CENTRE FOR
Women's Safety
and Wellbeing

Preventing violence,
promoting health,
advancing gender equality

Centre for Women's Safety and Wellbeing

Response to the Australia Law Reform Commission Justice Responses to Sexual Violence Issues Paper

Acknowledgement of Country

The Centre for Women's Safety and Wellbeing acknowledges the Whadjuk Nyoongar people as the Traditional Owners of the land where our office is located. We acknowledge Aboriginal and Torres Strait Islander peoples of this nation, and we pay respect to Elders past and present. We acknowledge the continued deep spiritual attachment and relationship of Aboriginal and Torres Strait Islander peoples to this country and commit ourselves to the ongoing journey of reconciliation.

Recognition of Victims and Survivors

The Centre for Women's Safety and Wellbeing recognises the strength and resilience of adults, children, and young people who have experienced domestic, family, and sexual violence and acknowledge that it is essential that responses to domestic, family, and sexual violence are informed by their expert knowledge and advocacy.

We pay respect to those who did not survive and acknowledge friends and family members who have lost loved ones to the preventable and far-reaching issue of domestic, family, and sexual violence.

About the Centre for Women's Safety and Wellbeing

The Centre for Women's Safety and Wellbeing (CWSW) is the leading voice for women and children affected by gender-based violence in Western Australia and the peak body for domestic, family and sexual violence services and community-based women's health services in WA. CWSW works to prevent domestic, family and sexual violence against women and their children; promote women's health and wellbeing; and advance gender equity.

We work to ensure that the evidence is taken up in policy and practice to further the safety, health and wellbeing of women and their children. We advocate for systems and structures that enable and support the safety, wellbeing and economic security of women.

CWSW also promotes non-violent and respectful attitudes and behaviours towards women and girls in the broader community, and community responsibility for violence prevention.

Introduction

The Centre for Women's Safety and Wellbeing (CWSW) welcomes the opportunity to provide feedback on the Australia Law Reform Commission (ALRC) Justice Responses to Sexual Violence Issues Paper (issues paper). This focus by the ALRC on sexual violence is important and overdue. Sexual violence is a devastating issue in our community, creating lasting harm to victim-survivors across the country.

The issues paper outlines specific questions and we have responded to those relevant to our area of expertise below. However, we take this opportunity to highlight several key issues which may or may not be out of scope for the ALRC but nevertheless are critical to outline.

Firstly, CWSW draws the ALRC's attention to the many numerous reports, reviews, inquiries and other such papers that have been written on these matters pertaining to sexual violence. Many landmark reports such as the ALRC's own Family Violence – A National Legal Response[1], the Victorian Law Reform Commission's (VLRC) report Improving the Response of the Justice System to Sexual Offences[2] and Queensland's Women's Safety and Justice Taskforce[3], clearly articulate many of the same issues that are raised in the issues paper. Many of these recommendations remain unaddressed, uncommitted to and unfunded, and many recommendations have not been considered in detail by State and Territory governments. While we welcome this important inquiry, we must impart that the answers and solutions for many of the issues already exist and have been clearly articulated. CWSW implores the ALRC to use this opportunity to drive collective change across Australia to harmonise and hasten the implementation of these reforms.

We also must strongly impart the recognition that the justice process when it works at its best is just one part of the healing process for a victim-survivor. Healing and recovery will often rely on the timely support of a specialist sexual assault service. **We cannot have change to the justice process without significant complementary funding to specialist sexual assault services to stand alongside victim-survivors before, during and <u>after</u> the justice process**.

In WA there are just six specialist sexual assault services to cover the largest State in Australia with distinct remote locations. **The regional services are funded at just $1.7 million a year total for five services.** The inadequacy of funding cannot be understated in the context of the high prevalence of sexual violence in the community and the high demand for services and supports. Currently, the needs of sexual violence victim-survivors are unable to be met.

CWSW also cannot ignore the invisibility of Aboriginal and Torres Strait Islander victim-survivors of sexual violence. It is urgent that the voices of these victim-survivors are elevated as part of this inquiry. As put eloquently by Loney-Howes, Longbottom and Fileborn[4]:

> "As Indigenous women academics and advocates in Australia have long highlighted, the criminal legal system and other state-controlled systems are spaces of violence for Indigenous women and their children. This includes the fact that the State and prisons are themselves sites of gender-based violence and other harms… in addition, as previously

[1] https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/
[2] https://www.lawreform.vic.gov.au/project/improving-the-response-of-the-justice-system-to-sexual-offences/
[3] https://www.womenstaskforce.qld.gov.au/
[4] https://link.springer.com/article/10.1007/s10691-024-09546-z#:~:text=We%20argue%20that%20there%20is,Indigenous%20women%20are%20subjected%20to

mentioned, police routinely dismiss or fail to respond to calls for help and minimise or even misidentify Indigenous women as perpetrators of violence."

"...sexual violence and child sexual abuse have provided the impetus for violent state intervention in the name of *protection*, perhaps most infamously in the Northern Territory Intervention... Resultantly, Indigenous women are unlikely to report to or access the criminal legal system, and the system is often actively harmful to those who do engage with it"

We urge the ALRC to consider specific, culturally appropriate approaches designed by and for Aboriginal and Torres Strait Islander subject matter experts and victim-survivors who are overrepresented in sexual violence.

Aside from the various recommendations we make in response to specific questions below, it is clear from years of reform and review that outcomes have changed very little for victim-survivors. In some instances, outcomes are in fact worse. As such, it is necessary that sexual violence is dealt with through specialist approaches. We believe this is the only way to start to shift the dial on justice outcomes.

CWSW strongly recommends the following:

1. The Australian Government works with the States and Territories to adequately fund specialist sexual assault services, in line with Royal Commission recommendation 9.6 to require and enable services to be:
    a. be trauma-informed and have an understanding of institutional child sexual abuse
    b. be collaborative, available, accessible, acceptable and high quality
    c. use collaborative community development approaches
    d. provide staff with supervision and professional development
2. Implement specialised justice responses to sexual violence including:
    a. Separate sexual violence courts or lists
    b. Specialist sexual violence prosecutors
    c. Dedicated sexual violence responders in each police district
3. Fund justice navigators within specialist sexual assault services to support victim-survivors throughout the justice journey
4. A nationally consistent approach to protecting counselling and sexual assault communications
    a. Including the creation of independent legal advice for victim-survivors, service providers, and other professionals for protected communications information
5. Pilot accessible models for the delivery of forensic and medical examinations for regional and remote areas, including local specialist sexual assault services.

Responses to Consultation Questions

Reporting the experience of sexual violence safely

Question 2 What reforms or recommendations have been implemented in your state or territory? How are they working in practice? What is working well? What is not working well?

The under-reporting of sexual offences is a longstanding and significant justice issue. In WA limited reforms have been implemented regarding the reporting of sexual violence. In August 2023, WA Police launched Safe2Say an online reporting platform allowing anonymous reporting of sexual offences to the sex crimes division. CWSW has concerns regarding the implementation, consultation and communication of this reporting mechanism. It is not widely known about, and the WA specialist sexual assault sector was not involved in any consultation during the development of this platform. We remain concerned that this could be an important tool for victim-survivors who may not want to go through the criminal justice process, allowing them to have their experiences noted with policing authorities. However, the Government has not in parallel developed any public communications plan to sit alongside this reporting process and as such this mechanism is largely unknown to most of the public as a legitimate form of reporting. Additionally, it is not clear how this platform links victim-survivors in with relevant supports to ensure their psychological and emotional safety when using this tool. The process of completing the questions of this tool is complex and it is likely to be re-traumatising in itself. Specialist sexual assault services highly recommend that victim-survivors do not complete this process on their own. It is recommended that this should be completed with the support of services who can then support the client to manage the trauma symptoms which are triggered by this process. Offering anonymous, alternative reporting of sexual violence is an important and powerful option for victim-survivors. These options can be a means to regain power and control after a sexual assault where a victim-survivor does not want to go through a drawn-out criminal justice process but feels the importance of documenting their experiences and alerting police as a form of community safety[5]. CWSW would like to see better consultation with the sector, victim-survivors and the public around this reporting option to fully see the benefits of this tool.

Separately, the Commissioner for Victims of Crime WA is currently undertaking a review of the criminal justice responses to sexual offending looking at the entire process from reporting to release of an offender from custody. The review was announced in February 2022, and we await the release of a final report and recommendations.

Question 3 How can accessing the justice system and reporting be made easier for victim survivors? What would make the process of seeking information and help, and reporting, better? You might consider the kind of information given to victim survivors, the confidentiality of the process, and the requirements of particular groups in the community.

Question 4 Do you have other ideas for what needs to be done to ensure that victim survivors have a safe opportunity to tell someone about their experience and get appropriate support and information?

CWSW believes that the WA model for child sex abuse should be used as a blueprint to create sexual violence reporting hubs. The Multiagency Investigation and Support Team (MIST) is a one-stop "shop" to provide a multidisciplinary, wraparound response to child sexual abuse. The MIST hubs have the co-locations of the police, specialist child interviewers, child protection workers, child and family

[5] https://www.aic.gov.au/sites/default/files/2023-11/ti678_alternative_reporting_options_for_sexual_assault.pdf

advocates and therapeutic support services working as an integrated team. An evaluation found that the model significantly increases the responsiveness of policing and child protection responses to the cases and children and families received support and services they would not have otherwise received[6].

Other States and Territories use and refer to this model as multi-disciplinary centres (MDCs). Victoria uses this model for adult and child victims of sexual assault. The specialisation of staff, case management, forensic medical examination rooms, and critically, the linkage with advocacy and therapeutic support through specialist sexual assault services are essential to improve the safety for victim-survivors in reporting their experiences.

CWSW would like to see MDCs rolled out more broadly across the country, particularly in WA which does not have this service for adult victim-survivors. The local specialist sexual assault service must be at the centre of this co-location model however, we insist that they maintain a standalone base to serve as an alternative entry point for those who are less comfortable with the co-location of police and other government services.

WA recently received Commonwealth funding for a pilot of a sexual assault legal service to deliver specialised, trauma-informed legal services to victim-survivors[7]. CWSW welcomes this pilot program and encourages the Government to establish permanent, ongoing funding.

Criminal justice responses to sexual violence

Question 6 What reforms or recommendations have been implemented in your state or territory? How are they working in practice? What is working well? What is not working well?

Question 7 What are your ideas for improving police responses to reports of sexual violence? What can be done?

There is a general lack of faith in police reporting on sexual violence matters. This was further entrenched in WA through Police losing at least 2 years' worth of sexual violence reports due to a technology failure. While this has since been rectified, it speaks to a larger problem of the lack of coordinated, strategic and regular review of how police deal with sexual violence reports.

Recent research in NSW found that sexual assault reports that do not progress past the investigation phase are recorded by police as "no further action taken" with no reasons recorded[8]. In WA almost 30% of sexual assault reports to police were withdrawn[9], but no clear reporting exists on reasons relating to the withdrawal. If any attempts are made to increase prosecution and conviction rates for sexual offence matters, efforts must clearly be put into transparent and consistent data collection by relevant reporting agencies on the causes of attrition to allow implementation of strategies to counteract this.

NSW has recently introduced dedicated Sexual Violence Portfolio holders in each district and a process to ensure any sexual violence matter that does not proceed to a charge is assessed by an

[6] https://www.unisa.edu.au/contentassets/af19f0a154cb4a208cef90e329ac0c5a/multagency-investigation--support-team-pilot-evaluation-report-004.pdf
[7] https://www.wa.gov.au/government/media-statements/Cook-Labor-Government/Legal-support-pilot-to-assist-sexual-assault-victims-20230920
[8] https://www.bocsar.nsw.gov.au/Publications/BB/BB170-Report-attrition-sexual-assaults.pdf
[9] https://www.alrc.gov.au/wp-content/uploads/2024/04/ALRC-JRSV-Issues-Paper-2024.pdf

expert committee. This review and transparency are necessary to identify opportunities to intervene and make meaningful change and we'd welcome every jurisdiction undertaking this process.

We'd like to see the testing of an appointments-based system for reporting sexual assault – this would enable victim-survivors to schedule appointments so they can access a police officer who has specialised, trauma-informed training from the very start of the reporting process. Ideally, these appointments would be conducted, wherever possible within specialist sexual assault services, supported by specialist sexual violence advocates. This would avoid the many reported instances of victim-survivors feeling unsafe and exposed when attending police stations and needing to tell their experience in front of the public. This option would allow for victim-survivors to specify the gender of the investigating officer to undertake an initial interview.

CWSW is aware of instances were inconsistencies in advice given by WA Police has had severe repercussions on victim-survivors and their families. In a WA case reviewed by the Royal Commission "the complainant's mother was informed by a police officer that after the complainant gave her first statement, the evidence was completed. This misinformation confused the complainant's mother, and the ODPP had to explain that the complainant needed to be cross-examined by the defence and to pre-record her oral evidence at trial[10]".

Low quality interviews and inconsistent application of procedures by police must be improved upon. Better working relationships and coordination between police and ODPP is required if improvements to reporting and justice outcomes are to be seen.

The VLRC recommended the adaption of the Virigina SAT model checklist[11]. CWSW would welcome the implementation of this model to improve responses to victim-survivors and help identify who from police, prosecution and other justice related teams are responsible for which part of the process.

Prosecution responses

Question 9 What reforms or recommendations have been implemented in your state or territory? How are they working in practice? What is working well? What is not working well?

Question 10 Do you have ideas for improving ODPP responses to the prosecution of sexual violence?

There have been concerns raised about the lack of external transparency around prosecutorial decision in sexual assault cases[12]. As the ODPP acts for the State and not as a lawyer for the victim-survivor, many find the process occurring without their input. ODPP are often willing to negotiate concessions on charges and penalties in exchange for guilty pleas often without victim-survivor feedback. Prosecutors also face the same bias and assumptions about sexual assault that afflict judges, jurors and the broader community, which has an impact on decision making. It is critical that ODPP are specifically trained in this area to overcome some of these embedded cultural views on sexual assault.

CWSW strongly recommends:

- Specialist prosecutors that are trained in sexual offences for victim-survivors of sexual assault

[10] https://apo.org.au/sites/default/files/resource-files/2016-08/apo-nid67421.pdf
[11] https://www.lawreform.vic.gov.au/wp-content/uploads/2023/08/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf
[12] https://www.aic.gov.au/sites/default/files/2020-05/tandi291.pdf

- Guidelines for ODPP for communication protocols with victim-survivors that are trauma-informed
- Stronger training and guidance of prosecutors to intervene in inappropriate cross-examination
- Avenues for independent review of sexual violence cases that are not progressed based on the model proposed by the VLRC[13]
- Regular public reporting on prosecution decision making that is nationally consistent to inform and identify national and State-level patterns

The trial process

Question 12 Do you have views about the measures listed above? Have the measures reduced the trauma of giving evidence? Could they be improved? Have things changed? What is working well? What is not working well? Are there other measures which have been implemented and are not listed above?

Question 13 Do you have other ideas for improving court processes for complainants when they are giving their evidence?

Currently under the *Evidence Act 1906* (WA) a victim-survivor of a serious sexual offence is automatically considered to be a special witness. The arrangements for a special witness can include: a support person, a communicator, ability to give evidence by video link from outside the courtroom and a screen so that the victim-survivor cannot see the accused. Our recommendations for improvements to the trial process and special measures are dealt with later in this response.

CWSW strongly recommends the implementation of "justice navigators" (also known as independent sexual violence advisors) to provide emotional and practical support to victim-survivors through the entirety of the justice process. Currently victim-survivors are often managing multiple different agencies and teams at different points of the process. It can be overwhelming and confusing, especially in the absence of independent legal advice, which is (automatically?) available to defendants. The attrition rates by victim-survivors clearly reflect this. Victim-survivors need to have a huge amount of personal support and inner strength to survive a criminal justice process. This often means that those who are particularly vulnerable and face other complexities do not proceed.

A review of the UK independent sexual violence advisers found the roles were highly valued, effective and affordable[14] . The VLRC found justice navigators were a critical link between support and justice. Victim-survivors who had access to justice navigators had greater rates of convictions and less attrition than those who did not[15].

CWSW strongly recommends the implementation of justice navigators for sexual assault victim-survivors based on the UK model[16]. It is considered vital that these roles sit within specialist sexual assault services to walk alongside victim-survivors through their entire journey. We further

[13] https://www.lawreform.vic.gov.au/wp-content/uploads/2023/08/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf
[14] https://www.womensaid.org.uk/wp-content/uploads/2016/01/Stern_Review_of_Rape_Reporting_1FINAL.pdf
[15] https://www.lawreform.vic.gov.au/wp-content/uploads/2022/04/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf
[16] https://assets.publishing.service.gov.uk/media/5a823641ed915d74e3402543/The_Role_of_the_Independent_Sexual_Violence_Adviser_-_Essential_Elements_September_2017_Final.pdf

recommend the exploration of a model for Aboriginal and Torres Strait Islander victim-survivors, but this must be designed in consultation with their community.

'Special measures': evidence in the form of audio-visual recordings

Question 15 Has the use of recorded evidence been implemented in your jurisdiction? If so, to what extent? How is this working in practice? What is working well? What is not working well? What could be improved? Do any of the matters discussed when the recommendations were made (some of which are outlined above) need further discussion in the context of the reforms having been implemented? Are there any other issues? What do you see as the advantages and disadvantages of using recordings of the complainant's evidence at trial?

Currently under the *Evidence Act 1906* (WA) there is a provision for adult complainants who are special witnesses to allow for the entire evidence, including evidence in chief, cross-examination and re-examination, to be pre-recorded at a special hearing. However, this is only available if the court is satisfied it is in the interest of justice, taking into account the availability of resources and infrastructure.

In WA this option is not frequently exercised for adult complainants due to the pathway not being well supported and known about. Courts are also less likely to support a pre-recording hearing for adult witnesses unless they have some other "vulnerability" over and above their special witness status. CWSW asserts that **standard practice for sexual assault cases should be for pre-recording hearings unless the victim-survivor does not want to use this option.** This should apply for both child and adult complainants and the pre-recording process should be well communicated to victim-survivors.

The ALRC's own issues paper notes the advantages of pre-recorded evidence far outweigh any perceived disadvantages. Research on pre-recorded evidence has found that:

- Time taken both to complete the evidence and conclude the trial is significantly reduced[17]
- Reduces levels of harm, trauma and distress to victim-survivors[18]
- Improved quality of evidence[19]
- Opportunity to redact and edit the pre-recorded evidence.

CWSW notes multiple reviews have found that pre-recording of evidence should be applied to all victim-survivors of sexual assault - both adult and children. Despite this, it has not been made available on a large-scale to adult complainants. Given the clear benefits, it is not good enough to limit this access on the basis of resourcing and infrastructure availability. Governments must invest in this option to expand pre-recording for victim-survivors.

CWSW recommends that there should be a presumption of pre-recorded evidence for sexual assault matters and this should be harmonised across Australia.

[17] https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6
[18] https://aija.org.au/wp-content/uploads/2023/10/Specialist-Approaches-to-Managing-Sexual-Assault-Proceedings_An-Integrative-Review_05.pdf
[19] https://www.alrc.gov.au/wp-content/uploads/2019/08/CP_1.pdf

'Special measures': intermediaries and ground rules hearings

Question 17 Has an intermediary scheme been implemented in your state or territory? How is it working in practice? What is working well? What is not working well? How could it be improved? Have any of the issues described above arisen?

WA has yet to implement a witness intermediary scheme. This was a key recommendation from the Royal Commission into Institutional Responses to Child Sexual Abuse and is currently being considered along with other changes to the Evidence Act[20].

CWSW strongly recommends establishing ground rules hearings for all sexual offence matters to set the parameters of how a particular trial will proceed, including important the rules around questioning ahead of cross-examination. This submission covers the problems and harm currently being experienced through improper, offensive and traumatising cross-examination processes in WA under question 22. Ground rules hearings have been found to reduce cross-examination time[21], improve the tone and content of questions and to be an effective tool to change the culture and practice in tasking the evidence of vulnerable victims[22].

Ground rules hearings currently apply in WA to child sexual abuse matters and generally establish the parameters of pre-recorded evidence[23]. In line with our recommendation to expand pre-recorded evidence to all sexual offence matters, CWSW would insist on extending ground rules hearings in parallel.

We note that in Scotland ground rules hearings are rolled out as a priority for all sexual offences regardless of the method that evidence is provided. Given the well-established reluctance of judges and prosecutors to intervene during cross-examination[24], we believe ground rules hearings are essential to set clear parameters on appropriate questioning.

Assessment of the credibility and reliability of complainants

Question 18 Are you aware of the research about memory and responsive behaviour in the context of sexual violence trauma? Do you have views about that research? Do you have views about whether prosecutors should call expert evidence about that research (that is, about how people recall traumatic events and/ or about how victim survivors of sexual violence typically respond)? Is that expert evidence being called in your jurisdiction? If so, how is it working? If it is not being called, do you know why not?

Question 19 What is your view about the usefulness of jury directions in countering myths and misconceptions described by the research discussed above? Do you have a view on whether the jury directions in your jurisdiction are sufficient? Could they be more extensive? How are the directions in Victoria under the Jury Directions Act 2015 (Vic) working in practice? Can they be improved?

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[20] https://www.wa.gov.au/system/files/2024-04/2022_wa_progress_report_safer_wa_for_children_and_young_people.pdf
[21] https://aija.org.au/wp-content/uploads/2023/10/Specialist-Approaches-to-Managing-Sexual-Assault-Proceedings_An-Integrative-Review_05.pdf
[22] https://aija.org.au/wp-content/uploads/2023/10/Specialist-Approaches-to-Managing-Sexual-Assault-Proceedings_An-Integrative-Review_05.pdf
[23] https://www.districtcourt.wa.gov.au/_files/Circulars_to_Practitioners_Criminal.pdf
[24] https://aija.org.au/wp-content/uploads/2017/08/Sleight.pdf

Question 20 Do you have a view about the other recommendations that have been made (educative videos, mixed juries, judge-alone trials, and education and training)? Do you have other ideas for reform based on research which suggests the evidence of complainants is assessed according to myths and misconceptions about memory and responsive behaviour?

Credibility

CWSW strongly recommends that further reforms are undertaken to ensure that errors in relation to minor details are not taken to mean that the central allegation of sexual abuse is wrong. One study has found that more than 90% of complainants were cross-examined about inconsistences in their evidence by defence counsel in sexual offence matters to determine their reliability as witnesses[25]. This study found that defence counsel were prolonging questioning about inconsistencies of victim-survivor evidence that are due to minor miscommunication errors or unintentional memory loss which may be due to the impact of trauma.

The Royal Commission noted that "errors or inconsistencies in minor details do not reliably predict overall accuracy or deception"[26], and despite this, defence counsel often raises inconsistencies that do not relate to any of the key evidence areas being tested. There is a clear conflict between current defence practice regarding credibility of victim-survivors and the evidence and research base. Despite this, Judges and prosecutors are not intervening in this type of questioning[27].

Given this CWSW recommends reforms to expert evidence and jury directions.

Expert Evidence

In WA expert evidence can be called for evidence about child behaviour for child sexual offence cases and evidence on family violence for criminal proceedings where family violence is a relevant fact, however there are no explicit provisions for sexual violence. As a result, expert evidence is rarely called for sexual offence matters[28]. CWSW believes expert evidence is essential for these cases to counter misconceptions, myths and biases surrounding sexual violence, its nature and impact on victim-survivors.

While expert evidence can provide similar information to a jury direction, there are advantages through being called on when there is no jury direction on a topic, adding additional context, adapting to new issues and research more quickly than directions.

The VLRC recommended an expert evidence panel on sexual violence to be drawn on for these trials. CWSW would recommend this approach be implemented consistently across Australia. Additionally, we recommend that Judges should be able to call on this expert panel to overcome any cultural reluctance by prosecution teams to do this.

Longman warning

With regard to the Issues paper - in WA no legislative amendments have been made to abolish the common law requirement that judges must warn juries that when deciding whether to believe the

[25] https://apo.org.au/sites/default/files/resource-files/2016-08/apo-nid67421.pdf
[26] https://apo.org.au/sites/default/files/resource-files/2017-08/apo-nid102271_5.pdf
[27] https://apo.org.au/sites/default/files/resource-files/2016-08/apo-nid67421.pdf
[28] https://www.lawreform.vic.gov.au/wp-content/uploads/2023/08/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf

complainant, they take into account the complainant's failure to complain at the earliest reasonable opportunity. Most other jurisdictions have acted to remove this obligation, noting the significant harm this warning causes.

The Longman direction in Western Australia requires judges to give the warning where the accused may have suffered a disadvantage due to a delay in the complaint being made[29]. The direction must "convey the long experience of the courts that the impact of delay on the forensic process makes it dangerous or unsafe to convict on the uncorroborated testimony of a complainant unless the jury is completely satisfied"[30].

The Longman direction is routinely used in Western Australia both in adult and child sexual offence matters. This direction fails to acknowledge that reporting incidents sexual violence is not always made immediately after the fact. Many victim survivors may be living in fear of a partner/ex-partner; have severe physical injuries; be highly traumatised; been threatened with death or severe harm; or do not have the means to leave the house and report violence. Mitigating factors such as these prevent or delay victim survivors from disclosing sexual violence, and this does not diminish the severity and gravity of such acts of violence.

Resistance from some law groups against removal of the Longman warning are predicated on assumptions that it would prejudice a defendant's right to a fair trial. However, CWSW strongly insists that one individual's right cannot justify systemic prejudice to an entire class of victim-survivors[31]. The argument for forensic disadvantage in complaint delays does not stand up to the evidence for sexual offence matters. Sexual offence trials almost always occur in the absence of physical evidence proof and instead rely on issues around consent. Therefore, it is hard to determine whether any time delays to making a complaint in reality reflect a forensic disadvantage to individual defendants[32]. Additionally, there have been no evidence found to suggest that a delay in reporting sexual assault signifies a lack of credibility of a complainant[33].

The WA ODPP submitted to the WA LRC that they "consider it the most urgent reform that the government has agreed to, but not yet implemented"[34]. The prevalence of delays in reporting sexual assault inherently means that the Longman warning actively punishes all complainants in this category of offence. It is not justifiable and CWSW insists it must be removed through legislative reform. CWSW also supports amendments to further disallow any comments made by or on behalf of the accused that suggests that the complainant delayed in making a complaint or did not make a complaint.

Jury Directions

Directions are critically important as many members of the community do not understand how the dynamics of sexual violence may impact on the behaviour of victim survivors. It is important for any jury to understand the law they are required to apply when they deliberate, and to place evidence in its proper context.

Jury directions may serve to educate the jury, assist jurors to understand and apply the legal definition of consent, to counter the myths and misconceptions that jurors may hold about sexual assault, and to reinforce an affirmative model of consent. It is imperative, however, that jury directions are clear,

[29] https://www.wa.gov.au/system/files/2023-01/LRC-Project-113-Issues-Paper-06.4.pdf
[30] https://www.wa.gov.au/system/files/2023-01/LRC-Project-113-Issues-Paper-06.4.pdf
[31] https://www.austlii.edu.au/au/journals/CICrimJust/2007/25.pdf
[32] https://www.austlii.edu.au/au/journals/CICrimJust/2007/25.pdf
[33] https://www.austlii.edu.au/au/journals/CICrimJust/2007/25.pdf
[34] https://www.wa.gov.au/system/files/2024-05/lrc-project113-sexual-offences-final-report.pdf

consistent and as comprehensible as possible, and not overly legalistic or technical, so that they may be effective and functional. Research indicates that jurors may struggle to understand trial judges' technical directions[35] . If the judicial directions fail to connect with the jury's understanding and are in turn ineffective, the danger of unfair prejudice has not been reduced.

The WA Law Reform Commission recently recommended the legislating of certain jury directions[36], including on responses to sexual violence. CWSW supports these recommended directions and encourages quick implementation by Government.

CWSW supports the recommendations of the VLRC to[37]:

- give more jury directions;
- give jury directions more effectively;
- improve jury education when someone becomes a juror;
- improve research on juror understanding, countering misconceptions and supporting
- the jury's task in sexual offence trials; and
- ensure a greater use of independent experts and expert evidence.

The timing of jury directions is also important. A Scottish review also found that the most effective ways to improve juror understanding are early, plain language written directions[38] and the VLRC believes it can help to give jury directions earlier in the trial and repeat them during the trial. CWSW recommends that jury directions are developed similar to section 52 of the Jury Directions Act 2015 (Vic) that would empower a judge to give a mid-trial direction and would recommend the scoping of written, plain language directions to improve juror memory[39].

CWSW strongly recommends the harmonisation of jury directions to improve consistency and shared cultural knowledge across society.

Judge-alone trials

Question 21 What is your view about a trial by judge alone in relation to sexual offending?

CWSW suggests that there should be consideration given to judge-alone trial for sexual offence matters.

Managing juries in sexual offence matters has clear challenges. Rape myths, misconceptions and bias are so baked into our society and community, it is a constant challenge for the justice process to manage jurors in this regard. The high levels of mistrust by the Australian community of women's reports of sexual assault has been clearly demonstrated[40] with 34% of people agreeing with the statement that sexual assault is used to get back at men and 24% agreeing with the statement that

[35] https://classic.austlii.edu.au/au/journals/UNSWLawJl/2005/15.html
[36] https://www.wa.gov.au/system/files/2024-05/lrc-project113-sexual-offences-final-report.pdf
[37] https://www.lawreform.vic.gov.au/wp-content/uploads/2023/08/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf
[38] https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6
[39] http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/jda2015197/
[40] https://www.anrows.org.au/publication/chuck-her-on-a-lie-detector-investigating-australians-mistrust-in-womens-reports-of-sexual-assault/read/

sexual assault allegations are a result of a regretted sexual experience[41]. The aborted *R v Lehrmann* trial is a clear example where juror misconduct can create damaging, lasting implications for a criminal trial. The accessibility of online information and well demonstrated public vitriol and media cycle surrounding high-profile sexual assault trials, makes any management of juries almost impossible.

While Judges may still have the same biases as a jury, if the recommended model for a specialist court list for sexual violence matters was implemented it would follow that these roles would have mandated, trauma-informed, specialist training in sexual violence, its nature, prevalence and presentation.

We believe that this will lead to better outcomes for victim-survivors. A review in Scotland[42] found there was merit to considering judge-alone trials. That review considered education of jurors who are selected for a single trial, in the form of a jury direction, on the impact of trauma on a complainant and the nature of sexual assault is unlikely to be effective. It found a key feature of a trial by jury where no written reason is provided for the judgment can be damaging for a victim-survivor and argued that this could be a key benefit of a judge-alone trial, as judges are required to provide reasons for their decisions.

We recognise research from New Zealand indicates that judge-alone trials do not necessarily have better outcomes for conviction[43]. However, CWSW notes that these judge-alone trials where not necessarily within specialist sexual violence court lists and the nature of a written judgement may allow for enhanced scope for an appeal. We believe that the specialisation of a court list for sexual violence and therefore the specific expertise of a judge presiding over a trial may create a different result. However, as far as we are aware this has not been extensively tested.

CWSW recommends that specialist court list be established as per our response to Question 33 and as part of this list pilot judge-alone trials once the necessary upskilling and training has been delivered. CWSW recommends that a thorough review is undertaken of this pilot that considers not only conviction rates but also the experiences of victim-survivors during that process.

Cross-examination and the law of evidence

Question 23 Are the legislative provisions adequate to protect complainants during cross-examination? If not, how could they be improved? Should they be harmonised?

Question 24 Should cross-examination that reflects myths and misconceptions about sexual violence, such as the belief that a 'rape victim' would be expected to complain at the first reasonable opportunity be restricted on the ground that it is irrelevant or on any other ground

Cross-examination is routinely identified as one of the most traumatising and dehumanising components of a criminal trial. Despite years of reform and review, research suggests that cross-examination questions are more damaging than they were in historical trials in the 1950s[44]. It is clear the reforms and changes have not changed the way cross-examination operates in practice. Legislative provisions to protect complainants during cross-examination must be strengthened and we call on the

[41] https://www.anrows.org.au/publication/chuck-her-on-a-lie-detector-investigating-australians-mistrust-in-womens-reports-of-sexual-assault/read/
[42] https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6
[43] http://www.nzlii.org/cgi-bin/download.cgi/cgi-bin/download.cgi/download/nz/journals/NZLFRRp/2022/2.pdf
[44] https://journals.sagepub.com/doi/10.1177/1077559517733815

ALRC to consider explicitly disallowing cross-examination that perpetuates rape myths and misconceptions.

The Evidence Act in WA limits what the defence can ask during cross-examination of victim-survivors however, the Act does not provide any examples of improper questioning. Judges and prosecutors do have legislative provisions in to intervene in offensive and improper cross-examination, but there is a well-established reluctance by Judges to do so [45]. This is due to an unfair recognition of a defendant's right to cross-examination as critical to ensuring a fair trial.

In some jurisdictions (including the Commonwealth and ACT), legislation imposes a duty on courts to actively disallow improper questions under their Evidence Act[46]. The ALRLC previously considered that this duty is necessary to overcome judges' long-standing reluctance to intervene in cross-examination matters[47]. **CWSW considers that this is a necessary change for WA and should be harmonised across the nation.**

Guidelines have been introduced in WA for cross-examining children and mentally impaired witness[48] however, these do not apply to complainants and witnesses outside of those circumstances. Given the pervasive nature of rape myths, misconceptions noted the in the discussion paper and the weaponisation of these by defence teams to undermine, belittle and cause harm to complainants, CWSW believes it is necessary to develop guidelines for sexual offence matters along the same lines. As per our response to Question 17 CWSW strongly recommends establishing ground rules hearings for all sexual offence matters to set the parameters of questioning ahead of cross-examination, in line with child sexual abuse prosecutions[49].

We strongly believe cross-examination that reflects myths and misconceptions about sexual violence should be actively disallowed and reinforced through the relevant legislation. If not through legislative change, then guidelines and ground rule hearings must occur. Evidence shows that prosecution teams also fail to intervene in improper questioning by defence teams. This goes to the heart of why CWSW insists that there must be specialised teams in ODPP and specialist court lists to deal with sexual violence matters.

In a recent case in Scotland, a complainant successfully complained about the conduct of the defence lawyer's cross-examination, who subsequently was fined and found to have repeatedly crossed the lines of what was acceptably and that his behaviour amount to unsatisfactory professional conduct[50]. CWSW would welcome an examination of how a similar scheme may be introduced in Australia to allow for complaints to be raised and penalties issued where defence teams are found to have engaged in misconduct and unprofessional behaviour.

It is clear the two main mechanisms currently available to pull up inappropriate questioning are failing to do that job. Mandated, specialised training, specific legislation and guidelines, and avenues to

[45] https://aija.org.au/wp-content/uploads/2017/08/Sleight.pdf
[46] https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/28-other-trial-processes-3/cross-examination-2/
[47] Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [5.114].
[48] https://www.districtcourt.wa.gov.au/_files/Circulars_to_Practitioners_Criminal.pdf
[49] https://www.districtcourt.wa.gov.au/_files/Circulars_to_Practitioners_Criminal.pdf
[50] https://www.scottishlegal.com/articles/advocate-lorenzo-alonzi-found-guilty-of-unsatisfactory-professional-misconduct-over-rape-trial-behaviour

penalise defence lawyers and teams for misconduct where they breach these standards, is essential if we are to reduce the harm of cross-examination on victim-survivors.

Personal information

Question 28 Are the legislative provisions adequate to protect the disclosure and use of a complainant's personal information obtained during counselling or other therapeutic intervention? How are they working in practice? Should they be harmonised? Is there a need for complainants to be separately legally represented in court when submissions are made about the disclosure of the material and the application of the legislative provisions?

CWSW cannot understate the importance of protecting counselling and confidential records as fundamental to victim-survivor's ability to seek therapeutic care. The subpoenaing of such records is a deterrent to accessing these important services and this intrusive invasion o often acts as a re-enactment of a victim-survivor's assault.

In WA there are some protections under the *Evidence Act 1906*[51] however, there are limitations to the current provisions, including that protections only kick in at the commencement of proceedings, and there have been instances where subpoenas have been issued without leave of the court.
We strongly recommend the strengthening of the current provisions to ensure that the court must see to it a protected confider is aware of the person's right to be represented by legal counsel and that the court must make certain a protected confider is aware of the relevant provisions of the protections – in line with the NSW Act.

Additionally, we recommend it be required for the court to be satisfied that the protected person, whose confidential communications are the subject of an application, is aware of the relevant provisions and has had an opportunity to obtain legal advice in relation to it. This strengthens the provision beyond merely providing copies of the application to ensure that there is a higher threshold applied to the Court so protected persons and protected confiders are clearly aware of the relevant provisions and legal avenues available to them.

The Victorian Law Reform Commission[52] (VLRC) found that few complainants were participating in the decision making regarding their confidential records because many were not aware of the application and that they were not aware they were entitled to intervene, and complainants did not have an automatic right to intervene and did not have legal representation.

CWSW understand that a similar situation occurs in WA, and professionals whose records are subpoenaed are not aware of their rights and under the Act. We also know that services who receive subpoenas but do not have in-house legal teams to challenge such request, are put in precarious and difficult positions.

The VLRC also recommended that a broader range of records needed to be protected including medical records, records held by the Department of Health, records made by social workers and records held by specialist family violence services. CWSW would recommend that similar changes are made Nationwide to extend protections to these types of records. CWSW strongly believe that it is necessary to implement and fund independent legal representation based on the NSW Legal Aid

[51] https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_46940.pdf/$FILE/Evidence%20Act%201906%20-%20%5B17-o0-00%5D.pdf?OpenElement
[52] https://www.lawreform.vic.gov.au/wp-content/uploads/2023/08/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf

service for sexual assault privilege to ensure that complainants and confiders have access to legal advice on these matters.

The VLRC[53] additionally noted issues with the NSW legislation, including defence not applying for leave prior to issuing a subpoena and courts granting leave for disclosure of protected communications too easily. It found that subpoenas issued without the leave of the court can still be valid, which undermines the purpose of these protections[54]. CWSW is aware of this occurring in WA.

As such, CWSW recommends stronger provisions to ensure that protected communications are not admitted where they have been obtained without leave of the court and that there are civil penalties for accessing and issuing of subpoenas in these instances. **There mut be a national approach to protecting counselling and other sensitive records of victim-survivors.** With different schemes across Australia, it makes it impossibly difficult for services and professionals who hold such records to protect them and ensure they are not misused.

CWSW recommends that the following changes are also implemented across Australia:

- Nationally consistent protection of counselling records, which ensure the provisions provide coverage both before, during and after proceedings take place
- Extension of protected communications to medical records, records held by the Department of Health, records made by social workers and records held by specialist domestic and family violence services
- Extend the application of protected communications clause to criminal, Family Violence Restraining Orders and relevant civil proceedings
- Use the provision in the NSW Act to ensure that the public interest in disclosure substantially outweighs the public interest in non-disclosure
- Government to implement and fund independent legal representation based on the NSW legal aid service for sexual assault privilege
- Requiring the court to be satisfied that the protected person whose confidential communications are the subject of an application for access and use, is aware of the relevant provisions and has had an opportunity to obtain legal advice in relation to it
- Require the prosecution to inform the complainant when an application is made of their right to appear and the availability of legal assistance.

CWSW strongly recommends that consideration be given to the limited probative value of such records. The provisions in WA do not reflect that the probative value of sexual assault communications and counselling records is in fact very limited[55], as noted in the second reading speech for the introduction of the legislation in NSW; "***the primary purpose of counselling is not investigative, it is therapeutic. …. As part of the counselling process, the complainant is encouraged to release emotions and talk unhindered, and yet the complainant has no legal right to review the notes to see whether they are an accurate reflection of his/her version of the events. Nevertheless, these notes can be used to claim that the complainant has made prior inconsistent statements and has feelings of shame and guilt which are consistent with a motive to lie.***"[56].

The probative value of such records in a legal setting is extremely limited and can cause extreme harm and re-traumatisation to a complainant when used as a weapon against them.

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[53] https://www.lawreform.vic.gov.au/publication/issues-paper-e-sexual-offences-the-trial-process/
[54] https://www.austlii.edu.au/au/journals/NSWBarAssocNews/2013/19.pdf
[55] https://www.austlii.edu.au/au/journals/NSWBarAssocNews/2013/19.pdf
[56] https://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2001/29.pdf

CWSW strongly recommends that the ALRC carefully considers the use and value of counselling records as evidence in sexual offence matters, makes clear recommendations to curtail their use and penalises prohibited subpoenaing of such records which is occurring consistently in many jurisdictions.

Specialisation and training of judges and counsel

Question 33 Do you have views about the creation of specialist courts, sections, or lists? Do you support specialised training for judges who conduct sexual offence cases? What issues should that training address? Do you support some form of special accreditation for lawyers who appear in sexual offence cases? Would this reduce the number of lawyers available to appear in such cases and contribute to delays in hearing such cases?

CWSW strongly recommends the creation of a specialist court (or list) be implemented Nationally.

Much has been written on the misinformation around sexual violence and the impact on the justice process. Noting that *"the average person simply does not have a sound understanding of when or how sexual offending occurs, how it is effected by perpetrators, and how survivors may respond"*[57] we believe it is necessary and urgent for sexual violence to be dealt with through a dedicated and specialised justice process.

Benefits of specialist lists include being trauma-informed, having specialist knowledge of the nature and drivers of sexual violence and enhancing the skills of staff across the criminal justice process (REF VLRC). Changing the culture of legal staff and the judiciary is difficult and inconsistent. Specialised lists allow for consistency and a highly skilled workforce who are trauma informed[58]. CWSW believes this is critical to create better outcomes for victim-survivors who are frequently retraumatised by the criminal justice process, demonstrated in part by the very high discontinuation rates.

The evidence for specialist courts/lists is compelling. South Africa, as one of the early pioneers of sexual violence courts, found they lead to significant reductions in delays and increases in convictions [5960]. The evaluation of the New Zealand pilot found these courts reduced delays, reduced trauma to victim-survivors, improved trial quality with better evidence and less adjournments and saw more frequent intervention by judges in inappropriate cross-examination[61]. A specialised family violence court in Canada that also has jurisdiction over child sexual abuse cases has been extensively reviewed and found that the court resulted in significantly higher conviction rates, significantly higher sentencing orders for offenders and improvements in delays[62]. Decades of law reform for sexual violence has

[57] https://www.jstor.org/stable/j.ctt1ws7wbh.16?seq=6
[58] https://www.lawreform.vic.gov.au/wp-content/uploads/2022/04/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf
[59] https://www.endvawnow.org/uploads/browser/files/assessment_sexual_offences_courts_sa.pdf
[60] https://www.alrc.gov.au/wp-content/uploads/2019/08/CP_1.pdf
[61] https://www.districtcourts.govt.nz/assets/Uploads/2019_Publications/Sexual-Violence-Court-Pilot-Evaluation-Report-FINAL-24.7.19.pdf
[62] https://espace.library.uq.edu.au/data/UQ_a9d6a71/UQa9d6a71_OA.pdf?Expires=1717138565&Key-Pair-Id=APKAJKNBJ4MJBJNC6NLQ&Signature=HRWuhJdLFU24yT~o-9~EIn1ND3Wy-UOOk3KckdqLATMJzY3z9NFtbbw7FHB~ObgjiMNsdtBgMdRT51nvArsMPN2STnZ2zBlWAztcaA-fpsrcIp0btx9JS1wZUOuImTPE8G4YZStm1IqdSpaiPv4Qg-

resulted in no change to poor outcomes. We strongly believe specialisation is essential to shift the dial.

The Model

For specialisation to create change, the model must be right. It is not enough to simply have a separate court list for sexual offences. The process, staffing and nature must be altered. We urge the ALRC to give serious consideration to the model proposed by 2021 Scottish review as per below[63]:

A National, specialist sexual offences court should be created, in which the core features should be:

1. Pre-recording of the evidence of all complainers;
2. Judicial case management, including ground rules hearing for any evidence to be taken from a complainer, either on commission or in court; and
3. Specialist trauma-informed training for all personnel.

The court should have the following features:

(a) A national jurisdiction in respect of serious sexual offences prosecuted on indictment;
(b) Procedures based on current High Court practice, revised to meet appropriate standards of trauma-informed practice;
(c) Those procedures to include judicial case management including GRHs and practises similar to those developed in High Court of Justiciary Practice Note No 1 of 2017 and No 1 of 2019; (d) Presided over by a combination of High Court judges and Sheriffs, who have received trauma-informed training in best practice in the presentation of evidence of vulnerable witnesses and appointed to the court by the Lord Justice General;
(e) Sentencing powers of up to 10 years imprisonment;
(f) Rights of audience available to members of the Faculty of Advocates, solicitor advocates, and prosecutors all of whom have received specialist trauma-informed training in dealing with vulnerable witnesses, including examination techniques, in accredited courses approved by the Lord Justice General;
(g) SCTS administrative and support staff trained in trauma-informed practices expanding on services already provided in the Evidence suites in Glasgow and Inverness;
(h) Pre-recording of the whole of a complainer's evidence as the default method of presenting the complainer's evidence;
(i) The right to independent legal representation (ILR) to allow complainers to oppose section 275 applications with appropriate public funding (discussed further in chapter 4);
(j) In the event of complainers requiring to attend court measures adopted will be those which address the comfort and safety of the witness;
(k) Measures in respect of pre-instruction and charging of juries as recommended in chapter 5 of this report; and
(l) Legal aid provision for the court including a dedicated table of legal aid fees.

Training

This specialist court list must include mandatory training for court staff including Judges, lawyers appearing in these courts, prosecution and defence staff, and those involved in court support services. Training must include:

- Understanding the impact of trauma, including on memory, cognition and emotions
- How to prevent and reduce re-traumatisation

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[63] https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6

- How to create psychological safety for complainants
- Lifespan impact of child sexual abuse
- Sexual violence in the context of intimate partner violence
- Types of perpetrators and dynamics of sexual offending.

Delay

Question 35 What are the causes of delay in your state or territory? Do you wish to comment on the past recommendations (as outlined above) and whether they have been or should be implemented in your state or territory? What are your ideas for reducing delays? Can there be a national approach to reducing some aspects of the delay?

Delays to the justice process have a profound and harmful impact on victim-survivors. The healing process cannot begin for victim-survivors until this process is complete. To be left in limbo for many years is unacceptable and is a key cause of the high rates of attrition from the justice process [64] .

It is CWSW's view that a substantial amount of delay is due to the under resourcing of various elements of the justice system. The sources of delay outlined in the issues paper can largely be attributed to a lack of appropriate funding. Clearly some sources of delay like unexpected court absences from the accused or complainant, difficulties in accused getting legal representation and technology breakdowns are not directly due to funding matters.

However, if Governments were to fully fund the justice system so all components and parties were able to participate at their fullest, we believe there would be a significant reduction in the delays for sexual assault matters.

The recommendations made by the VLRC to reduce delays, including implementing case management, all complainants having pre-recorded evidence options and improving the quality of police investigations, are worthwhile actions to sit alongside broad stroke investment[65]. We also reiterate our recommendations that a specialist court list would significantly improve timeliness to these matters based on the international evidence.

Sentencing

Question 39 Are there aspects of sentencing practices and outcomes which may be harmonised across jurisdictions?

Question 41 Have there been recent changes to the role of victims of sexual violence in the sentencing process in your jurisdiction? Are Victim Impact Statements given appropriate consideration by the sentencing judge? Are there further improvements to be made? Should victims have independent legal representation during sentencing submissions?

Question 42 Do you have ideas for improving the sentencing process in matters involving sexual violence offences?

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[64] https://www.lawreform.vic.gov.au/wp-content/uploads/2022/04/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf

[65] https://www.lawreform.vic.gov.au/wp-content/uploads/2022/04/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf

CWSW insists on the harmonisation across Australia to abolish good character as a mitigating factor in sentencing hearings given that the assessment of a perpetrators character can have a significant impact on the sentence imposed. A person's character should have no weight on judicial decision making to impose a sentence or penalty. Assessments about character are speculative, vague, have no formalised definition and therefore create unfair and unjust outcomes[66]. Penalties should be decided purely on the evaluation of the crime committed to reach just decisions that apply across the board. The additional testimony and good character references are highly traumatising, distressing and unnecessary for many victim-survivors.

The sheer prevalence of sexual offending in Australia alone indicates that there are many perpetrators from all walks of life. We know from research on child sexual offending among Australian men that they are more likely to be well connected and relatively wealthy[67]. This points directly to the problem with good character being used as a mitigating factor – where perpetrators do not fit the "stereotypical" view of what a rapist looks like and are well connected and wealthy, their sentences can be discounted on superficial notions of good character. It is unacceptable when the very nature of sexual offending often includes grooming of the victim and the broader community.

The Victims of Crime Commissioner's review is considering sentencing and victim impact statements (VIS), and we await those recommendations. However, CWSW would like to see an assurance that victim-survivors will not be cross-examined in relation to the contents of statements. We believe that statements provide a personal form of participation in the justice process and give input into sentencing decisions. However, the VIS must comply to the judicial rulings in place which can create disappointment and can offer limited closure and therapeutic value. It is why CWSW insists that specialist sexual assault services must be funded to sit alongside victim-survivors in this process to hold them and help continue the healing journey after the court case has been finalised.

Civil proceedings and other justice responses

Restorative justice

Question 46 What reforms have been implemented in your state or territory? How are they working in practice? How could they be improved? Have things changed? What is working well? What is not working well?

Question 47 What are your ideas for implementing restorative justice as a way of responding to sexual violence?

As mentioned, the Commissioner for Victims of Crime WA is currently undertaking a review of the criminal justice responses to sexual offending, looking at the entire process from reporting to release of an offender from custody. Discussion Paper Four[68] specifically looks at alternative justice responses and we await the recommendations from this review.

CWSW has some concerns that it is only failings of the current criminal justice process that have led to consideration of alternative processes. However, restorative justice options may provide much-needed alternative pathways for victim-survivors. The uptake in alternative reporting options like SARO

[66] https://www8.austlii.edu.au/au/journals/MonashULawRw/2018/19.pdf
[67] https://www.humanrights.unsw.edu.au/sites/default/files/documents/Identifying%20and%20understanding%20child%20sexual%20offending%20behaviour%20and%20attitudes%20among%20Australian%20men.pdf
[68] https://www.wa.gov.au/media/40130/download?inline

in NSW and story-sharing like Chanel Contos's school sexual assault petition, highlight the unmet need for victim-survivors to have opportunities to tell their story.

Eloquently put by Wendy Larcombe "*These shortcomings of 'conventional criminal' processes have led to a recent wave of interest and investment in 'innovative' and 'restorative' justice alternatives for sexual violence. It is critical that, as alternative justice processes or pathways are promoted and hopefully better coordinated, victim/survivors are given greater say about what they would like to happen, as well as information and advice about which justice pathways or options may best suit their needs"*[69].

We would welcome further examination by the ALRC on alternative and restorative justice methods that are victim-centred and trauma-informed.

Civil litigation

Question 48 Which of the measures listed above are likely to most improve civil justice responses to sexual violence?

Question 49 Apart from those listed above, are there other recent reforms and developments which the ALRC should consider? Are there further reforms that should be considered?

CWSW strongly supports the ALRC exploration of the new civil model put forward by QSAN and Angela Lynch.

The limitations of the criminal justice system for sexual violence matters have been clearly demonstrated. Low police reporting, low conviction rates and high attrition[70] all result in injustice for victim-survivors. The standard of proof required is one of the critical barriers. A failure to prove a charge of sexual assault does not equal a finding of innocence for a defendant. And yet many victims are left with that feeling. We believe there is strong merit in the exploration of a "sexual harm order" on the civil law balance of probabilities.

The ALRC is well placed to canvas this model as part of the Inquiry, and we'd welcome their consideration of this alternative pathway.

Workplace laws

Question 51 What provisions or processes would best facilitate the use of civil proceedings in this context?

With reference to the discussion paper, it is imperative that the Commonwealth more proactively compels the States and Territories to implement consistent equal opportunity reforms in line with the Respect@Work report and other recommendations.

In WA, the Government has delayed the reforms at a state level until at least 2025, despite the WA Law Reform Commission handing down critical recommendations in 2021. These reforms are urgent to improve responses to sexual harassment in WA. The laws currently do not work for victims of sexual harassment with CWSW aware of complainants in the State choosing instead to take their workplace sexual harassment complaints to the Federal Australian Human Rights Commission, despite experiencing longer wait times through that pathway. WA is the only place in Australia with a

[69] https://www.jstor.org/stable/j.ctt1ws7wbh.16?seq=1
[70] https://www.bocsar.nsw.gov.au/Publications/BB/BB170-Report-attrition-sexual-assaults.pdf

"disadvantage test" for sexual harassment complainants. This effectively renders the complaints process to the Equal Opportunity Commission completely ineffective and prevents legitimate sexual harassment claims being progressed. The requirement for a complainant to "prove" disadvantage only serves as another barrier to making complaints.

The compensation cap has not been updated since the Act came into effect in 1985. With the rates of inflation, and to reflect modern currency, the minimum amount should be amended to $140,000. The current $40,000 cap makes any process through the Equal Opportunity Commission not worth the effort put in by complainants and is out of line with other jurisdictions and best practice.

Additionally, the current legal framework in WA only provides protection for workplace sexual harassment. The Act must be amended as a matter of urgency to extend this protection to other areas of public life, especially as these incidents will not be captured by other complaints avenues. Numerous inquiries at both the State and Federal level have highlighted the pervasive nature of sexual harassment, particularly in WA, and made recommendations that insist on changes to the *Equal Opportunity Act 1984*. Underpinning those findings has been the complexity of different regulatory frameworks and the urgent need to align legislation and definitions across Australia to ensure consistency and create safe pathways for victim-survivors.

With the new Commonwealth positive duty on employers to prevent sexual harassment having already commenced, it is imperative WA commits to implementing this Respect@Work recommendation consistent with those made by the LRC to reduce confusion for both employers and victim-survivors. We urge the Commonwealth to act to harmonise the laws across the country more quickly, as ongoing delays are harming complainants.

Compensation schemes

Question 53 What changes to compensation schemes would best promote just outcomes for victim survivors of sexual violence?

In WA, victim-survivors can apply for compensation through the Criminal Injuries Compensation Scheme. CWSW understands that there are significant delays experienced in waiting to access compensation in WA. The compensation caps are extremely limiting at $75,000 for a single offence and $150,000 for multiple offences. Generally, payments are significantly lower than this. We believe that the compensation caps must be significantly uplifted to reflect the seriousness of sexual offending.

Separately, CWSW would also welcome the investigation of a national sexual assault brokerage scheme based on the Victorian model[71]. This would provide immediate, flexible support to victim-survivors wherever they are on the justice journey and for those who are not.

Victims' charters

Question 55 Have reforms been implemented in your State or Territory? If so, how are they working in practice? How could they be improved? Have things changed? What is working well? What is not working well?

[71] https://fac.dffh.vic.gov.au/sexual-assault-support-brokerage-program-guideline#:~:text=Sexual%20assault%20support%20brokerage%20(SASB,flexible%2C%20person%2Dcentred%20support.

Question 56 What are your ideas for ensuring victim survivors' rights are identified and respected by the criminal justice system? What can be done?

WA's Commissioner for Victims of Crime sits directly within the Department of Justice and as such do not have independent legislative functions. This is a concern, and we would recommend a transition to the Victorian model of an independent statutory body with legislative powers to enforce compliance with the Victim's Rights Guidelines.

We support Women's Legal Service WA's calls for the development of a charter of rights[72] to encourage greater compliance on the treatment of victim-survivors.

Conclusion

CWSW warmly thanks the ALRC for the opportunity to provide feedback on the Issues paper and welcomes this important inquiry.

It is clear the current criminal justice system is failing victim-survivors of sexual violence. It is urgent and imperative that innovative, evidence-based reform is made collectively and consistently around Australia. The changes must prioritise victim-survivors and be fully funded to be effective.

We urge the ALRC to consider the recommendations made above and strongly reiterate that we cannot have change to the justice process without significant complementary funding to specialist sexual assault services to stand alongside victim-survivors before, during and after the justice process.

Kind Regards

Alison Evans
Chief Executive Officer
Centre for Women's Safety and Wellbeing

[72] https://www.wlswa.org.au/wp-content/uploads/2023/04/WLSWA-Sexual-Offence-Reforms-Apr-23.pdf