Current Legal Issues Seminar - 13 November 2025

Banco Court, Supreme Court, Queensland.

Sexual Offences – Has the Pendulum Swung Too Far?:

A Response to Mr. Terry O'Gorman AM

Professor Heather Douglas AM*

Thank you to the organisers for the invitation tonight, and most importantly thanks to Terry O'Gorman for his analysis.

Unfortunately, I do not have the benefit of close engagement with the current case law and implementation issues associated with the amendments that Terry discussed. However, I have been writing about criminal justice responses to domestic and sexual violence for many years. We know sexual violence is disproportionately perpetrated against women by someone they know. Since the age of 15 about one in five women and about 1 in 20 men have experienced sexual violence.[1] 85% of women over 18 knew the person who carried out their most recent sexual assault,[2] most often perpetrated by an intimate partner.[3]

These statistics, coming from survey reporting, do not have much in common with the numbers of sexual violence cases criminally prosecuted. In part this is because there are low rates of reporting through formal avenues such as police. The National Personal Safety Survey found as few as 13% of women reported their most recent experience of sexual violence to police, although reporting is increasing.[4]

There are obvious reasons for deciding not to report. Research has found that complainants routinely express terror at the prospect of going through a sexual violence criminal trial.[5] Even when people do report sexual violence to police, most reports do not proceed to charge; even where charges are initially laid many are not prosecuted; and few that are prosecuted result in a finding of guilt.[6]

When thinking about criminal law reforms and sexual violence, I am always reminded of the work of the psychiatrist Judith Herman who works with victims of sexual assault. Herman has suggested that if one set out to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law, as the needs of victim-survivors are often in direct conflict to the needs of the criminal justice system.

She says:

> Victims need social acknowledgement and support; they get a public challenge to their credibility.

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[1] Australian Bureau of Statistics, 'Personal Safety, Australia: 2021–22 Financial Year' (ABS) http://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release

[2] Ibid.

[3] Ibid.

[4] Women's Safety and Justice Taskforce - Hear her voice - Report 2 - Volume 1 (2022) Brisbane p42. (Referred to as 'The Taskforce')

[5] The Taskforce, above at p97

[6] ABS above n1.

> Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control.
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> Victims need an opportunity to tell their stories in their own way, in a setting of their choice; they have to respond to yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative.
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> Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience.
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> Victims often fear direct confrontation with their perpetrators; the court often requires a face-to-face confrontation between a complaining witness and the accused.[7]

For years sexual violence advocates and legislators have been tinkering with the criminal justice process to try to address some of the issues raised by Herman and many others. Queensland's legislation on protected counselling communications[8] considered by Terry, is but one example.

As Justice Crowley points out in *SWN v CJA & Ors* [2025] QSC 218 (at [89]), the sexual assault counselling privilege provisions are designed to encourage victims of sexual assault offences to seek counselling and to protect them from the harm that might eventuate if matters disclosed or discussed by them in counselling are revealed and able to be used as evidence in a criminal proceeding. The privilege is drafted in favour of confidentiality and privacy but 'seeks to ensure the appropriate balance in each case between the right to a fair trial and the public interest in preserving the confidentiality of counselling communications'.[9]

But someone loses in this balancing act. Either the complainant inevitably loses some of her privacy and perhaps also loses some trust in her therapist and some ground in her recovery. Or the accused loses an opportunity to have possibly relevant and probative evidence admitted, and this may risk a fair trial. While the accused's loss of rights is naturally a concern, according to many who spoke to the Taskforce, it is the rights of complainants in this context that are much more likely to be sacrificed.[10]

In sexual offence cases the right to silence and the burden of proof protects the accused. This protection is a keystone of the Australian criminal justice system. But, regarding the counselling context, this is potentially at great cost to the specific complainant. And furthermore, other complainants who follow them may be reluctant to disclose their experiences to a counsellor - compromising their paths to recovery. As a society we should be aiming for healthy communities where people can seek treatment from their counsellor without fear that those records will be waved around in court.

I appreciate both the accused's position: how can there be a proper analysis of the probity of key parts of the counselling notes if the judge does not read them. But also, the complainant's position: trust is breached through disclosure. The balance, so-called, may be, a legal fiction.

As Terry has pointed out, this legislation has been in place for some time in Queensland and, consistently with the Australian Law Reform Commission's (ALRC) most recent report on the issue,[11] he recommends a review of this legislation to see how it's

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[7] Judith Herman, (2005). Justice From the Victim's Perspective. *Violence Against Women*, *11*(5), 571-602. https://doi.org/10.1177/1077801205274450574

[8] s 14A of the Evidence Act 1977 (Qld),

[9] Explanatory Memorandum, Victims of Crime Assistance and other Legislation Amendment Bill 2016 (Qld), p 2. https://cabinet.qld.gov.au/documents/2016/Nov/VicCrBill/Attachments/ExNotes.PDF

[10] The Taskforce, above n 4, p329.

[11] Australian Law Reform Commission, Safe, informed, Supported: Reforming justice responses to sexual violence. (2025) rec 46, (referred to as 'ALRC Report'), https://www.alrc.gov.au/publication/jrsv-report-143/

working. Especially in light of the recent discussions in the caselaw flagged by Terry, this would be timely.

As to police disclosure - this has been an issue for a long time.[12] To some extent it is understandable that police on the frontline become involved in the case and develop a case theory that goes one way or another and so will provide the evidence to the public prosecution service that they see as most relevant to their case theory.

While inappropriate, the reality is that there is very high attrition of sexual violence cases at the police stage. The statistics are hard to capture but the Women's Safety and Justice Taskforce reported that only about 20% of matters reported to police will result in charges[13] and that attrition rates are higher in Queensland than other states.

According to the Taskforce, Queensland police data identifies that charges are withdrawn *by the complainant* in about 17% of cases that are not proceeded with, but also that was evidence before the Taskforce that police often persuaded complainants to withdraw complaints despite available evidence on which to proceed.[14] Queensland police data also identifies that only about 10% of cases are unfounded or unsubstantiated, that is have insufficient evidence.[15]

The Taskforce found there are gaps in the data making it difficult to determine what proportion of charges were withdrawn at the prosecution stage, but pointed to NSW statistics[16] observing around 10% are withdrawn there. So, police protection of the case for the accused may be more of a problem– although also problematic.

The ALRC also highlighted concerns about the attrition rate of cases at both the police and prosecution levels. It found, as other reports have, that police stations as reporting spaces are often considered uncomfortable, not private or they are inaccessible. The ALRC also identified concerns that police were not investigating complaints or police and prosecutors withdrew charges for reasons that were often obscure to complainants.

Some of the ALRC's recommendations[17] have tried to tackle both under-reporting issues and police refusal to charge or withdrawal of charges. In general, it recommended the development of environments, practices and processes that would provide complainants with a safe context in which to report, including providing interpreters and being able to request a police officer of a particular gender to undertake the interview. (As a side note this highlights the need for improved gender balance in the Queensland Police Service on the frontline - currently 28.5% are women[18]).

Regarding police decisions not to pursue charges, the ALRC recommended that complainants should have right to seek and have reasons provided for why the matter they reported was not pursued, and the right to review the decision.[19]

Similar recommendations were made for complainants to have rights to have reasons and to review decisions made by public prosecutors. On these points the introduction of the

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[12] Identified in the 'Moynihan review'- Review of the civil and criminal justice system in Queensland (2008), chapter 5- https://cabinet.qld.gov.au/documents/2009/jul/review%20of%20civil%20and%20criminal%20justice%20system%20in%20qld/Attachments/Review%20by%20Moynihan.pdf

[13] The Taskforce above n4, at p. 44

[14] Ibid at 45

[15] Ibid

[16] Ibid at 46.

[17] ALRC Report, above n 11, Recommendation 8, 27

[18] Queensland Police Service, *Annual Report 2024-2025* (2025) https://www.police.qld.gov.au/sites/default/files/2024-10/QPS%20Equity%20Diversity%20and%20Inclusion%20Plan%202024-2025%20%28PDF%29.pdf p5

[19] ALRC Report, above n 11, recommendations 18 and 19.

Victim's Commissioner role in Queensland along with a Sexual Violence Review Board that will look at systematic issues is a positive introduction.[20]

One other matter before I move on from the police disclosure concern is phone downloads. In England and Wales, a recent annual report of the Victims Commissioner, Dame Vera Baird, stressed the concern of the 'digital strip-search'.[21] This describes the routine requests made by police in England and Wales, under threat of not investigating, for a rape complainant to hand over their mobile phone almost immediately upon making a complaint. Baird claims that phone contents have frequently been comprehensively downloaded and fully scrutinised, observing that a failure to hand over the phone commonly results in the investigation almost immediately being closed.

Baird states, 'victims are effectively being forced to choose between justice and their right to a private life'.[22] This circles back to the disclosure question and how we can balance a complainant's right to privacy with the need for the accused (or the police investigator) to have access to the material relevant to the trial. This is again a complex 'balance' which is often difficult to resolve. However, Baird pointed to an unpublished inquiry by CPS themselves that reported that 60% of demands for download made were 'irrational and over-intrusive'.[23] I am not sure we have that information available here, but it would be useful to explore.

I think trying to improve the criminal justice response to sexual violence continues to be important, and there have been useful changes. While the experience has been that many of these changes do not contribute to higher rates of successful prosecution,[24] they may improve the experience of the trial for complainants. Legislative changes to the concept of consent and jury directions that highlight myths about sexual violence may support the complainant to feel heard, reflecting Herman's point about the need for acknowledgement. Although in Victoria these changes don't seem to have increased numbers of successful prosecutions.

Another development is the possibility of giving remote testimony via CCTV.[25] Again, beneficial for some complainants, and helps address Judith Herman's point about direct confrontation. However, there is some research that points to the potentially lower conviction rates when this technology is used.[26]

The Taskforce and the ALRC focus was strongly on improving the process, broadly speaking, for people who report sexual violence. For example, the ALRC's first recommendation[27] was that independent legal services should be provided for people who report experiences of sexual violence and they should have standing to appear on behalf of complainants in various applications during the proceedings.[28] The ALRC also recommended justice system navigators should be introduced to assist people on their chosen pathway– whether they be justice systems or other pathways. This would begin early and include the report to the police if that was chosen. While there are various pilots underway in Queensland,

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[20] *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld)
[21] Dame Vera Baird, *Annual Report of the Victims' Commissioner 2021-2022*, https://victimscommissioner.org.uk/document/annual-report-of-the-victims-commissioner-2021-to-2022/
[22] Ibid
[23] Ibid
[24] Also this is questionable given Quilter and McNamara's review of NSW transcripts, see Julia Quilter and Luke McNamara, Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis, Number 259 (2023) BOCSAR, 2.
[25] In their research Quilter and McNamara found so called special measures were generally working well in Victoria and NSW: Quilter and McNamara, Ibid, 259,.
[26] Carolyn McKay and Kristin Macintosh, Remote Criminal Justice and Vulnerable Individuals: Blunting Emotion and Empathy? *Tilburg Law Review* (24) 2: 125-143.
[27] ALRC report, above n 11, recommendation 1, p15.
[28] Eg: to subpoena or inspect materials directed to third parties which may contain a complainant's personal, sensitive, or confidential information, including sexual assault counselling communications

the Queensland Sexual Assault Network has stressed that supports for sexual violence complainants should be embedded in specialist services if they are to work.

Of course, it is because sexual violence matters often have no third-party witnesses and it's a question of consent or not, that they often rely solely on the testimony of the complainant. So, the credibility of the complaint is at the centre of the investigation, charge, prosecution and jury decision. As a result, complainants face extraordinary intrusions into their private lives with access to their digital histories, records about their education, social service engagements, medical histories and of course counselling records often being sought. This is, for most people, very private data. When a sexual violence complainant starts on the criminal process, she can expect her private life will be combed through to see if there is any imperfection in her earlier life which may call into question her credibility.

Increasingly we recognise that the focus of the criminal trial on testing the oral testimony of potentially traumatised people is problematic. The most traumatised victims of sexual violence may experience all sorts of impacts from the trauma which can impact on their ability to present their evidence. These include gaps in memory and lack of coherency.

So, remembering Herman's list of survivor needs: social acknowledgement and support; a sense of power and control over their lives; an opportunity to tell their stories in their own way, and a need to control or limit their exposure to specific reminders of the trauma[29]- what does Herman suggest? Like the ALRC[30] and the Taskforce,[31] she suggests alternative justice options should be available alongside traditional charge and trial options.

Sisters Inside told the ALRC: 'It's time to boldly reimagine how responses to sexual violence could look.'[32] I want to finish then with emphasising the need for proper consideration of alternatives such as 'recognition meetings or statements' and restorative justice processes.[33] In chapter 17 of their report the ALRC explores the topic in detail. The Australian Capital Territory [34] recently reviewed its program for Restorative Justice and found that persons harmed through sexual violence typically utilised the process as a mechanism for getting what they needed, empowering themselves and seeking closure.[35] The reviewers found Restorative Justice can be safely and successfully delivered in the context of varying levels of offender accountability, without creating further harm.[36]

We have only touched the surface here regarding the range of reforms and suggestions made by the ALRC, however in answering the question - *Sexual Offences – Has the Pendulum Swung Too Far?*- I say no – but we need to be asking other questions also about how we boldly reimagine a justice response in this context.

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[29] Herman, above n 7, at 574
[30] ALRC Report, above n 11, Recommendation 8, 27
[31] The Taskforce, above n 4, chapter 2.15.
[32] ALRC Report, above n 11, 17.1
[33] Ibid, at 16.130- 16.140
[34] Siobhan Lawler, Hayley Boxall and Christopher Dowling, Restorative justice conferencing for domestic and family violence and sexual violence: Evaluation of Phase Three of the ACT Restorative Justice Scheme. AIC, Research Report 33 (2025) https://www.aic.gov.au/sites/default/files/2025-01/rr33_restorative_justice_conferencing_for_dfv_and_sv.pdf
[35] Ibid, at 144
[36] Ibid, at 145