's preexisting attitudes and beliefs while at the same time discounting or ignoring information that is contrary to one's preformed opinions. Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175-76 (1998); *see* Eric Rassin, Anita Eerland & Ilse Kuijpers, *Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 231, 231-32 (2010).

[397] Cossins, *supra* note 367, at 79.

[398] Austl. L. Reform Comm'n, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, ALRC REP. 138, Dec. 2021, at 3.

[399] David Wood, *Judicial Ethics: A Discussion Paper*, AUSTRALIAN INST. OF JUD. ADMIN. (1996).

[400] Cossins, *supra* note 367, at 76.

[401] *Evidence Act 2011* (ACT) s 41(1) (Austl.).

[402] Austl. L. Reform Comm'n, *Cross-Examination of Witnesses*, ALRC Rep. 102, Aug. 16, 2018, at 11; *see* Deck et al., *supra* note 370, at 17-18.

[403] Deck et al., *supra* note 370, at 18; Cossins, *supra* note 367, at 92; Henning, *supra* note 367.

[404] Phoebe Bowden et al., *supra* note 365, at 550.

reluctance, judges may not intervene because they lack the ability to recognise the problematic stereotypes underlying certain types of questioning.[405] Thus judges' lack of interventionism, coupled with their own knowledge deficits, can also play a role in the perpetuation of low conviction rates.

B. Policy Response: Reconceptualising the Role of Victim-Survivors and the Right to Representation

1. A Comment on Adversarialism: An Incrementalist Perspective

The above commentary demonstrates numerous deficiencies in justice system *processes* and court room *practices* which, can contribute to high rates of sexual assault case attrition and low conviction rates. Effective policy responses should seek to address these processes and practices specifically,[406] as opposed to *only* reforming substantive laws (i.e. regarding the definition of 'consent').[407] Whilst a reasonable argument could be made that better justice outcomes should be sought entirely outside of the adversarial framework,[408] more moderate reforms are also possible.

This article advocates an *incrementalist* approach and acknowledges that challenges to the very basis of adversarial criminal justice are probably outside of the 'Overton window' at this point in time.[409] Consequently, adjustments can and should be made *within* the adversarial framework to better recognise the 'triangulation of interests' inherent in the prosecution of sexual assault.[410] Whilst there are numerous policy instruments which could

[405] Indeed 'many judges show a conventional wisdom about human behaviour which may represent the limitations of their background'. *JJB v Regina* [2006] NSWCCA 126 (Austl.).

[406] Policy theorists argue that effective policy instruments should be *problem-led*, meaning that they should be chosen after a careful consideration of the problem and its causes so that the chosen instruments can address the issue and the context in which it arose. *See* Burke & Stephens, *supra* note 122, at 45.

[407] Horan, *supra* note 173, at 50; *see also* Jonathan Crowe & Gianni Ribeiro, *Most States Now Have Affirmative Sexual Consent Laws, but not Enough People Know What They Mean*, THE CONVERSATION (Mar. 25, 2024), https://theconversation.com/most-states-now-have-affirmative-sexual-consent-laws-but-not-enough-people-know-what-they-mean-225655 [https://perma.cc/5PH6-7VBE].

[408] For instance, by adopting an inquisitorial model of investigation for criminal sexual assault matters, a full discussion of which is outside the scope of this article. For further discussion, see Louise Ellison, A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems (July 1997) (LLM Thesis, University of Leeds).

[409] The 'Overton window' refers to the range of policies considered politically acceptable to the mainstream public and policymakers at any point in time. Elliott Aidan Johnson et al., *Breaking the Overton Window: On the Need for Adversarial Co-Production*, 20(3) EVID. POL'Y 393-401 (2023).

[410] *See Attorney General's Reference* (No 3 of 1999) [2001] 2 AC 91, 118 in which Lord Steyn opined that "there must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public." This view was cited with approval by the House of Lords in *R v H* [2004] 2 AC 134, 145-

be employed to address deficiencies in justice system processes, given the limited scope of this work, this chapter advances one primary recommendation: legislating a right for sexual assault victim-survivors to engage legal representation. Whilst a legal representative should not be construed as a silver bullet, this author ultimately feels this particular policy recommendation is the most suitable (single) means to address the numerous issues raised in the first half of this chapter.

2. Victim Representation: An Anathema to Adversarialism

Traditionally, a victim having their own lawyer has been considered an anathema to adversarialism,[411] and within the community there is some resistance to the idea.[412] It's been argued that the reason an accused person is entitled to representation (whilst a victim-survivor should not be) is because of the *consequences* for the defendant if found guilty: loss of liberty, imprisonment, public chastisement etc.[413] Relatedly, there are concerns that a victim-survivor having their own lawyer may prejudice the jury against the accused,[414] and erode the presumption of innocence.[415]

Moreover, some within the legal profession hold the view that legal representation for victim-survivors is simply not necessary on the basis that existing supports and structures are sufficient to protect the interests of sexual assault victims.[416] There are also numerous practical implications to consider,[417] including the potential for conflict between the DPP and the victim-survivor's legal representative.[418]

46, and in Australia Justice Bell referred to Lord Steyn's statement concerning the triangulation of interests (but did not approve or disprove) in Ragg v Magistrates' Court of Victoria (2008) 18 VR 300. *See also* Phoebe Bowden, Terese Henning & David Platter, *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?* (2014) 37 MELB. U.L. REV. 357 (2014) 539, 558.

411 Garkawe, *supra* note 389, at 595-96; Braun, *supra* note 337, at 823 n.5.

412 Iliadis & Braun, *supra* note 383.

413 *See* Milligan, *supra* note 350.

414 *Id.* This is because it is argued that one witness being allowed a lawyer (whilst others do not have one) might imply to the jury that the victim needs protection from the accused and thereby create a negative bias against the defendant in the minds of the jury.

415 *Id.*

416 Such as support persons, advisers, the court and public prosecutors. Braun, *supra* note 337, at 823-24.

417 Including questions such as: who would pay for the legal representation of victims? Would the length and cost of trials increase if victims were calling, examining and cross-examining witnesses? And, if so, by much? Would other cases be delayed because of longer sexual assault trials? Are there sufficiently trained and competent lawyers to take on such a role? How might this affect other stages in the justice process? Kellie Toole, *Lawyers for Victims of Crime Won't Guarantee Better Results*, THE CONVERSATION (June 20, 2014), https://theconversation.com/lawyers-for-victims-of-crime-wont-guarantee-better-results-27629 [https://perma.cc/GHW6-M2XG].

418 *See* Iliadis & Braun, *supra* note 383.

Despite these (legitimate) concerns, this article contends that given the clear 'triangulation of interests' in the prosecution of sexual violence, enshrining the rights of sexual assault victim-survivors to engage legal representation can be justified for two primary reasons.

3. Justifying Representation

(a) Benefits for an Individual Victim-Survivor

There is a plethora of literature and evidence suggesting that sexual-assault victim-survivors face disproportionately higher rates of secondary victimisation than other victims of crime.[419] A legal representative could play a crucial role in safeguarding the interests of a victim-survivor and mitigating against the traumatic effects of the trial process.[420] As detailed above, improper questions are rampant in sexual assault trials and these are not always objected to by prosecutors, or identified for disallowance by judges. Anne Cossins argues that cross-examination is "both used and allowed to be used as an instrument of injustice that may produce inaccurate evidence favouring the defence case."[421] Thus to negate the unfair effects of cross-examination, a victim-survivor should be entitled to representation which ensures that they are not subject to traumatic, unfair or discriminatory lines of questioning. Additionally, the presence of a legal advocate who is able to both detect and object to improper questioning will promote better standards of practice by other courtroom actors,[422] and thus play a key role in preventing the intrusion of rape myths into cross-examination processes.

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[419] 'Secondary victimisation' occurs when a victim of crime suffers further harm as a consequence of the way they are treated following criminal victimisation. Typically, secondary victimisation refers to the disbelief they experience throughout the criminal justice process and is characterised by a victim's subsequent feelings of dispossession, disillusionment and disempowerment. *See* Rebecca Campbell & Sheela Raja, *Secondary victimization of rape victims: insights from mental health professionals who treat survivors of violence*, 14(3) VIOLENCE AND VICTIMS 261 (1999); Jeffrey, *supra* note 339, at 60; Patterson, *Linkage*, *supra* note 151, at 328; Milica Boskovic & Gordana Misev, *Secondary Victimization of Sexually Assaulted Women*, *in* VICTIMOLOGY A COMPREHENSIVE APPROACH TO FORENSIC, PSYCHOSOCIAL AND LEGAL PERSP. (Springer ed., 2022); Kristin M. Hunter, Secondary Victimization of Young Adult Female Sexual Assault Victims (2019) (Honours Undergraduate Thesis, University of Central Florida).

[420] Mary Iliadis, Kate Fitz-Gibbon & Sandra Walklate, *Improving Justice Responses for Victims of Intimate Partner Violence: Examining the Merits of the Provision of Independent Legal Representation*, 45(1) INT'L J. COMPAR. & APPLIED CRIM. JUST. 105 (2021); Braun, *supra* note 337, at 823.

[421] RETHINKING THE ADVERSARIAL TRIAL, *supra* note 21, at 90-91.

[422] They would do so by objecting to improper questions posed by defence counsel and reminding judges of their obligation to disallow such questions.

(b) Benefits to the Justice System and Community

Affording credence to a victim's rights and justice needs is "not only within the victim's interest, but also in the public interest."[423] As discussed previously, low rates of reporting can be partly attributed to victim-survivors' concerns about how they will be treated by the justice system.[424] Addressing these concerns may help to increase rates of disclosure, reporting and justice system engagement by victim-survivors, which, ultimately, should serve to improve conviction rates as well as public perceptions of justice.[425]

These benefits cannot be understated. For the justice system, the introduction of victim representatives would mitigate against improper or inaccurate evidence being admitted,[426] improve the quality of victim testimony,[427] and relieve some of the tension that prosecutors and judges face when balancing the protection of witnesses against the rights of the accused.[428] As for the community overall, there is an undeniable public interest in the proper identification and prosecution of sexual offenders.[429] The introduction of representation for victim-survivors will help to achieve this end.

VII. CONCLUSION: BRIDGING THE JUSTICE GAP FOR SEXUAL ASSAULT VICTIM-SURVIVORS

A. Overview

It has been argued that "policy debates need to move beyond focusing on increasing conviction rates and reducing victim trauma within the legal process, and to consider other aspects that will contribute to change in legislation and *practice*."[430] This article has contributed to such a debate by

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[423] MARY ILIADIS, ADVERSARIAL JUSTICE AND VICTIMS' RIGHTS RECONCEPTUALISING THE ROLE OF SEXUAL ASSAULT VICTIMS 4 (Routledge ed., 2022) (citing Jonathan Doak, VICTIMS' RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE — RECONCEIVING THE ROLE OF THIRD PARTIES (Hart Publishing ed., 2008)).

[424] Clark, *supra* note 107, at 28.

[425] SYLVIA WALBY ET AL., STOPPING RAPE: TOWARDS A COMPREHENSIVE POLICY 111 (Bristol University Press 2015).

[426] RETHINKING THE ADVERSARIAL TRIAL, *supra* note 21, at 92.

[427] Braun, *supra* note 337, at 825 ("Moreover, affording victims the right to legal representation could help to increase the low conviction rates in sexual assault cases. The cross-examination of legally represented sexual assault victims could be faster and the content of a victim's testimony more accurate.").

[428] *Id.* at 824.

[429] Horan, *supra* note 173, at 61.

[430] *See id.* at 65-66.

methodically considering *processes, practices* and *procedures* which undermine participation in the justice system by sexual assault victim-survivors, and which individually and together contribute to case attrition.

The first part of this article provided an introduction and overview of sexual violence and the issues associated with case attrition. The second part introduced the concept of incrementalism and justified its value as an approach to addressing the systemic attrition of sexual assault cases. The third, fourth, fifth and sixth parts of this article each addressed a discrete point of case attrition, and highlighted the numerous challenges embedded within each of those stages. This article highlighted the grueling process of justice-seeking that must be embarked upon by any victim-survivor hoping to see justice dispensed for the crimes committed against them.

B. The 'Justice Gap'

The significant gap between the incidence of sexual assault and conviction for those crimes is a public policy problem. Sexual violence which goes unacknowledged or unreported, or that is not investigated, or not prosecuted, is violence that goes *unpunished*. Systemic factors resulting in sexual violence routinely going unpunished means that many victim-survivors of sexual assault do not perceive that they have viable access to justice.[431] This belief prevalent amongst sexual assault victim-survivors, which is reinforced by attrition statistics, is better known as the sexual assault 'justice gap'.[432]

The criminal law is a set of rules aimed at preventing harm within the community and maintaining social order. Thus, one of the primary aims of criminal justice is to discourage behaviour that constitutes a serious wrong against an individual, or that breaches some fundamental social value.[433] The ideals of criminal justice dictate that the commission of crimes ought to entail negative consequences for their perpetrators, but the existence of such a significant justice gap for sexual assault victim-survivors undermines this principle.

For the justice gap to be reduced there must be 'acceptance among all key players of its reality.'[434] More importantly, this article, having shown that the 'justice gap' for sexual assault victim-survivors is real, argues that

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[431] Haley Clark, A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault 3 (Apr. 2011) (Ph.D. Thesis, University of Melbourne).

[432] *See* JENNIFER TEMKIN & BARBARA KRAHÉ, SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE (2008); RETHINKING THE ADVERSARIAL TRIAL, *supra* note 21; Lonsway & Archambault, *supra* note 81, at 145.

[433] SIMON BRONITT & BERNADETTE MCSHERRY, PRINCIPLES OF CRIMINAL LAW (4th ed. 2017).

[434] Lonsway & Archambault, *supra* note 81, at 159.

if the justice gap is to be reduced, there must be *action* by all key players. Curbing case attrition and adequately responding to sexual violence requires more than just increasing conviction rates. Indeed, 'conviction rates are meaningless if they are computed based on a starting point where most of the attrition has already taken place.'[435] To curb attrition and improve justice outcomes for victim-survivors, reform is necessary at *every* stage of the justice process—which is exactly what this article has recommended.

C. The Viability of Incremental Adjustments and Their Subversive Possibilities

Whilst such multi-faceted, multi-level reform may sound overwhelming to policymakers, it need not be. The incremental policy adjustments recommended in each substantive chapter of this article are designed so they can be readily incorporated into existing policy and legal frameworks. Incremental adjustments, despite seeming low-impact or even inconsequential when considered in isolation, can, when taken together, have enormous transformative power over time.

When faced with complex public policy problems like sexual violence and the associated "justice gap" for sexual assault victim-survivors, it's easy for choice paralysis to affect policy-makers, and for the problem to seem insurmountable, or even "wicked" (i.e. unsolvable by its very nature).[436] Consequently, common responses to complex policy problems include denying their reality or significance, or even the very possibility of their amelioration.[437] Policy theorists explain that "the capacity to ignore information and arguments, and the capacity to deflect attention from a potential issue, is an important form of *power*."[438] Recognising this fact is necessary to effect change.

If policymakers are empowered to engage in "strategic ignorance,"[439] persuasion becomes a necessary tool for those seeking to change or challenge the status quo. In contrast to policy inaction, incremental adjustments become a desirable alternative.[440] Whilst governments,

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[435] *See generally id.* at 155 (explaining that improved conviction rates can be misleading in circumstances where policy change has resulted in reports being screened out *before* an arrest is even made, or before charges are filed).

[436] BRIAN HEAD, WICKED PROBLEMS IN PUBLIC POLICY: UNDERSTANDING AND RESPONDING TO COMPLEX CHALLENGES 41 (2022).

[437] *Id.* at 41-42.

[438] *Id.*

[439] *Id.* (consisting of a process whereby Governmental and private sectors exaggerate uncertainties about an issue to avoid accountability).

[440] *See id.* at 68 (finding this is because systemic tweaks are much easier for policymakers inclined to inaction to contemplate than large-scale, 'revolutionary' reforms).

politicians and policymakers may be hesitant to engage in the radical reconceptualization of "justice for sexual assault victim-survivors," they may be more inclined to implement policies which simply make adjustments "at the margins" of what exists currently.

Thus, the incremental adjustments recommended by this article exist in a unique space *between reform and revolution* as they may be agreeable to both reformists and advocates, as well as risk averse decision-makers. Despite representing a sort of "compromise,"[441] the *subversive* effect of incremental challenges to the status quo cannot be understated. Although the rationale for the use of incremental adjustments is their political viability and practical possibility, the motivation underlying their use is to encourage action and thus they represent an early step in a process of longer term, *fundamental* social change.

D. Future Directions

Whilst the recommendations for policy change and legal reform suggested throughout this work are a starting point, they are by no means the answer to all of the issues raised within this article. Indeed, this article (which is intentionally narrow in scope) has only "scratched the surface" of the issues associated with justice system participation by sexual assault victim-survivors in Australia.

The authors welcome further analysis of sexual assault case attrition and hope others are able to identify challenges and barriers not analysed in this necessarily narrow work. Additionally, if any recommendations contained within this article were to be implemented,[442] an analysis of their effect would likely provide valuable insight into the impact of policy incrementalism in this space.

Ultimately, sexual assault law reform is a complex and divisive topic, and the disciplines of both law and public policy should be concerned with what is clearly a *socio-legal problem.*[443] Sexual violence and its impacts cut

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[441] *See id.* at 51-54.

[442] *Id.* at 139 (or if similar policy instruments were to be employed in other jurisdictions).

[443] LAURA O'TOOLE, JESSICA SCHIFFMAN & ROSEMARY SULLIVAN, GENDER VIOLENCE (3rd ed. 2020); PREVENTING SEXUAL VIOLENCE: INTERDISCIPLINARY APPROACHES TO OVERCOMING A RAPE CULTURE (Nicola Henry & Anastasia Powell eds., 2014); Jiří Němec, *Socio-Legal Aspects of Sexual and Gender-Based Violence Survivors' Victimization in Kosovo*, 34 PEACE REV. 140 (2022); Christopher Norman Kujat, Gendered Violence in the Socio-Legal Context: When Your Sex Defines Whether You can be a Perpetrator of a Victim (2017) (LLM Thesis, Umeå universitet); Chris Ashford & Alexander Maine, *Violence and Socio-Legal Interventions in Gender and Sexuality*, 86(2) J. CRIM. L. 57 (2022); Kombe Mumba & Basant Singh, *Gender-Based Violence: A Socio-Legal Study of Zambia and India*, 2(3) INDIAN J. INTEGRATED RSCH. L. 1 (2000).

across all intersections of society,[444] and our responses to sexual violence should equally be intersectional, inter-disciplinary and well informed. So, although this article, and any future work expanding upon it, will be joining a "crowded field,"[445] justice for sexual assault victim-survivors is a topic worthy of constant attention.[446]

[444] *See* Elizabeth Armstrong, Lanora Johnson & Miriam Gleckman-Krut, *Silence, Power, and Inequality: An Intersectional Approach to Sexual Violence*, 44 ANN. REV. SOCIOLOGY 99 (2018).

[445] BRONITT & EASTEAL, *supra* note 26, at 9.

[446] Taylor Bachand, *Book Review – Rape Law in Context: Contesting the Scales of Injustice by Simon Bronitt & Patricia Easteal*, 38 U. TASMANIA L. REV. 96, 98 (2019).