DIRECTOR OF PUBLIC PROSECUTIONS
NORTHERN TERRITORY

Director – Lloyd Babb SC

27 May 2024

The Honourable Justice Mordecai Bromberg
President
Australian Law Reform Commission
PO Box 12953
George Street Post Shop
BRISBANE QLD 4003

By email: [redacted]

Dear Justice Bromberg

RE: INQUIRY INTO JUSTICE RESPONSES TO SEXUAL VIOLENCE

Thank you for the opportunity to comment on the Australian Law Reform Committee (**ALRC**) Justice Responses to Sexual Violence Issues Paper (**the Issues Paper**).

Sexual offences represent a significant proportion of the trial work undertaken by the Northern Territory Director of Public Prosecutions (**NT DPP**). In the last five years (1 July 2019 to 30 April 2024), the NT DPP has prosecuted over 400 sexual assault matters. Of these matters, approximately 280 were resolved by way of guilty plea and 128 proceeded to trial, with 53 verdicts of guilty and 39 verdicts of not guilty.

My Office works closely with the victims of these offences and is committed to the delivery of justice within a trauma-informed framework. The NT DPP plays an important role in ensuring that perpetrators of sexual violence are brought to justice and that vulnerable members of society, namely women and children, are protected.

The NT DPP commends the ALRC for its ongoing work in this space. My Office has been an active participant in policy and law reform discussions in this area at both the Territory and National level and looks forward to future collaboration to deliver better justice outcomes for Territorians and the broader Australian community.

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Our responses to the questions posed in the Issues Paper are attached for your consideration.

Yours sincerely

LLOYD BABB SC

Justice Responses to Sexual Violence

Submission by the Director of Public Prosecution (Northern Territory)

1. Police responses to reports of sexual violence

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

1.1 In the NT, the DPP prosecutes all offences on indictment (Crown matters). In Darwin, the DPP also prosecutes all summary offences and indictable offences being determined summarily. However, in Katherine, Alice Springs, Tennant Creek and bush courts (remote circuit courts) summary offences and indictable offences being determined summarily are prosecuted by Police.

1.2 The EAG's suggestion that police can be 'gatekeepers' to the justice system is not an inaccurate one. Police may receive a report of sexual violence, but determine that there is insufficient evidence to proceed.

1.3 There can be inconsistency in Police responses to reports of sexual violence. Whilst there are specialist police trained in interviewing complainants and child complainants of sexual violence, it is not always possible for these officers to conduct the interview. Police approaches must not only be trauma-informed and culturally appropriate but also rooted in contemporary understandings of the nature and prevalence of sexual violence as well as the rules of evidence. Consistent training in this regard is an ongoing issue due to resourcing and high turnover of police officers. Nevertheless, comprehensive and high-quality training for all police officers, including general duties members and particularly those who are acting as Remote Sergeants in bush settings, must be a priority. The rates of sexual violence, certainly in the NT, demand it. Training in how to respond to reports of sexual violence should be delivered at the outset of a police officer's career with regular refreshers thereafter.

2. Prosecution responses

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

Specialised sexual offence prosecutors

2.1 Serious sexual offences are only prosecuted by more senior prosecutors (typically at an SP2 level or above). The NT DPP does not otherwise have designated specialised sexual assault prosecutors.

Engagement with Victims through the Witness Assistance Service

2.2 Early and ongoing engagement with victims is strongly encouraged as best practice among prosecutors in the DPP. To this end, prosecutors are supported by Witness Assistance Service (WAS) Officers. Once allocated to a case, WAS Officers make contact with the victim and keep them informed as to the progress of the case. WAS officers provide the following support:

- assisting victims and witnesses to understand the court and legal process;
- showing victims and witnesses the court facilities before they are required to give evidence;

- supporting victims and witnesses during proofing sessions with the prosecutor, when giving evidence in court and while waiting to give their evidence;
- informing prosecutors, police or court staff of any special needs of the victim or witness, including whether consideration should be given to the witness being deemed a Vulnerable Witness;
- referring victims to counselling or other on-going support services as appropriate;
- providing victims with information and referral on how to apply for financial assistance available under the *Crimes (Victims Assistance) Act* or through Victims of Crime NT;
- booking interpreters;
- assisting victims with the preparation of Victim Impact Statements;
- continuing contact with victims where the offender is the subject of a supervision order (custodial or non-custodial) following a finding of not guilty by reason of mental impairment or lack of fitness to plead;
- assisting victims to have input into Parole hearings and any special conditions for release of the offender that may relate to the victim.[1]

2.3 WAS is an integral part of the NT DPP. WAS officers provide constant assistance and support to both prosecutors and victims. They often go above and beyond their stated job descriptions – locating witnesses in communities, working weekends to settle witnesses into hotels or pick them up from the airport (particularly where the witness has limited command of English), ensuring they are able to access meals while travelling for court and taking phone calls at all hours.

2.4 Given the DPP's large volume of cases, it is not possible for a WAS officer to be allocated to every case. However, victims of sexual offences including children and domestic violence victims are always given priority where possible. The NT DPP has also recently expanded the WAS program allowing WAS officers to be allocated to both Crown and Summary matters.

2.5 There is not a specialised child witness service.

2.6 In determining whether a matter should be discontinued or proceed on lesser charges, prosecutors are required (by internal policy) to seek the views of the victim and, in the case of junior prosecutors, seek approval from a senior prosecutor. In cases where the views of the victim cannot be accommodated, prosecutors, with the support of WAS officers, are directed to engage with the victim and provide the reasons for the decision. If victims wish to make a complaint, they are able to do so via letter to the Director.

Victims of Crime NT

2.7 Once a trial is over, if the accused is sentenced to a term of imprisonment, victims of sexual violence are able to register for the NT Victims Register, which is operated from within the Crime Victims Services Unit (CVSU). The aim of the Victims Register is 'to allow victims of crime to be informed of the progress of the offender through the correctional system and to provide those victims with certainty and comfort and ensure they were not caught unaware of an offender's release from prison or detention.'[2]

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1 Director of Public Prosecutions, *Witness Assistance Service: About Us*, <https://dpp.nt.gov.au/witness-assistance-service/about-us>.

2 Explanatory Statement, *Victims of Crime Rights and Services Bill 2006* (NT), 1.

2.8 The Victims Register is established and regulated under the *Victims of Crime Rights and Services Act 2006* (**VCRS Act**). Under the VCRS Act, the CVSU is required to provide a registered person (the victim) with the following information in relation to a relevant offender:

- the earliest possible date of release on parole and any changes to the date;
- the date when the Parole Board is to consider release on parole;
- the actual date of release on parole;
- the conditions of a parole order that are relevant to the registered person or relevant offence;
- the revocation or cancellation of a parole order;
- transfer to another prison or detention centre interstate or overseas;
- escape from the custody of the appropriate authority and any recapture;
- the date of release from a custodial correctional facility or detention centre under a suspended sentence order;
- the conditions of a suspended sentence order;
- the variation, revocation, cancellation or discharge of a suspended sentence order;
- the date of release from a custodial correctional facility under an administrative home detention permit;
- the conditions of an administrative home detention permit;
- the variation, revocation, cancellation or discharge of an administrative home detention order;
- the actual date of discharge from a custodial correctional facility or detention centre, unless the offender is discharged from the sentence at the end of a period of release under a parole order, suspended sentence order or supervision order;
- any other sentence or order that affects the earliest possible date of release, period of imprisonment or period of a suspended sentence order or supervision order;
- if known – the locality where the offender will reside while subject to a suspended sentence order, parole order, supervision order or administrative home detention permit or after discharge from the sentence;
- the death of the offender;
- any further information specified by regulation.[3]

2.9 Victims may opt out from these updates at any time.

Question 10 – Do you have ideas for improving ODPP response to prosecution of sexual violence?

2.10 Communication with complainants is a challenge in the Northern Territory in the prosecution of all criminal offences. The challenge is particularly pronounced where complainants live in remote communities. Often, the expenditure of significant police and community resources is required to even locate the complainant, let alone arrange a virtual meeting in the presence of an interpreter. For that reason, it is often the case that complainants are not able to be contacted more than once or twice through the court process.

2.11 Part of the issue is that the NT DPP does not have offices outside of Darwin, Katherine and Alice Springs. Where a complainant is in a remote community we are reliant on the assistance of external agencies with a physical presence in the community to assist with communications. In a lot of cases that is the NT Police,

[3] *Victims of Crime Rights and Services Act 2006*, section 22(1).

though remote police have a number of competing priorities and regularly cannot assist in a timely manner. In other communities where NT Police do not have a permanent presence, we are reliant on the community's clinic or councils to assist.

2.12 An improvement in victim related services in remote communities would be of great assistance. Those services could work with the NT DPP and WAS to provide support through the court process but also provide other related services to complainants, such as counselling. It may also be useful to fund service agreements between the NT DPP and some of the agencies, to formalise relationships.

2.13 Providing greater resourcing to the criminal justice system more broadly would also have the effect of expediting the hearing of sexual prosecutions in a meaningful way. Since 2004, the NT has had statutory time limits for sexual offence prosecutions (section 3A of the *Sexual Offences (Evidence and Procedure) Act 1983*). While those provisions exist, they are not able to be enforced in practice. For example, a lack of resourcing in the forensic sciences branch of the NT Police mean that forensic statements (particularly from biology) are unable to be completed within the 3 month committal period. Shortages of prison staff and defence lawyers also mean that even when prosecution briefs are complete, defence instructions are not able to be taken in a timely manner. The practical result is that the Local Court are obliged to continue to extent the statutory time limits to ensure fairness to the accused. It is not uncommon to have sexual assault prosecutions in the Local Court for 6 to 12 months before committal.

3. 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?

Legislative measures

3.1 There are a number of measures available to victims of sexual violence in the NT Local and Supreme Courts. Section 21AB of the *Evidence Act 1939* (NT) defines an "alleged victim of a sexual offence to which the proceedings relate" as a vulnerable witness.

3.2 Vulnerable witnesses in sexual offence proceedings are able to give their evidence-in-chief via a recorded statement and can have their evidence taken at a special sitting unless the Court determines there is good reason for not doing so.[4]

3.3 Complainants are also able to give their evidence from a vulnerable witness room via audio-visual link or in court with the use of a screen or partition between them and the accused.[5] Complainants are entitled to have a support person with them while giving evidence including a WAS officer, a friend, family member or 'any other person requested by the vulnerable witness and whom the court considers is in the circumstances appropriate.'[6]

3.4 While there are legislative mechanisms in place, their availability differs between the various NT courts. The Supreme Court is fully equipped to run trials in accordance

4 *Evidence Act 1939*, section 21B.
5 Ibid section 21A.
6 Ibid sub-section 21A(2AD)(a).

with those special procedures. The Darwin, Katherine and Alice Springs Local Courts are largely equipped to comply with the special procedures. The NT bush courts are, by and large, not able to accommodate most of the special procedures. The Courts are often convened in council offices and rarely have screen partitions available (or if they do, it is in the nature of a white board and largely ineffective). Evidence can be taken by Microsoft Teams from police stations, but again, that is not always an option if the internet or technology is not working or if there are no police officers at the station to facilitate it.

Trauma-informed design

3.5 It is worth noting the emerging research on trauma-informed architecture and interior design. Many courts, including the NT courts, were constructed at a time when the concept of 'trauma-informed' was unheard of. Some principles employed in trauma-informed design include:

- spatial layout – spaces with clear sightlines and few barriers – creates a sense of safety and calmness;
- visual interest with detail but not overcrowding – an appropriate quantity of objects, symmetry and regularity in their arrangement alleviates stress and promotes well-being;
- use of cool, calming colours and avoidance of deeply hued warm colours which may arouse negative emotions;
- durable furniture that is easy to clean;
- natural light – makes a room appear less crowded – lower levels of illumination mitigate perceived crowding and the resulting stress and discomfort;
- plants – plants perform an important biophilic function by connecting occupants to the natural world – this has been found to reduce stress and pain, and to improve mood.[7]

3.6 The structural layout of NT Courts makes it difficult to eliminate the risk of a victim coming face to face with the accused if the accused is on bail or the family and/or friends of the accused. That is the case even in the Darwin Supreme Court, where a number of court rooms require in-custody accused to be brought through the body of the court, rather than through internal passages.

3.7 That issue is even more pronounced in bush or circuit courts in remote areas. The nature of the court list often means there are a large number of people who have an interest in the daily court proceedings – either as defendants or witnesses or family. The pressure on complainants who are outside the courts waiting to give their evidence in the company of the rest of the community is enormous. It is often the case in bush courts that complainants who attend for court leave before their matter is ready to be dealt with.

3.8 The need for a secure area for vulnerable witnesses was front of mind when the Alice Springs Courthouse was refurbished in 2019. The two-storey concrete brutalist

[7] Neha Gill, 'The Importance of Trauma-Informed Design', *Forbes,* (Web Article, 9 December 2019) <https://www.forbes.com/sites/forbesnonprofitcouncil/2019/12/09/the-importance-of-trauma-informed-design/?sh=316ec2cb6785>.

1970s building was converted from an imposing, introverted facility with limited space and options for waiting, into an open light-filled place connected to the street and the community. The design created a separate discreet entrance for vulnerable witnesses, secure waiting areas with natural light, trauma-informed rooms in which to give evidence via video, and one specialised courtroom for domestic violence proceedings. The waiting area for vulnerable witnesses has direct access to the video conferencing room and to the witness stand in the domestic violence court. The design philosophy was based on a community-justice centre model where client support services are visible and easily available. The design won the 2021 NT Architecture Award for Public Architecture.[8]

Prosecutorial bias and proofing

3.9 There is also a level of prosecutorial bias which influences the way in which victims give evidence. Some prosecutors believe that a victim's evidence is more favourable or compelling when given from the court room. This is because the victim is in closer proximity to the jury and the jury is able to observe the victim's demeanour more closely in determining the truth of their account. Jury members may also consider the victim to be more credible due to the perceived bravery of facing the courtroom in intimidating circumstances. Hence whilst the above measures are available, they are not necessarily used consistently.

3.10 It is also worth noting the process of "proofing" the victim prior to their giving evidence is another occasion where the risk of re-traumatisation arises. Victims are usually asked by the prosecutor to view a recorded statement made by them to police or listen to a 000 call recording. The purpose of proofing is to prepare the victim for court. However, this can be an extremely distressing experience for the victim.

Are there other measures which have been implemented and are not listed above?

3.11 There are no other measures which have been implemented in the NT which are not listed in [45] of the Issues Paper.

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

Alternative means of giving evidence

3.12 Some complainants in sexual assault matters do not know the accused. Generally, those are cases where the sexual assault involves an attack (sometimes in a public place) and violence that goes beyond the act of sexual violence. Those complainants are often concerned about the accused seeing them again in the court room setting, which significantly adds to the anxiety involved in the process. Currently, the only way to avoid the accused watching them give evidence is for a complainant to give evidence in court behind a screen. Often that is difficult for complainants, but preferable to the accused watching them on a video link. In our view, it would be preferable for complainant's to have the option of giving evidence by video link without the accused watching the recording (given the screen would prevent an accused from seeing the complainant in any event.

[8] 'Refurbishment of the Alice Springs Courthouse', *Susan Dugdale & Associates* (Web Page, 2021) <https://www.dugdale.com.au/refurbishment-of-the-alice-springs-courthouse>.

Independent legal representation

3.13 Some complainants would be assisted by having their own independent legal representation. The court process can be difficult and disempowering for a lot of complainants, who have very little control of what occurs once the complaint has been made to police. Having independent representation, someone who can give them advice about their own rights and liaise with the prosecution if necessary, could ease some of that concern.

3.14 On a practical level, there are a number of issues that can arise during the course of sexual offence prosecution which necessitate a complainant getting independent legal advice – for example, where an application is being made for leave to subpoena confidential communications (under Part 7 of the *Evidence Act 1939*). Section 56C requires that notice of an intention to apply for leave be given to each party to the confidential communication, i.e. the complainant. Section 56D gives a party to the confidential communication an ability to appear at the hearing of the application in certain circumstances. The potential for trauma to the complainant during that process is greatly reduced if they have an independent lawyer who can represent their interests on such an application.

3.15 A complainant might, during the course of the proceedings, also want to make an application to self-identify under section 9 of the *Sexual Offences (Evidence and Procedure) Act 1983*. Again, a complainant would be greatly assisted by an independent lawyer during that process.

4. "Special measures": evidence in the form of audio-visual recordings

Question 15 – Has the use of recorded evidence been implemented in your jurisdiction? If so, to what extent?

4.1 As stated above, the use of recorded evidence is common place in the Supreme Court. The recorded statement taken by police pursuant to section 21B of the *Evidence Act 1939* is almost always utilised as most of the complainant's evidence-in-chief (often supplemented by body worn footage of the first complaint to police or the 000 call). The pre-recording of the remainder of the in evidence-in-chief, cross-examination and re-examination often takes place in advance of the trial proper at the special sitting. There is a practice direction in place that deals with the editing of that pre-recorded evidence prior to trial (Practice Direction 3 of 2006 – Special Hearings – Pre-recorded Evidence – Editing).

4.2 In 2016 the *Evidence Act 1939* was amended to apply those special measures to Local Court hearings as well. Despite that option being available, the Local Court has limited listing capacity to pre-record evidence. It also does not have the audio-visual equipment required and (at the present time) has to record the evidence using Microsoft Teams with camcorders as a backup. Recorded evidence-in-chief statements taken pursuant to section 21B of the *Evidence Act 1939* may be relied on, though generally for summary matters it is utilised primarily for child witnesses.

4.3 In 2017, however, the *Justice Legislation Amendment (Body-worn Video and Domestic Violence Evidence) Act 2017* came into effect. It provides another avenue for the taking of an audio-visual statement from complainants. In effect it allows

police, with the consent of the complainant, to take recorded statements on their body worn video to be tendered in court as evidence-in-chief. Those statements are often recorded at the scene of an incident or while the complainant is in hospital. For more serious sexual offences, though, the common practice is to take a more formal recorded statement under section 21B.

How is this working in practice? What is working well? What is not working well? What could be improved?

Evidence-in-chief statements

4.4 Evidence-in-chief statements are of immeasurable value. In our experience, it is a great comfort to a complainant not to have to tell their whole story again. It alleviates the concern that a lot of complainants have about their ability to remember more ancillary details when it comes time to give their evidence in court. It is also of great assistance to complainants who have difficulty reading and writing – the ability to see and hear the statement assists them in refreshing their memory prior to trial.

4.5 In cases of sexual violence in a domestic setting, the evidence-in-chief statements are particularly valuable to the prosecution. For all of the known reasons, it is often the case that DV complainants will resile from their initial account in court. Having the evidence-in-chief statement significantly reduces the chances that that will happen, and provides a strong basis for proceeding even if it does. It is also usually more compelling than a written statement, if it is admitted under section 65 of the *Evidence (National Uniform Legislation) Act 2011* where the complainant is unavailable.

4.6 While evidence-in-chief statements are generally very well done by police (and can be edited by consent if necessary), statements taken by more junior police officers in remote places are often not of the same standard. That is particularly the case where interpreters are used, and again even more so where the complainant is a child. There was a prosecution in 2013, BD (21345584) where a child complainant in a sexual assault matter participated in three separate evidence-in-chief statements, all with different interpreters, each failing to get to the crux of the issue. Back translations were done by both the prosecution and defence, which further complicated the evidence. In the end, in order to proceed the evidence would have had to be led from the child viva voce, but she was unable to do so and a *nolle prosequi* was filed.

Pre-recording evidence (special sittings)

4.7 The practice of pre-recording evidence is also very useful for a number of reasons. The Supreme Court is usually able to accommodate a pre-recording within a few months of the matter being committed to the Supreme Court, meaning the complainant's part in the proceedings is over much sooner than would otherwise be the case. The pre-recording of evidence also means the court is far more likely to be in a position to accommodate a complainant's request for breaks, without the pressure of a jury waiting for long periods. It also means that evidence led which might have otherwise have resulted in a jury discharge can be edited out, without the need for the complainant to come back and give further evidence.

4.8 In terms of complainant autonomy, we feel it is important that complainant's are given the option to decide how their evidence is given. We have found that some complainants prefer to be present before a jury to speak to them directly. Other complainants prefer that the accused not see them, and for that reason opt for the use of a screen while in court. Other complainants prefer being in the AVL room, away from the court. Having that flexibility gives a complainant some sense of control over the proceedings.

4.9 On a practical level, there are often issues with locating complainants in advance of a trial, particularly those in remote locations who are often fairly transient. Having a pre-record listing means that all efforts will be made early to locate the complainant and bring them to court. In the event the complainant cannot be located or is not able to attend court for the pre-record (for example because of cultural reasons such as funerals), the pre-record can be adjourned or vacated without impacting on the trial dates. That is particularly important for accused people who are remanded awaiting the outcome of the trial.

4.10 In terms of room for imprisonment, while pre-record dates are often months in advance of the trial listing, greater capacity in the court diary could potentially mean earlier listings. Indeed, stricter adherence to statutory timeframes for progressing matters in the Local Court would also ensure earlier pre-record dates.

Do any of the matters discussed when the recommendations were made (some of which are outlined above) need further discussion in the context of reforms having been implemented?

4.11 The use of recorded statements as evidence-in-chief means that police have to take care when interviewing complainants. They have to ensure the questions they ask are properly framed and sufficiently probative, to allow the recording to be put before a jury. While police members in specialist areas often have received training in relation to those statements, general duties police have not. It is often the case that body worn footage statements (admissible under section 21H of the *Evidence Act 1939* for domestic violence offences) are not of a high quality. It would be useful to consider best practice for the taking of such statements and develop guidelines that could be implemented by police.

4.12 The use of intermediaries by police would be of great assistance – particularly in the NT where witnesses are often from diverse cultural and linguistic backgrounds.

Are there any other issues? What do you see as the advantages and disadvantages of using recordings of the complainant's evidence at trial?

4.13 The advantages of recorded statements are outlined above.

4.14 A potential disadvantage of lengthy recordings is that they can be more difficult for a jury to absorb than evidence taken in person. That issue can be met by judges being alive to the concern and affording as many small breaks as might be necessary to assist with their concentration.

4.15 In our view the advantages far outweigh the disadvantages.

5. "Special measures": intermediaries and grounds rules hearings

Question 17 – Has an intermediary scheme been implemented in your state or territory?

5.1 There is no intermediary scheme or ground rules hearing process in the Northern Territory.

If an intermediary scheme has not been implemented in your state or territory, do you know why? Do you think such a scheme would be helpful? If so, what do you think the scheme should involve?

5.2 An intermediary scheme would be extremely helpful in the NT. We have a number of vulnerable people, including children, who often suffer from developmental disorders like FASD. Often times, police decide not to take statements from such child witnesses. We expect, though, that there are likely cases where those witnesses would be able to give an account if they were approached in an appropriate manner.

5.3 The challenge for the NT is the limited number of people with expertise who could act as intermediaries. We struggle to access psychologists, speech pathologists and social workers as required for assessments or treatment relating to accused, let alone the witnesses.

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

5.4 In the absence of intermediaries in the NT, an alternative approach may be to provide further specialist training to the lawyers and courts. A vulnerable witness advocacy skills workshop, facilitated by The Australian Advocacy Institute, was last run in Darwin in 2019. That course was extremely well received by the profession at the time, but the high turnover of lawyers in the NT means that very few of the now practicing advocates attended the workshop. Training like that needs to be delivered regularly, particularly where expert guidance on such issues is not available.

6. 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 the research?

6.1 Yes, we have been following the developments in the research regarding memory and responsive behaviour in the context of sexual violence trauma. In our view that research would assist juries to place the evidence given by complainant's in its proper context.

Do you have views about whether prosecutors should call expert evidence about that research (that is, about how people recall traumatic events and / or about how victim survivors of sexual violence typically respond)?

6.2 In some cases where it is particularly relevant, we have made attempts to lead the expert evidence (discussed below). Obtaining that evidence, though, is costly and there is a lack of available experts in the NT with the relevant experience.

6.3 In our view if the expert is giving generalised opinion only (that is, without regard to the particular complainant), it would be preferable for the information to be given to the jury by way of direction rather through calling a suitable expert.

Is that expert evidence being called in your jurisdiction? If so, how is it working? If it is not being called, do you know why not?

6.4 The NT has attempted to lead expert evidence of this nature in criminal trials. In the matter of *The Queen v SF* [2021] NTSC 91, an application was made to call expert evidence from Professor Jane Goodman-Delahunty on the variable extent and manifestation of memory loss among those who have experienced child sexual abuse, leading to coping strategies and partial amnesia.[9] That evidence was excluded under section 137 of the *Evidence (National Uniform Legislation) Act 2011* on the basis that (summarily):[10]

(a) it was hypothetical because there had been no professional assessment of the complainant, the evidence to be led was in the nature of applied psychological research;
(b) there was a potential for unfair prejudice in the sense that the jury might treat the evidence as evidence that the events had happened rather than neutral evidence;
(c) the trial had already commenced and the complainant's evidence had already been taken;
(d) given the complainant could not recall the events, it would be unfair to the accused to have expert evidence to repair or explain the deficits in the evidence which could not be tested through the complainant.

6.5 In another matter, the Crown applied to lead evidence regarding fragmented memories in the context of a sexual assault. That evidence was contained in two reports from Professor Jane Goodman-Delahunty. In an unpublished decision, the trial judge allowed the admission of most of the evidence including the evidence regarding general processes of human memory, the causes of fragmented memory, the kinds of human reactions and behaviour suggestive of avoidance coping strategy retrograde amnesia, dissociation (including peri-traumatic dissociation) and tonic immobility or freezing. The difficulty in that case was delay caused by the voir dire on the admissibility of that evidence. The voir dire was conducted on 20, 21 and 29 October 2021, 27 January 2022, 11 and 16 March 2022. The decision was handed down on 25 August 2022, delaying the commencement of the trial by close to a year.

Question 19 – What is your view about the usefulness of jury directions in countering myths and misconceptions described by the research discussed above?

6.6 Jury directions, whilst helpful, cannot and do not remedy unfair prejudice toward the complainant, particularly when given at the end of a trial. The NT has limited legislated jury directions and does not have a resource similar to the NSW Criminal Trial Courts Bench Book, which the NT DPP frequently refers to.

6.7 As referred to in the Issues Paper, the Northern Territory, like all jurisdictions, has legislated jury directions with regard to complainant evidence and delayed reporting.

[9] *The Queen v SF* [2021] NTSC 91 from [39].
[10] *The Queen v SF* [2021] NTSC 91 at [65]-[70].

Subsection 4(5) of the *Sexual Offences (Evidence and Procedure) Act 1983* (SOEPA) prohibits a Judge from giving a direction which suggests that 'it is unsafe to convict on the uncorroborated evidence of a complainant because the law regards complainants as an unreliable class of witness.' That section also requires the Judge to:

- warn the jury that delay in complaining does not necessarily indicate that the allegation is false; and
- inform the jury that there may be good reasons why a victim of a sexual offence may hesitate in complaining about it.

6.8 In 2023, the NT Government amended the *Criminal Code Act 1983* (the Code) to modernise the sexual offence provisions. The insertion of section 208PB was among the amendments. Section 208PB lists the jury directions relating to the issue of consent that the Judge must give in an appropriate case. These include, that a person must not be regarded as having consented to a particular sexual act merely because:

- the person did not say or do anything to indicate that the person did not consent; or
- the person did not protest or physically resist; or
- the person did not sustain physical injury; or
- during the period or on the occasion when the sexual act occurred, or on an earlier occasion, the person consented to engage in a sexual act (whether or not of the same type) with the person charged with the offence or with another person.

6.9 The judge must also, in the appropriate case, direct the jury that it may consider whether a mistaken belief as to consent was reasonable in the circumstances.[11]

6.10 Some of those directions (regarding protestation, physical injury and previous consent) had been part of the now repealed section 192A of the *Criminal Code* and were regularly given in jury trials to good effect. As these amendments only commenced on 25 March 2024, it is too soon to make any conclusive remarks about the efficacy of the step taken towards positive consent.

6.11 Notwithstanding the legislative provisions that preclude evidence being led regarding a complainant's 'general reputation as to chastity' or 'sexual activities with any other person,'[12] defence can and do still lead evidence which indirectly or by implication suggests a general reputation as to chastity or which emphasises the behaviour and actions of the complainant in the time leading up to the incident. For example, defence may ask questions about what the victim was wearing. This is done on the basis that defence has the right to interrogate the reliability of the victim's memory and the veracity of their evidence.

6.12 In a recent NT case, the victim stated that she was traumatised from the assault and no longer socialised with anyone from the accused's workplace as a result. The defence sought to challenge this statement by introducing video evidence of the victim, scantily-clad, riding a mechanical bull in the presence of those colleagues.

6.13 Evidence of this nature has the potential to be both unfairly misleading and traumatic for a complainant.

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11 Section 208PB(2) of the *Criminal Code*.
12 Section 4(1) of the *Sexual Offences (Evidence and Procedure) Act 1983*.

6.14 Another issue relating to jury directions is the availability of the 'good character' direction which can be given in child abuse proceedings where the accused is otherwise 'of good character'. This direction can be to the effect that a person of good character less likely to commit a criminal offence, and also that they are also less likely to lie about committing a criminal offence in the witness box. In the case of child sexual offenders, such a direction is likely to be misleading.

6.15 The Royal Commission into Institutional Responses to Child Sexual Abuse noted that the research to date shows that many child sex offenders do not have a criminal history.[13] This is because offenders often rely on their good character and trust relationships to perpetrate the abuse.

Do you have a view on whether the jury directions in your jurisdiction are sufficient? Could they be more extensive?

6.16 Jury directions in the NT could go further than they currently do. Directions could be used to dispel common myths that might affect the assessment of the complainant's credibility. Consideration could also be given to having a number of the directions given to the jury as a part of the judge's opening remarks. Those directions would be helpful for the jury to have in the back of their minds as they are hearing the evidence, to prevent unfair pre-judgement from forming and being ventilated in the jury room during early discussions. While a prosecutor can refer to the statutory directions in its opening, such matters should really have the authority of the Court behind them.

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)?

6.17 Mixed juries are unlikely to be feasible in the Northern Territory due to the unavailability of suitable experts.

6.18 Educational videos and mixed juries might also mean that important information is going to the jury without the parties being privy to exactly what was said. For mixed juries in particular it also means that an individual is potentially offering expertise directly to the other jurors in circumstances where the opinion is not able to be tested through cross-examination. There is potential unfairness there.

6.19 Education and training for judges, prosecutors, defence counsel and police would be valuable, in terms of responding in a trauma informed way to complainants in sexual offences. Education might also effectively shape the way evidence is given and the topics raised in cross-examination.

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 behaviours?

6.20 An issue which warrants raising, though not strictly unique to sexual assault cases, is the underrepresentation of Aboriginal and Torres Strait Islander people on juries. Aboriginal people make up approximately one third of the NT population, and yet the presence more than one Aboriginal person on a jury is rare.

[13] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Literature Review, 2016) 9, 78.

6.21 The ‘Australia Jury in Black and White’ report (the Report), released in June 2023, identifies the following factors which drive this underrepresentation:

- Non-inclusion on jury rolls
    - This is due to non-inclusion on the electoral roll, inadequate updating to the electoral roll, insufficiently inclusive jury district boundaries and jury summons non-delivery
- Exclusion from jury rolls due to disqualification
    - Exclusion categories include holding a certain office (e.g. police officer or lawyer); having a certain criminal history; being undischarged bankrupt (NSW) or being of ‘unsound mind’ (Northern Territory). Exclusion due to criminal history is particularly significant for Aboriginal and Torres Strait Islander people.
- Peremptory challenges
    - Peremptory challenges allow the defence and, in some jurisdictions, the prosecution, to challenge any prospective juror, without giving reasons. This allows the prosecutor or defence to remove inappropriate or potentially disruptive jurors. The counter to this use of the peremptory challenge is that behavioural cues might be misread, or stereotypes might be applied to determine someone as potentially inappropriate or disruptive.
- Excusals and other forms of self-elimination
    - Circumstances which may lead to excusal or self-elimination include disproportionate chronic health problems, including hearing loss; greater caring and community responsibilities including sorry business; language barriers; and financial burden.

6.22 Juries play an integral part in the criminal justice system. Juries uphold the rule of law and ensure community representation informs the balancing of evidence. In order for community perspectives to be accurately incorporated into the judging of the accused, juries must reflect the diverse communities they represent.

6.23 The NT has the highest rate of sexual assaults in Australia and Aboriginal women and girls are disproportionately affected. In 2018, Aboriginal women and girls were the victims in 44 per cent of reported sexual assaults.[14]

6.24 Greater representation of Aboriginal people on juries would improve the jury’s understanding of how culture and different circumstances may influence the way in which Aboriginal witnesses give evidence. While it is relatively common practice for juries in trials with Aboriginal witnesses to receive the “Mildren direction”, that direction does not deal with the specific issues faced by Aboriginal complainants in sexual matters (including concepts like shame).[15]

[14] Northern Territory Government, *Sexual Violence Prevention and Response Framework 2020-2028* (Policy Paper, 2020) 10.

[15] Mildren, D. 1999. Redressing the imbalance: Aboriginal people in the criminal justice system. Forensic Linguistics 6(1): 137-160.

7. Judge-alone trials

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

7.1 Judge alone trials are not available for any serious crimes in the NT, including most sexual offending. Therefore we have no experience to convey in relation to the pros and cons of jury versus judge alone trials in sexual assault cases.

8. Cross-examination and the law of evidence

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

Judicial control of the trial process

8.1 There is ample scope under the *Evidence (National Uniform Legislation) Act 2011* for limiting leading questions in cross examination to stop gratuitous concurrence. Section 26/29 provides the court with the power to determine the manner and form of questioning witness and their responses and in particular that a court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form. I have found the judges in the NT to be very alive to questions of fairness to the witness and to be amenable to limiting the asking of leading questions when fairness dictates that should happen (see for example, *Wodidj v Rigby* [2023] NTSC 34). Prosecutors need to be alive to the issue and make the request where the need arises.

8.2 Additionally, section 41(2) of the *Evidence (National Uniform Legislation) Act 2011* provides that:

> *The court must disallow an improper question or improper questioning put to a vulnerable witness in cross-examination, or inform the witness that it need not be answered, unless the court is satisfied that, in all the relevant circumstances of the case, it is necessary for the question to be put.*

8.3 Improper questioning is defined as a question or a sequence of questions put to a witness that:

- *is misleading or confusing; or*
- *is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or*
- *is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or*
- *has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).*

8.4 While it would be open to a prosecutor to make an objection under section 41, the preferable approach is for judges to intervene when the questioning is improper. There is a real risk that the Crown would undermine the evidence of the complainant if they are constantly interrupting cross-examination by objecting.

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

8.5 Myths and misconceptions about sexual violence still play out in the court room and the notion of a 'true victim' still looms large. Victims who:

- are sex workers;
- are adult entertainers;
- are not educated or well-spoken;
- do not show emotion when giving evidence;
- are inconsistent in their recall when giving evidence;
- have substance abuse issues;
- know the accused, especially those who are or were in an intimate partner relationship with the accused;
- did not physically resist the assault;
- did not say anything during the assault; or
- did not go to the police immediately after the assault;

can be less likely to be believed by the jury and more likely to be challenged and discredited by defence in cross-examination.[16]

If legislation were to address the above myth that a rape victim complains at the first reasonable opportunity, it should not be couched in terms of being an 'irrelevant' question. Rather, if deemed relevant by the Court, it should be accompanied by an appropriate direction.

8.6 For example, in a 2019 NT sexual assault case which involved a man at a bucks party shoving a beer bottle into the vagina of a female adult entertainer, defence argued that the context in which it occurred, namely "a stripper, at a buck's party, who is in the business of firing dildos out of her vagina", was "absolutely vital" in determining whether the accused was reckless as to her consent to the action. Although the jury found the accused guilty by a majority verdict, this followed an initial trial where the jury were unable to return a verdict.[17]

9. Interpreters

Question 26 – Have changes been made to interpreting services for complainants over the last five years? Does there continue to be a problem with availability, training and accreditation?

9.1 The Interpreting and Translating Service NT and the Aboriginal Interpreter Service both provide interpreting services for victims whose first language is not English.

9.2 The lack of available and accredited interpreters in the Northern Territory is a serious problem. So much so that his Honour Chief Justice Michael Grant AO in open court while presiding over a serious murder trial impacted by interpreter unavailability said

[16] Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crimes Against Adult Victims* (Australian institute of Criminology, 2020); Kate Minter, Dr Erin Carlisle and Dr Christine Coumarelos, '"Chuck her on a lie detector": Investigating Australians Mistrust in Women's Reports of Sexual Assault' (Research Paper, ANROWS, November 2021).

[17] *The Queen v Willcocks (No 2)* [2018] NTSC 38.

that: "… *the availability and reliability of interpreting services probably presents the largest immediate threat to the successful management of the criminal jury trial system here in the Northern Territory."* I agree with these comments and echo his Honour's concerns.

9.3 The impact of the lack of interpreters is felt across multiple agencies and also impacts the trust placed in the criminal justice system by Territorians. Put simply, cases are being adjourned when no interpreter is available. This places additional strain on an already overloaded system by delaying resolution, increasing the remand population, under-utilising the Courts, and causing additional stress to victims of crime. The issue impacts matters ranging from simple prosecutions in the Local Court to sentences and jury trials before the Supreme Court and impacts numerous matters on a daily basis.

9.4 In terms of possible solutions, I would urge consideration of drawing on the culturally and linguistically diverse community that makes up the Northern Territory Public Sector. According to the 2021-2022 Annual Report for the Department of the Attorney-General and Justice alone, 10.27% of staff self-identified as Aboriginal. Encouraging and paying for staff to gain national accreditation through the National Accreditation Authority for Translators and Interpreters ("NAATI") would dramatically increase the number of interpreters available for use by the Courts in the Territory. Consideration could be given to compensating staff with miscellaneous leave pursuant to By-Law 18 if they are called on to perform interpreter services.

9.5 Another possibility worth exploring is training inmates to be qualified interpreters. Many inmates speak English as a second language. I think that there are likely to be many suitable inmates who could get further education and receive NAATI accreditation. It would also be a very positive step towards their rehabilitation and give them a real sense of purpose.

9.6 There are also often issues with the accreditation level of available interpreters. For example, a lot of interpreters who work in the Local Courts are not Supreme Court accredited. Sometimes there are concerns with even accredited interpreters. For example, where it is plain that the interpretation is not direct, because the witness has used an English words, and the translation does not include the English words used.

Are there problems in regional areas?

9.7 In cases involving interpreters from a small language group, issues relating to conflict of interest arise more often. It is not uncommon for the interpreter to know the victim and / or accused or indeed, be related to them either biologically or culturally. This can lead to defendants or complainants refusing to engage with the interpreter or vice versa. In busy bush courts, that inevitably needs to further delay.

Are the available interpreters culturally and linguistically appropriate and diverse, particularly for complainants who are Aboriginal and Torres Strait Islander people?

9.8 No, a lot of the time interpreters come from the same community and / or family group as the witnesses they are interpreting for. In some cases, due to the lack of availability of interpreters in a particular language, witnesses have to be assisted by interpreters who are speaking the witnesses secondary rather than primary language (acknowledging that English is often a third language for Aboriginal witnesses).

9.9 Sometime interpreters impose their own views on the issue of which questions ought to be answered and in which way. In a recent example, a witness was giving evidence with the assistance of an interpreter in a domestic violence murder trial. The following exchange took place:[18]

> And who is John to you? What's the relationship?---He's my nephew.
>
> And what about the deceased, what was the relationship?---Sister.
>
> Okay.
>
> HIS HONOUR: That's Aboriginal way?---Yeah.
>
> THE INTERPRETER: Yes, your Honour. And your Honour, I just want to inform you that in the Aboriginal law, it's inappropriate to talk about his sister directly to the brother.
>
> HIS HONOUR: Yes.
>
> THE INTERPRETER: Inappropriate ways.
>
> HIS HONOUR: Yes.
>
> THE INTERPRETER: Yes.

9.10 In that case, the interpreter took the view that the witness ought not be answering the questions about his sister (the deceased). The exchange between judge and interpreter was in the presence of the jury and as a result they were able to take that into account when assessing the witness's evidence. Undoubtedly there would be many instances where that cultural concern was not raised and the evidence given was affected.

Is the unavailability of interpreters causing difficulties and challenges for the courts to ensure pre-trial rulings and trials commence as listed?

9.11 Yes, but the issues aren't limited to pre-trial rulings / trial listings. Matters are sitting stagnant and not resolving because defence lawyers are not able to take instructions for a plea.

10. Personal information

Question 28 – Are the legislative provisions adequate to protect the disclosure and use of a complainant's personal information obtained during counselling or other therapeutic intervention? How are they working in practice? Should they be harmonised?

10.1 "Confidential communication" is defined by section 56 of the *Evidence Act 1939* to mean communications made in confidence by a victim to a counsellor or to a victim by a counsellor. It also includes records kept by a party to the confidential communication.

[18] Trial of John Mayatjun (22126152), transcript of 14 September 2023 at T691.

10.2 Confidential communications are privileged communications (section 56B(1) of the *Evidence Act 1939*). They are not to be the subject of pre-trial disclosure and are not to be adduced at a trial without leave of the court (section 56(2)(c) of the *Evidence Act 1939*). The matters to be taken into account on an application of this nature are set out in section 56E of the *Evidence Act 1939* which states, the Court must not give leave to adduce or produce evidence of the confidential communications at trial unless satisfied that:

(a) the evidence will have substantial probative value to a fact in issue;
(b) other evidence of similar or greater probative value in respect of matters to which the confidential communication relates is not available; and
(c) the public interest in preserving confidentiality is substantially outweighed by the public interest in admitting the evidence what is of substantial probative value.

10.3 Nothing in the Part prevents the adducing or producing of evidence with the consent of the victim (section 56F of the *Evidence Act 1939*).

10.4 While there are good policy reasons for the provisions, in practice they are unworkable. For example, section 56C of the *Evidence Act 1939* requires written notice of an application to adduce or produce confidential information to be given to the court, the parties to the proceeding and to the party to the confidential communication who is not a party to the proceeding. In practice, then, that means the accused is obliged to provide to a complainant a notice under section 56C. If the complainant is not separately legally represented, that kind of contact has the potential to be very distressing (even if the prosecution acted as an intermediary for the accused).

10.5 Further, under section 56D of the *Evidence Act 1939*, a party to a confidential communication may appear at an application for leave if they are not a party to the criminal proceedings, *and* they are unlikely to be a witness in the proceedings, *and* they have leave to appear. On the face of it then, a complainant would always be precluded from being heard on the application.

10.6 However, under section 56E(2) of the *Evidence Act 1939*, the court must take into account the likelihood, nature and extent of the harm that could be caused to the victim if the evidence is adduced or produced. If the complainant cannot be heard on the application, it would fall to the prosecution to make submissions about those matters. The prosecution is at a distinct disadvantage because, on an application to produce the evidence, the prosecution will have no knowledge about the content of the material being sought. Other than general public interest observations, nothing specific can be put about the harm likely to be caused.

10.7 Where the application is being made to adduce evidence which is already in the possession of the prosecution and defence, the complainant will usually not be given access to that material. In circumstances where the confidential communications were made some time before, it can be extremely difficult for a complainant to remember what was said in order to properly assess their position (both in terms of harm likely to be caused and also whether they might consent to the disclosure).

10.8 From time to time, there is inadvertent disclosure of materials by police. That might be avoided by providing better training to police, however it would also be helpful to have a clear process to follow in circumstances where there has been inadvertent

disclosure to the prosecution (including where the defence have not yet received a copy of the disclosure).

Is there a need for complainants to be separately legally represented in court when submissions are made about the disclosure of the material and the application of legislative provisions?

10.9 Yes, the issues raised by confidential communications are complex. Fundamentally, this is the complainant's right to confidentiality, not the Crown's. On receiving a notice a complainant needs to be given clear advice about the options available. That advice needs to include whether or not the complainant should consent to the evidence being produce or adduced. That is not advice the Crown could or should give the complainant.

11. Types of evidence

Question 29 – Have legislative reforms to the admissibility and use of complaint evidence been effective? Are there problems associated with that evidence? Is this an area in which the laws should be harmonised? If so, how should they be harmonised?

11.1 Yes, the *Evidence (National Uniform Legislation) Act 2011* appropriately allows for the admission of complaint evidence. Routinely complaint evidence is led through the complainant, police and civilian witnesses. Where it is captured on a 000 call or body worn footage, that is routinely relied on as well.

11.2 Sometimes inconsistencies in complaints are used to undermine a complainant's reliability or credit. The introduction of expert evidence on memory and recall could counteract some of that risk.

Should the evidence of more than one complaint be admissible? Should complaint evidence be admissible as evidence of what is asserted by the complainant and / or assess credibility?

11.3 Yes, more than one complaint should be admissible. It is often the case that a complainant will tell different parts of the account to different people (their parents or friends etc.). Even if the complaint was given in exactly the same terms, it is often the case that different witnesses will recall as more significant different aspects of the complaint. Often, to get the full picture it is necessary to call complaint evidence from more than one source.

11.4 There might also be recordings which show more than one complaint – for example where there is a 000 call, then body worn footage of the initial attending police. That evidence is often particularly probative.

11.5 Complaint evidence should be admissible as going both to credibility and the truth of the matters asserted. There is no reason to treat complaint evidence in a manner different from other representations which are admissible as exceptions to the hearsay rule.

Should complaint evidence be admissible at all? Does it perpetuate myths about responsive behaviour to sexual violence trauma (by expecting complainants of sexual violence to complain at some stage and by placing weight on what was said)?

11.6 Yes, it should be admissible. Complaint evidence is often cogent evidence supporting the allegations. While it is true that not every sexual assault complainant will immediately complain, and that no adverse inference should be drawn from a lack of complaint, the Crown should not be prevented from using evidence of complaint where one is made. It has the capacity to strengthen the proceedings.

11.7 In some ways it is analogous to DNA evidence – DNA evidence such as semen located on a vaginal swab can be positive evidence that intercourse took place. However, the absence of DNA evidence on the swab does not mean that intercourse did not take place, because there are a whole host of reasons why DNA might not be found. That does not detract from the importance of DNA evidence when it is present.

Question 30 – Should there be legislative reform to the admissibility and use of distress evidence?

Is this an area which calls for legislative intervention and harmonisation? If so, how should they be harmonised? Should distress evidence be admissible at all?

11.8 As above in relation to complaint evidence, where there is evidence of distress it ought to be led.

Question 31 – Are there further reforms to be considered to tendency and coincidence or discreditable conduct evidence in addition to the Evidence (Tendency and Coincidence) Model Provisions released by the Royal Commission into Institutional Responses to Child Sexual Abuse?

11.9 Not at the current time.

Question 32 – Are there any other evidence issues relating to sexual violence trials that we should consider, including whether there should be harmonisation?

11.10 The nature of the jury process means that we don't know whether anyone who sits on a jury is a sexual assault survivors. We have had experience however of potential jurors asking to be excused because of the traumatic effect a jury trial would have on them.

12. Specialisation and training of judges and counsel

Question 33 – Do you have views about the creation of specialist courts, sections or lists?

12.1 A high proportion of the trials that run are sexual assault matters (60% of trials in 2023 and 52% of trials in 2022). This means that all of the small numbers of judges in the NT Supreme Court are specialist sexual assault trial judges. That being said, the approach of some judges is more trauma informed than others.

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

12.2 Specialist training is supported for all participants in the criminal justice system. In a jurisdiction like the NT, where there is a paucity of local expertise that is accessible, it is important that training provided by specialists is regular and comprehensive.

Do you support some form of special accreditation for lawyers who appear in sexual offence cases? Would this reduce the number of lawyers available to appear in such cases and contribute to delays in hearing such cases?

12.3 This measure would be supported. The potential for delay would depend on the availability of training, but could be managed by sending a wide variety of prosecutors of different levels for accreditation. Depending on the length of the accreditation process, locum lawyers from the bar could be utilised to fill the gap.

13. Delay

Question 35 – What are the causes of delay in your state or territory? Do you wish to comment on the past recommendations (as outlined above) and whether they have been or should be implemented in your state or territory?

13.1 The primary cause of delay in the NT is resourcing across the criminal justice sector. That includes the interpreter service, the availability of defence lawyers, the ability to secure prison visits to take instructions, the difficulties in finding witnesses and complainants to discuss matters and the court listings. Added to that are the delays in the fulsome investigation of matters, such as forensic testing (discussed above).

13.2 Resourcing consideration for the courts and lawyers also need to take into account the nature of the evidence now being led in sexual assault prosecutions. Where historically the briefs would be limited to a small number of civilian statements (a complainant, some complaint witnesses, some witnesses who might have context), the briefs of evidence now often include hours of electronic material such as body worn footage, CCTV and lengthy recorded statements. The time it takes to properly assess the evidence on such matters has significantly increased for both prosecution and defence counsel. The amount of voir dire issues it gives rise to and the time it takes to lead the evidence during a trial have also increased. There has not been a corresponding increase in resourcing available.

What are your ideas for reducing delays? Can there be a national approach to reducing some aspects of the delay?

13.3 In order for stricter timeframes to be an effective means of reducing delays, there needs to be resourcing available for things to be done quickly. The DPP has recently implemented a committal system which focuses on front loading the work on matters, with a view to finalising the appropriate charges that should proceed early in order to facilitate resolving matters earlier where possible. Again, in order for that to be done effectively the investigation needs to be complete and all relevant evidence needs to be provided to the DPP early. It also requires defence counsel to be able to access their clients (with suitable interpreters as necessary) at the prison and take meaningful instructions at an early stage.

13.4 While delay adversely affects the prosecution of sexual offences, the alternative of pushing matters on which are not ready is likely to have a far greater negative impact, both in terms of securing convictions and the likelihood of success of any appeals.

14. Guilty pleas

Question 37 – Have any recent changes in sentencing laws had an impact upon the preparedness of accused person to plead guilty to sexual violence offences?

14.1 On 25 March 2024, the *Sentencing and Other Legislation Amendment Act 2022* took effect. That act removed mandatory non-parole periods in relation to sexual offences against an adult victim, other than for sexual intercourse without consent (which still remains a mandatory minimum 70% non-parole period). It is too soon to say whether the relaxation of the mandatory minimums will have an impact on the prosecution of other sexual offences.

14.2 Section 78F of the *Sentencing Act 1995* also sets out a mandatory minimum sentence for sexual offences. A court is required to impose a term of imprisonment that can be partly, but not wholly, suspended. Generally speaking, offences of sexual violence are sufficiently serious that a term of imprisonment is warranted in any event, rendering the mandatory minimum regime of no practical consequence to the sentencing exercise.

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?

14.3 Sentencing indications are only available for matters being dealt with in the Local Court. The majority of sexual offences in the Northern Territory are dealt with in the Supreme Court where there is no capacity to seek sentencing indications.

14.4 Pleas could be incentivised by removing any mandatory non-parole period. Relief from a mandatory 70% non-parole period would likely make a plea a more attractive prospect than risking a guilty verdict at trial.

15. Sentencing

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

15.1 Because the offence provisions across jurisdictions are not harmonised it would be difficult to harmonise sentencing practices and outcomes.

Question 41 – Have there been recent changes to the role of victims of sexual violence in the sentencing process in your jurisdiction? Are Victim Impact Statements given appropriate consideration by the sentencing judge?

15.2 On 25 March 2024, the *Sentencing Act 1995* was amended to prevent victims from being cross-examined on their victim impact statements.[19]

15.3 Victim impact statements are being given the appropriate consideration by judges. Judges are regularly permitting victim impact statements to be read aloud at the

[19] Section 106B(9) of the *Sentencing Act 1995*.

request of the victim. Victims are, on occasion, being permitted to attend proceedings by AVL rather than being in the Court room with the accused while the victim impact statement is being read. The DPP has also successfully presented a pre-recorded victim impact statement.

Are there further improvements to be made? Should victims have independent legal representation during sentencing submissions?

15.4 Issues still arise where the victim impact statement provided by the victim goes beyond the agreed facts or introduces matters which were not otherwise contemplated by the parties (for example financial impacts that hadn't been the subject of evidence or the like). In some cases, it has fallen to the Court to adjudicate those issues, noting that victim impact statements are not tendered evidence but information that is "presented" to the court on the plea.

15.5 In our view there would be utility in the victim being independently represented during sentencing submissions. While the Crown is often prepared to advise the court about the victim's views (for example in relation to the making of a domestic violence order on a finding of guilt), it is sometimes the case that the position the Crown takes is at odds with the victim's view.

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

15.6 In our experience, lengthy adjournments between conviction and sentencing proceedings is a significant stressor for sexual assault complainants. It is often the case the reports are ordered after the taking of the jury verdict or the plea, which (in the case of psychological or psychiatric assessments) result in a delay of a number of months. It is also sometimes the case that once reports are returned, submissions are made and the matter is further adjourned for sentence. On other occasions, the court proceeds to sentence directly after submissions. Complainants who want to be present for sentencing proceedings often have to take several days off work to attend. Even if they just want to attend the sentence, they end up coming several times because of the uncertainty about what will happen on any given date.

15.7 It might be beneficial for judges set a schedule for the plea proceedings at the outset so that a complainant can (if necessary) choose to attend for only part of the process. For example a date for the entering of the plea and the reading of the VIS, a further date for submissions and then a specific date for sentence. Having the program ahead of time may assist to manage complainant's expectations.

15.8 Sentencing of sexual offences in the NT would also be improved by the availability of specialised sex offender programs. There are limited programs available at the prison and almost no programs available in the community (other than privately funded counselling). As a result, the option for sentencing orders that sufficiently promote rehabilitation and community protection are limited.

15.9 Similarly, there are limited resources available to allow the Court to accurately assess risk.

16. Appellate proceedings

Question 44 – What are your ideas for improving the appeals process in matters involving sexual violence offences?

16.1 The NT DPP has long advocated for a right of interlocutory appeal. No such right exists in the NT, nor can there be an appeal brought against a not-guilty verdict. It is critical, then, that pre-trial rulings which substantially weaken the case are able to be appealed before the trial is run.

17. Restorative justice

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

17.1 There is not currently a restorative justice pathway for sexual offending that is an alternative to criminal prosecution for adult offenders.

17.2 There are provisions in the *Youth Justice Act 2005* (NT) that allow police to convene a Youth Justice Conference between an accused and victim as part of the diversionary process.[20] The Court may also refer a youth to a Youth Justice Conference.[21] That power applies to all offences being dealt with under the *Youth Justice Act 2005* (NT) and can include serious sexual offending (albeit not sexual offences carrying life imprisonment).

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

17.3 Restorative justice will only be an appropriate alternative to criminal prosecution where both the victim and the accused are prepared to engage fully in it. If the victim is not supportive of taking that approach, it should not be available (in the way that it is for Youth Justice Conferences).

18. Workplace laws

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

18.1 Inadequate complaint processes in workplaces can unnecessarily funnel complainants into the criminal justice system.

18.2 Recently, a NTPS employee reported sexual harassment by her supervisor. She was told, erroneously, by her workplace that they could not take action unless she reported it to the police. Whilst the victim was reluctant to involve the police, she felt she had no other choice. The defendant was charged with indecent assault (he had slapped her on the buttocks) but pleaded guilty to common assault for early resolution.

[20] Section 39(2)(c) of the *Youth Justice Act 2005*.
[21] Section 64(1)(b) of the *Youth Justice Act 2005*.

18.3 It is critical that workplaces implement sufficient policies and processes for allegations of sexual harassment and sexual assault so as to avoid undue pressure on the criminal justice system.

19. Compensation schemes

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

19.1 We understand, anecdotally, that there is a significant backlog in processing claims for victim's compensation. Compensation for victims of sexual offences needs to be awarded in a timely manner to allow the funds to be used immediately, for example to cover the costs of counselling. While the DPP / WAS have counselling services available, those services are not always appropriate for the particular individual. Victims need to be able to access private counselling as a matter of urgency at the time of the offending.

19.2 WAS officers sometimes assist victim's to fill out the claims for compensation. On occasion, we have had victim's requesting evidence from the brief to support their claims. Depending on the timing of the request, the DPP may or may not be able to oblige. Those kinds of hurdles make it extremely difficult for victims of crime to access compensation.

20. Victim's charters

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

20.1 There is a Northern Territory Charter of Victims' Rights. Those rights are not incorporated into legislation, but when they were introduced a direction was issued by the then Director of Public Prosecutions requiring prosecutors to observe the obligations in the charter (Direction 2 of 2020).

20.2 The Charter of Victims' Rights, insofar as it relates to the prosecution of offences, largely replicates the Director's Guidelines.

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

20.3 In our view, there would be utility in funding a victim support service that sat outside of the DPP. The DPP (and WAS) are only able to assist victims once that matter is before the Courts and only to the point of finalisation of the criminal proceedings. That means that victims have no formalised support at the time of the alleged offending as well as after sentencing (other than by the Victim's Register if they sign up to it).

20.4 It would be useful to have a wraparound victim's service who were engaged from the time of the alleged offending until the expiration of any order the offender might be subject to. That service could liaise directly with WAS and the DPP to provide additional support throughout the court process, but could also assist victims in engaging with outside agencies during that time (such as emergency supports, victims of crime, housing or the child support agency). Where necessary, the victim service might also engage independent legal representation for the victim. Once the

criminal proceedings are finalised, the victim support service could liaise directly with Community Corrections about the supervision for offenders and the impact those arrangements might have on the victim.