

Australian Law Reform Commission
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Dear Commission

Submission - Justice Responses to Sexual Violence

Thank you for the opportunity to provide a submission on the inquiry into justice responses to sexual violence.

As Commissioner for Children and Young People in Western Australia, I have a statutory responsibility under the *Commissioner for Children and Young People Act 2006 (WA)* to advocate for the views of children and young people to be heard in decision making that affects them. This role includes giving priority to Aboriginal and Torres Islander children and young people and those who are vulnerable or disadvantaged for any reason.

In undertaking these responsibilities, I must also have regard for the United Nations Convention on the Rights of the Child (UNCRC) which upholds the right of all children and young people to be protected from harm, to be safe, feel safe and be respected wherever they are, and to participate in decision making that affects them.

It is within the context of my role as an independent, statutory officer and the functions outlined above that I provide the following comments.

1. General comments

All children and young people have the right to be safe, to belong, and be heard on matters that affect them. We must increase protections and safeguards for children and young people who have experienced sexual violence and child sexual abuse, as well as adults who were children at the time they experienced sexual abuse. This must be balanced with justice responses that minimise the extent of any re-traumatisation for children and young people when seeking a justice outcome.

We must continue to embed the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), ensuring the justice system is child-safe, supportive, and accessible for victim-survivors.

In making this submission, I have chosen to respond to the specific questions arising in the issues paper that are pertinent to my role in advocating for children and young people in Western Australia.

These comments are made with regard to upholding the rights afforded to all children and young people under the UNCRC, in particular Article 3 which requires that “in all actions concerning children whether undertaken by... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration”.ⁱ

2. Reporting the experience of sexual violence safely

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?

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?

Children and young people must have safe, trusted and accessible avenues to report sexual abuse experiences and to access culturally safe and trauma-informed supports. My office was engaged by the National Office for Child Safety to develop resources to help children and young people to understand their right to speak up when they feel unsafe, unhappy or unfairly treated. The *Speak up and make a complaint* resources takes a child-focused approach to help children and young people to feel comfortable and empowered to make a complaint or raise a concern.ⁱⁱ

Children and young people must be taken seriously when disclosing their experiences. The people they choose to disclose to need to listen, understand and respond appropriately so that the child or young person gets the help, support and protection they need. Many children and young people may not ask for help until they reach crisis point, because they don't have the confidence to seek support or are too scared to ask for help.

There must be 'no wrong door' for children and young people to report their experiences. We have been told on many occasions that children and young people who go to a police station to report have been turned away because they have no evidence or there are no witnesses; often without having their statement taken. All children and young people should be referred immediately to specialist police teams experienced in working with children and young people who have disclosed sexual abuse.

Children and young people need a trusted adult or support person to confide in and guide them through the reporting process. This could be a parent, guardian, teacher, counsellor, or advocate who can provide emotional support and help navigate next steps. Adults and professionals should understand the different ways children and young people express concerns or distress such as changing behaviour or circumstances. It is important that we create environments where children and young people are comfortable about speaking up if anything is worrying them.

Children and young people need mechanisms that enable them to report concerns, seek assistance, and access support in a safe and age-appropriate manner. We need to ask children and young people about what they need to feel safe and supported to speak up. These mechanisms must be designed to accommodate their unique needs and vulnerabilities, ensuring their voices are heard and respected.

Research by Easton (2019) indicates that early disclosure is a powerful protective factor against mental distress later in life.^{iv} A helpful response to disclosure can help to re-establish trust and attachment, ensure child safety, and connect the child to additional support resources.^v Disclosure responses that may be helpful for children and young people include listening to and believing their story, promoting their safety, reporting to appropriate authorities, providing emotional support and connecting them with clinical resources.

Information and resources for children and young people must be accessible and in child-friendly language. This also includes providing children and young people with information about what constitutes an 'abuse' or an 'attack', recognising newer forms of abuse such as technological abuse and image-based abuse (e.g. the sharing of photos on social media). Clear and age-appropriate information should be provided about the reporting process, including what to expect, who will be involved, and available support services. There needs to be culturally safe ways for children and young people to report, ensuring that resources and support are available in languages other than English, and that children and young people with disability also have appropriate avenues.^{vi} Families and schools should also have access to information that clearly outlines mandatory reporting requirements and avenues to seek support for children and young people.

While other jurisdictions have already introduced a regulatory role for independent oversight of child safe organisations, WA is currently in the process of developing its proposed model. This will be an important step in implementing the recommendations of Royal Commission in Western Australia, ensuring that organisations in child related work implement policies, procedures and practices that prevent child abuse and ensure allegations are appropriately addressed in line with their core business.

In Western Australia, I have the legislative authority under the *Commissioner for Children and Young People Act 2006* (WA) to monitor the way in which a government agency investigates or otherwise deals with a complaint made by a child or young person and the outcome of the complaint. As part of this function, I also monitor the way in which agencies and organisations implement National Principle 6 of the National Standards for Child Safe Organisations, ensuring that processes to respond to complaints and concerns by children and young people are child-focused.

3. The trial process

'Special measures': procedural changes

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?

I strongly support measures that aim to minimise re-traumatisation for child sexual abuse victim-survivors. Adoption of measures to minimise the trauma of giving evidence should include consideration of the 'best interests' of the child or young person as the paramount consideration.

This should be balanced by the circumstances and wishes of the child, upholding the rights of children and young people to be heard and to participate in decisions that impact them.^{vii}

In Western Australia, the *Evidence Act 1906* (WA) provides for a child to give evidence at a special hearing, be recorded on a visual recording, and for that visual recording to be presented to the court without the affected child being present at the court proceeding (s106I(1)(b)).

No child or young person should have to face their accused perpetrator in court. It is critical that we continue to address barriers that may deter child victims from giving evidence, allowing for them to give evidence by way of video or audio recording, and for that evidence to be recorded for use in any subsequent proceedings.

Where a child or young person is giving evidence at a special evidence hearing, the environment should be tailored to their individual needs and circumstances, ensuring a safe, controlled, and accessible environment. Communication should be both age and developmentally appropriate; any questioning should be done considering the best interests of the child.

As outlined in Recommendation 61 of the Royal Commission, a child witness should be allowed to be supported when giving evidence, in both court proceedings and evidence recording hearings, through the presence of a support person, or a support animal, or by otherwise creating a more child-friendly environment.

In Western Australia, the Child Witness Services (CWS) aims to help children and young people feel more comfortable and supported when they are involved in legal processes. CWS provides videos, games, and other age-appropriate activities to engage children and young people during waiting periods. This aims to create a child-friendly environment and reduce stress or discomfort experienced by child complainants. CWS staff are trained in working with children and young people who have experienced trauma or abuse and assist with communication ensuring that children's voices are heard and their experiences are accurately conveyed.

The Children's Court of Western Australia has therapy dogs which provide support to children and young people when they are in court to provide comfort. Therapy dogs can reduce stress and anxiety for children and young people and can improve speech and memory function along with physical and mental wellbeing. Therapy dogs and other similar initiatives can be extremely beneficial for children and young people throughout the justice process.

'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? Do you have any ideas generally about the use of intermediaries in the criminal justice system?

Western Australia is currently considering introducing new provisions through the Evidence Bill 2024 Exposure Draft to provide for the use of witness intermediaries for vulnerable witnesses, including children and young people, in criminal proceedings.

It is imperative that we continue to work towards embedding the recommendations of the Royal Commission, including those that introduce witness intermediary schemes to support vulnerable witnesses in child sexual abuse proceedings.^{viii}

Witness intermediaries play a crucial role in supporting children and young people when they are required to provide evidence or testify in legal proceedings. I consider that the inclusion of this new scheme recognises the need for special measures to ensure that the legal system considers the best interests of the child and facilitates their right to be heard when giving evidence as a witness.

In my submission to the Department of Justice on the current draft of the Evidence Bill 2024 Exposure Draft, I outlined the importance for witness intermediary schemes to provide a clear framework to effectively guide courts, practitioners, and vulnerable witnesses. My recommendations were to:

- Appoint an entity responsible for establishing the witness intermediary service.
- Prescribe mandatory criterion for appointment of a witness intermediary.
- Extend the requirement for assessment of need for witness intermediary to include all children in criminal or civil proceedings.
- Make provision to allow courts to appoint an intermediary of its own initiative or on application of a party or the witness.
- Require courts to make express consideration for the views and best interests of the child when deciding whether to dispense with the services of a witness intermediary.

It is vital that in circumstances where a court is contemplating dispensing with the services of a witness intermediary, the best interests of the child and the child's own views are heard and taken into consideration. The age and developmental capacity of the child to make decisions in their best interest are relevant to this consideration.

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 whether prosecutors should call expert evidence about that research?

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?

Children and young people who have experienced child sexual abuse often experience significant challenges throughout their lifetime. Studies indicate that trauma and the stress from trauma can trigger a prolonged stress response, impacting the development and function of the growing brain.^{ix} Children and young people who have experienced childhood trauma or child sexual abuse are often hypervigilant and struggle to regulate their emotions. Ninety percent of people seeking support from public mental health services have experienced sexual, physical or psychological trauma.^x

It is critical to understand that concerning sexualised behaviour in children and young people is merely the ‘tip of the iceberg’, hiding deeper underlying emotions.^{xi}

The research report, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainant’s Evidence* (the Report), outlines the importance of understanding how memory might be affected for child and adult complainants of child sexual abuse.^{xii} This is particularly critical to inform how police should interview child and young people when reporting sexual abuse, and in having an understanding about what children and young people can be expected to remember about their experiences of sexual abuse.

Research by Goldfarb et al (2023) found that “many adults and children beyond toddlerhood retain fragments and sometimes more detailed memory of highly negative, emotional childhood events, even years later. At least for older children and adults, central information is more likely to be retained over time than peripheral detail, especially if the event is negative and stressful”.^{xiii} Memories about core events are more stable than memory for minor details or changeable details of recurring experiences. These are often the areas where misconceptions and concerns about memory performance arise for police, legal practitioners and courts when interviewing victims of child sexual abuse.^{xiv}

We need ongoing research on the most effective measures to educate police, legal practitioners, judges, and juries about memory in cases of child sexual abuse. At a minimum, they should receive specialised training on memory to address misconceptions about memory performance and responsive behaviour of victims of child sexual abuse. As some adults may only disclose experiences of child sexual abuse later in life, it is critical that police understand how this may impact their ability to recall their experiences.

Jurors need guidance on children and young people’s behaviour, memory and reliability to assist them in their decisions in child sexual abuse cases.^{xv} As the Report outlines, provisions of the Australian Uniform Evidence Law that allow experts to introduce general and case-specific evidence about a child witness’s memory or other development have rarely been invoked in cases of child sexual abuse. Similarly, provisions to allow experts to give evidence on the development and behaviour of children generally or who have been victims of sexual abuse have also been underused.^{xvi} Education around the importance and utilisation of these provisions in cases of child sexual abuse must be prioritised.

Research has found that where interviewing strategies and procedures are sub-optimal, the victim’s ability to provide a reliable memory may be compromised.^{xvii} Emotional distress, shame and fear experienced during interviews or court proceedings can overwhelm child witnesses, hindering memory retrieval.^{xviii} Even children with mild or moderate intellectual disabilities can provide accurate accounts of events when asked appropriate questions. To address these challenges, supporting child witnesses with a child communicator or intermediary who communicates effectively with children can ensure age-appropriate questioning and enhance witness support.^{xix} Interviewing techniques for children and young people should prioritise rapport-based support, age-appropriate questioning, and accommodate individual needs.

Supporting effective communication upholds the rights of children and young people to have choice and control and make decisions about their own lives.

Specialisation and training of judges and counsel

Question 33: Do you support specialised training for judges who conduct sexual offence cases? What issues should that training address?

Judges should receive specialised training on child development, trauma-informed approaches, and cultural safety, as well as additional training regarding sexual offence cases.

Knowledge of child development enables judges to adopt child-centred approaches in legal proceedings, considering the best interests of the child and ensuring that legal decisions prioritise their wellbeing and developmental needs. This allows judges to recognise how experiences, such as trauma, sexual violence, abuse, or neglect, can impact a child or young person's behaviour, emotions, and cognitive abilities. This is particularly important when dealing with a child or young person who has engaged in harmful sexual behaviours or sexual violence against another child.

Judges who understand child development, and how trauma can impact children and young people, are better equipped to make informed decisions that are sensitive to the unique needs and vulnerabilities of children and young people.

4. Civil proceedings and other justice responses

Restorative justice

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

Restorative justice processes for children and young people who have experienced sexual abuse must focus on providing a supportive and healing approach to addressing harm. For victim-survivors, restorative justice can be an empowering process within a framework that prioritises the wellbeing and safety of the victim.

It is important that children and young people who are victim-survivors provide informed consent to participation in restorative justice processes and are supported by trained professionals during the process, to discuss expectations and ensure they feel safe and supported.

We need to recognise that children and young people can both experience or exhibit harmful sexual behaviours and sexual violence. Research indicates that at least one-third of child sexual abuse is perpetrated by other children and young people, often against a younger child.^{xx} Children and young people who display these types of behaviours have often experienced trauma, multiple types of harm or cumulative harm to their development. However, research also tells us that many children and young people are likely to grow out of offending.^{xxi}

Restorative justice approaches must balance the rights of the victim with the child or young people who had engaged in the harmful sexual behaviour. The child or young person's age, level of maturity, and 'best interests of the child' must be taken into consideration while balancing this with the rights of the victim and the public interest.^{xxii}

Traditional punitive approaches often lead to stigmatisation and isolation for children and young people who exhibit harmful sexual behaviours towards others. While the criminal justice system may be an appropriate avenue for managing adults who have sexually offended, there is considerable evidence to suggest that it is not the right response for children and young people who engage in harmful sexual behaviours.^{xxiii}

Children and young people who exhibit harmful sexual behaviours or have engaged in sexual violence need developmentally appropriate therapeutic and specialist services that are distinct from adult perpetrators. Restorative justice alternatives can be a more inclusive approach that prioritises the wellbeing and rights of all parties involved.^{xxiv} Changing how we perceive harmful sexual behaviours is critical; given the evidence that brain development continues into early adulthood.

Restorative justice processes may provide offenders with an opportunity to understand the impact of their actions on the victim, to take responsibility for their actions, understand the harm caused, and express genuine remorse. It can be a supportive environment for children and young people to access rehabilitation, counselling, therapy, or support programs tailored to their needs.

A restorative justice approach requires skilled facilitators, child psychology, social work, and youth justice working collaboratively in order to improve outcomes for victims and children and young people who engage in harmful sexual behaviours.^{xxv} We also need to prioritise research into the effects of restorative justice for children and young people who are victims of sexual violence, as well as for children and young people who are perpetrators of sexual violence or harmful sexual behaviours.

Thank you for the opportunity to contribute to the inquiry into justice responses to sexual violence. For further information about the matters discussed in this submission, please contact Dawn Fitzgerald on 08 6213 2205.

Your sincerely,



Jacqueline McGowan-Jones
Commissioner

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- ⁱ United Nations Convention on the Rights of the Child (1989), article 3.
- ⁱⁱ NOCS (National Office for Child Safety) (2019) [‘Speak up and make a complaint’](#), NOCS, accessed 20 May 2024.
- ^{iv} S Easton (2019) ‘Childhood Disclosure of Sexual Abuse and Mental Health Outcomes in Adulthood: Assessing Merits of Early Disclosure and Discussion’, *Child Abuse Negl.* 93: 208-214.
- ^v S Easton (2019) ‘Childhood Disclosure of Sexual Abuse and Mental Health Outcomes in Adulthood: Assessing Merits of Early Disclosure and Discussion’, *Child Abuse Negl.* 93: 208-214.
- ^{vi} Disability Royal Commission,
- ^{vii} United Nations Convention on the Rights of the Child (1989), article 4.
- ^{viii} Royal Commission into Institutional Child Sexual Abuse, Recommendation 59.
- ^{ix} Blue Knot Foundation (2024) [‘Impacts’](#), Blue Knot Foundation, accessed 24 May 2024.
- ^x Blue Knot Foundation (2024) [‘Impacts’](#), Blue Knot Foundation, accessed 24 May 2024.
- ^{xi} Blue Knot Foundation (2024) [‘Impacts’](#), Blue Knot Foundation, accessed 24 May 2024.
- ^{xii} J Goodman-Delahunty, M Nolan and E Van Gijn-Grosvenor (2017) [‘Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence’](#), accessed 20 May 2024.
- ^{xiii} D Goldfarb, GS Goodman, Y Wang, RP Fisher, D Vidales, LC Gonzales, Y Wu, D Hartman, J Qin and ML Eisen (2023) ‘Adults’ Memory for a Maltreatment-Related Childhood Experience: Interview Protocols’, *Clinical Psychological Science.* 11(1): 164-182.
- ^{xiv} J Goodman-Delahunty, M Nolan and E Van Gijn-Grosvenor (2017) [‘Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence’](#), accessed 20 May 2024.
- ^{xv} Royal Commission p.
- ^{xvi} J Goodman-Delahunty, M Nolan and E Van Gijn-Grosvenor (2017) [‘Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence’](#), accessed 20 May 2024.
- ^{xvii} J Goodman-Delahunty, M Nolan and E Van Gijn-Grosvenor (2017) [‘Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence’](#), accessed 20 May 2024.
- ^{xviii} J Goodman-Delahunty, M Nolan and E Van Gijn-Grosvenor (2017) [‘Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence’](#), accessed 20 May 2024.
- ^{xix} J Goodman-Delahunty, M Nolan and E Van Gijn-Grosvenor (2017) [‘Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence’](#), accessed 20 May 2024.
- ^{xx} Blue Knot Foundation (2024) [‘Impacts’](#), Blue Knot Foundation, accessed 24 May 2024.
- ^{xxi} Blue Knot Foundation (2024) [‘Impacts’](#), Blue Knot Foundation, accessed 24 May 2024.
- ^{xxii} D Haslam, B Mathews, R Pacella, JG Scott, D Finkelhor, DJ Higgins, F Meinck, HE Erskine, HJ Thomas, D Lawrence, E Malacova (2023) [‘The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report’](#) Australian Child Maltreatment Study, Queensland University of Technology, accessed 22 May 2024.
- ^{xxiii} Australia & New Zealand School of Government, [‘10 Pillars of Youth Justice’](#), 2020, accessed 20 May 2024.
- ^{xxiv} L Armstrong (2018) [‘Is Restorative Justice an Effective Approach in Responding to Children and Young People Who Sexually Harm?’](#), *Laws* 10: 86. Accessed 22 May 2024.
- ^{xxv} R Sterling (2015) ‘Juvenile Sex Offender Registration: An Impermissible Life Sentence?’, *University of Chicago Law Review* 82: 295–315. Accessed 22 May 2024.
- ^{xxvi} L Armstrong (2018) [‘Is Restorative Justice an Effective Approach in Responding to Children and Young People Who Sexually Harm?’](#), *Laws* 10: 86. Accessed 22 May 2024.
- ^{xxvii} L Armstrong (2018) [‘Is Restorative Justice an Effective Approach in Responding to Children and Young People Who Sexually Harm?’](#), *Laws* 10: 86. Accessed 22 May 2024.

