Legal Aid NT submission to ALRC Issues Paper 49:

Justice responses to sexual violence

About Legal Aid NT

Legal Aid NT welcomes the opportunity to make a submission to the Australian Law Reform Commission's (**ALRC**) inquiry into justice responses to sexual violence.

Legal Aid NT is the statutory provider of legal assistance services in the Northern Territory. We have offices in Darwin, Palmerston (the Helpline), Katherine, Tennant Creek and Alice Springs, and auspices the Domestic Violence Legal Service (DVLS) in Darwin.

Legal Aid NT provides criminal law, family law and civil law services across the Northern Territory, including representation on grants of legal aid, duty lawyer services, family dispute resolution, legal task assistance, legal advice, information and referral, community legal education and social support services. Our reach includes providing criminal law services at the 30 Bush Court locations throughout the Northern Territory and civil law outreach services to the Barkly region remote communities, in and around Katherine, and across the northern region of the Territory including remote island communities.

This submission follows the headings in the Issues Paper and answers the questions as relevant to our expertise.

For information, Legal Aid NT also refers the ALRC to *the Journey Mapping Workshop Report: Exploring the voices and experiences of victim/survivors of Domestic and Family violence in the NT Justice System*.[1]

Legal Aid NT consents to this submission being public.

[1] https://irp-cdn.multiscreensite.com/a4a6272a/files/uploaded/41391%20Mapping%20Project%20Report%20Book_web.pdf

Criminal justice responses to sexual violence

Police responses to reports of sexual violence

Legal aid NT's suggestion for improving police responses to reports of sexual violence is to consider national implementation of a scheme based on PARt, the Prevent. Assist. Respond. Training: Training for NT Police and Health Workers.

The PARt [2] project arose in the context of Legal Aid NT's formal partnership and Memorandum of Understanding with Tangentyere Aboriginal Council Family Safety Group. This partnership identified the need to develop specialist ongoing domestic, family and sexual violence training for police and health care workers in the Northern Territory. Funding was provided by the Territory Government in 2022 as a "Community and place-based partnerships for the prevention and response to domestic, family and sexual violence" grant. The PARt project is being delivered by a consortium led by the Tangentyere Council Aboriginal Corporation with the Women's Safety Services of Central Australia, Legal Aid NT and the Domestic Violence Legal Service as partners, and with the support of NT Police and the NT Department of Health.

This specialist DVSF training for police and health care workers is an Australia-first.

An initiative of this project was the *Do your PARt Symposium* convened in Alice Springs on 8 March 2023. The event brought together agency, organisation, and community representatives, and gave them the opportunity to contribute directly to the development of the training package.

The trial process

'Special measures': procedural changes

In the Northern Territory sexual violence offences are generally prosecuted in the Supreme Court of the Northern Territory before a jury, with most cases heard in the Supreme Court building in Darwin.

The Northern Territory has implemented all the special measures listed in the Issues Paper except for changes to court design to limit complainant's interactions with accused.

While efforts are made to limit interactions within the Darwin Supreme Court building, these efforts are not always effective due to the physical layout of the facilities. All participants in the criminal proceedings use the same entrance and it can be difficult to juggle the arrival time of people at court for proceedings listed at a specified time and movements during breaks in proceedings to minimise interactions.

The use of pre-recorded evidence has clear benefits for vulnerable witnesses. However, trial experience confirms that the best way for a jury to assess evidence is when it is given in person, and this remains a consideration in determining the use of special measures in jury trials.

[2] Tangentyere Council (2022) PARt: Prevent. Assist. Respond. Training.

'Special measures': evidence in the form of audio-visual recordings

Under the *Evidence Act 1939* (NT), where a vulnerable witness is to give evidence in proceedings for a sexual offence, if a prosecutor asks the court:

- to admit a recorded statement in evidence as the witness's evidence in chief or as part of the witness's evidence in chief, or
- to hold a special sitting in relation to the witness to have an audiovisual recording made of the examination of the witness at the special sitting,

the court must accede to the request unless there is a good reason for not doing so.[3]

What does not work well, or consistently well, is the technology used to record or play the recorded statement. The quality of the technology plays a significant role in the ability of the jury to assessing the credibility of a witness. Poorer quality technology invariably diminishes the impact of the evidence in chief of a witness and the impact of cross-examination. Even where technology is high quality, recorded evidence may not have the impact of evidence in person. Prerecorded evidence can be more informal and more detached, and this may have the effect of diminishing credibility in the solemn context of proceedings.

The provision and maintenance of high-quality audio-visual technology presents resourcing issues. In the Northern Territory, aside from any quality issues, technology failures, such as the equipment recording audio only or not recording at all, are not uncommon and can result in the evidence of a complainant being compromised in or a complainant having to give oral evidence again.

While Legal Aid NT supports the use of pre-recorded evidence to assist complainants, the use of pre-recorded evidence also presents resourcing issues for legal aid organsations due to the duplication of work. A complainant's pre-recorded evidence is invariably the most important evidence in a criminal trial and the cross-examination of a complainant requires a consideration of all the evidence, the issues and the approach to be taken in the trial, and accordingly requires the preparation of the whole criminal trial. That work then needs to be duplicated when the actual trial is listed.

The use of police interviews as evidence-in-chief is more problematic. In the Northern Territory, there is a general entitlement for the evidence-in-chief of a complainant in a sexual offence to be given by the playing of their police interview. There are two significant differences with this sort of evidence compared with pre-recorded evidence in court. First, the eliciting of evidence depends on the skills and training of police officers who are not legal practitioners. Second, there is no live adjudication of the questioning together with the ability for unfair questions to be disallowed and appropriately reframed. In our experience, judicial officers are more tolerant in allowing the unedited versions of this material to be adduced in the trial than they would be if the evidence was given live in court.

[3] *Evidence Act 1939* (NT) s 21B.

‘Special measures’: intermediaries and grounds rules hearings

An intermediary scheme has not been implemented in the Northern Territory.

We are not able to comment on why an intermediary scheme has not been implemented but note the under resourcing of the justice system in the Northern Territory. Jurisdictions where an intermediary scheme has been implemented would be better placed to comment.

Assessment of the credibility and reliability of complainants

Legal Aid NT is aware of the research about memory and responsive behaviour in the context of sexual violence trauma. This evidence is not generally called in the Northern Territory but the prosecution is able to do so.

Whether or not prosecutors should call expert evidence about that research would depend upon the nature of that evidence. If the expert evidence is specifically aligned to the evidence of a witness in the circumstances of a particular case, there is a danger that this expert evidence could unfairly enhance the evidence of the witnesses.

The preferrable course is legislated jury directions to address myths and misconceptions consistent with research findings. That is the function of jury directions and a jury’s deliberations about these matters should not depend on the effectiveness of the evidence given in a particular case.

Legal Aid NT supports education and training.

We do not support mixed juries comprising lay people and experts on memory and responsive behaviour research. The function of a jury is to judge the facts and not to bring opinions to the process that cannot be tested.

Judge-alone trials

Judge alone trials can be useful in trials that involve complex legal concepts or matters which are highly prejudicial to accused. However, consistent with the criticisms of judge alone trials in the Issues Paper, Legal Aid NT supports the important role of the jury system in ensuring community values are represented in the criminal justice system and notes the risk that a sole judge may bring their own beliefs and misconceptions to their proceedings.

Cross-examination and the law of evidence

The legislative provisions in the Northern Territory are adequate to protect complainants during cross-examination. Cross-examination that may be interpreted as reflecting myths and misconceptions about sexual violence, may be relevant to a fact or issue in proceedings and therefore, should not as a blanket rule be restricted on the ground that it is irrelevant or on any other ground.

Cross-examination is concerned with the adducing of evidence as distinct from both the finding of facts and the making of submissions. Myths and misconceptions generally concern fallacious opinions that victims will always behave or present in a certain way in a given scenario. What needs to be guarded against, therefore, is the particular use that a jury might make of the evidence, or a particular submission that might be made, rather than the evidence itself. The mechanism in a jury trial to achieve that is through jury direction on the use of evidence and not through the restriction of otherwise of admissible evidence.

As noted in the Issues Paper, legislative reforms now allow a wide range of circumstances in which prosecutors may object to questions or judges disallow them, including questions that are irrelevant and have no basis other than a stereotype or myth or misconception.

Further, defence counsel should be able to question the complainant about the timing of a complaint, where relevant.

Interpreters

The Northern Territory is one of the most linguistically diverse places on Earth, with more than 100 Aboriginal languages.[4] Approximately 60% of Aboriginal people speak an Aboriginal language at home. Many speak more than one Aboriginal language, and English may be a second, third or fourth (or more) language. In some parts of the Northern Territory, English proficiency is very low, and for some, non-existent.

There is a chronic shortage of interpreters in the Northern Territory in comparison with need, particularly problematic in regional areas. The Supreme Courts receives priority in allocation of interpreters for legal proceedings, however, trials in the Supreme Court are vacated and hearings in the Darwin Local Court are adjourned 'on an almost daily basis'[5] because interpreters are not available.

The Northern Territory also has significant problems with the training and accreditation of interpreters. The standard of the interpreting services for legal proceedings in the Northern Territory is particularly poor. Interpreting services are manifestly underfunded.

Personal information

In the Northern Territory there are adequate legislative provisions to protect the disclosure and use of a complainant's personal information obtained during counselling or other therapeutic intervention.[6]

Confidential communications including a complainant's personal information can only be produced on subpoena or adduced at trial with the leave of the court. The Court can only give leave if it is satisfied that the evidence has substantial probative value, that other evidence of similar probative value is not available, and the public interest in preserving confidentiality and preventing harm to the complainant is substantially outweighed by the admission of the evidence.[7]

The complainant's personal information obtained during counselling or other therapeutic intervention is not as a matter of practice regularly sought in the Northern Territory by defence counsel when it is not put in issue by the Crown. The provisions in the Northern Territory allow for the consideration of the harm that a complainant might suffer as a result of the disclosure of evidence and that would ordinarily be presented by the Crown which could include (if necessary) the calling of evidence. It is therefore unnecessary for a complainant to be represented but also undesirable as a witness giving evidence in the proceedings should not be privy to the arguments in relation to the admission of their evidence.

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[4] Stephen Gray et al, *Criminal Laws Northern* Territory (The Federation Press, 3rd ed, 2021) 71.

[5] Kristina Kukolja, Chronic shortage of Indigenous interpreters in Australia's legal system risks violating human rights, ABC (online, 11 August 2023).

[6] See Part 7 of the *Evidence Act 1939* (NT).

[7] *Evidence Act 1939* (NT) s 56E.

Types of evidence

The Northern Territory is a uniform evidence law (UEL) jurisdiction and accordingly, there is a substantial degree of harmonisation with other UEL jurisdictions. The establishment of the UEL model was the subject of significant inquiry by law reform commissions and any substantial changes to the admissibility of different types of evidence will require further significant inquiry.

Legal Aid NT maintains a general position that countering myths and misconceptions are best dealt with through direction about the use of evidence rather than through prohibiting otherwise admissible evidence being adduced.

The UEL has expanded the admissibility of complaint evidence and the use that can be made of it and, subject to the application of the exclusionary provisions in any given case, there is no limit on the number of complaints that can be adduced at trial, including complaints made to police and others involved in the investigation of alleged offending. Complaint evidence is invariably adduced by prosecutors as evidence that supports a complainant's account notwithstanding that it is not evidence independent of a complainant and is accordingly and area that is tested through cross-examination. It would be difficult to apply a general restrictive rule that is not attuned to the facts of a particular case. However, in cases where there are many complaints, the constant repetition of a complainant's account can have an overwhelming effect which is no longer prevented by the common law rule against prior consistent statements.

Like complaint evidence, evidence of distress is adduced by prosecutors as evidence that supports a complainant's allegation. That evidence usually comes from a person independent of the complainant who has observed the complainant, particularly when receiving an immediate complaint. It would be impractical in those circumstances to adduce evidence from a witness of a complainant's account while limiting the evidence of the manner in which the account is given.

Reform to tendency and coincidence evidence does not concern myths and misconceptions relating to complainants nor reducing the trauma of court proceedings but, rather, increasing the likelihood of obtaining a conviction. There has been substantial reform in this area, both generally and specifically in relation to sexual offences, that has resulted in the greater admission of this type of evidence. There is no need for further reform.

Legal Aid NT does not support further reforms 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.

Specialisation and training of judges and counsel

The Northern Territory is a relatively small jurisdiction. The volume of work and available resources would not support the creation of specialist courts, sections or lists.

However, Legal Aid NT is supportive of specialised training for judges who conduct sexual offence cases. That training should address the issues set out in the Issues Paper.

Given the size of the jurisdiction and the relatively small pool of practitioners in the Northern Territory, special accreditation for lawyers who appear in sexual offence cases would be impractical.

Delay

Systemic challenges in the Northern Territory justice system which contribute to delay include:

- A chronically under-funded justice system including:
    - inadequate funding of all justice agencies including legal assistance and prosecution services, except for the police who are funded at twice the national average per capita.
    - a lack of court infrastructure, and limited Audio-Visual Link facilities to allow remote appearances.
- Late investigation and disclosure of relevant matters and evidence.
- Inefficient court procedures, including the lack of effective use of committal process and availability of trial dates.
- A lack of interpreters.
- Lack of financial and logistical assistance to clients to access legal assistance services and courts, such as travel from remote communities.
- Limited domestic, family and sexual violence support services and programs.
- Overcrowding of correctional centres and detention centres leads to limited access to clients who are held in remand, sentenced or in administrative detention.

Guilty pleas

In the Northern Territory there have not been any recent changes to sentencing for sexual violence offending.

Sentencing indication hearings are not used in the Supreme Court of the Northern Territory and therefore there is no experience of this process in terms of encouraging guilty pleas.

The criminal justice system in the Northern Territory requires whole sale reform to improve efficiency.

Sentencing

The Northern Territory criminal justice system would benefit from the introduction of early appropriate guilty plea reform of processes from committal to sentence including aspects of sentencing practices and outcomes.

There have not been recent changes to the role of victims of sexual violence in the sentencing process in the Northern Territory.

Victim impact statements are given appropriate consideration by sentencing judges.

Appellate proceedings

In the Northern Territory, provisions for the recording of the evidence of a complainant at trial are invariably used so that a complainant ordinarily does not have to give evidence again.

There are no provisions that allow for the bringing of interlocutory appeals in the ordinary case. A concern about the introduction of such provisions is that they will fragment criminal proceedings in a small, under-resourced jurisdiction in which there is a limited number of practitioners and result in further cost and delay.

Civil proceedings and other justice responses

Restorative Justice

The Northern Territory does not have restorative justice processes as a way of responding to sexual violence.

Legal Aid NT notes and adopts the view of National Legal Aid that:

> The use of criminal justice processes as the primary response to sexual offending has clear limitations. Victim survivors have different justice needs that should be met through an expanded range of options, based on their needs and preferences. These processes and practices can provide additional pathways for accountability and healing.
>
> Restorative and problem-solving approaches can create better outcomes for both victim-survivors and people accused of offending. Restorative pathways can facilitate accountability for people who caused harm and healing for those who have been harmed. However, any restorative justice approach should be carefully implemented so that it can be actively monitored and evaluated. Any restorative process should not cause any harm for the participants in the process and should embed safeguards in the model.

Civil litigation

Legal Aid NT agrees that significant government funding for legal assistance services to provide legal assistance in civil proceedings is required to make the civil litigation process more accessible and effective, including to support applicants to apply for Intervention Orders.

Legal Aid NT agrees that other relevant aspects of civil litigation that the ALRC could address include in particular:

- trauma-informed court processes, support for victim survivors, and the availability of training and other measures to address the myths and misconceptions about sexual violence, and
- the intersection of sexual violence issues with family violence matters, family law matters, and child protection matters.

Workplace laws

Legal Aid NT supports the positive duty to eliminate discrimination, sexual harassment and victimisation which is found in the new Part 2A of the Anti-discrimination Act 1992 (NT), which came into force on 2 January 2024.

Compensation schemes

Legal Aid NT submits that changes to compensation schemes to allow them to operate effectively and efficiently, and best promote just outcomes for victim survivors of sexual violence would include:

- Streamlining processes to ensure that applications for victims of crime compensation are dealt with in a timey manner

- Ensuring that the application process is user friendly and does not involve overly complicated processes
- Ensuring that compensation available to victims under the current scheme is not reduced by moving toward an award based model from an injury based model
- Facilitating a scheme that supports the agency and autonomy of victims
- Ensuring that victims who are living in remote communities have equal access to support services, such as counselling
- Ensuring that victims of family and domestic violence are not penalised for failure to report incidents or failure to leave a relationship within a prescriptive period of time.
- The linked image cannot be displayed. The file may have been moved, renamed, or deleted. Verify that the link points to the correct file and location.
- Recognising trauma must as a consideration when developing reforms to better support to victims of family and domestic violence, and
- Avoiding confining compensation to loss of earnings which would severely reduce the amount of compensation available to some of the most vulnerable victims, including Aboriginal and Torres Strait Islander people living in remote areas and victims of family and domestic violence who may be unable to work.

Victims' charters

The Northern Territory has a Charter of Victims' Rights, however, Legal Aid NT does not have sufficient experience to comment about how it works in practice or could be improved.

Conclusion

Thank you for the opportunity to provide a submission to this inquiry.

Should you require any further information from us please be in touch with Bianca Aloisi, Executive Assistant at [redacted]

Yours sincerely,

[redacted]

Annmarie Lumsden
Director, Legal Aid NT
27 May 2024