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24 May 2024

Hon. Marcia Neave AO

Judge Leisl Kudelka

Australian Law Reform Commission

Inquiry into Justice System Responses to Sexual Violence

Re: Submission to the Inquiry into Justice System Responses to Sexual Violence (2024)

We are grateful for the opportunity to submit a response to the Inquiry into Justice System Responses to Sexual Violence. Mid North Coast Legal Centre (MNCLC) is a program of Advocacy Law Alliance.

MNCLC provides free civil law assistance to residents of the Mid North Coast of NSW. This region is characterised by high indicators of socio-economic disadvantage including people living with disabilities, First Nations communities, CALD communities and people reliant on Centrelink income. We provide services to survivors of domestic and family violence as a priority group. In the most recent reporting period (July 2023-Dec 2023), a snapshot of our clients reveals that:

- 87% were living with financial disadvantage
- 41% were living with a disability or mental illness
- 16% identified as a First Nations person
- 17% came from "outer regional or remote" areas
- 9% were living with insecure housing or in homelessness
- 30% of the services we provided were to people experiencing family violence

MNCLC's work involves regular contact with clients who have experienced sexual violence. This frequently (but not exclusively) is reported to us as occurring in intimate partner relationships. The help we offer includes accessing the NSW Victims Support service, and assisting victim-survivors with other legal issues that may arise such as debts, employment law or discrimination concerns.

MNCLC adopts a trauma informed, client-centric approach to supporting clients who are victims of violence. We acknowledge that the justice system provides one mechanism for resolving issues and healing – but that equally important for clients is the chance to exercise agency and control over their involvement in legal processes that affect them.

MNCLC has taken some time to review the Issues Paper provided by the Inquiry. Our submission will engage with the questions posed, as they are numbered in the Issues Paper. All client stories are composite, de-identified and are included as examples of common scenarios that we have encountered.

Why is civil law assistance for victim survivors important?

At the outset, MNCLC would like to note the importance of civil law assistance after an event for many victim-survivors.

MNCLC often sees clients who have experienced sexual violence and who have never disclosed this to Police. It may be that violence occurred within an intimate partner relationship, or indeed as a historic event in a family or community context that has now changed. For these clients, the opportunity to seek recognition and some level of redress without the need to engage in the criminal law process may be important. Our clients speak of the traumatic nature of having to revisit these experiences in the manner that the Police need to substantiate criminal activity; or of the complex issues that arise when a client identifies as Aboriginal or Torres Strait Islander.

The civil law support MNCLC offers includes specific help to navigate the NSW Victims Support scheme. This assistance may include correct identification of the grounds for an application, support to source evidence, making submissions on evidence to clarify the situation for an assessor, and support to seek reviews of decisions where we consider there may be merit.

MNCLC has also offered legal assistance to clients in the following contexts:

- Assisting with employment law matters where a client has experienced sexual violence or harassment in the workplace.
- Untangling or negotiating debts that emerge to form part of a client's situation, such as in the case of sexual violence which is perpetrated in the context of coercive domestic relationships.
- Seeking access to help through Leaving Care Plans (for young people who have experienced sexual violence and who live in or have left Out of Home Care environments).
- Advising on Apprehended Violence Orders.

Q7 – What are your ideas for improving police responses to reports of sexual violence? What can be done?

MNCLC acknowledges the significant work that the Police undertake in responding to violent incidents, including those of sexual violence. We appreciate the complexity of many of the situations that Police are required to deal with, and the speed with which they need to respond.

MNCLC has assisted clients with Out of Home Care experience, through a project we delivered called LevelUP. LevelUp offered proactive civil law assistance to clients with a Care experience. Our client cohort registered disproportionate levels of trauma, abuse and sexual assault, and 40% of our clients were living in relationships of violence or abuse at the time we came into contact with them.¹

Clients in our LevelUP program routinely told the project Solicitor of negative interactions with Police, including negative or dismissive responses to sexual assault allegations brought to Police attention. These interactions coloured our clients' willingness to seek help from Police when other situations arose.

In some cases, clients expressing traumatic responses to abuse or assault did so to the Police in ways that were elevated or atypical. This trauma response led to their story not being believed.

Misidentification by Police and the consequences

Client story - What's not working - misidentification and the consequences

Our client is a First Nations person who lives with mental health issues and has had several interactions with the justice system. They had experiences of sexual assault and sought our help to access the NSW Victims Support (VS) scheme. A call to the Police for help in escaping one incident had resulted in our client being misidentified as a perpetrator of violence. They had exhibited a trauma response to the assault which was elevated and atypical. This resulted in the client being charged. When the client accessed our service for Victims Support they had already been convicted of an offence in relation to the incident. As a result, this has had the potential consequence that a VS Scheme application might fail or, if successful, any amount awarded could be reduced in accordance with s44 of the Act which directs the

¹ See full report at: <https://mnclegal.org.au/wp-content/uploads/LevelUP-Final.pdf>

Commissioner of Victims Services to “have regard to behaviour, attitude or disposition of the primary victim concerned that directly or indirectly contributed to the injury”²

After advice our client decided not to pursue a Victims Support application.

This problem is not an isolated one. As recent research noted,

“(First Nations) Women who have used retaliatory or pre-emptive violence in response to abuse or to protect themselves also come into contact with the criminal legal system. First Nations women are also more likely to encounter structural racism in their interactions with the criminal legal system.”³

This problem could be addressed in a number of ways. Trauma awareness skills training for Police may help reduce the issues of mis-identification. In addition, the VS scheme could be amended to allow weight to be given to submissions on a criminal record that explains misidentification.

Q48 – Trauma informed and culturally safe justice responses that may improve civil justice responses to sexual violence.

MNCLC has embedded a trauma-informed and culturally safe approach in all its practice areas, but we see the particular importance of this for our clients who have experienced sexual or family violence. Delivering legal assistance in this way prioritizes the wishes and choices of clients, giving them time and space to arrive at conclusions that are right for them. This may mean that they might make choices not to exercise their rights, or not to directly report the violence they have experienced. A trauma-informed approach may mean client interactions take longer, and a focus on building trust must occur before a client discloses the full extent of their circumstances.

Our experience has been that the training we have undertaken to embed this approach must be regularly repeated for staff to support their skills development in this area. It also requires a commitment from managers and funders in the public legal service context to understand that clients who have experienced trauma such as sexual violence will require more time, patience, and the willingness to re-book appointments to be able to clarify the legal options for the client, so they understand the approaches available and their consequences.

Cultural sensitivity is also important for agencies responding to sexual violence. MNCLC provides support to clients who identify as First Nations people, and to those who come from

² *Victims' Rights and Support Act 2013 (NSW)* s44 (1) (a)

³ <https://theconversation.com/increased-incarceration-of-first-nations-women-is-interwoven-with-the-experience-of-violence-and-trauma-164773>

culturally and linguistically diverse (CALD) backgrounds. We regularly participate in cultural responsiveness training and encourage the employment of First Nations staff where possible.

We note that for many people from diverse backgrounds such as both these cohorts, the reporting of sexual violence to Police may have consequences that are experienced on levels beyond victim's safety alone. For example, rates of incarceration⁴ and child removal⁵ for First Nations people are at extraordinary levels and there may be reluctance to involve authorities as a result. This underscores the importance of a civil law scheme that provides an effective option for victim-survivors.

Client story - What's working – the Sexual Assault Reporting Option in NSW

Our client experienced sexual assault in a family context many years ago. The offender has now died. The offender's death brought many emotions to the surface for our client, and they sought assistance to apply for counselling and victims support payments as a result. The *Victims Rights and Support Act 2013* (NSW) ("the VS Act") requires evidence of an act of violence to be supplied in support of an application for recognition payment. In NSW, the option to apply for a "Sexual Assault Reporting Option (SARO)" provides an opportunity to offer this evidence to the Police without the need for potentially intrusive investigative action from the Police⁶. The SARO then serves as evidence of an act of violence for the Victims Support scheme.

This option is a positive attribute of the civil law response to sexual assault in NSW. Although the SARO questionnaire is detailed and may be confronting to complete, the knowledge that unnecessary investigative action may be avoided gives confidence to some victims to disclose the events.

Q51 – Comments on the use of civil law proceedings in the context of the workplace

Sexual harassment or assault which occurs in the context of the workplace is not uncommon. MNCLC provides legal help to people who have employment law problems including where that problem involves workplace responses to sexual violence or assault.

We welcome the advances in the legal framework responding to sexual harassment. We would also welcome the clarification of the legislative provisions around serious misconduct and grounds for dismissal, as outlined in our recommendation below.

⁴ [Corrective Services, Australia, December Quarter 2023 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/australian-bureau-of-statistics/publications/corrective-services/december-quarter-2023)

⁵ <https://www.snaicc.org.au/our-work/child-and-family-wellbeing/family-matters/>

⁶ https://portal.police.nsw.gov.au/adultsexualassault/s/?language=en_US

Client Story - employment and sexual violence

Our client was a victim of sexual violence in the workplace. The workplace sought to manage it by way of mediation. MNCLC provided advice to the client to help clarify their rights and the legal system response to what had occurred and advised on options available to them through Victims Support.

Although the client did not re-engage with our service, this advice was important for their sense of agency in the workplace. We also are not aware of the outcome for the offender in this matter, however we are of the view that steps to respond to this behaviour as serious misconduct should be explicitly codified.

Recommendation:

- Codify sexual harassment as serious misconduct or grounds for dismissal in the Fair Work Regulations 2009.

The *Fair Work Regulation* 2009 currently identifies:

(iii) assault; or

(iv) sexual harassment

as constituting serious misconduct⁷.

MNCLC sees value in amending clause (iii) to specifically include sexual assault as serious misconduct. This removes any ambiguity that employers (particularly those in small business who may not have the resources of HR support) may perceive. The resulting clause would then read:

(iii) assault and/or sexual assault; or

(iv) sexual harassment

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

The NSW Victims Rights and Support Act provides for a scheme (the "VS Scheme") to respond to act/s of violence by way of financial support and counselling. The details are:

⁷ Fair Work Regulations 2009 – Reg 1.07 (3)

Financial Support

- an “immediate needs support package” (INSP) (which aims to respond to the immediate needs of victims fleeing domestic or family violence).
- Financial assistance for immediate needs.
- Financial assistance for economic loss.
- Recognition payment.

Counselling

Counselling support is a vital and important part of the package available to victims. Up to 22 hours (or more under certain circumstances) is available. Counsellors may provide a Certificate of Injury for clients as evidence of harm for the purposes of financial support through the scheme. The ability to use the counselling to support applications for financial assistance is often helpful as it may be the only workable opportunity for a client to source and receive counselling. However, it can also act as a handbrake on scheme participation.

Case Study: Alex

Alex is a survivor of multiple assaults and later in life, a survivor of domestic violence. Alex did not feel comfortable making multiple applications for support through Victims Services as they found disclosing the episodes of violence very traumatic. Alex was able to access counselling for the first time through Victims Services. They established a good rapport with their counsellor and were despondent to learn the counsellor could not continue to offer Alex counselling beyond 44 hours (the total counselling available through their applications for support). Alex was unable to fund continued counselling because of their limited income.

Recommendation:

- [Extend the amount of time available for counselling under the NSW VS Scheme to victims of sexual assault.](#)

Injury or Harm

At present, the VS Scheme requires evidence of injury to grant financial support. MNCLC believes this is an unnecessary burden on victim-survivors of sexual assault as applicants without the support of a service will often struggle to do this. Obtaining evidence of injury can be an immensely re-traumatising event and MNCLC believes that an assumption of injury should be present for victim-survivors of sexual assault. Not all applicants wish to engage with a Victims Services counsellor to obtain evidence of harm, particularly where they have made their own journey of recovery. Obtaining or providing evidence of harm can be a barrier to applicants accessing the scheme.

Case Study: Tim

Tim is a survivor of childhood sexual assault who came to our Centre seeking support. Tim was homeless and struggled with addiction due to traumas that occurred in his early life. We assisted Tim to apply for a copy of his medical and counselling records from around the time of the abuse to support a Victims Services application. After many requests records were provided to Victims Services with a brief 'Certificate of Injury' which was not provided to Tim or his lawyer before lodging. This report was written by someone who had never met him nor been involved in his care. Victims Services dismissed Tim's application on the basis that there was insufficient evidence to establish he suffered harm due to the sexual assault when he was young. Tim then had to quickly access other records and we assisted him to lodge a review. Tim expressed that the process of being denied his records, and then his application for support, was extremely distressing and traumatising for him.

Recommendation:

- Remove the need to demonstrate injury for victims of sexual assault.

INSP for Victims of Sexual Violence

At present, the NSW Victims Support Scheme does not allow for grant of an INSP for victims of sexual violence that did not occur within a domestic relationship. MNCLC would like this to be amended to allow access to this payment for other victims of sexual violence. This payment is a quick response option that includes payments for items required to enable victims to move, flee or protect themselves. This would allow for the purchase of cameras or replace furniture or property which might have been involved in a sexual assault. This would aid recovery and allow some steps toward restoring a victim's dignity.

Recommendation:

- Introduce an INSP payment for victims of sexual assault to support recovery.

Vicarious Trauma impact on workforce

Legal professionals working in community legal centres are frequently exposed to the traumatic experiences of their clients, especially in cases of domestic and sexual violence. Vicarious trauma, also referred to as secondary traumatic stress, occurs when individuals absorb the emotional and psychological burdens of others, leading to symptoms similar to those experienced by the primary victims.

Over the past five years, the prevalence of cases related to sexual violence within our legal practice has increased steadily. This trend raises concerns and challenges about the heightened risk of vicarious trauma among our employees. As lawyers engage with clients and delve into the details of their traumatic experiences, they can internalise the emotional weight of these narratives. This process of empathetic engagement, while essential for effective legal support and case work, can significantly impact the mental health of legal professionals.

The consequences of vicarious trauma are profound and can manifest in various psychiatric conditions such as depression and post-traumatic stress disorder (PTSD). Left unaddressed, these conditions can lead to a range of detrimental outcomes, including impaired work performance, loss of income, and in severe cases, suicidal ideation.

Considering the evolving landscape of workplace health and safety, we have increasingly complex responsibilities regarding the mental health of our employees. These obligations stem from various sources, including statutory occupational health and safety laws, workers' compensation legislation, and discrimination laws. Moreover, recent legal precedents, such as the High Court case of *Kozarov v Victoria*⁸ underscore the importance of employers' duty of care towards employees engaged in inherently stressful legal work. This duty extends to the assessment of individual circumstances and the implementation of reasonable measures to safeguard employee well-being.

MNCLC values and supports the work our dedicated and caring staff undertake, and so have instituted practices aimed at reducing the risks of vicarious trauma. This is an element of public legal practice which is not always understood or factored into the assumptions of funders or reporting bodies but is critical to sustaining a workforce able to respond with compassion and commitment.

Recommendations

- Better resourcing for free legal assistance services to ensure best practice support for lawyers and other workers exposed to vicarious trauma – for example, specific funding for confidential 1:1 supervision and debriefing with a specialist psychologist.
- Access to ongoing training and support for free legal assistance services to develop policy and practice responses that support the workforce.

⁸ [2022] HCA 12

We thank you for your consideration.

Yours sincerely



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