

# *Legal Representation for Sexual Assault Victims — Possibilities for Law Reform?*

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## *Abstract*

In the past, Australian law reform often focused on improving the situation of sexual assault victims in the criminal justice system in order to increase the low reporting and conviction rates for sexual violence. Studies have shown, however, that the reporting and conviction rates for sexually motivated crime have remained low, and that victims who do report sexual assault continue to feel dissatisfied with the way they are treated by the criminal justice system. This article explores the notion of granting sexual assault victims the right to be legally represented when testifying as witnesses at trial in order to improve their experience with the criminal justice system. After considering different types of legal representation available to victims in the German inquisitorial system, it is argued that one form of legal representation, namely legal representation for victim witnesses, could successfully be implemented for sexual assault victims in the Australian adversarial criminal justice system.

## **Introduction**

Over the past 40 years, much law reform has been undertaken in Australia in the area of sexual offences (Clark 2010; Daly 2011). One of the aims of law reform has been to improve the experience of sexual assault victims in the criminal justice system and to increase the low reporting and correspondingly low conviction rates for sexually motivated crime. Although the progress of law reform has differed between Australian jurisdictions, Daly (2011:3) explains that there has been an emphasis on distracting attention from the victim's character,<sup>1</sup> and expanding the definition of rape as well as sexual intercourse. Reforms have further focused on restricting the admissibility of evidence on a victim's sexual reputation and enabling victim witnesses to give evidence

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<sup>1</sup> Before a defendant is convicted, the alleged victim is referred to as the 'complainant' on the basis that the term 'victim' implies that the defendant has committed a crime. This article refers to both victims and complainants as 'victims' and 'victim witnesses' for reasons of simplicity. While the focus is exclusively on legal representation for adult victims of sexual assault during the trial stage, researchers have contemplated the introduction of legal representation for child victims of sexual assault in Australia in the past: see, for example, Cossins (2004). Legal representation for victims could also be contemplated during the pre-trial stage: see, for example, Smythe (2002:6–10).

using video technology or while accompanied by a support person (Australian Law Reform Commission 2010:1121–2). Despite these attempts, research studies have indicated that sexual violence offences remain underreported (Daly and Bouhours 2010; Australian Bureau of Statistics 2004:54–7). Conviction rates are low and have even started to decrease over the last years (Daly and Bouhours 2010:619). Furthermore, the small percentage of victims who do report sexual assault remain dissatisfied with their treatment in the criminal justice system (Clark 2010:31). Reasons identified for the underreporting of sexual offences include shame and fear of the perpetrator, fear of not being believed, and fear of the treatment in the criminal justice system (Australian Law Reform Commission 2010:1101). Stubbs (2003:23) has argued that law reform in the area of sexual assault has more ‘symbolic value’ than actual effect in practice. The researcher attributes the failure of law reform to prevailing traditional perceptions of women and sexuality. She emphasises that changes in regards to sexual assault may depend on substantial changes in underlying social values. On the basis that ongoing sexual assault law reform has neither increased low reporting rates nor improved the victims’ perception of the criminal justice system, commentators have concluded that in Australia the reform of ‘rape law’ alone is not going to achieve these goals and have called for ‘new and more imaginative ways of addressing the problem’ (Daly 2011:8).

One such ‘new way’ of addressing the problem could be to give sexual assault victims the right to be legally represented while they testify as a witness at trial. In the past, the possibility of introducing legal representation for sexual assault victims has been rejected on the basis that the structure of the adversarial system does not allow for victim participation through a legal representative. It has been argued that the Australian adversarial system is constructed as a two-sided contest between prosecutor and accused, and therefore cannot accommodate a victim’s legal representative as a third party without violating the defendant’s procedural rights (Law Reform Commission of Victoria 1991:33–4 cited in Barga and Fishwick 1995:103). However, recently some have argued that legal representation for (sexual assault) victims within clearly defined and limited parameters would not necessarily infringe upon the rights of the accused (Kirchengast 2011).

This article analyses whether legal representation for sexual assault victims in Australia could be a possibility for law reform. It first contemplates justifications for the introduction of legal representation for sexual assault victims at trial. It considers how the right to legal representation would have to be shaped in order to be consistent with the Australian adversarial system and not infringe upon the procedural rights of the accused. The article then examines different models of legal representation available to victims in Germany’s inquisitorial criminal justice system. Finally, while acknowledging the differences between the two systems, it is argued that the model of legal representation available to victim witnesses in Germany could also be used for sexual assault victims in Australian criminal trials. Such a model could improve victim witnesses’ experiences in the criminal justice system and potentially increase the low reporting and conviction rates for sexual violence offences.

## **Benefits of legal representation for sexual assault victims**

In Australian criminal trials, as in most common law jurisdictions, victims generally have no formal standing and cannot present views or concerns during the main trial, except for when

being questioned as a witness.<sup>2</sup> Consequently, although free to consult with a lawyer outside of court to receive legal advice, victims do not have the right to be legally represented in court or express views and concerns through their legal representative. The question arises as to why victims of sexual assault, in particular, should have a right to legal representation. This may be justified for two reasons. First, studies have shown that victims of sexual assault may be at a higher risk than other victims of crime of being re-traumatised by the criminal justice system. Therefore, the introduction of legal representation for these victims may be justified to avoid such negative consequences. Second, legal representation for sexual assault victims may have benefits not only for the individual victim, but also for the criminal justice system in general. As pointed out above, reporting and conviction rates for sexual violence offences remain low. Granting sexual assault victims the right to be legal representation may help increase reporting and conviction rates in sexual assault cases. These benefits will be analysed in detail below.

### *Benefits of legal representation for the individual sexual assault victim*

In an adversarial trial much emphasis is placed on cross-examination to expose unreliable or dishonest witnesses (Ellison 2001:11; Australian Law Reform Commission 2010:1334). The nature of the adversarial criminal justice system creates a ‘highly competitive atmosphere’ at trial, which can be traumatising for victims (Doak 2005:297). Herman (2005:574) found that ‘if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law’. In particular, sexual assault victims can have traumatising experiences when testifying in court and can be in specific need of additional support (Raitt 2010:71; Australian Law Reform Commission 2010:1335–6). In sexual assault trials, victims have to testify in detail about very personal matters. Many victims find it humiliating to give evidence of matters of sexual nature in a public court where the perpetrator is present, and find the cross-examination at trial to be terrifying and traumatic (Ellison 2001:16; Stubbs 2003:17). In a study on the experience of 200 victims of rape and robbery in the criminal justice system, Resick (1987:475) found that one year after rape, rape victims indicated that the thought of having to testify in court and not being believed by judge and jury was the most fear-inducing factor.

Another reason why sexual assault victims may require additional support when testifying is that the actual treatment of sexual assault victims during cross-examination in adversarial trials can be particularly fierce (Lees 1993:14, 22; Australian Law Reform Commission 2010:1116; regarding child victims of sexual assault see Eastwood and Patton 2002:97–9). In cases where the defence is built on the consent of the victim to the sexual intercourse, the defence tactic during cross-examination is often to focus on the character of the victim in order to discredit the witness’ reliability (Kennedy and Eastal 2010:135–6). Studies have found that the sexual activities and history of the victim are raised during cross-examination frequently (analysed in Heenan 2003:4; Heath 2005:7; Victorian Law Reform Commission 2001:56–7). Evidence concerning a victim’s sexual reputation is rendered inadmissible in

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<sup>2</sup> The term ‘standing’ (*locus standi*) as used in this article means the right to appear and participate in the criminal trial. An exception to the rule that victims have no formal standing in Australian criminal trials has existed since 2010 in New South Wales, where sexual assault victims can object to producing a communication made to their counsellor on the basis that this communication is privileged. The victim, as ‘protected confider’, has standing in regards to the question of whether the communication is privileged. See *Criminal Procedure Act 1986* (NSW) s 299A. The introduction of this right is discussed later in this article, in the section on ‘Role and rights of legal representatives for sexual assault victims’. Also on the international level at the International Criminal Court, a court with a largely adversarial structure, victims have the right to participate, also through a legal representative, upon application to court. See *Rules of Procedure and Evidence for the International Criminal Court*, rr 89–91.

relevant legislation in all Australian states or territories except for the Northern Territory,<sup>3</sup> and a victim's sexual history is only admissible in some circumstances (Eastael 2012:22). However, in practice in many Australian jurisdictions, evidence concerning sexual reputation and history is still used widely (Heath 2005:7, 10; Heenan 2003:7).

Acknowledging the often negative experiences of sexual assault victims, Australian jurisdictions have attempted to address the negative impact the criminal justice system has had on these victims (Parkinson 2010:1). For example, research studies on sexual assault victims and their treatment in the criminal justice system have been undertaken in Australian jurisdictions (see NSW Criminal Justice Sexual Offences Taskforce 2005; Community Development and Justice Standing Committee 2008). Furthermore, much law reform has occurred in relation to the treatment of sexual assault victims in the criminal process. Apart from rendering evidence regarding the victims' sexual reputation generally inadmissible, sexual assault victims have also received the right to give evidence via video technology or in the presence of a support person in Australian jurisdictions.<sup>4</sup> Yet, there is no evidence suggesting that secondary victimisation of sexual assault victims by the criminal justice system has been reduced or that victims' satisfaction with their treatment in the criminal justice system has significantly increased due to the introduction of these reforms.

The traumatic stress sexual assault victims can be under when testifying could be reduced if a legal representative were present to support them making them feel more confident. In a study on rape victims in Europe, Bacik, Maunsell and Gogan (1998:17) found that a significant relationship exists between being legally represented by a lawyer and a victim's level of confidence when giving evidence. Although studies have not explicitly focused on the question of whether victims want to be legally represented, research by Wemmers and Cyr (2004) on victim participation in Canada and what role victims want to play in criminal proceedings suggests that victims do not want ultimate decision-making power, but favour a role in which they can present views and concerns to a decision-maker. Legal representation for sexual assault victims would offer victims the possibility to do this without being burdened with decision-making power.

The above shows that sexual assault victims may have special needs for support when testifying and that there is a high risk of them being re-traumatised at trial. For this reason, in comparison with other victim witnesses, sexual assault victims have already been afforded special procedural protections in state and territory legislation. While not all sexual assault victims may wish to be legally represented, there is good reason to grant those victims who do the right to a legal representative who can safeguard their interests and

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<sup>3</sup> Questions regarding the sexual reputation are generally not admissible in any Australian state or territory jurisdiction with the exception of the Northern Territory. See *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–50; *Evidence Act 1906* (WA) ss 36B–BC; *Criminal Procedure Act 2009* (Vic) ss 341–342; *Criminal Procedure Act 1986* (NSW) s 293; *Criminal Law (Sexual Offences) Act 1978* (Qld) pt 2 s 4; *Evidence Act 1929* (SA) ss 34L–N; *Evidence Act 2001* (Tas) s 194M. For the situation in the NT, see *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4. In Australia, victims' rights are articulated in victims' charters and declarations that the majority of jurisdictions have enshrined in legislation, see *Victims of Crime Act 1994* (WA) sch 1; *Victims of Crime Act 1994* (ACT); *Victims of Crime Assistance Act 2009* (Qld), *Victims Rights and Support Act 2013* (NSW); *Victims of Crime Act 2001* (SA); *Victims' Charter Act 2006* (Vic). Tasmania and the Northern Territory have not implemented victims' charters in legislation. Victims have also received the right to make a Victim Impact Statement at the sentencing stage. See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30A; *Sentencing Act 1997* (Tas) s 81A, *Sentencing Act 1995* (WA) ss 24–26, *Sentencing Act 1995* (NT) ss 106A, 106B, *Crimes Sentencing Act 2005* (ACT) s 47–53, *Sentencing Act 1991* (Vic) ss 8J–8S; *Victims of Crime Assistance Act 2009* (Qld) ss 15, 15A, 15B; *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i); *Criminal Law Sentencing Act 1988* (SA) s 7A.

<sup>4</sup> See, for example, *Criminal Procedure Act 1986* (NSW) s 294B.

procedural rights (see also Raitt 2010:44).<sup>5</sup> Giving the victim this right could help to ensure that the cross-examination is less traumatic for victims, and that only admissible and appropriate questions are asked. Studies on jurisdictions that have introduced legal representation for victims suggest that by simply having a legal representative present at trial, victims have experienced less animosity from defence lawyers (Temkin 2002:293; Bacik, Maunsell and Gogan 1998:17–18). Concurring, Canadian research has found that where an independent counsel for sexual assault victims is involved ‘everyone takes it more seriously’ (Mohr 2002 as discussed in Raitt 2010:7). Being taken more seriously would, in itself, be a benefit for sexual assault victims in criminal trials.

### **The adequacy of existing protection for sexual assault victims in the criminal justice system**

The question arises, however, as to whether the protection of sexual assault victims and their rights requires a legal representative, or if this could also be efficiently carried out by existing actors in the criminal justice system. Some within the legal profession hold the view that a legal representative is not required to protect sexual assault victims and their rights, but that this can be efficiently accomplished by victims’ advisers and support persons, the court and the public prosecutor. This view was made clear by a member of the judiciary in a consultation workshop on the introduction of such a support system in New Zealand, where the judge stated that he ‘cannot conceive of the role that a lawyer for the victim would play if victims’ advisers and everyone else did enough’ (McDonald and Tinsley 2011:200).

Although there may be some truth in the above statement, it overlooks the fact that it is not the primary role of the courts or the public prosecutor to safeguard victims’ rights, and that both must also consider the public interest and the right of the accused to a fair trial (Smythe 2002). Courts and public prosecutors therefore have to consider different interests, such that the interests of the victim cannot be given, and in fact are not given, due attention at all times. The following section of this article analyses why victims’ interests are not sufficiently safeguarded by existing actors in the criminal justice system.

#### **(a) Courts**

An example of competing interests, which the court does not always resolve in favour of the victim, can be seen, for example, in Victoria and New South Wales. Here, courts were found to be somewhat insensitive to the need of making testifying less traumatic for victims, possibly believing that the right to a fair trial for the defendant could otherwise be endangered (Victorian Law Reform Commission 2004:314; Department for Women (NSW) 1996:123). Further, although courts are often under a statutory duty to prevent unnecessary, misleading, unduly annoying, belittling and stereotypical questions in the examination of witnesses, they have been found to be reluctant to interfere in order to protect witnesses in criminal trials (Australian Law Reform Commission 2010:1335–6; in relation to child victims see Cashmore and Trimboli 2005:51–2).<sup>6</sup>

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<sup>5</sup> The limitation of the suggested scheme to victims of sexual assault may attract criticism for being discriminatory to other victim witnesses who have not been afforded the right to legal representation. Even within the restricted parameters suggested in this article, the introduction of a legal representation scheme for victims in Australia is likely to be perceived critically, as legal representation for victims has historically not been part of the adversarial system. Therefore, basing the scheme on already existing procedural guarantees for sexual assault victims in Australian jurisdictions may be the best approach (see also Kirchengast 2011:5)

<sup>6</sup> Although the literature available was mostly published in the 1990s and early- to mid-2000s no more recent studies exist to the author’s knowledge indicating that sexual assault victims have felt more satisfied with their treatment in the criminal justice system since. The constant and ongoing attempts to law reform in this area seem to suggest that the situation for sexual assault victims has not changed significantly in practice.

In light of current practice, the introduction of a legal representative could make the needs of victims more visible and enhance the sensitivity of the courts to these matters. A victim's legal representative could perform the role that is not, or is inconsistently, performed by the courts.

### **(b) Public prosecution**

The task of safeguarding a victim's interests cannot be carried out efficiently by the public prosecutor, because the prosecutor is not the victim's representative, but the representative of the state and the public interest (Doak 2008:139). Although the prosecution is obligated to consider the interests of the victim during the criminal trial, the public prosecutor has to consider the public interest and the rights of the defendant in order to guarantee a fair trial as well. Situations can arise where the interests of the prosecution and the interests of the victim collide. For example, a survey by Brown, Burman and Jamieson (cited in Doak 2008:140) regarding Scottish sexual offence trials found that prosecutors often did not shield witnesses from character attacks. It has been explained that this behaviour is based on the belief that too many objections to the questions of the defence counsel can make the jury suspicious because it implies that the prosecution is hiding something. Another reason for not shielding victim witnesses from character attacks is the belief that a victim witness distressed through defence questions may make the jury feel sympathetic towards the victim and possibly more likely to convict the defendant (Doak 2005:307). This example illustrates the difficulty for the prosecution in balancing simultaneous competing interests. For this reason the public prosecutor cannot efficiently protect a victim's interests during trial.

### **(c) Victim advisers**

Victim advisers, whose role it is to inform victims and, in some cases, accompany the victim to court, cannot protect a victim's interests as efficiently as legal representatives for two reasons. First, the victim and the legal representative can form a close relationship during their consultations leading up to the trial, which allows the victim to build up trust and to be well prepared to testify. This may not always be possible where a victim adviser accompanies the victim to trial. Victim advisers employed by the government or in a non-government organisation can have a much greater workload and may have many victims assigned to them. This does not allow them to build a strong relationship with each victim individually. It is arguable, however, that the close bond between victims and their legal representatives could also be problematic, for example, where this leads to a power imbalance. Such an imbalance could develop where the legal representative exercised rights on behalf of the victim during cross-examination that the victim did not wish to exercise. It has to be pointed out though that the role of the legal representative suggested in this article, in comparison to, for example, the role of a litigation guardian for a child in child welfare cases, who is responsible for determining the best interests of a child in litigation, is that of a lawyer acting as an advocate for the client and in accordance with the client's wishes (in regards to litigation guardians and conflicts of interests, see Moore 1996). This means that even where legal representatives did not agree with the client's wishes they would be required to act in accordance with these wishes. In order to ensure that the legal representative is able to understand and respect the victim's wishes suitable training should be provided for lawyers acting in this role. Ultimately, this would contribute to keeping the risk of a power imbalance at a minimum.

Second, and most importantly, even where victim advisers have formed a close relationship with the victim and accompany the victim to court, the victim remains in a very vulnerable position when testifying at trial (Temkin 2002:302). Victim advisers and other support persons generally do not have the right to object to any questions during

cross-examination, nor to be heard concerning applications for the introduction of a victim's sexual history. There is also no evidence suggesting that the presence of a support person helps to improve the treatment of victims at trial by the other participants. Although the presence of a victim adviser or other support person may provide some support to the victim, and be an improvement to being completely alone, only a legal representative can ensure the respectful treatment of the victim at trial.

### **Summary**

It has been demonstrated above that gaps exist in the protection of sexual assault victims at trial that cannot be filled by victim advisers, prosecutors or the courts, due to the limitation of their allocated roles in the criminal justice system and the interests they have to consider. Neither the prosecution nor the courts are primarily responsible for safeguarding victims' interests and it cannot be assumed that they will do so incidentally. Victim advisers have no standing at trial and can therefore protect the victim only to a limited extent. Granting sexual assault victims the right to legal representation has the potential to fill the existing gap in protecting sexual assault victims by allowing them to be heard and to testify in a less stressful environment.

### ***Benefits for the criminal justice system***

Legal representation for sexual assault victims may, however, be justified based not only on the needs of individual victims, but also on the benefits the introduction may have for the criminal justice system.

As pointed out above, the underreporting of sexual violence offences arises partly from victims' fear of their treatment in the criminal justice system (Australian Law Reform Commission 2010:1101). Furthermore, the victims' unwillingness to proceed with their case can cause the prosecution to withdraw the sexual assault case (Lievore 2005:4). Smythe (2002) and Bacik, Maunsell and Gogan (1998:17–18) have concluded that victims who are legally represented feel more confident and less stressed with a legal representative by their side during the main trial. Affording sexual assault victims the right to be legally represented could therefore increase their confidence in criminal trials and contribute to reducing anxiety over their treatment in the criminal process. This could potentially increase the low reporting rates and reduce the high attrition rates in sexual assault cases.

Moreover, affording victims the right to legal representation could help to increase the low conviction rates in sexual assault cases. The cross-examination of legally represented sexual assault victims could be faster and the content of a victim's testimony more accurate. As previously noted, sexual assault victims can find testifying in court to be a traumatising and stressful experience. Psychological studies have found that high stress levels hinder effective memory and the capacity to process information (studies analysed in detail in Ellison 2001:19–20). Research also suggests that court-related stress can make victims more vulnerable to suggestions by the questioning parties, due to retrieval failures of the short-term memory reducing the actual quality of testimony (Ellison 2001:21). This causes incomplete description of the events and an 'increase in errors and inconsistencies in testimony' (Ellison 2001:21). The stress victims experience can also interrupt the flow of the trial if victim witnesses take longer to answer questions during cross-examination because of memory failure or the need for questions to be repeated. Studies have suggested that the more support there is available for a victim, the better prepared the victim will be to testify (Raitt 2010:44). Smythe (2002) has concluded that the introduction of a legal representative at trial could improve the actual quality of a victim's testimony because legally represented victims feel more confident during the main trial. Better quality of

victims' testimony in sexual assault trials could be beneficial in increasing the currently low conviction rates in sexual assault cases in Australia.

Having considered the reasons for introducing legal representation for sexual assault victims, the following section of this article will analyse what role and rights the legal representative for sexual assault victims in Australia should have.

## **Role and rights of legal representatives for sexual assault victims**

Given the potential benefits of legal representation for sexual assault victims, as discussed above, the question arises as to how the role of a legal representative would have to be shaped in order to be consistent with the Australian criminal justice system and without prejudice to the accused. In addressing this question, two forms of legal representation available to victims in the German inquisitorial system are considered below: legal representation for Private Accessory Prosecutors ('PAPs'), who have similar rights as the public prosecutor at trial; and legal representation for victim witnesses. When considering whether a German model of legal representation could be introduced in Australia, the difference between the German inquisitorial and the Australian adversarial system that may hinder the successful transplantation of a right from one jurisdiction to the other will be kept in mind (regarding the differences between the two legal systems see, in general, Weigend 2010:252; Freiberg 2011:82; Block et al 2000:170).

### ***Legal representation with broad participation rights***

The following section of this article considers whether the legal representative of sexual assault victims in Australia could be afforded participation rights during the main trial akin to those of legal representatives of PAPs in Germany (*German Code of Criminal Procedure* ss 395–402, '*German Code*'). It first examines those rights in the German inquisitorial system and then analyses why granting legal representatives of sexual assault victims broad rights is inconsistent with the Australian adversarial system and could endanger the right to a fair trial for the accused.

### **The rights of legal representatives of Private Accessory Prosecutors in Germany**

In Germany, acting as a PAP allows victims of certain types of criminal acts, including victims of sexual crimes, to join the public charges brought by the public prosecutor. For particularly vulnerable victims like victims of sexual assault, a state-funded legal representative has to be ordered by the courts as counsel (*German Code* ss 397a(1), 395(1)). In relation to other criminal acts, the PAP can request legal aid for employing a legal representative under the same conditions applicable to legal aid in civil trials if the victim cannot be expected to sufficiently safeguard their interests without a legal representative (*German Code* s 397a(2)). The PAP and their legal representative have extended rights at the main trial. Unlike other victims who are summoned as witnesses, the PAP and their legal representative have the right to be present during the main trial even if the PAP still has to testify at a later stage of the proceedings (*German Code* s 397(2)). The legal representative on behalf of the PAP also has the right: to be heard at trial whenever the prosecution is heard (*German Code* s 397(1)); to request evidence (*German Code* ss 397(1), 244 (3)–(6)); to refuse judges in case of partiality (*German Code* ss 397(1), 24, 31); to question the accused, witnesses and experts (*German Code* ss 397(1), 240(2)); to object to court orders and questions of the trial parties (*German Code* ss 397(1), 242, 238(2)); and to make statements including a closing statement (*German Code* ss 397(1), 257, 258). This shows

that the legal representative on behalf of the PAP has very broad rights to participate during the criminal trial (for an overview, see Kury and Kilchling 2011).

### **Problems with broad participation rights for legal representatives of sexual assault victims in Australia**

If legal representation for sexual assault victims were introduced into the Australian adversarial system in the above form, a victim's legal representative would have similar rights as the parties to the proceedings. For example, the legal representative would have the right to call evidence, conduct cross-examination of witnesses and make closing statements. However, introducing legal representation for sexual assault victims with such broad rights in the adversarial system has been met with great concerns in academic literature. The main concern in this regard is that the structure of the adversarial trial does not allow for the participation of a PAP and their legal representative. Pizzi and Perron (1996:41) argue that the German model of Private Accessory Prosecution is unique to the inquisitorial system and cannot be transplanted into the adversarial criminal procedure due to structural issues. They opine that because trials in Germany are judge-dominated and do not proceed as a dispute between two parties, it is easier to make room for the victim without offsetting the balance of the parties at trial (Pizzi and Perron 1996:41). Concurring, Doak (2005:298) argues that the integration of a third party, the victim, could cause the traditional distribution of roles in the adversarial system between state and defendant to be set off balance. These arguments seem convincing when closely considering the structural differences of the German inquisitorial and Australian adversarial system, as will be done below.

The main difference between the Australian adversarial system and the German inquisitorial system is the conception of the adversarial criminal trial as a contest between two adversaries (Fileborn 2011:2). In the Australian criminal trial, the parties take an active role in gathering the evidence in order to convince the court of certain facts (Findlay, Odgers and Yeo 2009:188; Gifford 1997:94). The adversarial system emphasises the autonomy of the contesting parties, namely prosecution and defence, and the control the parties have over the legal proceedings (Block et al 2000:171). The characteristic role of the judge is generally more passive and focuses mainly on deciding questions of law, including the admissibility of particular evidence, and on ensuring that the appropriate trial procedure is followed (see, for example, *Ratten v The Queen*; Findlay, Odgers and Yeo 2009:188; Gleeson 2007:5). While the judge in Australian criminal trials can widen the scope of fact-finding in exceptional circumstances, for example, by encouraging parties to call witnesses or asking witnesses clarifying questions (see, for example, *Whitehorn v The Queen*; *Richardson v The Queen*; Gifford 1997:94), overall the adversarial trial remains focused on party control. Plater and Line (2012:69–70) explain that the underlying reason for the bipartisan structure of the adversarial trial is the belief that the conflict between prosecution and defence best guarantees fairness of proceedings. Adversarial trials are considered to create an 'equality of arms' between defence and prosecution because defendants can gather their own evidence and challenge the prosecutions' case at any stage of the proceedings (Corrado 2010:289). It is further believed that the defence will put forward their case more forcefully in this bipartisan setting, which in turn contributes to truth-finding and fairness of proceedings (Corrado 2010:289).

In Germany, in contrast to the adversarial trial, public prosecution and defence have a less dynamic role, while the inquisitorial trial judge has a very active role in conducting judicial inquiries and examining the evidence (*German Code s 244(2)*). In Germany, it is the judge through the power of their office (*ex officio*), not prosecutor or defendant, who is primarily responsible for deciding which witnesses will be heard during the trial. Defence

counsel and prosecution only have the right to request additional evidence to be introduced at trial if admissible under the criminal procedure code (*German Code* s 244(3)). At trial, the judge takes the lead role in questioning the witnesses. Defence counsel and prosecution only have the right to ask additional questions subsequently (Joachimski 1999). This shows that the parties in the German criminal justice system play a subsidiary role in examining evidence, while the judge maintains close control over the questioning of the parties (see also Doak 2008:283).

The introduction of legal representation for sexual assault victims in the adversarial system with the same broad rights that the PAP's legal representative has in Germany holds the risk of a victim's legal representative aligning with the prosecutor against the defendant. In the adversarial system, this could endanger a fair trial if defendants had to defend themselves against two accusers. In that case, there would be no equality between the accused and the other parties in criminal proceedings. In the German inquisitorial system, this risk for the defendant appears less severe because the case, including the examination of evidence and what witnesses will be heard at trial, is mostly controlled by the judge, who therefore can ensure that a fair trial takes place even when a third party participates (Kury and Kilchling 2011:47). In Germany, the close judicial control over the proceedings can prevent an unfair alignment of the legally represented PAP and the public prosecutor against the defendant.

### **Summary**

The above analysis has shown that legal representation for sexual assault victims in Australia with the broad rights available for a PAP's legal representative in Germany is inconsistent with the Australian adversarial system as the system only recognises the prosecution and defence, and not the victim as parties to the criminal trial. For this reason, affording victims' legal representatives such broad rights could potentially endanger a fair trial for the defendant and should not be introduced in the Australian adversarial system (concurring in the South African context: Smythe 2002). However, it may be that a more narrowly tailored model of legal representation, similar to that available for witnesses in Germany could be accommodated in the Australian system.

### ***Legal representation with narrow participation rights***

The following section of this article first examines what rights legal representatives of victim witnesses have in Germany. It goes on to argue that the introduction of a legal representative with similar rights for sexual assault victims in Australia is consistent with the Australian criminal justice system and does not violate the rights of the accused.

### **Legal representation for victim witnesses in Germany**

The German inquisitorial system not only allows legal representation for victims acting as PAPs. Victims, who are not eligible to participate as a PAP, or choose not to do so, have the right to employ a legal representative as a witness (*German Code* ss 68b, 406f). The legal representative is present, for example, when the victim is being questioned as a witness at the main trial. Prior to questioning, the legal representative can make applications on behalf of the victim, including applications for: the exclusion of the public during examination of the witness (*German Courts Constitution Act* s 171b); exclusion of the defendant during examination of the witness (*German Code* s 247); and to allow victims to testify using video technology (*German Code* s 247a). The task of the legal representative during examination is to object to abusive, compromising, disrespectful,

suggestive or leading questions thereby ensuring compliance with existing witness protection legislation (*German Code* ss 68a, 241(2)).

### **Legal representation for sexual assault victims in Australia**

#### **(a) Rights of the legal representative for sexual assault victims in Australia**

A legal representative for sexual assault victims in Australia could have a similar role to the legal representative for victim witnesses in Germany. For example, the role of the legal representative for sexual assault victims in Australia could include: the right to make applications on behalf of the victim for the use of alternative ways of giving evidence (see, for example, *Evidence Act 1977* (Qld), s 21A); being present when the victim appears in court; objecting to inappropriate questions (see, for example, *Uniform Evidence Acts*, s 41); objecting to questions concerning the sexual reputation of the victim;<sup>7</sup> and representing the victim when an application for the admission of sexual history is made by the defence (regarding the admission procedure for sexual history evidence, see Heath 2005:7–8).

It may be argued that the courts can appropriately guard against the introduction of sexual reputation evidence and inappropriate questioning. However, they have shown reluctance in practice to perform this duty, as identified above in the first section of this article, making legal representation necessary to sufficiently protect sexual assault victims.

#### **(b) Consistency with the adversarial criminal justice system and prejudice to the accused**

The role of a legal representative for sexual assault victims suggested in this article is narrowly tailored and limited to safeguarding the victims' rights when they testify as a witness at trial. The victim and the victim's legal representative remain non-parties to the trial. Generally, the participation of non-parties is not inconsistent with the Australian adversarial system, as the possibility of amicus curiae participation shows. Traditionally, an amicus curiae is a non-party to the court proceedings who can apply to court for leave to make a submission on a particular point of law or other aspect of the case (Kenny 1998:159). The amicus curiae, as a non-party, is not entitled to request evidence or cross-examine witnesses. A victim's legal representative in the form suggested in this article could be considered, although not in the traditional sense, an amicus curiae, in assisting the court with the decision-making process by presenting the views of the victim as a non-party.<sup>8</sup> That legal representation for victims as non-parties is consistent with the Australian adversarial system is supported by recent developments in one Australian jurisdiction. Since 2011, New South Wales has introduced a state-funded legal representation scheme for sexual assault victims when addressing the court in relation to the prevention or restriction of disclosure of sexual assault communications (*Criminal Procedure Act 1986* (NSW) s 299A).

Furthermore, the suggested narrow form of legal representation for sexual assault victims does not infringe upon the procedural rights of the defendant. The legal representative of a sexual assault victim in the suggested form cannot exercise the same rights the parties can, but is limited to exercising some rights in relation to the protection of the victim witness at trial. For this reason, the defendant does not face the risk of a victim's legal representative aligning with the prosecutor and having to confront two adversaries.

<sup>7</sup> Questions regarding the sexual reputation are generally not admissible in any Australian state or territory jurisdiction, with the exception of the Northern Territory: see fn 4.

<sup>8</sup> The Scottish Executive Justice Department has considered a victim's legal representative in the form suggested in this article to be an amicus curiae (Scottish Executive Justice Department 2002:3).

### **(c) Legal representation for (sexual assault) victims in other common law jurisdictions**

Legal representation for victims is available to varying degrees in several other common law jurisdictions. For example, under federal law in the United States, a victim has the opportunity to intervene and express views and concerns represented by counsel at certain relevant stages of the trial without becoming a party to the proceedings (*Crime Victims Rights Act 2004* (US); for a detailed analysis of the Act, see Blondel 2008). Victims can be legally represented to a more limited extent in the Republic of Ireland. Submissions by the legal representative of a rape victim have been possible since 2001 in relation to a defendant's application for the admission of the victim's sexual history in court (*Criminal Law (Rape) Act 1981* (Ireland) s4A(3)). Similar to the situation in Ireland, in New Hampshire, Wisconsin and West Virginia, a rape victim's legal representative can make submissions for the victim when the admissibility of sexual history evidence is considered (see Doak 2008:141). In South Carolina, a legal representative may act on behalf of the victim where the defence claims improper or illegal conduct of the victim as a defence (Doak 2008:142).<sup>9</sup>

#### **Summary**

The above discussion has shown that in Australia, the introduction of a legal representation scheme for sexual assault victims with the suggested limited rights does not violate the procedural rights of the defendant and is consistent with the Australian justice system.

Although legal representation for victims has not been part of the adversarial system historically, and may therefore be critically perceived by some, this does not mean that it cannot become part of the adversarial system in the future.<sup>10</sup> Doak (2008:147) concludes on the introduction of legal representatives for victims that 'while there can be little doubt that a victim's "right to counsel" would sit very uncomfortably within the adversarial framework, it may, conceivably, not be so incompatible that it may not function at all'.

#### ***Consequences of the absence of bills of rights in most Australian jurisdictions***

While it has been demonstrated that a legal representation scheme for sexual assault victims to the suggested limited extent is not incompatible with the Australian criminal justice system, care must be taken in introducing any such system so as not to infringe upon the defendant's procedural rights. The risk of infringement is great in Australia due to the absence of bills of rights in all Australian jurisdictions except for the Australian Capital Territory and Victoria. Garkawe (2005:21–2) points out that Australian courts, in the absence of a bill of rights protecting the defendant's procedural rights, would be unable to declare legislation that infringes the defendant's rights as unconstitutional or interpret the victim's rights in a, perhaps more limited, way that does not infringe the defendant's rights.

The absence of bills of rights in most of Australia, however, does not in itself mean that legal representation for sexual assault victims cannot be introduced. Rather, having concluded that the suggested extent of legal representation does not violate the defendant's

<sup>9</sup> To the author's knowledge, no research exists on whether the introduction of legal representation for victims has increased victim satisfaction with the criminal justice system in the United States. However, in regards to Ireland research by Bacik and others on legal representation for rape victims between 2003 and 2009 found that legal representatives were employed relatively frequently by sexual assault victims (Bacik et al 2010:slide 14).

<sup>10</sup> It has been concluded that legal representation with similar parameters (referred to as the 'Danish model') could be accommodated in the New Zealand criminal justice system (McDonald and Tinsley 2011:201). A legal representative for victims of sexual offences with the narrow rights suggested here has also been recommended for adoption to the South African Parliament based on the argument that this does not violate defendants' rights in the adversarial criminal justice system (Smythe 2002).

rights, it would simply be necessary to ensure that the extent of participation of the legal representative is clearly enshrined in legislation. The legislation allowing legal representation for sexual assault victims would have to be worded carefully, in order to ensure that the defendant's procedural rights are not infringed.

When considering whether victims should be afforded the right to legal representation, the feasibility of the approach in terms of, for example, costs and possible increase in workload for the criminal justice system also have to be taken into consideration.

## Feasibility of the approach

### *Costs*

The question arises as to what cost implications come with the introduction of the right to a legal representative for sexual assault victims in Australia. While in Germany, the costs of legal representation generally have to be met by the individual victim, as pointed out above state-funded legal representation is available for victims of certain more serious crimes, including sexual crimes.<sup>11</sup> Implementing a cost approach in Australian jurisdictions where victims are liable for the costs of their legal representatives would mean that only financially able sexual assault victims could be legally represented. In order to enable all sexual assault victims regardless of their financial status to benefit from the scheme, legal representation would have to be state-funded or victims would have to be afforded the opportunity to seek legal aid. In New South Wales, for example, where sexual assault victims can be legally represented when opposing the introduction of protected confidence communications, legal aid has been made available since 2011 for qualifying victims who wish to be legally represented.

Although it is difficult to predict the financial implications for the future due to many unknown factors and influences, two arguments in favour of state-funded legal representation for sexual assault victims are discussed below. First, although the scheme needs to be financed, savings may occur elsewhere in the public sector, as McDonald and Tinsley (2011:207) explain when considering legal representation for rape victims in New Zealand. For example, fewer state-funded victim service providers could be required where victims can be legally represented. Furthermore, the immediate costs for a legal representative have to be considered in relation to the costs that may arise for the public health sector long-term for the physical and psychological treatment of victims traumatised by their trial experience. The stress and trauma experienced in the court system could be reduced if a legal representative assisted victims at trial. In the long term, this could potentially save the public health sector costs associated with sexual assault victims' treatment, possibly setting off the costs required for the scheme (a similar argument has been made by Raitt 2010:72).

### *Lengthier trials*

The right to legal representation for sexual assault victims also risks causing lengthier trials, thereby adding time and cost burdens on the criminal justice system. For example, the right of the legal representative to object to inappropriate questions, including questions

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<sup>11</sup> *German Code* s 406f. Victim witnesses, however, can generally choose to apply for legal representation that is available for all witnesses and may be state-funded under particular circumstances, s 68(b)(2). Victims eligible to participate as PAPs — for example, victims of sexual crimes and victims of other violent crime — but refusing to do so, have the right to state-funded legal representation at trial under certain circumstances as well as to legal aid: *German Code* ss 406g, 397a.

concerning the sexual reputation of the victim, and the possible obligation for prosecution and defence to rephrase questions could theoretically make proceedings longer. It could be argued, however, that inappropriate or inadmissible questions concerning the sexual history of the victim would occur less frequently when a legal representative is present at trial. This would also reduce the frequency of objections to such questions. In that regard, a study on the Danish criminal justice system — where victims have the right to be legally represented — has found that cross-examination of rape victims has become significantly shorter because victims have become more willing to testify and less follow up questions on a particular matter are necessary (Temkin 2002:292).

With limited rights granted to the legal representative it seems unlikely that the right to legal representation for sexual assault victims will delay trials to any significant extent and render the scheme impractical.

## Conclusion

This article has identified that, despite much law reform in the area of sexual assault over the past 40 years in Australia, reporting rates for sexual violence remain low and victims remain dissatisfied with their treatment in the criminal justice system. The article has subsequently considered a different approach that could potentially improve the experience of sexual assault victims in the adversarial criminal justice system, namely giving sexual assault victims the right to be legally represented. Although at the 2010 Australian and New Zealand Critical Criminology Conference Kirchengast drew attention to this issue, there has never been a rigorous debate in Australia as to the merits of legal representation for sexual assault victims.<sup>12</sup> At the Conference, Kirchengast (2011:5) suggested that a possible approach to be taken in Australia could be to afford victims private counsel for sex offences, where the interests of the victim differ from the interests of the accused and prosecution. Concerning the situation of granting victims legal representation in the United States, Pizzi (1999:353) has concluded that '[d]efense attorneys understand that constitutional recognition of a status for victims of serious crimes, independent of the prosecutor, has a tremendous symbolic value, and they do not want to see it accorded to victims.' Nothing suggests that resistance to the introduction of legal representation for victims will be less strong in Australia. However, without a discussion of the different possibilities of legal representation and the benefits for sexual assault victims and the criminal justice system, the matter will never move forward. It will remain an unspoken consensus that sexual assault victims cannot be legally represented at trial. This article has argued that granting victims the right to legal representation in the suggested narrow form is consistent with the structure of the adversarial system and does not violate the procedural rights of the accused. It has shown that legal representation for victims at trial has advantages not only for the victim, but also for the criminal justice system. While in other common law jurisdictions victims have been granted some form of legal representation at trial already, it may be time in Australia to reflect the possibility of introducing legal representation for sexual assault victim witnesses. This could be a step towards improving the experience of sexual assault victims in the criminal justice system and to increasing the currently low reporting and conviction rates for sexual violence offences.

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<sup>12</sup> In the 1990s, the topic came up for discussion in relation to rape law reform in Victoria. The Victorian Real Rape Law Coalition recommended to the Law Reform Commission of Victoria the introduction of legal representation for rape victims in court proceedings. The Law Reform Commission of Victoria (1991:34), cited in Bergen and Fishwick (1995:103), rejected the approach, stating *inter alia* that integrating a victim into the trial by granting legal representation could take away from determining the guilt or innocence of the defendant.

## Cases

*Ratten v The Queen* (1974) 131 CLR 510

*Richardson v The Queen* (1974) 131 CLR 116

*Whitehorn v The Queen* (1983) 152 CLR 657

## Legislation

*Crime Victims Rights Act 2004*, 18 USC (US)

*Crimes Sentencing Act 2005* (ACT)

*Crimes (Sentencing Procedure) Act 1999* (NSW)

*Criminal Law (Rape) Act 1981* (Ireland)

*Criminal Law Sentencing Act 1988* (SA)

*Criminal Law (Sexual Offences) Act 1978* (Qld)

*Criminal Procedure Act 1986* (NSW)

*Criminal Procedure Act 2009* (Vic)

*Evidence Act 1977* (Qld)

*Evidence Act 1929* (SA)

*Evidence Act 2001* (Tas)

*Evidence Act 1906* (WA)

*Evidence (Miscellaneous Provisions) Act 1991* (ACT)

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*Uniform Evidence Acts*

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