



Submission on Justice Responses to Sexual Violence

Australian Law Reform Commission

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Acknowledgement

We acknowledge the Traditional Owners of Country, recognise their continuing connection to land, water and community, and pay respect to Elders past and present.

We acknowledge the victim-survivors of domestic, family and sexual violence with whom this submission may impact and whose voices inform our advocacy to increase access to justice.

About Colin Biggers & Paisley

Colin Biggers & Paisley is a legal practice with offices in Sydney, Brisbane and Melbourne. Lawyers from Colin Biggers & Paisley volunteer with the Colin Biggers & Paisley Foundation, which is dedicated to promoting and protecting the rights of women, children and Aboriginal and Torres Strait Islander people.

Colin Biggers & Paisley is committed to promoting and facilitating access to justice and opportunities, aiming to create a business that our people are proud to be a part of and our clients are proud to work with. For many years, Colin Biggers & Paisley has assisted Women's Legal Service NSW (**WLS NSW**) and Marrickville Legal Centre and its clients on a pro bono basis. Colin Biggers & Paisley acts as a volunteer of WLS NSW in relation to client's applications for support through Victims Services. Our clients in these matters are often marginalised, financially insecure and disadvantaged women, with low levels of literacy, insufficient access to resources such as emails, printers and the internet. Our clients also often present with complex trauma and with two or three claims for sexual abuse and domestic violence perpetrated by multiple offenders. Our lawyers are seconded to Marrickville Legal Centre and provide legal advice and assistance as court duty lawyers and representation during domestic violence court list days.

The preparation of this submission has been undertaken by experienced lawyers with carriage of Victims Services matters, primarily assisting women who are victim-survivors of domestic, family and sexual violence and lawyers assisting on court duty service days and domestic violence court lists.

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Table of Contents

1.	Introduction	4
2.	Summary of Recommendations	5
3.	Reporting the experience of sexual violence safely	6
4.	Police responses to reports of sexual violence	8
5.	The trial process	10
6.	Assessment of the credibility and reliability of complaints	12
7.	Judge-alone trials	14
8.	Guilty Pleas	15
9.	Compensation schemes	16
10.	Victims' Charter	18
11.	Reference list	20

1. Introduction

We welcome the opportunity to provide feedback on any draft reform changes to the Australian Law Reform Commission inquiry into sexual violence.

This submission prioritises recommendations that are victim-survivor focused and enhance transparency and accountability within government organisations and processes. The prevalence of sexual violence continues to be frightening, especially when many sexual assaults are unreported.

Colin Biggers & Paisley works with many victim-survivors of sexual assault. Many of our clients struggle to come forward and report their sexual assault. Our recommendations call for a transparent and victim-orientated process to be implemented. The criminal justice process continues to be ambiguous for many individuals and it needs to be demystified. The NSW Sexual Violence Plan 2022 - 2027 identified that:¹

The NSW Government recognises that gender-based violence, including sexual violence and domestic and family violence, can be prevented and its impacts reduced. Doing so requires a public health approach to addressing sexual violence. A public health approach provides a framework for informing all efforts to prevent and respond to sexual violence and is critical to understanding key risks and the individual, relationship, community and societal factors that interact and contribute to sexual and other gender-based violence.

Colin Biggers & Paisley has prepared this submission on the following basis:

- practical legal experience;
- working and volunteering with Community Legal Centres; and
- a literature review.

Colin Biggers & Paisley submit that any proposed law reform must adopt a uniform, multidisciplinary approach that prioritises education about sexual violence and its impacts, as well as transparency in the processes that seek justice for victim-survivors. Colin Biggers & Paisley strongly submit that there is an urgent need for reform, especially in light of the increased pressure to deliver services during a sexual violence crisis.

¹ Communities and Justice, NSW Government *NSW Sexual Violence Plan 2021- 2022* (Report, December 2022) <<https://dcj.nsw.gov.au/documents/service-providers/domestic-and-family-violence-services/NSW-Sexual-Violence-Plan-2022-2027.pdf>>.

2. Summary of Recommendations

- Increased accountability and audits of police sexual assault training via an independent body.
- Implementation of access to counselling or mental health providers when reporting sexual assault.
- Education on the meaning of sexual assault.
- Informal reporting to be implemented in each State and Territory in Australia.
- Education on access to counselling services.
- Educate defendants (and the general public) about the court process through pamphlets or other aids in the lobby of the courtrooms.
- Implement increased accountability by having an independent body audit police sexual assault training programs. This body should review and evaluate the effectiveness of police education and training initiatives, with evaluation reports made public.
- In NSW, the *Victims Rights and Support Act 2013* be amended so that the Commissioner of Victims Rights has powers to audit police sexual assault training programs.
- Require police in every Australian jurisdiction to implement an annual, comprehensive audit process to assess compliance with a defined Sexual Violence Standard. Each Police Area Command should conduct 'dip' sampling to provide insights into adherence to the Sexual Violence Standard at all levels of the police force.
- Train judges to effectively object to lines of questioning that rely on rape myths.
- Develop and implement educational and training materials to ensure that judges adopt practices which contributes to a more humane and less intimidating trial environment for complainants
- During the jury selection process, question potential jurors to ascertain their beliefs and attitudes about sexual assault, allowing for the rejection of those who may convict on the basis of rape myths.
- Provide jurors with education on rape myths before the trial commences.
- Include sexual assault experts on the jury panel to ensure a diversified perspectives and counter incorrect beliefs, ensuring that decisions are based on evidence and facts.
- Trial by judge-alone for cases of sexual offending.
- Implement a system to notify applicants of any restitution debts early in the process and allow them to appeal or arrange payment plans.
- Identify victim-survivors of sexual assault who are also perpetrators at the beginning of the application for compensation through the NSW Scheme. Once identified as both a victim and a perpetrator, provide the opportunity to write submissions detailing any exceptional circumstances that may apply.
- Develop procedures to assist applicants with administrative tasks related to the NSW Scheme process, such as accessing identification and required documentation.

- Ensure access to counselling and information about the NSW Scheme is available when a sexual assault is reported. Additionally, send victim-survivors general information about the NSW Scheme six months after their initial report, in case they are unable to engage with the NSW Scheme immediately after disclosing the offence.
- A mechanism to be implemented that clearly identifies the steps the Commissioner can take when a departure from the Victim's Charter occurs.

3. 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?

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?

1. During 2022, NSW recorded 12,413 victim-survivors of sexual assault, marking the eleventh consecutive annual increase.² It is unclear whether this rise is due to an increase in reporting by victim-survivors, potentially influenced by movements such as #MeToo, or an actual increase in the incidence of sexual violence offences.
2. Underreporting of sexual violence remains a significant issue for victim-survivors. Reports can be made by victim-survivors, witnesses or another person reporting the incident to the police. However, not all sexual assaults are reported to the police and there is likely an underestimate of sexual assault occurring in Australia.
3. In NSW, the following methods currently exist to report sexual violence:
 - (a) formal reports to the police; and
 - (b) informal reports through the Sexual Assault Reporting Option (**SARO**) form.
4. When a victim-survivor chooses to report a sexual assault, whether formally or informally, they are required to re-experience and recount a traumatic event. It is important that throughout the reporting of a sexual assault (whether formally or informally) a victim feels safe and secure. Our work with sexual assault victims shows that both the reporting processes have the real and significant potential to re-traumatise victim-survivors. To ensure they feel supported, victim-survivors should be provided with psychological support and an option to receive counselling to guide them through the reporting process.

Formal reporting to Police

5. Many victim-survivors of sexual assault fear police and authorities, especially in circumstances where the victim is from a minority group (e.g. if they identify as an Aboriginal and Torres Strait Islander or former inmate). In our work with victim-survivors, we have observed a significant level of distrust towards the police, coupled with a fear that even when they disclose to the police they will not be believed (especially if the victim-survivor has a criminal history, alcohol or drug abuse).

² Australian Bureau of Statistics, *Recorded Crime - Victims 2022* (29 June 2023) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release#:~:text=There%20were%2012%2C412%20victims%20of,of%20victims%20of%20sexual%20assault>>.

6. Fear and distrust of the police continue to be a common theme amongst many Australians.³ Whether stemming from personal history or other factors, there is a general distrust among victim-survivors, despite them being the first point of contact in sexual violence incidents.
7. The distrust held by the community appears to be founded in a lack of transparency and accountability. Establishing clear protocols for reporting and investigating sexual assault could demonstrate the police's commitment to upholding the law. Mandatory training for all police officers in relation to sexual violence, along with informing the community about this training, could also help build this trust.

Informal reporting via SARO forms

8. Colin Biggers & Paisley has experience assisting victim-survivors applying through the Victims Services Scheme in NSW, which often requires the completion of a SARO report over the phone. Victim-survivors frequently struggle to complete the requisite forms on their own due to a lack of support, their literacy levels and the emotional toll of recounting the assault details. At this stage, victim survivors do not have access to counselling services to assist them in completing a SARO report, and many cannot afford private counsellors. We recommend increasing awareness about free counselling services and including this information when completing the SARO form.
9. A further concern raised by victim-survivors is that many victim-survivors who do not wish to report the matter to police often become anxious when they see the question "Do you want to be contacted by the police" in the SARO form. Further re-traumatising the victim survivor. Even though the client is assured that the police will not be informed, this fear is reignited. A consideration should be given as to whether this question is required for informal reporting.
10. We note that informal reporting is currently only implemented across NSW, and Queensland (via the Assault Reporting Option form). Whilst informal reporting can be improved, we strongly recommend that informal reporting be implemented in each State and Territory across Australia. This will likely increase the number of reports being made and allow victim-survivors to be given greater opportunity to be heard.

Other factors relating to the underreporting of sexual assaults

11. Historical factors contributing to underreporting include misconceptions about what constitutes sexual assault, institutional violence at the hands of police for some population groups, and barriers to accessing police.⁴ General education on sexual assault and promoting access to reporting mechanisms could alleviate these barriers.
12. Further, living in remote and regional areas or being incarcerated pose significant hurdles when reporting sexual assault.⁵ Those living in remote areas may not have easy access to police stations or other services that facilitate access to services to support the individual in the reporting of sexual violence. Effective referral points and mechanisms are needed for victim-survivors with limited access to phones or the internet, possibly through community engagement and education are required around reporting options.

³ Hayley Gleeson, 'Australian police forces have a festering domestic violence problem. Will a double homicide force NSW police to finally face the truth' *ABC News* (online, 7th March 2024) <<https://www.abc.net.au/news/2024-03-07/police-force-domestic-violence-serving-officers-homicide-truth/103526170>>.

⁴ Australian Institute of Health and Welfare, Australian Government *Sexual assault reported to police* (Report, April 2024) <<https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/police/sexual-assault-reported-to-police>>.

⁵ Queensland Centre for Domestic and Family Violence Research, 'Prevention, Early Intervention and Support for Aboriginal and Torres Strait Islander People who have Experienced Sexual Violence' (2019); Australian Institute of Health and Welfare, Australian Government *Sexual assault in Australia* (Report, August 2020) <<https://www.aihw.gov.au/getmedia/0375553f-0395-46cc-9574-d54c74fa601a/aihw-fdv-5.pdf.aspx?inline=true>>; Communities and Justice, NSW Government *NSW Sexual Violence Plan 2021- 2022* (Report, December 2022) <<https://dcj.nsw.gov.au/documents/service-providers/domestic-and-family-violence-services/NSW-Sexual-Violence-Plan-2022-2027.pdf>>.

13. Many of the victim-survivors that Colin Biggers & Paisley assist are incarcerated. For example, a client advised of an initial report of their sexual assault was made to a NSW Correctional Officer (CO). The CO contacted the police, who took our client's report. However, our client could not complete the report due to the trauma of recounting the details of the assault. The police then consulted the CO, who claimed that our client had previously "fabricated similar stories", which was included in the police report. Our client's report was not further investigated and her initial report notes from the police indicate opinion as to the fact that she was either lying or had imagined the attack. This incident highlights the struggle many victim-survivors face in being believed when reporting their sexual assault. This experience has further deepened our client's distrust in the police and the justice system as a whole when reporting sexual assaults or other incidents of violence.

Recommendations

- Access to counselling (or mental health providers) when reporting sexual assault.
- Education on what constitutes sexual assault.
- Education and information widely available on how to access to counselling services.
- Improved police training in working with victim survivors (see responses to questions 6 and 7).
- Informal reporting to be implemented in each State and Territory of Australia.

4. Police responses to reports of 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?

14. Police are described as the 'gatekeepers' of the justice system. As first responders, their response sets the course of action for each case. The importance of improving police responses to sexual violence is critical as their attitudes can impact a victim-survivors' decision to either withdraw or continue their report following initial disclosure. Police education and training have been at the forefront of endless law reform discussions which seek to change police actions and responses to sexual violence. The mantra that police officers require increased training constantly rings through the sexual violence policy arena. In this space, training is expected to be a mechanism through which police responses can be shaped and improved.
15. As foreshadowed in our response to questions 2 and 3 above, the continuous search for improvement in policing violence against women has 'largely pinned its hopes on the influence of 'better' police training'.⁶ But what is 'better'? It is already well-known and accepted that the success of police training rests on evidence-based initiatives which are supported by the expertise of the specialist family and domestic violence sector and informed by the lived experiences of victim-survivors. This is not new. Debates – seemingly endless –

⁶ Elizabeth Stanko & Katrin Hohl, 'Why training is not improving the police responses to sexual violence against women: a glimpse into the 'black box' of police training in Emma Milne, Karen Brennan, Nigel South and Jackie Turton (eds), *Women and the Criminal Justice System Failing Victims and Offenders?* (London: Palgrave Macmillan 2018) 167, 3.

about why changes to police training have not led to improvement across the board in the policing of sexual violence against women only continues to fuel the narrative that police require more training. However, instead of providing police with more training, a critical eye must first be drawn to the effectiveness of such training.⁷

16. Whilst the police force has improved its approach to sexual violence over the years, there continues to be a disconnect between the implementation of education and training and the lived experience of victim-survivors.⁸ Police training is largely sealed within the core culture of policing, imbued with lack of diversity and its control ethos. Currently, there is no ability to peel back the veil of police practices. Police training is 'largely sealed off from outside scrutiny [and] there is little transparency, educational review or accountability for what is being taught'.⁹ There is no way to see what measures are being implemented, if they are being implemented, how they are being monitored, and how their success is being measured. Without regular reviews of police training and education, there is no way to identify the areas which require improvement, nor can we determine or measure the success of such initiatives.
17. To ensure education and training within the police force can be properly evaluated and reviewed for its effectiveness, there must be greater accountability mechanisms and regular audits of sexual violence.¹⁰ It is critical that an independent body is set up to review and evaluate current police training. The proposed independent body should ensure that police training on sexual violence is developed and delivered with significant input from and co-facilitation with experts in sexual violence, cultural sensitivity, disability advocacy, LGBTIQ+ rights, and legal services.¹¹ Close as to what training is provided, to whom, by whom, for how long, how often, in what form, how is it informed by the lived-experience of victim-survivors, and how does it address victim-blaming attitudes and conscious and unconscious bias. Training must be evaluated for its effectiveness, and any future training must also be regularly evaluated for its effectiveness, with evaluation reports made public.
18. Central to improving police responses to sexual violence is ensuring that police across every Australian jurisdiction implement an annual, comprehensive audit process to assess officers compliance with a defined Sexual Violence Standard Operating Procedure (**Sexual Violence Standard**).¹² The Sexual Violence Standard should encompass best practices and protocols for handling sexual violence cases. As part of this audit process, each Police Area Command should conduct 'dip' sampling, conducted by a designated Sexual Violence Specialist Officer.¹³ These sampling exercises will provide insights into the adherence to the Sexual Violence Standard across different levels within the police force. The audit results should be published and made public, providing information on compliance levels and any notable variations or trends observed between Police Area Commands.¹⁴ In addition, reports should outline the measures to address any identifiable concerns. In NSW, this can be implemented by amending the *Victims Rights and Support Act 2013* so that the Commissioner of Victims Rights has powers to audit police sexual assault training programs.
19. Without a clear window into police training, we are unable to determine what is and is not working. Strengthening police responses to sexual violence through education and training is a significant step towards improving victim-survivors' experience with the police. We have already laid the groundwork for how training is to be developed, that is, through the lived experience of victim-survivors and underpinned by sexual violence experts and specialist legal services. However, we have failed to critically view and analyse how these educative

⁷ Ibid 2.

⁸ Ibid.

⁹ Ibid 4.

¹⁰ Women's Legal Service NSW, Submission to Department of Communities and Justice, *Response to the public consultation on the Crimes Legislation Amendment (Coercive Control) Bill 2022 (NSW)* (31 August 2022) 30.

¹¹ Ibid 9.

¹² Ibid 31.

¹³ Ibid 9.

¹⁴ Ibid 31.

measures are being implemented and monitored, if at all. We must now turn our attention to police practices and begin to 'tease out the specific elements of training that facilitate successful learning, translation into practice, and retention'.¹⁵

Recommendations

- Implement increased accountability through the implementation of an independent body to audit police sexual assault training programs. This independent body should review and evaluate the effectiveness of police education and training initiatives, with evaluation reports publicly evaluable.
- In NSW, the *Victims Rights and Support Act 2013* be amended so that the Commissioner of Victims Rights has powers to audit police sexual assault training programs.
- Require police in every Australian jurisdiction to implement an annual, comprehensive audit process to assess compliance with a defined Sexual Violence Standard. Each Police Area Command should conduct 'dip' sampling to provide insights into adherence to the Sexual Violence Standard at all levels of the police force.

5. 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?

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

20. The measures listed in the Issues Paper should be acknowledged for their efforts to alleviate the trauma complainants endure when providing evidence. Revisions to the rules of evidence and sexual assault laws have focused on rejecting gendered stereotypes, with the aim of reducing trauma. However, these procedural changes, while important, have not adequately addressed their continued use and reliance by lawyers and judges.¹⁶
21. Despite many reforms intended to improve the experience of giving evidence for complainants of sexual assault, reports of a traumatic experiences persist.¹⁷ Beneath the procedural layers of the trial process lies a reliance on rape methodology as part of the questioning process, often leading to heightened levels of distress for complainants.¹⁸ Whilst measures like closed-circuit television and closed-court sessions during testimony have been introduced, it is the *nature and style* of questioning that remains the most traumatic aspect for complainants.

¹⁵ Christopher Dowling, *Police training in responding to family, domestic and sexual violence* (Report No. 689, 18 April 2024) 14.

¹⁶ Elisabeth McDonald et al., *Rape myths as barriers to fair trial processes: comparing adult rape trials with those of the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

¹⁷ Ibid.

¹⁸ Julia Quilter, 'Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35 *Australian Feminist Law Journal* 23.

22. Research conducted by Elisabeth McDonald et al. on the use of rape myths during trials reveals that the questioning process is coded to reflect both the reliance on rape myths (such as the expectation of an immediate complaint) and the efforts by counsel to 'forestall reliance on rape myths'.¹⁹ Reliance on these outdated tropes perpetuates an underlying heuristic schema and confuses the jury after they have been directed not to take on such evidence. Persistent and badgering questions during cross-examination - such as why the complainant did not resist, scream, or disclose the offence immediately - indicate that a particular rape myth is being inferred and relied upon to bolster the defence's position. This line of questioning is profoundly traumatic for the complainant, insinuating guilt and implying that she could have prevented the assault, thus creating a sense that she is the one on trial. Such questioning by counsel reinforces rape myths that the legal system has attempted to eradicate, further distressing complainants by challenging their credibility and the accuracy of their evidence.²⁰
23. It is essential for legal practitioners to receive training on sexual assault and the importance of avoiding rape myths throughout the trial process. As Tania Boyer succinctly puts, 'if you're a good lawyer, you should be able to provide your evidence without saying mean things'.²¹ However, the reality of implementing training is burdensome. A more streamlined approach to mitigating trauma for complainants is to train judges to better object to lines of questioning that rely on rape myths. Judges play an integral role in upholding fair trial standards and protecting the well-being of complainants.²²
24. Research has found that complainants appreciate judges who are courteous and attentive, reporting that this makes them feel respected and protected.²³ Through their demeanor, communication and trial management, judges can make the trial process more humane and less intimidating for complainants. In her research, Elisabeth et al. finds that judges who greet the complainant, guide them through the trial process, and proactively attend to their needs (such as providing proactive and responsive breaks from questioning) demonstrate empathetic judicial conduct.²⁴ These were found to significantly contribute to creating a supportive environment for complainants during the trial.
25. Therefore, the success of trauma-informed mechanisms in the legal system hinges not only on their procedural availability but also on their effective implementation by legal practitioners and judges. The nature and style of questioning must prioritise sensitivity and respect for the complainant's experience and evidence.

¹⁹ Elisabeth McDonald et al., *Rape myths as barriers to fair trial processes: comparing adult rape trials with those of the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 50.

²⁰ Elisabeth McDonald et al., *Rape myths as barriers to fair trial processes: comparing adult rape trials with those of the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

²¹ Tania Boyer et al., *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) 89.

²² Elisabeth McDonald et al., *Rape myths as barriers to fair trial processes: comparing adult rape trials with those of the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

²³ Elisabeth McDonald et al., *Rape myths as barriers to fair trial processes: comparing adult rape trials with those of the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020); Tania Boyer, Sue Allison and Helen Creagh, *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) 82; Rebecca Parkes, *The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System* (DClinPsy thesis, University of Auckland, 2017) 83.

²⁴ Elisabeth McDonald et al., *Rape myths as barriers to fair trial processes: comparing adult rape trials with those of the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

Recommendations

- Train judges to effectively object to lines of questioning that rely on rape myths.
- Develop and implement educational and training materials to ensure that judges adopt practices which contribute to a more humane and less intimidating trial environment for complainants.

6. Assessment of the credibility and reliability of complaints

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?

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?

26. Jury directions alone are ineffective in countering myths and misconceptions surrounding sexual assault. Jurors' views on consent, sex, and a woman's sexuality and bodily autonomy are ingrained and formed over their lifetimes, making them resistant to change through judicial direction. Sexual assault is not understood in isolation; it is influenced by societal preconceptions about what it is *supposed* to look like and how a complainant is *supposed* to behave. These views are established long before a trial begins. During the trial, jurors interpret evidence through existing schemas, which act as a cognitive framework that helps them organise and interpret information.²⁵ Once jurors view evidence through a particular lens, it is extremely difficult for them to reinterpret it through a different one, even following a judge's direction.²⁶
27. As discussed in question 21, the nature of a sexual assault trial allows jurors' pre-held beliefs and misconceptions to filter into the trial process. Accordingly, a direction to the jury that a particular use of evidence is forbidden is likely to fail to the extent that it conflicts with a juror's commonsense reasoning.²⁷ In this sense, a direction is only as effective as a jury's views and whether it connects with their understanding.
28. Critics describe jury directions as a 'near heroic belief' which cannot 'cure negative impressions' formed about a particular piece of evidence and is 'anything other than judicial wishful thinking'.²⁸ Psycho-legal studies have found that individual jurors do not follow judicial directions to ignore inadmissible evidence.²⁹ From a psychological perspective, the direction

²⁵ Elisabeth, McDonald et al., 'Rape myths as barriers to fair trial process: comparing adult rape trials with those of the Aotearoa Sexual Violence Court Pilot' (2020) *New Zealand Law Foundation Research Reports* 5, 67.

²⁶ Ibid.

²⁷ Dorne, Boniface. 'The common Sense of Jurors vs The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials' (2005) 28(1) *UNSW Law Journal* 261, 267.

²⁸ Kamala London et al., 'The Effect of Jury Deliberations on Jurors' Propensity to Disregard Inadmissible Evidence' (2000) 85(5) *Journal of Applied Psychology* 932, 932.

²⁹ Ibid.

to ignore certain inadmissible evidence can paradoxically increase a juror's desire to attend to it, as they can recall the myth raised in the direction but not the surrounding context accurately.³⁰ Accordingly, directions can, in effect, reinforce certain rape myths by highlighting them in the first place, increasing their relevance in the minds of the jury.³¹

29. To effectively counteract rape myths, additional measures beyond jury instructions must be explored. One approach is to **challenge jurors during the jury selection process**.³² Given the prevalence of rape myths in sexual assault trials, we recommend that potential jurors be questioned on their beliefs and attitudes regarding sexual assault. For example, potential jurors could be asked if they would be less likely to convict a defendant if the complainant and the defendant were in a relationship, or whether they would be less inclined to convict if the complainant had previously consented to some other form of sexual act prior to the sexual assault.³³ This process would allow the prosecution, defence counsel and the judge to gauge a potential juror's reactions and provide an opportunity to reject jurors who may convict based on certain rape myths. This process also offers an opportunity to provide juror education to debunk these myths as they arise.
30. The following recommendations are grounded in a literature review and we support that these recommendations be explored further.
31. **Educating jurors on rape myths and explaining why they are wrong** could assist in prevention misconceptions and stereotypes from influencing the trial process. The Law Commission of New Zealand suggested distributing information packs prior to the commencement of a sexual assault trial, but ultimately gave no formal recommendation.³⁴ Whilst this is a good idea, it would have to be tailored to the factual background of the case, which would be particularly burdensome.³⁵ Education would have to be thorough and ongoing, with regular monitoring and evaluations for effectiveness. However, because education for jurors on rape myths is likely to be short and not necessarily responsive to the particularities of each case, it is unlikely to make fundamental changes to juror beliefs that are relied upon when deliberating, and thus may not successfully remedy the issue. On the other hand, longer and more thorough educational processes are likely to produce delays.³⁶
32. **Integrating experts into the jury panel** is a creative yet effective solution. Unlike jurors, experts on sexual assault are aware of misconceptions and are well placed to provide solutions to the issues of rape myths in sexual assault trials.³⁷ Experts may lack the element of community values that lay jurors bring to the deliberating process, including experts provide a balanced approach and foster a dynamic engagement with the case. For example, including an independent psychologist in the jury pool may assist in explaining the psychological trauma of all those involved.³⁸ This ensures that jurors are not passively listening to expert evidence during the trial and can engage with the experts throughout the deliberation process. Diversifying the jury panel with experts in sexual violence has the

³⁰ Andrew Wistrich et al., 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153(4) *University of Pennsylvania Law Review* 1251, 1261; Jeremy Finn, Elisabeth McDonald and Yvette Tinsley, 'Identifying and Qualifying the Decision-Maker: The Case for Specialisation' in Elisabeth McDonald and Yvette Tinsley (eds), *"Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 221 at 239.

³¹ Amelia Erin Retter, 'Thinking outside the (witness) box: Integrating experts into juries to minimize the effect of rape myths in sexual violence cases' (2018) 49(1) *Victoria University of Wellington Law Review* 157.

³² Christopher Mallios and Toolsi Meisner, 'Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias' (July 2010) *Strategies: The Prosecutors' Newsletter on Violence Against Women* 2.

³³ Ibid.

³⁴ Law Commission The Justice Response to Victims of Sexual Violence, Law Commission New Zealand *The Justice Response to Victims of Sexual Violence* 136, December 2015, 120.

³⁵ Amelia Erin Retter, 'Thinking outside the (witness) box: Integrating experts into juries to minimize the effect of rape myths in sexual violence cases' (2018) 49(1) *Victoria University of Wellington Law Review* 157.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

potential to diversify views in the jury panel and counter incorrect beliefs, ensuring that decisions are based on evidence and facts.³⁹

33. Additionally, as discussed in question 21, judge-alone trials could filter out misconceptions and rape myths from the sexual assault trial process. However, it is crucial to ensure that judges receive adequate training on sexual assault to mitigate the risk of their own prejudices affecting the trial process.

Recommendations

- During the jury selection process, question potential jurors to ascertain their beliefs and attitudes about sexual assault, allowing for the rejection of those who may convict on the basis of rape myths.
- Provide jurors with education on rape myths before the trial commences.
- Include sexual assault experts on the jury pane to ensure a diversified perspectives and counter incorrect beliefs, ensuring that decisions are based on evidence and facts.

7. Judge-alone trials

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

34. Colin Biggers & Paisley recommends the use of judge-alone trials for cases of sexual offending. While juries play an important role in the criminal justice system by potentially imbuing the trial process with community values, their prejudices and misconceptions can compromise the fairness of sexual offending trials.
35. There is a significant 'justice gap' between reports of sexual violence and convictions.⁴⁰ Despite significant reforms to sexual assault legislation, most recently on the positive model of consent, conviction rates have not improved, highlighting a disconnect between legislative intentions and societal attitudes.⁴¹ Academics suggest that juries are the 'weakest link' in prosecuting sexual offences due to their biases.⁴² While other factors, such as the legal definition of consent and 'reasonable belief', may also affect conviction rates, juror bias remains a critical barrier in sexual violence trials. As a cross-section of society, jurors hold diverse attitudes about sexual violence and sexual violence victims. Jurors' knowledge gaps are often filled with stereotypes and myths, influencing their decision-making processes. Since jurors are not required to disclose their reasoning for their verdicts, these myths and misconceptions infiltrate the deliberating process (either consciously or unconsciously) without any transparency or accountability.
36. In contrast, judges are less likely to be guided by emotion and have a strong understanding of the law and an appreciation for evidentiary rules. Their extensive legal training and experience enable them to dismiss misconceptions that might otherwise influence jurors. Judges also provide written judgments, offering transparency and allowing scrutiny of their reasoning, making errors of fact or law identifiable for appeals.

³⁹ Ibid.

⁴⁰ Joe Slater, 'Just Judge: The Jury on Trial' (2023) 60(2) *American Philosophical Quarterly* 169, 169.

⁴¹ Ibid 178.

⁴² Ibid 173.

37. This is not to suggest that jurors do not play an integral part in our criminal justice system. However, due to the nature of sexual assault offences, judge-alone trials for these cases are more appropriate. Sexual assault is a domain where 'experience, common sense and logic are informed by stereotype and myth'.⁴³ A judge-alone trial reduces the risk of rape myths and misconceptions, ensuring a fair and just trial process.

Recommendation

- Trial by judge-alone for cases of sexual offending.

8. Guilty Pleas

Question 38 Are sentencing indication hearings (or their equivalent) effective in terms of resulting in guilty pleas? Can the process be improved? Are there other ways in which guilty pleas may be encouraged?

38. Both victim-survivors and defendants feel overwhelmed and anxious when attending court. For many, court is a foreign environment, filled with pre-conceived notions about how the court process operates. A sentencing indication scheme has been implemented in NSW, and observed by Colin Biggers & Paisley through the court duty lawyer service and the court run domestic violence list days.
39. When our lawyers provide duty lawyer services in court, we frequently hear comments such as, "how can I avoid coming back?", "Is there a way to spend less time here", and "I don't agree, but I can't afford to take time off work". Whilst the court process is a pivotal point for many, it was not the priority for all. A client's focus is on work, their children or in some instances, their partner (who is often the other party in proceedings). The promise of a 25% sentencing discount for pleading guilty often leads defendants to plead guilty, even when they disagree with the facts, finding it "just easier". While guilty pleas are "encouraged", this raises concerns about whether the court processes ensure justice for both parties, especially since guilty pleas cannot be reversed once accepted by the court.
40. This problem often comes to light when the Magistrate queries whether the defendant fully agrees with the facts. If the defendant expresses disagreement, the court usually directs them to a duty lawyer or rejects their guilty plea. Two problems arise from this. First, the capacity of duty lawyers depends on community legal centres or legal aid. Legal aid has stringent criteria due to demand, and community legal centres or duty lawyers have limited capacity to take on matters on the day. This prevents defendants from understanding the plea process they are about to enter. Consequently, delay occurs as defendants wait for a lawyer to become available. Second, if the Magistrate rejects the plea, both defendant and interested parties (potentially the victim-survivor) must return to court at a later date, placing a heavy burden on all involved.
41. Another issue observed during domestic violence list days is the defendants taking legal advice from the police. Police often act as a "proxy" for victim-survivors when they are unable to attend themselves, leading defendants to feel that the police are "pushing" them in a certain direction.
42. In light of these observations, it is essential for defendants to receive independent advice, allowing for guilty pleas to be entered in an effective and efficient manner. One method could be providing educational pamphlets prepared by Legal Aid or community legal centres that are sent with the Written Notice of Pleading, or requiring defendants to read them before

⁴³ Lisa Dufraimont, 'Myth, Inference and Evidence in Sexual Assault Trials' (2019) 44(2) *Osgoode Hall Law School of York University* 316, 330.

entering court. This ensures defendants are informed and have mechanisms to ask questions, leading to a better understanding of the court process and more appropriate pleas. Additionally, ensuring that legal aid and community legal centres are adequately funded.

43. Educating the general public, particularly defendants, can help demystify the court process. Whilst it will not entirely remove the overwhelming anxiety that many experience, it can enable individuals to make a more informed decision. Simple pamphlets or posters that outline the process could be an effective mechanism for this.
44. Additionally, in circumstances where the defendant admits they committed the charge but disagree with some facts, they are often advised by lawyers and police to seek an adjournment to write representations. To make changes to the fact sheet, a defendant is required to make written representations. However, many defendants are unaware they can do this before their first court date, resulting in no plea being entered.
45. Further, representations can take up to six weeks to be considered by the police, as the relevant officer needs to consider the amended facts and is often unavailable on the day the defendant appears in court. Once again, this potentially delays the timeline for entering a guilty plea, even in circumstances when it is appropriate to do so.
46. To address this, we recommend making relevant police officers more accessible or reviewing the representation process. Additionally, informing defendants about this process because court attendance could allow them to begin the representation process earlier, leading to quicker resolutions.

Recommendations

- Educate defendants and the general public about the court process by providing pamphlets or other informational materials in the waiting areas of courtrooms.
- Improve access to the police officers to streamline the representation process, ensuring it occurs more efficiently.

9. Compensation schemes

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

47. In NSW, the primary compensation scheme available to victims of violence is the Victims Support Scheme (**NSW Scheme**) governed by the *Victims Rights and Support Act 2013* (NSW).⁴⁴ This scheme provides counselling, financial assistance and a recognition payment to victims-survivors.
48. To be eligible for any service of the NSW Scheme, applicants must provide a form of identification. One obstacle we face with many applicants, particularly those who are incarcerated or are from low socioeconomic backgrounds, is their lack of access to valid identification and the means to provide clear copies. Prisoners, for instance, typically have only their Master Index Number (**MIN**) card. Restrictions on access to scanners make it difficult for them to provide one form of identification, let alone two as is currently required for the NSW Scheme. We recommend establishing proper procedures or referral points to assist

⁴⁴ Victims Services 'Victims Support Scheme', NSW Government (Web Page) <<https://victimsservices.justice.nsw.gov.au/victims-services/how-can-we-help-you/victims-support-scheme.html>>.

applicants with the administrative requirements of the NSW Scheme, such as access to Service NSW scanners.

49. A recurring issue with our clients is the cycle of abuse. The following case study illustrates one of the NSW Scheme's shortcomings.

Case Study: Jane Smith*

- Jane was incarcerated when she came to us seeking support in applying for Victims Support.
- Jane was diagnosed with a psychological disability and was financially disadvantaged as she could not access funds whilst in prison.
- Jane before being imprisoned suffered from drug addiction. Jane was kidnapped, beaten and sexually assaulted, and took months to physically recover.
- Jane was rescued by police and the incident was subsequently reported. Jane was taken to hospital at the time.
- Jane was psychologically traumatised after the kidnapping, however, did not have access to counselling services or the support she required. Jane then entered into an relationship with a minor and was imprisoned.
- Jane was able to apply for 22 hours of counselling through Victims Services. Counselling helped Jane uncover her psychological struggles which allowed her to realise that she had unintentionally hurt someone.
- Jane was released from prison due to her established mental health issues and psychological trauma.
- We applied for a recognition payment for Jane, and she was awarded \$10,000. However, this amount was then reduced by \$10,000 due to a restitution debt.
- Unknown to us, Jane had been notified of an order for restitution. However, the order was not linked to her application for Victims Services when it began. Jane's objection to the order was unsuccessful.

**the name of our client has been changed to protect anonymity.*

50. The case study of Jane highlights the following gaps in the NSW Scheme:
- (a) access to counselling needs to occur promptly from the point of reporting, and options need to be provided when leaving the safety of a hospital; and
 - (b) there is a lack of identification mechanisms in situations where the cycle of abuse continued.
51. In Jane's case, the ongoing cycle of abuse, or "domino effect of abuse", forced her to relive her trauma. Informing Jane that she received "nothing" after going through the trauma again, despite her debt being wiped, left Jane feeling unsupported. The NSW Scheme, while providing some support, fails to address cases where the abuse continues rather than ends. It is important that compensation schemes are victim-oriented and consider the long-term impact of abuse and offer opportunities for victims to explain their situations.
52. We recommend implementing a mechanism to identify victims and perpetrators when applying for Victims Support. If a new victim is identified as a perpetrator, the applicant (whether that be a victim-survivor, counsellor or legal representative) should be notified

immediately of any restitution debt. The applicant should also be given an opportunity to appeal the restitution debt or seek an instalment payment scheme at the beginning of the process.

53. Victims who are also perpetrators require accountability and the opportunity to be heard simultaneously. To ensure that victims are fairly considered, we propose the following recommendations.

Recommendation

- Implement a system to notify applicants of any restitution debts early in the process and allow them to appeal or arrange payment plans.
- Identify victim-survivors of sexual assault who are also perpetrators at the beginning of the application for compensation through the NSW Scheme. Once identified as both a victim and a perpetrator, provide the opportunity to write submissions detailing any exceptional circumstances that may apply.
- Develop procedures to assist applicants with administrative tasks related to the NSW Scheme process, such as accessing identification and required documentation.
- Ensure access to counselling and information about the NSW Scheme is available when a sexual assault is reported. Additionally, send victim-survivors general information about the NSW Scheme six months after their initial report, in case they are unable to engage with the NSW Scheme immediately after disclosing the offence.

10. Victims' Charter

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?

54. Victim charters proactively focus on the victim-survivor and indicate that victim-survivors should be placed at the forefront of these processes. Under Part 2, Division 2 of the *Victims Rights and Support Act 2013* (NSW) (the **Victims Act**), the Charter of Victims Rights are established in NSW. The Charter is currently required to be upheld by everyone in NSW Government departments and people working in non-government agencies and private contractors, who provide services to victims of crime.
55. Generally, the Charter establishes a clear framework and rights for victim-survivors. This allows for each person dealing with victims to be held to the same level of accountability and victim-survivors know what they can expect. Unfortunately, pre-conceptions about victim-survivors persist that impact trust in and implementation of Victims' Charter. One example, as previously discussed, is the relationship between police and victim-survivors.
56. The NSW police website advises that the Charter of Victim's Rights requires the NSW Police Force when interacting with victim-survivors to:⁴⁵
- (a) comply with the Charter of Victims Rights;
 - (b) comply with the NSW Police Force Customer Service Charter;

⁴⁵ NSW Police Force, NSW Government, *Charter of Victims' Rights* (online, accessed 23 May 2024) https://www.police.nsw.gov.au/safety_and_prevention/victims_of_crime/more_information/charter_of_victims_rights

- (c) be victim focussed;
 - (d) use interpreters and support persons where necessary;
 - (e) provide victims with a victims' card.
57. We generally repeat our recommendations in sections 3 and 4 , including that there be increased accountability and audits of police sexual assault training via an independent body. Mechanisms that reinforce transparency between the police and the community will ensure that the Victims' Charter is better implemented.
58. Sections 11 and 12 of the Victims Act provide the Commissioner of Victims Rights the power to make enquiries, conduct investigations, however, the Commissioner "lacks any specific power to represent victims".⁴⁶ Kirchengast et al. proposed that whilst the powers of the Victims Act allow the Commissioner to compel evidence or conduct investigations, it could also be interpreted that the powers could allow the Commissioner in NSW to take up a victim's case, if the Commissioner decides there has been a failure to maintain a right provided under the Victim's Charter.⁴⁷ Former reforms should be considered to better specify what actions can be taken when a departure from the Victim's Charter occurs.

Recommendations

- A mechanism to be implemented that clearly identifies the steps the Commissioner can take when a departure from the Victim's Charter occurs.

⁴⁶ Tyrone Kirchengast, Mary Iliadis and Michael O'Connell, 'Development of the Office of Commissioner of Victims' rights as an appropriate response to improving the experiences of victims in the criminal justice system: integrity, access and justice for victims of crime' (2019) 45, *Monash University Law Review*, 1, 8.

⁴⁷ Ibid.

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