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Dear Australian Law Reform Commission Members,

Australian Law Reform Commission Submission: Justice Responses to Sexual Violence

Introduction

I am pleased to provide this Submission to the Australian Law Reform Commission on 'Justice Responses to Sexual Violence'. This submission addresses the questions:

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

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

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

In particular, I will be focussing on the issue of independent legal assistance and representation to the victim-survivor of a sexual offence, and the importance of providing victim-survivors with trauma-informed and culturally safe legal assistance.

I am a comparative criminal law academic in the Faculty of Law, Monash University, and I research, publish, and teach in the area of criminal law and procedure with specific expertise on gendered-based violence, sentencing and the lack of legal representation in criminal matters.

Victim Rights in Australia

In Australia, much like other common law countries, criminal trial proceedings are adversarial in nature. This means that, typically, a criminal trial is a ‘contest’ between the prosecution, which represents the state, and the accused, who is typically advised and represented by a defence lawyer.¹ The victim-survivor is not a party to this proceeding; they are a prosecution witness.

Although the complaint of a victim-survivor often ‘triggers’ a criminal investigation, in practical terms, victim-survivors do not have the authority to decide whether police in fact charge the alleged offender with a criminal offence, or whether prosecuting agencies proceed to trial. The decision to charge an accused - and to subsequently proceed to prosecution – is independent of the victim-survivor but has impactful consequences for them. For example, if the prosecution is discontinued, victim-survivors may be without any possibility of redress. Equally, if the prosecution proceeds against the victim-survivor’s wishes, it is made clear that the victim-survivor’s personal interests are secondary to the public interest of the state in prosecuting and punishing criminal activity.

In Australia, the victim-survivor’s participation is therefore important but limited. A victim-survivor’s views may contribute to prosecutorial decisions. For example, as a matter of policy, the Office of Public Prosecutions in Victoria is required to consult with the victim-survivor about any decisions that: substantially modify charges; result in a discontinuance with all or some of the charges; result in an acceptance of a plea to the charges.² Although the victim-survivor is to be consulted, it should be emphasised that this does not mean that their views will in fact determine the outcome.

¹ There may be of course circumstances where a person is not represented, because they are either unrepresented or elect to self-represent.

² Director of Public Prosecutions Victoria, Director’s Policy: Victims and Persons Adversely Affected by Crime (11 August 2015) [25]; Director’s Policy: Prosecutorial Discretion (24 November 2014) [12]; Director’s Policy: Resolution (24 November 2014) [7].

Further, the adversarial trial process in the criminal justice system places significant emphasis on cross-examination to determine if a witness is unreliable or dishonest. This process, in particular, has been identified as a source of terror and trauma for many victim-survivors.³ Sexual assault victim-survivors are particularly vulnerable to trauma when testifying in court. The need to recount intimate and often distressing details in a public setting, with the accused present, can be deeply traumatising. Research by Raitt (2010) and the Australian Law Reform Commission (2010) highlights the specific challenges faced by sexual assault victims in court proceedings.

On the other hand, in some jurisdictions victim-survivors are afforded certain rights that are enshrined in legislation. For example, in Victoria, under the *Victims' Charter Act 2006* (Vic) certain principles are to be upheld by investigatory agencies, prosecuting agencies and victims' services agencies. These include principles such as the victim's right to be treated with 'courtesy, respect and dignity';⁴ the right of a victim to be provided with relevant information by investigatory, prosecuting and victims' services agencies including information about the victims' entitlements and a victim's entitlement to their privacy.⁵

Independent Legal Representation for Victim-Survivors of Sexual Offences

Without independent legal representation, a victim-survivor is seriously inhibited from effectively participating in the legal system, and their rights are not adequately protected or exercised. For example, a victim-survivor may require advice about their avenues of redress, the intersectionality of civil and criminal proceedings, and how to object to the introduction of confidential communications or evidence of sexual history. In addition, providing evidence in court as a sexual assault victim-survivor can be an incredibly traumatic experience, often compounded by feelings of vulnerability and fear. The presence of legal

³ Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2001) 16; Kerstin Braun, 'Legal Representations for Sexual Assault Victims – Possibilities for Law Reform?' (2013-2014) 25(3) *Current Issues in Criminal Justice* 819, 821.

⁴ *Victims' Charter Act 2006* (Vic), s 6(1).

⁵ *Victims' Charter Act 2006* (Vic), s 14.

representation during this process has the potential to mitigate this trauma by providing victim-survivors with support and increasing their confidence levels.⁶

Finally, with the proliferation of technology there is likely to be a significant increase in requests for digital and third-party disclosures which can intensify victim-survivor scrutiny. [ref?] For example, in the United Kingdom ‘victim-survivors who report to the police are asked to sign a consent form that enables prosecutors and defence barristers to access sensitive and private personal information, such as mobile phones and mental health records. Research indicates that many victim-survivors do not fully understand the form they are signing, not realising they are allowing access to their records and mobile phone data.’⁷ Legal advice and representation can reduce ‘needless scrutiny of victim-survivors’ personal lives.’⁸

Although there may be concerns that an adversarial system cannot accommodate a victim-survivor’s legal representative, ‘some have argued that legal representation for (sexual assault) victims within clearly defined and limited parameters would not necessarily infringe upon the rights of the accused.’⁹ In this regard a limited right to representation has been provided for in a number of Australian jurisdictions. For example, in NSW a state funded

⁶ Kerstin Braun, ‘Legal Representations for Sexual Assault Victims – Possibilities for Law Reform?’ (2013-2014) 25(3) *Current Issues in Criminal Justice* 819, 822.

⁷ Olivia Clarke, Tina Skinner, and Olivia Smith, ‘Independent Legal Representation is a Necessity for Victim-Survivors’ (28 June 2021) <https://blogs.bath.ac.uk/iprblog/2021/06/28/independent-legal-representation-is-a-necessity-for-victim-survivors/>.

⁸ Olivia Clarke, Tina Skinner, and Olivia Smith, ‘Independent Legal Representation is a Necessity for Victim-Survivors’ (28 June 2021) <https://blogs.bath.ac.uk/iprblog/2021/06/28/independent-legal-representation-is-a-necessity-for-victim-survivors/>.

⁹ Kerstin Braun, ‘Legal Representations for Sexual Assault Victims – Possibilities for Law Reform?’ (2013-2014) 25(3) *Current Issues in Criminal Justice* 819, 820. Also see Tyrone Kirchengast (2011) ‘The Integration of Victim Lawyers into the Adversarial Criminal Trial’ in Murray Lee M, Gail Mason and Sanja Milivojeic (eds), *Proceedings of the Annual Australian and New Zealand Critical Criminology Conference*, Sydney Institute of Criminology, Sydney Law School, University of Sydney, 1-2 July 2010, 5.

legal representation scheme exists for victim-survivors of rape but only in relation to objection or restriction of disclosing protected sexual assault notes.¹⁰

However, it is suggested that independent legal advice and representation ought to be provided to the victim-survivor from the initial point at which the criminal proceeding is initiated; that is, when they make a complaint to police through to the completion of the legal process, including appeals. Arguments that such an expansion of the rights of the victim-survivor is not compatible in an adversarial system is incorrect. It does not create rights, but rather provides the victim-survivor with the advice necessary to effectively exercise rights already afforded to them.

A number of cognate common law jurisdictions have introduced independent legal advice for victim-survivors of sexual offences, and these jurisdictions may provide a model as to how such an approach may be implemented across Australia. For example, in Canada in addition to the provision of independent legal representation for victim-survivors of sexual offences, an expanded Independent Legal Assistance for Survivors of Sexual Violence (ILA) program exists which provides free legal advice to victim-survivors of sexual violence. It is administered at the provincial level and each victim-survivor is provided with a set number of hours of legal advice, and in some cases attendance at legal clinics. Both the independent legal representation and independent legal advice is intended to be trauma-informed, with providers trained to 'take a trauma-informed approach, which is to say that they understand how trauma can affect a person and work to make sure the person feels safe and is not re-traumatised.'¹¹ In Ireland, legal advice is available for victim-survivors of sexual offences and solicitors have been allowed to sit in court to monitor cross-examination and indicate to the

¹⁰ *Criminal Procedure Act 1986* (NSW) s 299A; Kerstin Braun, 'Public Submission to the Victorian Law Reform Commission: Improving the Response of the Justice System to Sexual Offences: Issues Papers A – H' 7 December 2020 https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Sub_2_Braun_final.pdf, 3.

¹¹ *Independent Legal Advice for Survivors of Sexual Assault*, <https://www.policivictimservices.bc.ca/2023/11/02/independent-legal-advice-for-survivors-of-sexual-assault/#:~:text=With%20funding%20from%20the%20Government,to%20survivors%20of%20sexual%20assault.>

prosecution when they wish to intervene.¹² A limited right to representation exists for objecting or restricting an accused's application to adduce evidence relating to the complainant's prior sexual history.

Recommendations

I recommend that victim-survivors of sexual offences ought to have a right to independent legal advice and representation and that the provision of these services ought not be means tested.

The introduction of independent legal representation and advice for all victim-survivors of sexual offences needs to be complemented by appropriate training of legal professionals in the provision of trauma informed and culturally safe legal assistance.

This should, of course, form part of a broader reform to the adversarial proceedings themselves which should move towards a specialist and trauma informed process that responds appropriately before victim-survivors experience additional harm.

Conclusion

Thank you for considering my submission. I am happy to provide further information on any of these, or associated issues.

Yours Sincerely,



¹² Rape Crisis Scotland, Beyond ILR: The Case for Independent Legal Advice for all Survivors of Sexual Violence (2022) 3, https://www.rapecrisisscotland.org.uk/resources/1666867844_Beyond-Independent-Legal-Representation.pdf; *Advice for complainants in rape and certain sexual assault case*, Legal Aid Board, <https://www.legalaidboard.ie/en/our-services/legal-aid-services/common-legal-problems/rape-and-sexual-assault/>.