

## Conventional and innovative justice responses to sexual violence

Kathleen Daly

Despite 30 years of significant change to the way the criminal justice system responds to sexual violence, conviction rates have gone down in Australia, Canada, and England and Wales.<sup>1</sup> Victim/survivors continue to express dissatisfaction with how the police and courts handle their cases and with their experience of the trial process. Many commentators and researchers recognise that the crux of the problem is cultural beliefs about gender and sexuality, which dilute and undermine the intentions of rape law reform.<sup>2</sup> These beliefs affect victims adversely, but at the same time, increased criminalisation and penalisation of offenders is not likely to yield constructive outcomes.

This paper reflects on the limits of legal reform in improving outcomes for victim/survivors. Given the extent of reform to procedural, substantive, and evidentiary aspects of sexual assault legal cases, we may have exhausted its potential to change the response to sexual assault. We may need to consider innovative justice responses, which may be part of the legal system or lie beyond it.

There is increasing scepticism that reform of rape law alone can change victims' experiences appreciably. Stubbs (2003) has suggested that while legal reforms may have "symbolic value", they are "likely to be limited in effectiveness" because of the "resilience of cultural mythologies about women and about sexuality" (p. 23). Koss (2006) has made a bold "call for action" (p. 224) for considering alternatives to conventional criminal justice, including restorative justice

1 England and Wales is one jurisdiction with respect to criminal law, crime, and justice (some exceptions may relate to local police matters in Wales). Scotland and Northern Ireland are also distinct jurisdictions; together the three comprise the United Kingdom. With some exceptions, all the research reported here comes from England and Wales.

2 For example, reports by the Tasmanian Law Reform Institute (TLRF) (2006) and the Australian Law Reform Commission (2010) noted that despite the removal of mandatory warnings about the credibility of complainants and delayed reporting of complaints, it is still for judges to make assessments about reliability and credibility of the witness in particular cases. Therefore, "the effectiveness of the reforms has been eroded by subsequent judicial interpretation and developments in the common law" because trial judges appear to be pre-emptively warning juries about the quality of the evidence to avoid appeal challenges (TLRF, 2006, p. 3).



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conferences; and Naylor (2010) has proposed a restorative justice conference model, along with a specialist court. Edited collections on gendered violence and restorative justice have canvassed the views of academics and practitioners (Ptacek, 2005, 2010; Strang & Braithwaite, 2002), many of whom support the development of alternatives. Those in the victim support and advocacy sector have also contributed to this shift in perspective (Amstutz, 2004; Achilles, 2004; S. Herman, 2004; Worth, 2009).

In this paper, I consider a range of responses to sexual assault: those that exist both within and outside the legal system. Rather than one justice pathway for victim/survivors, a menu of options and varied pathways is required. Since 1994, I have been researching the benefits and problems of using restorative justice in sexual assault cases (Braithwaite & Daly, 1994; Curtis-Fawley & Daly, 2005; Daly, 2002a, 2006a, 2008; Daly & Curtis-Fawley, 2006; Daly & Stubbs, 2006; Proietti-Scifoni & Daly, 2011). Over time, I have observed increasing interest to consider justice alternatives.

This Issues paper considers a range of approaches, programs, and practices that have been proposed or used (nationally and internationally) to improve criminal justice system efficacy (e.g., conviction rates) and victims’ experiences in the aftermath of sexual assault—both within and outside the legal process. I identified 48 types of responses, which reside on a continuum, ranging from conventional to innovative. The continuum reflects the dynamic qualities of justice practices as conventional–innovative hybrids are emerging.

Conventional justice responses are concerned with better ways to gather evidence and prosecute cases, and to provide better services and supports for victims. Innovative justice responses are a variety of newer practices that seek to address victims’ “justice needs”, including an acknowledgment of wrongdoing and mechanisms of redress or repair (see Box 1).

Part I of this paper reviews the research literature about sexual assault law reform and its limits. Part II defines key concepts of conventional and innovative justice responses, formal and informal justice, and victims’ justice needs. It demonstrates the need to think broadly about innovation and not to be confined to one idea such as restorative justice. This

part presents and analyses 48 conventional and innovative justice responses to sexual assault, and assesses the evidence on them. Part III outlines six areas that need to be addressed to enhance justice outcomes for victims of sexual assault.

## Part I. Sexual assault law reform

### The promise of legal reform

During the 1970s and 1980s, spurred by feminist advocacy on behalf of victims of gendered violence, extensive reform of rape law occurred in many Western countries. This process began in the 1970s in the United States and Australia, and in the early to mid 1980s in Canada and New Zealand. Reform has been more piecemeal in England and Wales, and it was not until 2003 that comprehensive rape law legislation was enacted. In Scotland, it has yet to be enacted.

Legal reform varied in intensity and scope in Australian states and territories. However, the focus was to shift attention away from the victim's character to the offender's behaviour, eliminate the witness corroboration rule and other physical evidence requirements to prove non-consent, and broaden the definition of rape and sexual intercourse. Rape shield laws were enacted to restrict the introduction of evidence at trial about a victim's past sexual history. The definition of rape was expanded from a single offence (vaginal intercourse with the penis) to a series of graded offences, associated with aggravating circumstances and acts. Sexual intercourse was broadened to include oral and anal penetration, and marital rape was criminalised in all jurisdictions. Comprehensive changes were introduced in New South Wales in 1981, in the Australian Capital Territory in 1985, and in Victoria in 1991 (see reviews by ACT Office of the Director of Public Prosecutions and Australian Federal Police [ACT ODPP & AFP], 2005, pp. 4–7; Barga & Fishwick, 1995; Heath, 2005). Legal reforms were accompanied by changes to administrative procedures and services for victims. Police officers began to receive training in sexual assault investigation and in assisting victims, and supports for victim/survivors were established.

### Limits of legal reform

During this initial phase, optimism prevailed that legal reform would change the landscape of police and criminal justice responses, make the system more efficient (e.g., lead to higher convictions), and enhance positive experiences for victims. This did not occur. Older practices continued despite legal change.<sup>3</sup> Reviewing the impact of legal reform in the United States, Koss (2006) observed that although feminist and victim social movements “achieved spectacular success by the standards of social change” (p. 217), legal reforms had little or no impact on rates of prosecution and conviction. Some believe that reforms may have had some educative impact on judges and lawyers (Spohn & Horney, 1992), but the most significant impact appears to have been on victim/survivors, who began to report sexual victimisation more often.

### A five-country study of attrition

One key measure of the impact of law reform is to look at case progression and conviction rates for rape. In a recent comparative analysis of five jurisdictions, a colleague and I analysed the attrition of cases from the criminal justice system, utilising data from 1970 to 2005 in Australia, Canada, England

3 In Australia and New Zealand, see Brereton, 1994; Heath & Nafine, 1994; Jordan, 2001, 2004; Lievore, 2004; Mossman, Jordan, MacGibbon, Kingi, & Moore, 2009; and NSW Department for Women, 1996. In the United States, see Spohn & Horney, 1992. In England and Wales and Scotland, see Brown, Burman, & Jamieson, 1993; Burman, Jamieson, Nicholson, & Brooks, 2007; Kelly, 2001; Kelly, Lovett, & Regan, 2005.

and Wales, Scotland, and the United States (Daly & Bouhours, 2010).<sup>4</sup> Seventy-five unique studies of rape case attrition were analysed. We found that of cases reported to the police, the overall rate of conviction was 15% to *any* sexual offence, and 9% to the *original* offence charged by the police. We also found temporal variation in the conviction rate. Of offences reported to the police, there was a statistically significant decline in the conviction rate to any sexual offence: from 18% in an earlier period (1970–1989) to 12.5% in a later period (1990–2005). The largest decrease in conviction rates occurred in England and Wales (from 24 to 10%) and to a lesser degree, Canada (26.5 to 14%). The decrease was more moderate for Australia (from 17 to 11.5%). By comparison, in the United States, there was no change (13 to 14%). In the later period, there is a remarkable convergence of average conviction rates in common law<sup>5</sup> countries: they range from 10% to 14%.<sup>6</sup> Confirming this pattern, a New Zealand study carried out after our review found that of sexual violation offences reported to the police in 2005–07, 14% resulted in a conviction to any sexual offence (Triggs, Mossman, Jordan, & Kingi, 2009, p. vii).

The reasons for the decline in conviction rates can be understood once we see how the attrition process works. The next section shows where cases are filtered out of the legal process, using data from Australia, and discusses why this occurs.

### The journey of 100 cases

Drawing from Australian victimisation surveys and findings from Australian attrition research, the journey of 100 cases reported to the police is shown in Figure 1. Of 100 cases, 20 proceed past the police and prosecution and are adjudicated in court, 3.5 go to trial and are convicted, 8.5 are acquitted or the case is withdrawn. Of the 11.5 convicted defendants, 4.5 receive a prison sentence, although there is insufficient evidence to say if any incarceration time was served. Put another way, for 88.5 out of 100 Australian victims who report a sexual assault to the police, their case is *not* proceeded with by the police or prosecution; or it is dismissed, withdrawn, or acquitted, once in court. Therefore, for almost nine out of 10 sexual assault victims, no formal legal redress occurs.

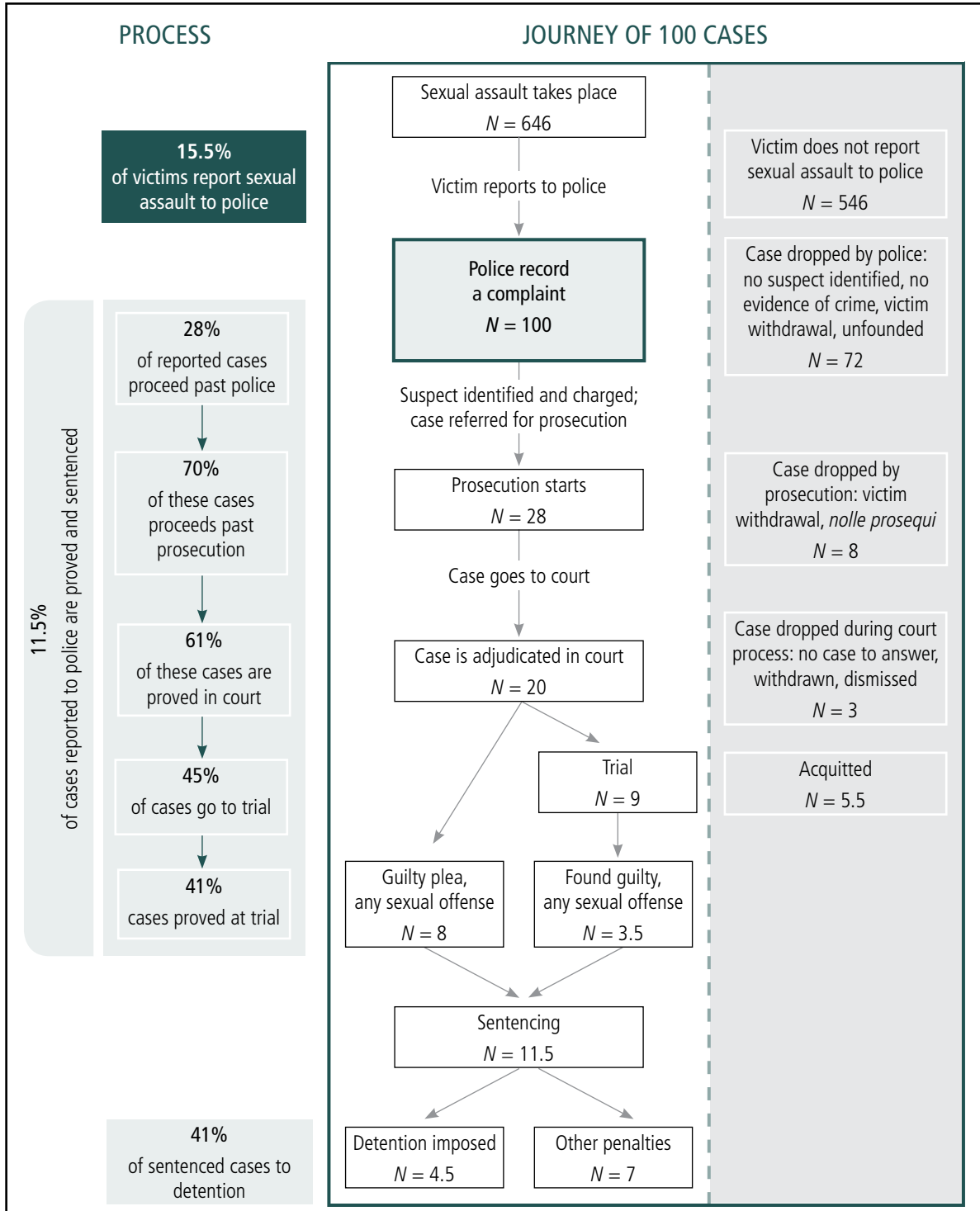
For the factors associated with cases proceeding past the police or prosecution and with court conviction, Daly and Bouhours (2010) found that the presence of evidence (forensic or witness evidence, visible victim injury, and weapon use) is strongly associated with the likelihood of conviction in both the earlier and later time periods. At the same time, the factors associated with a

4 In Daly and Bouhours (2010), two data periods were created to determine if there was change in the estimates of conviction over time. The year of data gathering in the 75 studies ranged from 1970 to 2005. The estimates of conviction clustered in two phases: earlier (1970–1989 data) and later (1990–2005 data). These two phases also corresponded to older and newer ways of researching sexual victimisation. It seemed logical to use these indicators to draw a temporal line in the analysis. The earlier and later phases do not coincide with pre- and post-legal reform because all countries had some type of legal reform by the end of the 1980s, although some had gone substantially further than others. Rather, the more recent period (1990 forward) can be viewed as a time when legal reform matured, when there was a more developed consciousness by victims (and by victim support groups) of expanding definitions of rape, and when more research attention was given to sample surveys of victimisation, using more sensitive methods.

5 A distinction exists between “common law” and “civil law” countries, although some countries (such as Germany and Japan) combine elements of both. Australia, Canada, England and Wales, Scotland, New Zealand, and the United States are based on English Common Law; most continental European countries such as France, The Netherlands, Spain, Italy etc., are civil law countries. These differences also apply in countries that were once colonies of European powers. Historically, common law was developed by custom and “case law” (judicial decisions in individual cases), beginning before there were written laws and applied by courts after there were written laws. Civil law countries take their tradition from Justinian Roman law. In the modern period this has translated into jurisprudential differences: in civil law countries, legislation is seen as the primary source of law. Courts therefore base their judgments on the provisions of codes and statutes, from which decisions in particular cases are derived. By contrast, in the common law system, cases and judicial interpretation about legal principles are a primary source of law. Civil and common law systems also differ in criminal procedure. In general, the judge in civil law systems plays an active supervisory role in case investigation, whereas in a common law systems investigation is the responsibility of police and prosecutors, and the judge’s role is to adjudicate impartially on the evidence and arguments introduced in court by the prosecution and the defence. These are broad generalisations, and many exceptions can be found. Note that this common law/civil law distinction should not be confused with differences between branches of law within a country (i.e., criminal law, which handles “public” harms and wrongs in which the state sees itself as the victim; and civil law, which handles “private” harms and wrongs between individuals or organisations, and in which a plaintiff sues a defendant for damages or some other compensation or remedy.

6 This range excludes Scotland, whose conviction rate of 17.5% is based on just three cases.

Figure 1: Journey of 100 cases reported to the police in Australia, 1990–2005



Note: This diagram is based on four Australian victimisation surveys and attrition estimates from 12 Australian studies utilising data for 1990 to 2005 (100 cases = 100% of cases reported to police).

victim's character and credibility, which were strongly associated with conviction in the early period, decreased in importance in the later period.<sup>7</sup> These findings for a victim's character may initially seem to be contrary to research on rape trials (NSW Department for Women, 1996; Temkin & Krahé, 2008), which have found that the trial centres on a victim's sexual reputation and credibility more often than on evidence factors. However, the sample of studies in Daly and Bouhours (2010) included both trials and pleas (about two-thirds of convictions were by guilty plea); and it is in the trial context that a victim's character and credibility is most closely scrutinised.

This occurs because legal officials, along with other members of society, can have negative stereotypes of rape victims, holding them responsible for victimisation, unless the assault contexts and elements conform to the "real rape" stereotype (stranger relations, visible physical injury, weapon use) (see Estrich, 1987; Lievore, 2004; Temkin & Krahé, 2008). The same mindset was evident in analyses of rape case law during the 19th and mid-20th centuries (see Estrich, 1987); it was documented in a socio-legal study of judge and jury decisions in rape cases in the 1950s (Kalven & Zeisel, 1966); and it continues to be evinced in research on victims in the legal process. When a reported assault is not congruent with the "real rape" elements, attention is drawn to a victim's character or credibility.

Drawing from Spears and Spohn (1996), reputedly "genuine" victims have good moral character (e.g., no history of drug or alcohol use, previous offending, or working in the sex industry); do not engage in risk-taking behaviour before the offence (walking alone at night, hitchhiking, at a bar alone, going home with an offender); scream and physically resist an assault; and report it right away.

One significant effect of legal reform has been that victim/survivors of non-stranger sexual assault (i.e., known assailants) are more likely to report the offence. Over time, from studies in Australia and elsewhere, we have seen a shift in the proportion of sexual assaults by unknown assailants reported to the police: from nearly 50% in an earlier period (1970–1989) to about 25% in a more recent period (1990–2005) (Daly & Bouhours, 2010, p. 576). Heenan and Murray's (2006) research in Victoria found the stranger rape share to be even lower: 16% of cases reported to the police. Likewise, Harris and Grace's (1999) analysis of British data found that the stranger share of cases reported to the police was 12%. It is little surprise that victims' experiences with and judgments of the criminal process are not positive.

### Limits of legal reform: victim/survivors in the criminal justice process

Research on victims' experiences with the legal process in common law countries like Australia (ACT Victims of Crime Coordinator, 2009; Fawcett Commission on Women and the Criminal Justice System, 2009; NSW Violence Against Women Specialist Unit, 2006; Regehr, Alaggia, Lambert, & Saini, 2008) and civil law countries (Bacik, Maunsell, & Gogan, 1998) shows that, despite legal and procedural reforms, victim/survivors are dissatisfied with the criminal justice system.

Drawing from the ACT Victims of Crime Coordinator (2009), NSW Violence Against Women Specialist Unit (2006), and Bacik et al. (1998), sexual assault victim/survivors report a lack of sufficient information on procedures and the progress of their case. Lengthy delays in the court process are distressing, and some withdraw their complaint to deal with the assault emotionally. Although victims tend to have a more positive perception of the police, this perception changes when their case is referred for prosecution. The shift in status from being a victim to being a witness is disempowering and confusing (ACT Victims of Crime Coordinator, 2009). Many feel unprepared for court and think that the process of cross-examination is abusive, particularly when they have to give evidence both at committal and at trial. Many wish they had been consulted about the decision to downgrade the charges or drop the case, although most believe that the decision should be left to the prosecution.

<sup>7</sup> In addition, stranger victim-offender relations are strongly associated with conviction in the early period, but decrease in importance in the later period.

By comparison, sexual assault victims in civil law countries are said to have more positive experiences with their legal representatives, who offer support and provide information and advice (Bacik et al., 1998). Such legal support is absent in common law countries like Australia, but there is interest to consider it (Raitt, 2010).<sup>8</sup>

The ACT Victims of Crime Coordinator (2009) found that many victims are disappointed with the outcome of the case either because it is not prosecuted or does not result in conviction. However, even when there is a conviction, a large share feels dissatisfied with and traumatised by their treatment in court. They report that they are not believed, there is too much focus on their behaviour, and their complaint is not taken seriously enough.

### More legal reform?

Since 2000, most Australian states and territories have conducted reviews and produced discussion papers on better ways to respond to adult victims of rape and sexual assault, including more effective legal mechanisms. These include:

- Australian Capital Territory (ACT ODPP & AFP, 2005; ACT Victims of Crime Coordinator, 2009);
- New South Wales (NSW Attorney General's Department, 2006; NSW Violence Against Women Specialist Unit, 2006);
- Queensland (Crime and Misconduct Commission, 2003, 2008);
- South Australia (Chapman, 2006);
- Victoria (Victorian Law Reform Commission, 2004); and
- Western Australia (Community Development and Justice Standing Committee, 2008).<sup>9</sup>

In 2009, *Time for Action*, a plan directed to the Australian Government by the National Council to Reduce Violence Against Women and Their Children (2009a), was released, and the Australian Government has since developed a plan in response to the council's report, in which effective justice responses is a core outcome area (Council of Australian Governments, 2011). Similar government reviews have also occurred in New Zealand (New Zealand Ministry of Justice, 2008) and England and Wales (Government Equalities Office, 2010).

These reviews take stock of the impact of legal reform and consider further areas for reform. They give insight into what victims are seeking in the legal process, the problems they continue to face, and what further steps should be taken. Although more legal reform often takes centre stage in these reviews, one also sees openness to considering alternatives. For example, New Zealand's Ministry of Justice (2008, pp. 13–14, 18–19) discussion paper considered the strengths and limits of changing definitions of consent, along with related statutes concerning a defendant's "reasonable belief" in consent, both of which are key questions for sexual assault law reform. However, the paper warned that "there are dangers in expecting too much from changing the law, when attitudes and behaviours need to be addressed more generally ... [The law] is a fairly blunt instrument for [changing attitudes] without other supporting educative and social measures" (p. 14 & 19).

For some time, governments and policy makers have recognised a pressing need to do something to improve police and court outcomes and victims' experiences. This is evident in the many inquiries and reviews that have been undertaken, not for the first time, but repeatedly, in many jurisdictions in Australia and elsewhere. However, cultural beliefs about gender and sexuality continue to undermine the intentions of legal reform. These beliefs affect victims adversely, but at the same time, further criminalisation and penalisation of offenders is not likely to yield constructive outcomes, either in reducing the incidence of sexual assault or changing these beliefs. The criminal justice system, as

<sup>8</sup> See footnote 5 for detail on the distinction between civil and common law.

<sup>9</sup> In the Northern Territory, attention was directed to child sexual abuse in Aboriginal communities, with the *Little Children are Sacred* report (Wild & Anderson, 2007). Tasmania conducted a review of rape and sexual assault in 1998 (Task Force on Sexual Assault and Rape in Tasmania, 1998).

currently constituted, is poorly suited to the tasks of changing behaviour and beliefs. To reduce the incidence of sexual assault and change beliefs, educational campaigns are preferable to increasing criminalisation and punishment (Carmody & Willis, 2006; Temkin & Krahé, 2008). There is growing critique about the utility of heavily punitive responses to sex offenders such as sex offender registries, community notification, residential restrictions, satellite tracking, and post-sentence detention (e.g., Brown, 2008; McSherry & Keyzer, 2009; Ward, Gannon, & Birgden, 2009). If achieving justice for victims is not likely to be met by more legal reform or by punitive responses toward offenders, we require new and more imaginative ways of addressing the problem.

### Victims' justice needs and the potential of innovative justice responses

Innovative justice responses, as defined in this paper, are concerned with making the legal and social response to rape more accountable and accessible to victim/survivors. They address J. Herman's observation that the "needs of victims are often diametrically opposed to the requirements of legal proceedings":

*Victims need social acknowledgment and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to ... rules and ... procedures that they may not understand ... Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes–no questions [that does not reflect] a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience. Victims often fear direct confrontation with their perpetrators; the court requires a face-to-face confrontation. (J. Herman, 2005, p. 574, emphasis added)*

Herman's ideal justice model, from a victim's perspective, includes social acknowledgment, a sense of control, an opportunity to tell one's story, not having to continually relive the crime, and not being required to confront a perpetrator directly.

Koss (2006) contrasted a victim's survival needs (e.g., their physical and mental health, housing, employment, education) and their justice needs, which include:

*[a] desire to tell their story, be heard, have input into how to resolve the violation, receive answers to questions, observe offender remorse, and experience a justice process that counteracts isolation. (pp. 208–209)*

The view reflected here is that justice needs are not likely to be met by current criminal justice responses. It seems imperative then to review and assess innovative mechanisms for achieving the social acknowledgement, validation, and redress of harm that victim/survivors currently seek. The following section provides an overview of 48 practices and approaches designed to improve the justice response to sexual assault for victim/survivors.

## Part II. Conventional and innovative justice responses

One challenge in describing and comparing conventional and innovative justice responses is the terms themselves. These and other concepts such as informal justice and restorative justice require discussion. But before doing so, the observations of Frohmann and Mertz (1994) are relevant. They suggested that legal reform has had dual goals of efficacy (i.e., increasing the likelihood of conviction) and process (i.e., "attention to women's perceptions and experience of the process itself"), but these goals do not "always coincide" (p. 831). Further, they emphasised the role of "cultural and epistemological constructions of gender and violence" (p. 834) in hindering desired change. Such cultural constructions explain why despite legal reform, many victims remain dissatisfied by their experiences in the criminal justice system; and why we cannot assume that alternatives will be any less affected by them (Stubbs, 2003; see also Smart, 1989). However, innovative practices have the potential to "prise ... open ...



cracks in patriarchal structures” (Braithwaite & Daly, 1994, p. 210), to build “links, interruptions” to stop violence (Pennell & Burford, 2002, p. 126), and to “check and challenge” an offender’s denials and minimisations of sex offending (Daly & Curtis-Fawley, 2006, p. 258).

Drawing on the research literature and my own work in the area, Box 1 explains how “conventional” and “innovative” justice responses, “informal justice” and “restorative justice” are defined in this paper.

## Box 1: Key concepts

### Conventional and innovative justice responses

*Conventional responses* are concerned with better ways to gather evidence and prosecute cases, and to provide better services and supports for victim/survivors in the legal process. They may be part of the criminal justice system or work alongside of it. Most assume reliance on legal mechanisms and formal legality, with an emphasis on prosecution and trial as the major pathway to justice for victims. Conventional responses are a first step in changing the criminal justice system to make it more accountable and accommodating to victim/survivors.

*Innovative responses* are a variety of newer practices that seek to address victims’ justice needs, including an acknowledgment of wrongdoing and mechanisms of redress or repair. They may be part of the criminal justice system, work alongside of it, or be independent of it. Innovative responses assume a mixed model of reliance on formal legal mechanisms, informal justice interactions, and civil society practices, with an emphasis on victim participation, voice, validation, and vindication, and on offender accountability. These responses are more experimental, and a small body of evidence exists on their effectiveness, but they offer additional options and may be better able to satisfy victims’ justice needs.

Conventional responses are concerned with helping victims to cope better with criminal justice system logics and operations, whereas innovative responses are concerned with addressing those things that many victims say they want, but rarely experience in the criminal justice system. Rather than being discrete

categories, it is helpful to view these responses as residing on a continuum.

For example, sexual assault services may work directly with the police and other agencies, in supporting victims through the investigation and adjudication process. Their work falls under a “conventional” response heading because it is primarily concerned with assisting victims within the criminal justice system. In other instances, however, such services may provide support and counselling for victim/survivors who do not wish to report the offence to the police. Indeed, some organisations may facilitate processes by which victims meet with offenders, but these activities occur independently of a legal process. The latter activities are an innovative response because they are expressly concerned with addressing victims’ justice needs, although the activity is taking place outside a police station or courthouse, and outside a legal process more generally.

Hybrid forms are also evident, which gives a dynamic quality to the conventional–innovative response continuum. For example, facilitated meetings or conferences between victims, admitted offenders, and other relevant people may occur as a diversion from court or as pre-sentence advice to a judicial officer. They are firmly within the conventional response sphere; however, part of the justice activity involves victim participation, voice, validation, and vindication in a more free-flowing meeting or conference.

### Formal and informal justice

Since the mid-1970s, there has been growing interest in alternative justice forms, variably termed informal justice, community justice, and popular justice, along with discussion about how these should articulate with the criminal justice system (Matthews, 1988). Criminologists, legal scholars, activists, sociologists

and legal practitioners have argued for a more “direct” relationship between individuals—whether as defendants or victims—and the justice system to better achieve crime prevention, the rehabilitation of the offender, the validation of the victim, and the restoration of the community. Debate was rekindled in the 1990s

with the rise of restorative justice and a consideration of how it should articulate with conventional criminal justice (Braithwaite, 2002; Van Ness, 2002). No attempt will be made here to review the vast literature produced over the last four decades in this area (see Daly & Proietti-Scifoni, 2011). Suffice to say, the discussion has been going on for a long time across many fields of knowledge; it emerges, subsides, and then re-emerges with new names and pronouncements.

*Formal justice* refers to the traditional structure and purpose of the criminal legal system, namely that harms and punishments are to be adjudicated by a court; it utilises standard police, prosecutorial, and court responses to crime. *Informal justice*, by contrast, refers to a variety of practices that permit conversation and interaction (both directly and indirectly) between crime victims and offenders, those close to them such as

family and friends, and other relevant people affected by the offence.

Some informal justice practices are legally formalised. For example, legislation has been established to create facilitated meetings, such as youth justice conferences; and legislation, practice directions, or other administrative rules are used to circumscribe the activity and outcome in specific ways. Other informal justice practices are not legally formalised. They may operate in civil society in a range of organisational contexts such as faith groups, hospital units, and victim support organisations, among others. Although not legally formalised, they rely on rules, procedures, and protocols to operate in a professionally accountable manner. Mediation and restorative justice providers operate across the several types of informal and formal justice domains.

### Restorative justice and conferencing

*Restorative justice* is defined in many ways (Daly & Proietti-Scifoni, 2011), but generally refers to a variety of contexts in which admitted offenders meet with victims, whether directly or indirectly. The aim is dialogue, encounter, and repairing the harm caused by crime. Although restorative justice pays greater attention to crime victims, practices can often be offender-centred. Despite what many say or think, the aim is not to “restore” relations in a literal sense, although this may be desired in some cases (see Daly, 2002b, 2006b, for a critical analysis of restorative justice; and Daly, 2000; Duff, 2003, for consideration of the role of retributive censure in restorative justice). Restorative justice processes (or other types of informal justice practices) are set in motion only **after** a suspect has admitted to an offence. Restorative justice has no mechanism of adjudicating “facts”, and therefore cannot replace the criminal justice system.

In this paper, restorative justice refers to practices that can be used at different stages of the criminal justice process, including diversion from court, pre-sentence, and post-sentence. These practices, termed *conferences*, are facilitated meetings with admitted offenders, victims, their supporters, and other relevant people. They are run by a professional, and depending on the context and jurisdiction, there is a police officer present. Depending on the legal context, the aim is for

the participants to discuss the impact of the offence and to censure the behaviour, for victims to voice their story and ask questions, and for participants to decide on an appropriate outcome.

In Australia, conferences are principally used as diversion from court for admitted youth; and in one jurisdiction (South Australia), they are used routinely in youth sex offence cases. In New Zealand, where conferences were first legislated for youth in 1989, they are now used in both the youth and adult jurisdictions. New Zealand has an advanced professional practice with the establishment of a national group of providers, Restorative Justice Aotearoa, who have been working with the government since 2001 to establish performance standards. This development arose with the introduction of a pre-sentence adult conference pilot in 2001 in four areas, which has since been expanded across the country. Adult conferences are also used in New South Wales pre- and post-sentence (the latter between prisoners and victims or victim’s family members). Jurisdictions vary in the degree of victim control in the conference process. Compared to other Australian jurisdictions, the ACT’s youth conferences are unusual in that they cannot go forward without the agreement of a victim. Likewise in New Zealand, with some exceptions such as when a facilitator cannot locate a victim, an adult pre-sentence conference cannot go forward without the agreement of a victim.

## Type and focus of responses

Given the limits of legal reform, I was interested to identify conventional and more innovative justice practices that addressed sexual assault as an offence and supported victim/survivors. Forty-eight conventional and innovative justice practices, programs, or proposals (termed “approaches” or “responses”) have been identified. These are detailed in the online Appendix, “Inventory of Responses to Sexual Violence”, which includes developments in Australia, New Zealand, the United States, Canada, England and Wales, and some European countries.<sup>10</sup> The criteria for inclusion were that responses:

- addressed victims’ justice needs (not health or survival needs, or prevention) in affluent democratic countries like Australia with a common law framework;
- involved more serious sexual offence categories (i.e., rape and attempted rape);
- were targeted at adult female victims/survivors of male perpetrators;
- were for victims/survivors rather than for offenders; and
- were practices or activities, rather than proposals for legal reform.

Some responses did not fit these criteria, but were important to include because they might be applicable or had promise. For example, some are currently being used in child sexual abuse or partner violence cases, but could be applied in adult rape cases. Some have only been proposed, not implemented; some come from civil law countries, but could be applied in common law settings; and some come from international criminal justice and contexts of war.

The Inventory describes the stage of the legal process in which the response occurs, name of approach, jurisdiction(s) where it is practiced, stated aims, and whether it focuses on system efficacy, victim experience with process, both system efficacy and victim experience, or on offenders. The activities are described, and a summary of research or evidence, if any, is given.<sup>11</sup>

These conventional and innovative responses are grouped into four broad types—specialisation, offender focused, legal reform, and victim advocacy and participation:

- *Specialisation*: specialist police teams, investigation, and multidisciplinary responses involving police, forensic specialists and sexual assault counsellors; specialist prosecution units and courts.
- *Offender Focus*: intensive case management and offender support and supervision.
- *Legal Reform*: reforms to legal procedure, definitions of consent, admissibility of evidence, and adjudication processes.
- *Victim Advocacy and Participation*: victim support, services, and advocacy, such as sexual assault counsellors providing support during legal processes and witness assistance programs; mechanisms that encourage participation within the legal process, such as victim legal representation and victim impact statements, and that encourage participation outside the legal process by, for example, victim-offender meetings, memorialisation and cultural performance.

When analysing the Inventory (see Table 1), several observations can be drawn. First, of the 48 responses, most are concerned with improving victim experiences (52%), or with system efficacy and victim experience (34%). Few address system efficacy alone (6%) or have an offender focus (8%), results that largely reflect the criteria for inclusion. Examining the data another way, improved victim experiences are the focus of all the programs and approaches within the victim support group, whereas both system efficacy and victim experiences are more often evident in the police teams and specialist courts groups.

10 For Australia, readers may wish to refer to the National Council’s (2009b) *Background Paper to Time for Action*, which itemises in detail the programs and practices for prevention, provision, and prosecution in each state and territory.

11 The Inventory is current as of mid-2011. However, the intention is to develop it as an online ACSSA resource, and to update and amend the information as further practices and research come to light.

Table 1 . Responses to sexual violence: Summary analysis

Response group	System efficacy	Victim/survivor experience	Both efficacy & Victim/survivor experience	Offender focus	Offender & victim focus	Total N <sup>a</sup> in response group (N are innovative)	Existing research evidence (yes)
Specialisation							
Specialist police teams	1	5	5	0	0	11 (0)	6
Specialist prosecution units/courts	0	2	5	0	0	7 (0)	4
Offender Focus							
Offender accountability, support and re-entry	1	0	0	2	0	3 (0)	1
Legal Reform							
Proposals for legal reform	1	0	3	0	0	4 (0)	2
Victim Advocacy and Participation							
Victim support, services, and advocacy	0	9	0	0	0	9 (0)	3
Victim participation <i>within</i> the legal process	0	5	3	0	2	10 (5)	7
Victim participation <i>outside</i> of the legal process	0	4	0	0	0	4 (4)	3
<b>Total</b>	<b>3 (6%)</b>	<b>25 (52%)</b>	<b>16 (34%)</b>	<b>2 (4%)</b>	<b>2 (4%)</b>	<b>48 (9) (100%)</b>	<b>26</b>

<sup>a</sup> This number refers to unique approaches, not the frequency or spread of the activity. For example, in the specialist police teams group, multidisciplinary “one-stop shops” exist in many forms, depending on the country, but are counted as one approach (and one entry in the Appendix). Likewise, in legal reform proposals, differing definitions of consent have been discussed in many jurisdictions, but these are counted as one approach. Note. Of 5 innovative responses in the victim participation within legal process group, 3 are concerned with both efficacy and victim/survivor experiences; and 2 have an offender and victim focus. Of 4 innovative responses in the victim participation outside the legal process group, all are concerned with victim/survivor experiences.

Second, innovative approaches are in the minority; they are 9 of 48 approaches in the Inventory. Third, existing research evidence refers to any published or pending research on practices from Australia or elsewhere. Of the 48 approaches, there is research evidence for just over half; of 39 conventional responses, research exists for 19 (49%); of 9 innovative responses, there is research for 7 (78%). The rest contain descriptive information of what is supposed to occur, but there is no evidence on what does occur or with what impact. Fourth, there is a paucity of evidence that compares innovative and conventional responses from the perspective of victim/survivors. In fact, in most cases, it is not possible to directly compare the two because victims may choose to participate (or not) in the criminal justice system, or to participate in different ways; therefore, self-selection effects make comparison difficult, if not impossible. One field experiment has been conducted in England of adult victims' experiences with conventional court sentencing, and with court and a supplemental pre-sentence conference (Sherman et al., 2005; see also Shapland, Robinson, & Sorsby, 2011); however, sexual assault cases were not eligible. Of all the groups, relatively less research exists for the victim support, services, and advocacy group.

In describing the responses and assessing what is known of their impact on victim/survivors, I first consider conventional responses in the Specialisation, Offender Focus, and Legal Reform groups. Then I discuss responses in the Victim Advocacy and Participation group, in which some are conventional, and others are innovative.

### Specialisation

Research on specialist police teams, one-stop crisis response centres (such as the Sexual Assault Referral Centres [SARC] in England and Wales), and Sexual Assault Nurse Examiners (SANE)—all of which comes from the United States and England and Wales—is generally positive: victim/survivors are supported, evidence is gathered, and in particular, better quality forensic evidence is gathered (e.g., Home Office, 2009; Littel, 2001; Lovett, Regan, & Kelly, 2004; Patterson, 2005; San Diego City and County SART, 2007).

Specialist court approaches include specialist prosecution and court activities. For Victoria, these include the Specialist Sex Offences Unit in the crown prosecutor's office, which began in 2007 (Boyd, 2008), and a specialist sexual offences list in the magistrates' court,<sup>12</sup> which began in 2004 for child victim cases and was extended to adult victim cases and rural areas in 2006 and 2007 (Magistrates' Court of Victoria, 2010). An evaluation of sexual assault reform in Victoria found that the Specialist Sex Offences Unit had improved the support for victim/survivors both before and during the court process (Success Works, 2011, p. ii). For the specialist list for child victim cases, a reduction in delay and increase in guilty pleas were noted by the Victorian Law Reform Commission (2004, pp. 176–77). Specialisation of court technology (video-taped witness evidence and use of CCTV in court) has been introduced in child victim cases in several jurisdictions (Western Australia, Victoria and New South Wales). Research of three Sydney courts found that although there were some benefits, there were delays and problems using the new technologies effectively and “children are still subjected to long, overly complex questioning” (Cashmore & Trimboli, 2005, pp. ix–x).

Specialist courts and community-integrated responses to partner, domestic, and family violence have existed for some time in Canada, the United States, Australia, and the United Kingdom. Researchers in the United States tend to focus on rates of re-offending rather than victims' experiences.<sup>13</sup> The Northern Society for Domestic Peace, based in British Columbia, is a significant resource for research on specialist courts (principally in jurisdictions across Canada). Stewart (2005) reviewed domestic violence courts in Australia and other countries, noting a variety of models in use. She pointed out that there “would be great value in the establishment of appropriately resourced specialist domestic

12 This is a specially managed list of all cases relating to a charge for a sexual offence. Such a list may provide a greater level of consistency in the handling of sexual offences cases, reduce distress for victim/survivors, and result in quicker outcomes.

13 For example, see the special issue on intimate partner violence and justice in *Criminology and Public Policy*, 2008, 7(4).

violence courts” (p. 34), but emphasised that the courts would need to be staffed by specialist magistrates and prosecutors, have skilled police and legal staff, and have victim advocates and court support services. For the ACT’s family violence court, Holder (2008) observed that specialisation increases the likelihood of victims reporting cases to the police, and the presence of victim advocates positively affects victims’ experiences.

There is a high level of support in the sector for specialist sexual assault courts for adult offenders (e.g., Heenan, 2005a, 2005b; Victoria Law Reform Commission, 2004). These were introduced in South Africa in 1993, and by 2000, 20 courts had been established (see Box 2). These courts are considered conventional because they operate using standard legal approaches of prosecution and trial, although the legal actors may be better trained and have a better understanding of the problems facing victim/survivors in court. The South African courts should not be confused with Sex Offense Courts, started in New York State, which are in the Offender Focus group.

### Box 2: Specialist sexual assault courts for adults (South Africa)

Introduced in South Africa in 1993, 20 specialist sexual assault courts were established by 2000.\* The available research is on practices from the early 2000s. The South African courts were designed to improve victims’ experiences in court and to increase conviction rates. It was hoped that specialist staff would develop expertise to deal with rape cases, provide more victim-friendly processes with a continuity of staff, CCTV during cross-examination, and other victim care and support services.

Moult (2000) and Walker and Louw (2003, 2005a, 2005b) reported mixed findings. On one hand, higher rates of conviction were achieved, and victim/survivors felt generally positive about the court. However, the authors noted many problems: insufficient access to services or follow up care, re-victimisation in cross-examination, long delays, and insensitive judicial officers. The courts appear to do better in achieving system efficacy, but there is little difference from conventional courts in levels of re-victimisation of victim/survivors.

\* According to a recent discussion paper, 62 such courts are now operating in South Africa (New Zealand Ministry of Justice, 2008), but no verifying citation is given.

### Offender Focus

There are many offender-focused practices, but those considered here have the potential to positively affect victim/survivors. An early guilty plea means that a victim does not wait 1 to 2 years to see a case concluded and that a convicted offender receives appropriate treatment. Victims’ Champion for England and Wales, Sara Payne, suggested with respect to all victims that there should be increased “incentives to plead guilty earlier in the process” and the “discount for trial-day guilty pleas” should be eliminated (Payne, 2009a, p. 46). However, in a second report on rape victim/survivors, Payne (2009b) found that based on focus group discussions, the women felt that “sentences [were] too low ... and that perpetrators [were] treated too leniently in prison” (p. 28). It is difficult to know what to make of these views, particularly of the perceptions of lenient treatment in prison, because Payne (2009b) does not go into any depth.

Intensive case management and supervision is the principle aim of the Sex Offense Court, first established in Oswego County, New York, in 2003 and now operating in seven other counties (Center for Court Innovation, n.d.). The court monitors and supervises defendants pre-sentence, as well as those on probation or parole (Grant, 2007). However, the judge may also preside over cases where pleas have not been entered. The court has a designated prosecutor, defence attorney, and team of probation officers; therefore, it operates like other types of problem-solving courts (e.g., drug courts). K. Herman (2006) noted that the court “work[s] closely with local service providers to facilitate victim access to advocacy, counselling, and other social services” (p. 77), but information is lacking on victims’ experiences.

Offender reintegration occurs through Circles of Support and Accountability (COSA), which began in Ontario, Canada, in the mid-1990s to provide social support for released “high risk” sex offenders. The idea has since been taken up in the United Kingdom, United States, and many other Canadian jurisdictions (Wilson, Cortoni, & McWhinnie, 2009). Participation is voluntary, and only released offenders who have completed their entire sentence can participate (i.e., they are not on parole). Circles are convened with the ex-prisoner and four to six community members, who work on a volunteer basis. During the first 2 to 3 months of the circle, at least one community member meets with the ex-offender daily, and the entire circle meets weekly. The process is guided by the Good Lives Model,<sup>14</sup> with a “focus on support ... positive social influences ... help with cognitive and other problem solving, and [reducing] social isolation and feelings of loneliness and rejection” (Wilson et al., 2009, p. 426). In an analysis of re-offending, the authors compared Canadian COSA participants and a control group and found significantly lower rates of re-offending for the COSA group.

## Legal Reform

The set of ideas in this group focuses on changes in evidence and adjudication procedures in rape trials. Many discussions of changing the response to rape make legal reform the centre of analysis. I give it less prominence because there is already an impressive and extensive academic legal scholarship in legal reform, coupled with careful and detailed reviews by government inquiries. Examined briefly here are meanings of consent, a defendant’s history of previous sexual offending, judge-only adjudication, and summary adjudication in magistrates’ courts.

Changing the legal definition and meaning of consent has been a major focus of proposed legal reforms of the past and present in common law countries. Despite some improvement, analysts now recognise that legal practitioners often subvert or undermine such reform. Responding to these challenges, more sophisticated ways of defining consent have been proposed, such as positive notions of consent. Another proposed approach, although less often discussed, is to introduce evidence at trial of a defendant’s previous sexual offending (Chapman, 2006). Proposals to remove the bias and prejudice of juries in rape trials have been considered. Temkin and Krahé (2008) reviewed the benefits and potential for judge-only adjudication of rape cases, but concluded that there would be “fierce resistance” to the idea by legal practitioners in England and Wales. In Belgium and France, for some less serious sexual offence charges, a panel of three judges can adjudicate the case. This reduces court delay, although some victim/survivors may be concerned that the offence is downgraded in legal seriousness (Bacik et al., 1998).

## Victim Advocacy and Participation

### Victim support, services and advocacy

Victim support organisations may work with the police or other agencies, but they also have an autonomous role in providing support and counselling for victim/survivors who may not wish to call the police. Victim advocates make referrals, explain options, and accompany victims to police stations or medical exams, and witness assistance personnel assist and accompany victim/survivors during court and post-court processes (Parkinson, 2010). In England and Wales, an Independent Sexual Violence Advisor, who may be based in a police station or victim support organisation, assists complainants in the legal process and accesses social agency support, where necessary. The ACT’s Wrap Around Program coordinates the major criminal justice, medical, and victim support agencies in assisting victims in the legal process. Educational websites are an important source of self-education and information for victims and medical staff. With some exceptions (e.g., Robinson, 2009, on the Independent Sexual Violence Advisor, and Campbell, 2006, on victim advocates), there is little research on practices in this group.

<sup>14</sup> The Good Lives Model of rehabilitation is a theory of positive psychology (Ward & Brown, 2004). It aims to treat the unique needs of offenders based on the strengths they require for wellbeing. This is achieved through a consultation and case management approach for each offender.

## Victim participation *within* the legal process

### Conventional justice responses

Victim participation within the legal process group contains conventional and innovative responses. The conventional justice responses include:

- victim impact statements;
- compensation and civil suits;
- victim representation in court; and
- prosecution and reparation (a conventional–innovative hybrid).

Victim impact statements are one of the earliest responses that encouraged victim participation in the legal process. Victim impact statements are documents introduced during the criminal process, which serve to give victims an opportunity to tell offenders and the court how the crime affected them. Research shows highly variable legislation and practices in Australia, the United Kingdom, and the United States. The major areas of variability include who writes the statement (a victim alone or with the help of a staff person); what form it takes (a check list or narrative); when it is used or read (throughout the criminal process or only at sentencing); who presents and reads the report in court; and whether, in addition to a written report, a victim is also allowed to speak in court. Such variation in practice and legislation makes evaluations of victim impact statements complex (Edwards, 2001). Research to date shows that despite critics' fears, the presence of a victim impact statement does not increase sentence severity; and despite advocates' claims, the presence of a victim impact statement does not increase victim satisfaction with the sentence outcome or the criminal justice system.

Compensation and civil suits are mechanisms that can acknowledge a victim's emotional and physical injury. In Australia, the various schemes and eligibility rules for compensation have been described (ACSSA, 2006, 2009), but research is lacking on the number of claims sought, the number awarded and for which cases, the amount of money awarded, and the impact of the process on victims. One exception is a CASA House (Victoria) study carried out in 1997, which found that victim/survivors seek compensation not principally for financial recompense, but to restore their sense of dignity and to raise public awareness about the harms they suffered (ACSSA, 2009). Compensation in England and Wales is discussed in *The Stern Review* (Government Equalities Office, 2010), where it is reported that the average award to adult and child victims of rape in 2009 was £15,581 (A\$33,966 in 2009). The review raises "serious concerns" about the eligibility requirements of applicants who did not appear to be "blameless" (e.g., had been drinking alcohol). No information is given on how many victims sought compensation, how many claims were refused or reduced in monetary value, and on what grounds they were refused or reduced. On balance, little is known about application processes and outcomes of compensation schemes from a victim's perspective.

For research on victims pursuing civil suits (torts) for monetary damages, these cases typically involve organisations (e.g., a university or shopping mall), who have the money to pay, rather than the individual offenders (Bublick, 2006). Feldthusen, Hankivsky, and Greaves (2000) found that of three groups of claimants for sexual assault (those seeking compensation, participating in a special tribunal, and pursuing civil suits) those pursuing civil suits experienced the greatest difficulty in the adjudication process, although 44% gave an overall positive response when asked how they felt after the adjudication was over.

Victim representation by a lawyer in court occurs in civil law countries (see Bacik et al., 1998; Temkin, 2002) and it is now being considered in common law countries (see Raitt, 2010, for review). To date, two common law jurisdictions (Ireland and Canada) have "procedures for legal representation at specific procedural stages" (Raitt, 2010, p. 69), but these are more limited compared to victims' legal representation in civil law countries. It is widely acknowledged that through a lawyer's voice, a victim's interests may more fully be brought into the legal process, and Bacik et al. (1998) found that



victims' satisfaction with and confidence in the trial process was higher when they were represented by a lawyer. Other benefits for victim/survivors noted by Raitt (2010) are "continuity of support and shared knowledge and understanding" (p. 71), experiencing better treatment and support, and protecting dignity and privacy.

The International Criminal Court's (ICC) hybrid response to war crimes and genocide offers—at least in theory—a way to re-conceptualise the response to sexual violence in domestic settings. Victims can present their views to the court, although this typically occurs via a victim's legal representative. Victims can also request reparations in the form of "monetary compensation, the return of property, and symbolic measures such as a public apology or commemoration or memorial" (ICC, 2011, p. 11). As of mid-2011, no convictions have been made by the ICC against those charged with sexual violence, and no reparations have been ordered by the ICC for any sexual offence, although much has been accomplished by the Trust Fund for Victims (2010). De Brouwer (2009) suggested that although the ICC's provisions have potential in theory, they may "well remain not much more than a paper tiger" (p. 200).

#### Innovative justice responses

Innovative justice responses that have been used or proposed within the legal process include the following:

- Community Holistic Circle Healing;
- restorative justice guilty plea (see Box 3); and
- conferences using restorative justice processes, namely:
  - youth conferences as diversion from court;
  - youth conferences pre- and post-sentence;
  - adult pre-sentence conferences (Project Restore-NZ); and
  - RESTORE (Arizona) (see Box 4).

Community Holistic Circle Healing is a community based approach to child sexual abuse. The idea emerged in the late 1980s in several Canadian First Nations communities in the Hollow Water area in Manitoba. This justice process was developed to deal more effectively with intergenerational child sexual abuse in a way that did not rely solely on "white" courts and forms of punishment. Greater emphasis is given to community building and to cultural understandings of "healing" individuals. A documentary on Hollow Water, produced by the National Film Board of Canada (Macdonald & Dickie, 2000), suggested that Circle Healing is now used for family violence cases. Circle Healing does not appear to address sexual victimisation of adults, and it is uncertain if its initial focus on child sexual abuse continues today.

The Circle Healing process begins with victim disclosure and support and protection of the victim. Two or three designated staff members then confront the offender and the police are informed. The suspect is given the choice of admitting guilt and being charged and automatically sentenced to probation with the strict requirement to participate in the "community way" (involvement in circles, along with intensive therapeutic intervention in a community setting, which can last for 3 to 5 years); or the suspect can choose to go through the regular court system, with jail as a possible outcome. In general, suspects must plead guilty and be charged to participate in the Circle Healing process; however, some have opted into the process voluntarily, without having been charged by the police.

Lajeunesse (1996) conducted an extensive study of the views and experiences of victims who participated in Circle Healing. Of 52 victims, about half said that the Circle Healing response was appropriate from a justice perspective, but the rest did not think so because the offender was not showing signs of change in that they continued to abuse alcohol. A high share (73%) said it was important for them to forgive the offender, and the major reason given was that this helped them to

heal from the offence. Two-thirds said they benefited from the Circle Healing process, in particular, by talking to others and participating in counselling, groups, and circles.

Conferences using restorative justice processes take place at differing points in the legal process: suspended prosecution, diversion from court, pre-sentence and post-sentence. In South Australia, Belgium, and England, they are used in youth cases; in Arizona and New Zealand they are used (or have been used) in adult cases.

### Box 3: Restorative justice guilty plea

Combs (2007) put forward an imaginative proposal in light of the problem of accountability in prosecuting mass atrocities, genocide, and war crimes. It is prohibitively expensive to prosecute and bring to trial all those accused. She argued for an aggressive policy of plea bargaining, carried out with a credible threat of prosecution. These ideas are relevant to sexual violence cases in domestic courts when considering ways to change what happens during a guilty plea hearing. Combs argued that the guilty plea hearing can be made more meaningful if it has truth telling and victim participation, factors that she associates with restorative justice. Truth telling is the defendant describing what they did in detail and answering the victim's questions. Victim participation is the victim/survivor telling the defendant what the impact of the offence was. This activity would take place in a regular court-room, but it contains elements of informal justice processes (dialogue and exchange) by the direct protagonists, or a representative of the victim if she chooses not to be present.

### *Youth conferences*

The most developed body of research on conferencing and court-conference responses to sexual violence is a series of studies carried out in South Australia. They include the Sexual Assault Archival Study (SAAS) of 385 youth cases disposed from 1995 to 2001 in South Australia—in which comparisons were made between court and conference case processes, outcomes, and re-offending (Daly, 2006a; Daly, Bouhours, Broadhurst, & Loh, 2011)—and the In-Depth Study of 14 conference cases of sexual and family violence (Daly & Curtis-Fawley, 2006; Daly & Nancarrow, 2010). In addition, South Australian youth court judges' sentencing remarks in sex offence cases were analysed (Bouhours & Daly, 2007; Daly & Bouhours, 2008), which gave insight into what judges say to youth on the day of sentencing.

A summary of these studies (Daly, 2010) reveals the following. Youth sex offending was more likely to be admitted to, and more likely to be disposed of by a conference, for intra-familial rather than extra-familial cases. Of cases that go to court, nearly half were dismissed. From the quantitative analysis of the Sexual Assault Archival Study, coupled with qualitative studies of victims, the conclusion is that conferences are better than court from a victim's perspective because some type of justice response occurred: victims (or family members) were able to explain the impact of the offence to an admitted offender, and to check and challenge denials or excuses for offending. By comparison, in half of court cases, there was no justice response that validated victims because these cases were dismissed.

The judicial sentencing remarks show that although the judges admonished the intra-familial sex offences strenuously and as “real rape” (typically, these had young victims), this admonishment was not apparent in sexual assaults among peers. This latter result reflects patterns in adult sexual assaults: those involving acquaintances and peers are not considered “real rape”, and they face more hurdles in the legal process.

An analysis of re-offending (general, not sexual re-offending) by Daly et al. (2011) revealed several key findings. For all youth, those with offences prior to the SAAS study re-offended at a significantly faster rate than those without prior offending. Those charged with sexual assault of children and siblings or with street harassment had significantly slower times to re-offend than those charged with sexual assault of peers or adults, or offences with no physical contact. For proved conference

and court cases, the rate of re-offending for conference youth was significantly slower than for court youth, but only for those with no previous offending. Likewise, the rate of re-offending for youth referred to the Mary Street Sexual Abuse Prevention Program<sup>15</sup> was significantly slower than those not referred, but only for those with no previous offending.

The Youth Justice Coordinators who were involved in youth conferencing stated that without the Mary Street Program, they would have been more hesitant to use conferencing in sexual assault cases. The following elements of Mary Street's staff practice may be considered relevant here:

- staff are familiar with the conference process, and can prepare an offender (and his family supporter[s]) for it;
- staff are concerned that apologies to victims are thought through with care and not made prematurely (in some cases, staff may advise against a verbal apology at the conference); and
- the timing of a conference may be determined, in part, by how far along the offender is in the therapeutic process (Daly 2002a).

In Belgium, family group conferences have been used in selected youth offence cases (mainly intra-familial). It is a pre-sentence option, with referral made by a youth court judge. Vansvereren (2010) described the practices, but did not discuss the number of cases or outcomes.

In the Greater Manchester area in England, Mercer (2009) applied family group conferencing to children and youth who displayed sexually harmful behaviour and victims of their behaviour. Working with the Assessment Intervention and Moving On project (AIM), Mercer developed a restorative justice assessment framework to determine if cases (mainly sibling and intra-familial) are appropriate. These are mainly post-sentence (and therefore may not be entirely within a legal process), although some have been pre-sentence. The AIM project's justice-therapeutic practice blends a victim, offender, and family focus; it is impressive in the attention given to power dynamics, blame, and shame associated with youth sex offending. As of 2009, a total of 25 referrals had been made to the program, with 10 moving to a direct meeting (Mercer, 2009).

### *Adult pre-sentence conferences*

Restorative justice conferencing as pre-sentence advice in adult cases was first piloted in several New Zealand sites during 2001 to 2004; however, sexual offences were ruled ineligible. Likewise, in several sites in England and Wales that were part of the Justice Research Consortium (JRC) experiment, pre-sentence conferences as supplemental to the conventional sentencing process were introduced in the early 2000s, but again, sexual offences were excluded (Sherman et al., 2005).<sup>16</sup> Sex offences were excluded not only in the JRC project, but other adult conference schemes in England and Wales (see Shapland et al., 2011).

In South Australia, adult pre-sentence conferencing was piloted in 2004–05. Twelve conferences were carried out, two of which were for sexual assault. Goldsmith, Halsey, and Banfield (2005) found that the facilitation of communication in a supportive and safe environment was achieved for most victims. However, the sexual assault cases posed more difficulties. They concluded that "greater thought" needs to be given to how participation is encouraged and managed in these cases, a point underscored several times in this paper.

<sup>15</sup> Mary Street provides an intensive therapeutic intervention, typically of 1 year's duration, to address adolescent sex offending by young people aged 12–17 years. Conference and court outcomes may include participation in the Mary Street program as part of the undertaking or penalty. Mary Street is based in South Australia, headed by Alan Jenkins. It is based on his synthesis of selected theories of abusive behaviour in the context of power relations, and it is informed by Narrative Therapy practices. It takes an "invitational approach" to assist youths to develop ethical strivings and a sense of accountability for their actions, but in the broader context of family and community relationships (Jenkins, 1990, 2009).

<sup>16</sup> In their research, Sherman and colleagues (2005) utilised an experimental design: they randomly assigned cases to court only or to a supplemental conference in addition to court, after victims consented to participate in the experiment. It is of some interest to learn that victims who opted into the experiment were disappointed when they were randomly assigned to court only, rather than to the supplemental conference.

In New Zealand, pre-sentence conferencing for adult sex offence cases is being used, but rarely (three conference cases for sexual assault in 2009, compared to 250 for family violence; Ministry of Justice official, personal communication, June 11, 2010). Project Restore-NZ, a group named in recognition of Mary Koss's work (see Box 4) and having an explicit feminist focus, is using the conference model (Jülich, 2010). An analysis of a small number of sexual assault conferences (Jülich, Buttle, Cummins, & Freeborn, 2010) recommended that restorative justice providers need to be well trained and appropriate resources must be in place. The authors addressed many ethical questions on optimal conference procedures and practices in sex offence cases.

#### **Box 4: RESTORE (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience)**

RESTORE was developed in Arizona under the leadership of Mary Koss and ran from March 2004 to September 2007, when project funding ended. It aimed to bring together the needs of sexual assault victim/survivors and the principles of restorative justice (for details on protocol and procedure, see Koss, Bachar, Hopkins, & Carlson, 2004; Koss, 2006, 2010)

RESTORE was the first project to explicitly use feminist and restorative justice principles to address victim/survivors' justice needs (telling one's story, validation, participating in an outcome) in adult offender cases. Eligibility was initially limited to first-time offenders, acquaintance contexts, and non-penetrative offences, although some criteria were relaxed in time. After a prosecutorial referral, a victim/survivor was contacted to see if she consented to the process; only after that was an offender contacted. Upon an offender's successful completion of the program, the case was dismissed.

Stubbs (2009) suggested that RESTORE combines ideas of restorative justice and therapeutic jurisprudence because offenders are required to undergo an intensive regime of treatment, ongoing monitoring, and monthly reviews for 12 months. Although great care was put into program planning, supports for victims, and agency protocols, RESTORE faced a pipeline problem: prosecutors referred few cases, and typically just those that "were not good cases" (Stubbs, 2009, p. 10), that is, cases the prosecutors assumed would not succeed in court. Arizona is a conservative state where prosecutors are elected, and some feared a case may "go wrong". Twenty-two RESTORE conferences were completed for felonies (acquaintance rape) and misdemeanours (indecent exposure and public indecency), and just over half of victims met offenders face-to-face (Koss, 2011). Koss and colleagues are preparing research papers and published findings should be appearing in 2011 or 2012.

#### **Victim participation *outside* the legal process**

In this group, all the approaches are considered innovative because their activities permit a high degree of victim participation and voice, unconstrained by a legal process. They are enacted in civil society and include the following:

- victim-offender meetings;
- victim-prisoner meetings; and
- memorials, days of reflection or action, and cultural performance (see Box 5).

##### **Victim-offender meetings**

In 2004, the Center for Victims of Sexual Assault, an interdisciplinary team of medical, social worker, and psychological staff, based at the University Hospital of Copenhagen (Denmark), began to experiment with victim-offender meetings (Madsen, 2004, 2008). The idea evolved when some victims expressed an interest to meet or confront the person who attacked them, but did not wish to report the offence to the police. The cases are typically sexual assaults where victim and offender

know each other. Madsen (2008), who facilitates the process for victim/survivors (and when it occurs, facilitates the victim–offender meetings) has described what happens and the impact on victims.

Intensive care is given to prepare victim/survivors, for example by using letter writing as an initial step for a victim to express herself to the perpetrator and to broach the possibility of meeting. The process does not require an offender to make an admission to the assault, but it does require “a degree of consistency” in the victim’s and offender’s descriptions of what happened. In 2004, 16 victims came forward; 10 wrote letters to the offender, six offenders replied, and a few meetings were held. For victims who went through the process, including meeting with the alleged offender, Madsen (2008) observed that:

[The women] are proud of having faced their greatest fear and being open to what he had to say. The fact that they may later reject some of it does not change their experience of having regained their dignity, or rather, of having seized it back for themselves. (p. 7)

Madsen (2008) said that some months after the meeting, victims reported that the process was a positive experience and that they would do it again. She has continued to receive and respond to requests by victim/survivors in similar numbers as when she began (about 15–16 per year) (K. Madsen, personal communication, August 16, 2010).

For many years, rape crisis and sexual assault centres, along with faith groups, have played important roles in helping victim/survivors who wish to disclose, but not report offences to legal authorities, or whose case does not proceed in the legal process. For example, the Victorian South Eastern CASA has been organising victim–offender meetings since 2006, at the request of victims (C. Worth, personal communication, April 8, 2010). However, except for these examples, little is known about what organisations and groups are doing to facilitate victims’ justice needs of validation, voicing stories, and finding closure, whether individually or as groups. There may be many more examples of these kinds of activities, but documentation is limited.

### Victim–prisoner meetings

For the relatively rare number of sexual assault cases in which legal proceedings conclude with a court conviction and prison sentence to serve, voluntary meetings can be organised and run by professional facilitators. This has been occurring in Canada (Gustafson, 2005; Roberts, 1995) and the United States (Umbreit, Vos, Coates, & Brown, 2003). A recent feminist-informed study by Miller (2011) analysed 10 prisoner–victim restorative justice dialogues that were handled by the Victims’ Voices Heard program, established in Delaware (US) in 2002. The cases included interpersonal violence, sexual assault, and child sexual abuse.

In New South Wales, a Restorative Justice Unit (RJU) was formed in the Department of Corrective Services in 1999 to oversee and convene meetings. As of 2010, there were 145 completed “restorative justice processes” (out of about 850 referrals); the majority were face-to-face, but some were indirect. The meetings could take place post-sentence or post-release. A very small number, perhaps three, were sexual assaults (RJU Acting Manager, personal communication, August 12, 2010). Extensive preparation is required in these cases, and the RJU follows a carefully delineated protocol. Only victim-initiated referrals are considered for rape cases, typically alongside or after professional therapy. A major research project, headed by Janet Chan and Jane Bolitho, began in 2010 at the University of New South Wales to study and evaluate the RJU’s activities and outcomes (J. Bolitho, personal communication, September 23, 2010).

Faith communities have also played a significant role in supporting and implementing prisoner–victim meetings worldwide (e.g., the Sycamore Tree Project, organised by Prison Fellowship International in many countries). A key element of the prisoner–victim meetings in North America and Australia is that an offender’s participation plays no role in parole or any other criminal justice decisions, which is an important criterion from a victim’s perspective. That is why this response is considered to be outside a legal process, even though a prisoner is under criminal justice control.

Compared to youth or adult conferences, victim–offender meetings require significantly more time and intense preparation. Depending on the case, this may take several years. Careful protocols must be developed and followed to ensure that the process goes well.

### Box 5: Memorials, days of reflection or action, and cultural performance

In the context of collective sexual violence during civil war in the former Yugoslavia (Nikolić-Ristanović, 2005) and individual sexual violence in places like Australia, memorials, days of reflection, and public awareness days can be held to help validate and support victims/survivors. Although days of action have taken place in Australia to raise public awareness, there is little evidence on how they may affect victim/survivors or members of the public.

Examples of cultural performance include the Women’s International War Crimes Tribunal, a people’s tribunal, which sat in December 2000 to consider the criminal activities of Japan and its high-ranking military and political leaders during the 1930s and 1940s to enslave women in sexual “comfort stations” for men. Although it was a mock trial, Chinkin (2001) suggested it was a “striking example of the developing role of civil society as an international actor” (p. 335). Other tribunals have been held to address international crime and violations of human rights, but the Tokyo tribunal was the first women’s tribunal (p. 339) and the first to address sexual violence. Another example is a play produced by the DAH Theatre Company of Belgrade, *Crossing the Lines*, first performed in May 2009 (Simić, 2010). The play is based on the book, *Women’s Side of War (Women in Black-Belgrade, 2007)*, which contains testimonies of sexual abuse and violence experienced by women across ethnic lines and religious divisions during the war in the former Yugoslavia during the 1990s. It is a type of documentary theatre that bears witness to women’s suffering and victimisation. Although these examples address sexual violence in war or state-related violence, cultural performance, educational, and artistic activities could be applied in domestic settings.

## Assessing conventional and innovative responses

Several conventional justice responses have attracted interest in the sector, and I consider two: specialist courts and legal representation.

Specialist sex offence courts have been viewed as a promising way forward. However, research from South African specialist courts by Moulton (2000) and Walker and Louw (2003, 2005a, 2005b) suggests that legal requirements continue to trump victims’ justice needs. Despite the evidence not only from the South African courts but also specialist courts for child sexual assault cases, many commentators believe that specialisation—of judicial officers, prosecutors, and defence—will lessen the trauma of the legal process for victims. The idea seems intuitively appealing, and there is evidence that specialist courts help victims of partner and family violence. However, there is a problem in generalising positive research results from domestic/family violence courts to sexual violence courts: legal jurisdiction.

In Australia and elsewhere, domestic/family violence courts (as one type of problem-solving court) are located in the magistrates’ court jurisdiction, whereas most rape cases are dealt with in district or county courts. Therefore, proposals for a specialised sexual violence court would need to consider whether the court should be for less serious sexual offence charges in the magistrates’ jurisdiction or for all types of sexual offences. Alternatively, courts in both legal jurisdictions could be considered: the magistrates’ level court would be for pleas to offences under its legal jurisdiction, and the district or county level court would be a site for more innovative approaches during the adjudication and sentencing process.

Another conventional response that has received a good deal of interest in Australia and other common law countries is victims having legal representation. Based on the evidence from civil law jurisdictions, this approach has promise. However, it should be considered alongside other approaches

that are currently used in common law countries and are effective from a victim's perspective, such as victim advocates and independent sexual violence advisors. Proposals for change in this area need to consider the trade-offs between having an effective professional legal presence in the courtroom, and assisting victim/survivors more generally with information, access to services, and support, which specialist sexual assault workers are able to provide.

For innovative justice responses in domestic settings, most involve meetings, conferences, or circles. These have different mixes of individuals (victims or offenders or both, their supporters, and other community members), and there is a range of social and legal contexts in which they may occur. One, the restorative justice guilty plea, takes place within a standard legal process; others such as conferences guided by principles of restorative justice take place at different points in the legal process.

In analysing the debate on restorative justice in cases of gendered violence, Curtis-Fawley and Daly (2005) found that Australian victim advocates and service providers who had greater familiarity with actual practices were more likely to support or see the value of restorative justice than those with less exposure or experience. Proietti-Scifoni and Daly (2011) also found that New Zealand opinion leaders' exposure to actual practices mattered: sceptics were largely government officials and managers of victim services, whereas supporters worked as facilitators, law officers, ministers, or direct victim service workers. However, all emphasised the need for protections and conditions if restorative justice were to be used, including victim safety and a facilitator's awareness of power dynamics and how to manage these effectively (see also Kingi, Paulin, & Porima, 2008). Similar concerns have been raised by North American professionals and practitioners (Pennell & Kim, 2010; Stubbs, 2010, pp. 107–108). A unifying theme is that the standard "off the shelf" conference model is not likely to be suitable for gendered violence cases unless it is modified appropriately and facilitators are competent and experienced in these cases.

Although restorative justice is a popular concept and dominates the landscape of discussion of justice alternatives, it should not confine our thinking. For example, certain types of Indigenous community-controlled approaches may be relevant and applicable; some innovations are called victim-offender mediation, but use feminist-centred principles; some innovative responses may reside entirely in civil society (e.g., cultural performances, days of remembrance); and elements of parallel justice are relevant (S. Herman, 2004). In addition to actual practices, there is a need to consider where they are located, when they are set in motion, and how they may articulate with the criminal justice system.

Many innovative justice responses are recent, and the research evidence base is small. Case studies have been reported by Braithwaite and Daly (1994) and Daly and Curtis-Fawley (2006) for youth sexual violence, and Madsen (2008) and Jülich et al. (2010) for adult cases. A summary analysis of the court and conference handling of youth sex offences, differences in re-offending, and judges' sentencing remarks is available (Daly, 2010). Publications from RESTORE in Arizona are appearing (Koss, 2011). There is significant knowledge about Indigenous victims' experiences from the Hollow Water project, although it is for contemporary or historic child abuse (Lajeunesse, 1996). Feminist-informed case studies of prisoner-victim meetings are also now available (Miller, 2011), and a major project is underway on prisoner-victim meetings in New South Wales, although it does not focus on sex offences (J. Bolitho, personal communication, September 23, 2010).

With the exception of the Sexual Assault Archival Study on youth sex offending (Daly, 2006a; Daly, 2010), there is no comparative analysis of sexual offences finalised in court or by conference. The evidence base could be larger if we wished to include all the studies of adult conferences. However, there are several problems in doing so: sexual assault victims are not in the samples because these offences have been ruled ineligible for adult conferences, and what is reported can be superficial and limited to quantitative indicators of "satisfaction". For example, researchers conclude that victims are "more satisfied" with restorative justice conferences than court; they feel less angry and fearful toward offenders after conferences; or they feel that justice was done (see, e.g., research from England by Sherman et al., 2005; and the New Zealand pilot on adult conferences by Morris, Kingi, Poppelwell, Robertson, & Triggs, 2005). We cannot be sure if these positive findings can be generalised to sexual

assault because the researchers do not explore if interpersonal violence differs from, say, larceny cases. In their analysis of two adult sex offence cases, Goldsmith et al. (2005) concluded that practice protocols would need to be modified to deal with the complexities and dynamics of these cases.

There are significant gaps in knowledge, not only for innovative responses, but also for many conventional responses. We know little about what victim support organisations and groups are doing to facilitate victims' justice needs and with what impact on victims/survivors. There is no information in Australia on how victims are accessing compensation schemes and with what outcomes. We do know that specialist police teams, one-stop shops, more integrated service provision and specialist nurses are generally viewed and experienced positively by victim/survivors, although all the evidence to date comes from the United States and England and Wales.

### Part III. Challenges and ways forward

In the past decade, feminist scholars have debated the strengths and limits of alternatives to the standard legal process for gendered violence cases (Daly & Stubbs, 2006). The potential benefits for rape victims are greater voice and participation, validation and vindication, offender accountability for the offence, and a communicative environment where questions can be asked and assurances of no further harm can be given. There are also potential drawbacks with a more flexible dialogue-based environment, including manipulation of the process by offenders, pressure on victims to agree to outcomes, and a perception of too lenient outcomes. Here, it is important to acknowledge Stubbs' (2003) point that "cultural mythologies about women and about sexuality" (p. 23), which are well-documented in court proceedings, cannot be expected to be absent in alternative justice practices. Yet, there may be more potential to challenge these mythologies with innovative justice practices.

Hudson's (1998, 2002) theoretical work draws attention to the discursive potential of facilitated meetings such as restorative justice conferences: an ability to challenge stereotypical understandings of sexual victimisation, blame, and responsibility. Likewise, Daly and Curtis-Fawley (2006) suggested that a more flexible dialogic environment permits participants to check and challenge an offender's denials or minimisations of offending.

Debate on the appropriateness of alternative justice responses to sexual violence is limited, in part, by a paucity of evidence (compare Cossins, 2008; and Daly, 2008); and in part, by misunderstandings of what the practices may entail (compare Hudson, 1998, 2002; and Lewis, Dobash, Dobash, & Cavanagh, 2001). There is a skew in the debate, with critics more likely to consider the idea with ongoing violence (domestic and family violence) than incident-based violence (more often sexual violence) in mind.<sup>17</sup>

Although legal reform and conventional responses have assisted and improved the experiences of many victim/survivors of rape and sexual assault, they remain limited and insufficient, and they do not affect the vast majority of victims who do not report rape to the police. For that reason, we need to think more imaginatively about new openings and opportunities for victim/survivors who decide to engage with the criminal justice system, as well as those who do not.<sup>18</sup>

The character and contexts of rapes reported to the police have been changing in the past two decades, with an increasing share of non-stranger rapes coming to police attention, which do not

17 Key edited texts focus on restorative justice in partner and family violence (e.g., Cook, Daly, & Stubbs, 2006; Ptacek, 2005, 2010; Strang & Braithwaite, 2002) not sexual violence. Although there is overlap, there are important differences. First, the dynamics of partner violence are distinctive (ongoing with a cyclical pattern of abuse, offender apology, reconnection, abuse etc.). Sexual assault occurs within intimate and familial relationships, as well as within friendships, and professional and more casual social relationships. Second, evidence and sanctions for partner and sexual violence differ. The former are routinely handled in the magistrates' courts, and the latter, in district, county, or superior courts. Evidentiary requirements to prove rape are more stringent (but see Garner & Maxwell, 2009, for a meta-review of conviction rates for partner violence, which finds, on average, a 16% rate of conviction).


18 It is important to recognise that in some cases, a victim's desire not to report an offence can conflict with public safety; this occurs when a perpetrator continues to commit assaults, but police information is lacking to make an arrest.



reflect the mythology of “real rape”. It is these cases, in particular, that require close attention with respect to the future direction of legal, practice, and policy change.

In contemplating ways forward, all analysts emphasise the importance of changing cultural beliefs and attitudes toward gender and sexual violence. Equally important, but less often recognised, is the need to change cultural beliefs and attitudes toward those accused and convicted of sexual offences. Until such attitudes change in tangible ways, suspects will not come forward with admissions and will continue to deny the assaults. Like harmful stereotypes of victims, the demonisation of offenders stymies efforts to address sexual violence effectively.

Increasing criminalisation and penalisation of rape and sexual assault is likely to be counterproductive for at least two reasons. First, the broader evidence on punitive strategies shows that they deepen social and economic inequalities and can entrench social problems, including re-offending.<sup>19</sup> Second, the demonisation of some sexual offenders (in the media, but also through laws such as indefinite detention, continued GPS tracking of offenders post-release, and restrictions on residency) makes sex offenders seem so monstrous that women’s everyday victimisation experiences by partners, friends, and colleagues cannot be imagined as “real rape”.



The demonisation of some sexual offenders ... makes sex offenders seem so monstrous that women’s everyday victimisation experiences by partners, friends, and colleagues cannot be imagined as “real rape”

Here we face a conundrum: how do we respond to rape with the seriousness that it deserves without, at the same time, engaging in a hyper criminalisation of offences? There is no clear answer, but among the elements to be considered are these:


- At law, rape may have a particular legal meaning, but in practice and from a victim’s perspective, there are myriad contexts, kinds of harm and injury, and victim–offender relations in which sexual assault is experienced that are not well captured in offence definitions.
- The impacts of sexual assault can vary for each victim; victims’ desires for redress, and what form this should take, will also be varied.
- The criminal justice system should not be considered the principle site for changing people’s behaviour and attitudes about gender and sexuality.

## Directions for policy and practice

Policy-makers, practitioners, legal advocates, and researchers face a clear challenge. Legal reform of the past decades has been associated with decreasing, not increasing, conviction rates in Australia. This is in part, because more victim/survivors are reporting offences that do not reflect the “real rape” stereotype (that is, stranger sexual assaults) than in the past. Although an estimated 15.5% of Australian victim/survivors report the assault to legal authorities, 20% of reported cases make it to court. Based on my review, the following six points should be considered for policy and practice.

### Debate and clarify justice goals

To build consensus on directions for change, it is important that all the key players reflect upon and debate what their justice goals *are* for rape and sexual assault. These range widely. Some want to see a greater emphasis on “symbolic justice”, that is, a strengthening of police and court responses, more convictions, and perhaps, increased punishment. Symbolic justice relies on the one pathway



The criminal justice system should not be considered the principle site for changing people’s behaviour and attitudes about gender and sexuality.

<sup>19</sup> In California, there are stringent restrictions on where registered sex offenders can live. This has resulted in an increase of those convicted of sex offences, who are homeless and living on the street. Given the increased vulnerability of the homeless and those in unstable housing to sexual assault, this situation is of concern. Sexual assault services have themselves criticised the punitive approaches taken in various states (Kaye, 2008).

of formal criminal justice. Others see the value of “pragmatic justice”, which relies on multiple pathways of formal and informal justice mechanisms, with an emphasis on victim participation. This perspective recognises that most victims will never see their case reach court and that non-stranger rapes will continue to face hurdles in the legal process, no matter how artful new legal language and procedures may be. Still others may be unsure what direction to take.

### Emphasise early stages of the justice process

Attention needs to shift from the trial to earlier phases of the criminal process, when victims first disclose offences and initial investigations are conducted. In particular, greater attention should be paid to increasing admissions to offending, although not necessarily convictions. More generally, educational campaigns about gender and ethical sexual relations are likely to be more effective in preventing sexual violence than criminal law and justice system sanctions.

### Do not rely solely on criminalisation and punitive penal strategies

A sole focus on criminalising and stigmatising sex offending is counterproductive. Increasing criminalisation and penalisation will not necessarily address the justice needs of victim/survivors. Such penal strategies deepen inequalities. Moreover, they are deployed in atypical forms of sexual assault, reinforcing the gap between the “real rape” construct and the everyday circumstances in which many victims are assaulted. Responses must be appropriate, but greater attention should be given to strategies that are more socially inclusive and re-integrative of offenders. What needs to be considered are mechanisms to encourage more *admissions* to offending (whether in legal or non-legal settings), and whether these need to be always tied to *convictions* for sexual offences. An admission can be a way of validating the harm victims have experienced, and treatment interventions for offenders could take place without a conviction.

### Reconsider the ineligibility of sexual assault cases for conferencing

Informal justice processes are already occurring in universities, faith communities, victim support, and rape crisis units, although these are not well documented. However, in relation to the justice system, sexual assault cases have often been ruled ineligible for conferencing. Government policy-makers have been wary of supporting conferences in sexual assault cases because they can appear to be a “too lenient” response to serious offences. However, *the trade-off is not between a “more” or “less serious” response, but between any response or none at all.* Phased in, careful introduction of conferences or other types of justice mechanisms in varied legal contexts, or independent of the legal system, can be monitored and researched; and from this, we can begin to build an evidence base.

### Resource practices and modify protocols

Practices such as conferences, victim–offender meetings and the like must be prepared for and run in ways that are appropriate for rape and sexual assault. Facilitators must be knowledgeable and experienced in running face-to-face or indirect meetings. As many have observed, and despite what restorative justice proponents may say, the standard conferencing model was not devised with victims in mind, let alone sexual violence victim/survivors. Therefore, modification of protocols and practices is required.

### Provide a menu of options

Victim/survivors should have a menu of options, which may or may not articulate with criminal justice. This requires reconceptualising the response to rape and sexual assault as running on multiple pathways, not just one of formal criminal justice responses. Alternative or informal justice processes can take place in many legal contexts (e.g., instead of reporting an offence, after an offence has not been proceeded with by police or prosecution, parallel with a court process, at

sentence, post-sentence, and post-release), and organisational contexts (e.g., government agencies and the non-government sector). In these processes, victim/survivors should expect a greater degree of participation, voice, validation, and vindication. This may go some way in addressing victims' justice needs and current dissatisfaction with the formal justice system.

## Conclusion

Changing the way in which rape cases are handled in the legal system has proved to be even more challenging today than it was three decades ago. Justice remedies for the vast majority of victims of sexual violence are inadequate. In hindsight, we can see that incremental legal reform could only go so far. "Real rape" continues to construct everyday imaginings of what rape is to most victims, offenders, legal officials, and others in society.

Finding the right balance between censuring wrongs, validating and vindicating victims, protecting society, and providing supports and services for offenders and victims in a democratic society that is committed to the rule of law and due process for citizens is a significant and far-reaching task. It requires imaginative and innovative ways of thinking about justice beyond the standard approaches of prosecution and trial, or of increasing punishment.


Legal reform may improve the situation at the margins, but more visionary change is required. Rather than only trying to assist victims to fit better within the requirements of the law or to change legal language and procedures, innovative responses should be considered. These provide opportunities for victims to participate more directly in justice activities, to voice their stories, and to acknowledge and validate wrongs they have suffered. For the minority of cases that remain in the legal system, these activities are not a "second class" or inferior form of justice because some innovative responses *do* or can articulate with the formal criminal justice system. They may offer options for the vast majority of victims who do not report sexual assault to the police or whose cases never reach court.

If we listen closely to the many sources of dissatisfaction that victims have with the criminal justice system, they are about how system officials, the accused or convicted offender, and others do not fully acknowledge and recognise the harm caused (i.e., a lack of vindication and validation), the inability for a victim/survivor to tell the story of victimisation on her own terms (lack of voice), and loss of power in the justice process (lack of participation). These elements can be addressed by responses that are more dialogue-based and interactive and have a greater degree of active participation and decision-making by victim/survivors.

Innovative justice responses may or may not articulate with the criminal justice system; they can take place in many legal and organisational contexts or operate entirely in civil society. There are many ways that victims' justice needs can be better addressed in the aftermath of rape. Openness to new ways of thinking about the problem, coupled with reflection and debate on desired justice goals, will be significant steps forward.

## Appendix: Inventory of responses to sexual violence (by Kathleen Daly and Brigitte Bouhours)

To view the accompanying Appendix, please see ACSSA Issues 12 online at:  
<[www.aifs.gov.au/acssa/pubs/issue/i12.html](http://www.aifs.gov.au/acssa/pubs/issue/i12.html)>



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