



## **Australian Law Reform Commission Inquiry into Justice Responses to Sexual Violence**

(Note: extension was granted for submission to 31 May 2024)

### **Older Women and Sexual Assault: Age is not Protective**

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## Background

The Older Women's Network (OWN) has been at the forefront of progressive change, activism and advocacy since 1985. We have gone from strength to strength as a dynamic members-led organisation expanding throughout NSW with 17 groups. Over the years, OWN has developed services and resources for older women; and written and contributed to numerous influential reports on key issues for older women such as **income security, homelessness, ageism, wellbeing, abuse of older people** and **domestic violence**. We have played our part in putting these issues at the forefront of public policy debates.

## Experience in Family Violence and Sexual Assault Policy

The Older Women's Network currently auspices the 'Violence Against Older Women Support and Education' program. The launch of this program arose from several years of advocating to improve the quality of aged care. In the course of that work, it became apparent that sexual assault of older women occurred on a regular basis and was often ignored or discounted as unimportant. As a result, women did not receive support, alleged perpetrators continued in their roles, and no action was taken to reduce the risk of further assaults. The result of the ALRC 2017 report, *Elder Abuse - a National Legal Response*, and the following Royal Commission into Aged Care that estimated that up to 50 assaults took place a week<sup>1</sup> confirmed our claims.

In advocating for change, OWN made representations to the Royal Commission into Aged Care; delivered submissions to consultation processes in the development of new legislation and administrative reforms; took part in projects such as OPAN (Older Persons Advocacy Network)'s 'Ready to Listen', a project that developed training and information resources for the sector; and currently sits on the ALRC's Lived-Experience Expert Advisory Group on Sexual Violence. Comments and advice in this submission is drawn from the result of this work.

## Introduction

OWN is pleased to note that 'people in residential care settings; older people, especially those experiencing cognitive decline'; are recognised by the ALRC as needing particular attention (ALRC Issues Paper, 1).

OWN is represented on the Lived-Experience Expert Advisory Group which is making a separate submission. OWN supports this submission fully, particularly noting its recommendations to apply the human rights framework and a trauma informed approach to law reform.

The majority of matters raised in the Issues Paper and responses by the EAG are the same for women regardless of age. Many conditions attached to old age can be experienced at any age and should be managed by the justice system according to the capacity of the individual. For example, in a circumstance where a complainant at any age, has a cognitive issue from a chronic illness or a brain injury or trauma from an historical assault; then

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<sup>1</sup> Royal Commission into Aged Care Quality and Safety: Final Report – The new system, (2021), vol 3B, 522 – 523.

reporting and trial processes should apply to ensure the complainant is not retraumatized, the public interest is served and the community protected.

However, we would like to highlight the fact that there are issues that particularly relate to age. The *National Plan to End Violence against Women and Children 2022-2032*, describes the circumstances that are specific to older women:

*For older women, gender-based violence includes...violence that occurs in non-family or domestic settings such as violence from carers and sexual violence in residential aged care facilities. Many older women experience the compounding negative effects of taking on multiple unpaid caring roles, which can affect their employment and economic security and mean they have limited control over finances and decision-making. ... 62% of people who experience elder abuse do not seek help or advice regarding their situation, meaning that this often remains a hidden problem. (p39)*

This submission will amplify the relevant issues described in the National Plan that affect older women who are victims of assault, particularly when they occur while in the care of an aged care provider.

### **Restrictive interpretation of uniformity**

The Terms of Reference and Issues Paper directs attention to uniformity of legislation and procedures of the criminal justice system in reporting, trial processes and sentencing of sexual assault. Focussing only on legislation from the first contact with the criminal justice system is particularly restricting for women who do not have control over their living arrangements.

If a complainant is in the care of a service provider, whether it is child protection, criminal justice institution, disability or aged care, they are restricted in how and to whom they can make their first complaint because of where they are living, or who controls their living arrangements (such as residential care). If the perpetrator is also a care provider, there is naturally an inherent difficulty. The laws that govern care in these circumstances are the first obstacle in reaching the criminal justice process.

Uniformity is important not just between jurisdictions but between different areas of law. There should be the same level of protection and responsibility by all care providers. For example, the protection, reporting and responsibility of a young person supported by a disability service provider should be the same as if that person is living in aged residential care. The level of protection should not be based on age.

There is a risk when decisions are made to place any crime into 'age' categories, that is, when it relates to older people, it is categorised as so-called 'elder abuse'. Causes and responses to sexual assault are not the same as managing forms of abuse and neglect. When sexual assault is found in a list of abuses and neglect, it somehow becomes less than a crime. Frequently when reviewing literature on older people and sexual assault, information is not found in the area of criminology, but in social welfare articles about elder

abuse. For example, the AIHW report on sexual assault<sup>2</sup> includes reference to older people, only to refer the reader to their report on 'elder abuse' where it is treated in the same way as fraud. There is no corresponding link from 'Elder Abuse' to data on sexual assault.

The Commonwealth's "National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023" mentions sexual assault but fails to include any specific reforms or actions. Including it as an 'add-on' to elder abuse suggests that this crime is different if it happens to an older person. Different, usually means less, with different rules applying. Naming it as sexual abuse and classifying it in the criminal justice area should over-ride reporting rules that apply in other legislation governing the 'care' of individuals.

## Response to selected questions

### *Reporting the experience of sexual violence safely*

**Question 3: How can accessing the justice system and reporting be made easier for victim survivors? What would make the process of seeking information and help, and reporting, better?**

- a) **Enhanced outreach and education:** Implement community-based programs specifically targeting older women to educate them about their rights, available services, and how to access them. Information should be disseminated through various channels, including senior centres, healthcare providers, and community organisations, in particular those like the OWN who focus on support to older women.
- b) **Confidential and safe reporting mechanisms:** Develop multiple confidential reporting options, such as hotlines, online portals, and in-person services at trusted community locations.
- c) **Ensuring anonymity and safety can encourage more survivors to come forward.** Building relationships and trust is imperative for older women, particularly those from CALD backgrounds, as they are not likely to disclose or seek support unless they feel a deep sense of trust. This is because in the lifespan of many older women, they have not been believed or supported in the past when they experienced historic instances of sexual assault or child abuse and so carry that experience of lack of trust that telling anyone will actually make any difference.
- d) **Simplified reporting processes:** Streamline the reporting process to make it less intimidating. Provide clear, step-by-step guidance on what to expect when reporting a sexual assault. Ideally information should also be shared on options outside of the judicial system depending on each individual's situation.
- e) **Dedicated Support Coordinators:** Assign case managers to guide survivors through the justice process, ensuring they receive continuous support and information. This service should be fully funded and provided by community legal centres.

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<sup>2</sup> AIHW, April 2024 <https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/sexual-violence>, viewed 20 May 2024.

f) **Increased accessibility:** Ensure all services are accessible to those with mobility issues or disabilities. This includes physical access to buildings and the availability of services like sign language or interpreters.

g) **Residential services and institutions should have the same access** as corrective service institutions, with telephones available that can fast-dial to specialist hotlines.

**Question 4 Do you have other ideas for what needs to be done to ensure that victim survivors have a safe opportunity to tell someone about their experience and get appropriate support and information?**

Older women, like other women, are very unlikely to report an assault. Older women face specific difficulties in reporting. The most difficult is for women who live in a retirement village, residential age care, or are dependent on a carer who may also be the perpetrator.

There is a 42 percent chance that everyone over the age of 65 will spend a period of time (average of 6 months) in residential care. This percentage increases with age, so at 90, for women, it is a 95 percent chance. In other words, if someone lives long enough, they are very likely to enter residential care.<sup>3</sup> Considered over a period of time, this is not a small proportion of the population who need protection.

Data from the Aged Care Quality and Safety Commission on reports of unlawful sexual contact or inappropriate sexual conduct in residential aged care facilities show:

- 530 reports between 1 October and 31 December 2021
- 485 reports from 1 January and 31 March 2022
- 452 reports between 1 April and 30 June 2022
- 633 reports between 1 July and 30 September 2022
- 565 reports between 1 October and 31 December 2022
- 592 reports between 1 January and 31 March 2023
- 519 reports between 1 April and 30 June 2023 (Aged Care Quality and Safety Commission 2021; 2022a; 2022b; 2022c; 2022d; 2023a; 2023b).

Yet, until recent changes made in response to the Royal Commission into Aged Care, not all assaults were 'notifiable'. There were a number of exemptions that allowed providers to avoid reporting to the Complaints Commission, and there was no obligation to report to the police.<sup>4</sup> The definition and reporting of 'Serious Incidents' has since changed, sexual assaults (after much lobbying) were included in mandatory reporting. This does not necessarily mean that all assaults are reported but it has improved.

If a complainant is in the care of a service provider, they are restricted in how and who they can make their first complaint because of where they are living, or who controls their living arrangements (such as residential care). This is also the case for self-care units in retirement villages, where a manager may be the first person the complainant approaches. Retirement villages are not within the scope of aged care facilities so there is no

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<sup>3</sup> Broad JB, Ashton T, Gott M, McLeod H, Davis PB, Connolly MJ. Likelihood of residential aged care use in later life: a simple approach to estimation with international comparison. *Aust N Z J Public Health* 2015; **39** 374–9.

<sup>4</sup> *Aged Care Act 1997 (Cth)*, 63-1AA(3).

responsibility to record or report to anyone or to advise a complainant of where they could seek assistance. In New South Wales, Rule 10 of the Rules of Conduct stipulates that retirement village operators are required to have an Elder Abuse Prevention Strategy in place to identify and respond to elder abuse in their villages. This includes information on ways to respond to elder abuse or concerns of suspected abuse, including reporting procedures, escalating matters to appropriate agencies and authorities and response times. Unfortunately, it is non-enforceable, and not all villages are compliant with these requirements.

### 1. Case study

*Margarita's story of her reporting of an attack and subsequent prosecution of the offender,<sup>5</sup> demonstrates a series of failures, the first one is that there was no obligation to report by the facilities manager, another that there was no obligation to make her room secure. This is a notable gap in legislation.*

Since the Royal Commission, the Bureau of Crime Statistics and Research (BOCSAR) reported a 34 percent increase in police attending aged care services following changes to reporting requirements to the Serious Incidents Response Scheme (SIRS). There are no details as to the outcome of the visits.<sup>6</sup> We do not even know if police record these cases, as feedback from at least one sexual assault service notes that the police they work with do not do so as charges cannot be laid.

### 2. Case study

*Published accounts of experiences of carers, such as 'Sandra's Story', published by OPAN<sup>7</sup>, demonstrates the difficulty of reporting, her daughter explained:*

*Not long after mum was admitted to a residential aged care home, she reported that she had been raped. She reported this on multiple occasions over a week and the staff filled out a number of incident reports and called in their nurse practitioner, who then contacted us.*

Following this report, the facility treated the reports as "hallucinations of rape", despite bruising and increased agitation. The provider continued to allocate male carers, they failed to report the allegations to the Dementia Behaviour Management Assessment Service (DBMAS), the Geriatrician, Aged Care Quality and Safety Commission, police or Elder Abuse Service. The family was given no information about support services in the community. Instead, Sandra was given high doses of Risperidone, which caused a reaction and led her to a psychiatric ward. The family contacted police who refused to investigate either the actions of the provider or the assault complaint, instead making unsubstantiated remarks about a 'rape fantasy'.

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<sup>5</sup> <https://startsat60.com/media/news/sexual-assault-victim-margarita-solis-96-shetoo-campaign-international-womens-day>

<sup>6</sup> <https://www.abc.net.au/news/2023-12-28/reported-assaults-in-nsw-aged-care-homes-hit-record-levels/103270420>

<sup>7</sup> <https://www.opalinstitute.org/uploads/1/5/3/9/15399992/sandrastoryb.pdf>

A recent survey of frontline workers in the field<sup>8</sup> conducted by OWN reported their frustration that family carers and women reporting sexual assault living in residential care found that if the assault was by a fellow resident, no action was taken. They believed that the provider should have a duty of care to deliver a safe living environment, and failing to do so sure should attract criminal penalties.

**Mandatory reporting** is essential so that the culture of denial ceases. The Crimes Act and the Aged Care Act need to reinforce reporting requirements. Failure to report and take action denies there is a victim, harm caused and responsibility. Lack of action places the reputation of the organisation and 'efficiency' above duty of care and suggests that the 'ledger is balanced' - that is, a belief that more good than harm is done by the delivery of the service.<sup>9</sup> The outcome of this institutional response results in witnesses being reluctant to come forward, since if they do, they experience, as the Royal Commission found:<sup>10</sup>

*People receiving aged care, their family members and their advocates have described the powerlessness, despair, anger and frustration that they have felt when confronted with providers' resistance to feedback and complaints.*

Failure to address this belief embeds flaws that lead to problems in:

- Understanding how risk of assault can be reduced and how to care for victims of assault. When the records of assault are distorted, it leads to the myth that older people do not, or rarely experience sexual assault and specific strategies are not needed
- Initiating redress for victims, without timely reporting, the period for useful scrutiny is lost, as is the chance of timely remedial action for the victim.

Regardless of whether the criminal justice system changes to improve prosecution rates, recording of complainant's allegations are important. This should be enshrined in law. Reporting is needed so that systems can be improved for the industry as a whole, as well as drawing attention to high frequency complaints at specific institutions. Providers are far more inclined to suppress any complaints than to deal with them in order to preserve their star rating.

### ***Required improvements***

**Culturally competent services:** Provide training for service providers on the specific needs and sensitivities of older women from diverse backgrounds. Ensure services are available in multiple languages and are culturally sensitive.

**Peer support programs:** Establish peer support networks where survivors can connect with others who have had similar experiences. This can reduce isolation and provide emotional support.

**Feedback mechanisms:** Create avenues for survivors to provide feedback on the services they receive. Use this feedback to continuously improve service delivery and ensure it meets the needs of older women.

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<sup>8</sup> Unpublished data, OWN 'Violence Against Older Women Support and Education' Survey data, March 2024.

<sup>9</sup> As quoted in Palmer, D 'The role of organisational culture in child sexual abuse in institutional contexts', Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, (2016), 21.

<sup>10</sup> Royal Commission into Aged Care Quality and Safety, 'Final Report' (2021) Volume 1, 137.

**Public Awareness Campaigns:** Launch campaigns to reduce the stigma associated with sexual violence and encourage a supportive community environment for survivors.

**Mandatory reporting**, with aggregated data available to the public, and **mandatory recording** of sexual assault cases, regardless of the cognitive impairment of the alleged perpetrator.

**A public visitor program** to all government funded aged care facilities, similar to that in prisons. Such visitors can speak with residents, observe institutional practices and accept complaints from residents.

## **Criminal justice responses to sexual violence**

There are 16 sub-categories in this section.

### **1. Police responses to reports of sexual violence**

**Question 7 What are your ideas for improving police responses to reports of sexual violence? What can be done?**

This question is closely aligned with the question about reporting. As referred to above, BOCSAR has recorded an increase in police calls to residential care but there are no details as to the outcome of the visits.<sup>11</sup> We know from media reports that the result of such calls can range from a disaster (as in the tasing of a resident which led to hospitalisation and death)<sup>12</sup> to successful prosecutions for sexual assault cases.<sup>13</sup> The most likely outcome is no change to the status quo, particularly if the offender is a fellow resident.

As in the references in the question about reporting, there is evidence that police are not responsive (or are inappropriately responsive) to allegations from residential aged care, having made assumptions about the cognitive ability of the victim survivor and/or the perpetrator. Without accurate recording of reports and reasons for action or non-action, it is not possible to see patterns in police processes nor if certain facilities are logging more cases than others.

If the assault is not recognised or recorded, then the victim survivor is not going to get to the next step of being referred to support services. A recent survey of frontline workers in the field<sup>14</sup> conducted by OWN reported that the most common way older women came to the service was via self-referral. This points to police and other services not taking enough responsibility to refer their clients or residents.

Police can discount the idea that an older woman can be assaulted because of the myths around rape, and age; and the mistaken idea that older women are not 'rapeable'. An

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<sup>11</sup> <https://www.abc.net.au/news/2023-12-28/reported-assaults-in-nsw-aged-care-homes-hit-record-levels/103270420>

<sup>12</sup> <https://www.begadistrictnews.com.au/story/8202295/what-we-know-about-95yo-aged-care-residents-tasing/>

<sup>13</sup> <https://www.abc.net.au/news/2022-10-12/man-who-attempted-to-rape-elderly-woman-sentenced-to-jail/101527360>

<sup>14</sup> Unpublished data, OWN 'Violence Against Older Women Support and Education' Survey data, March 2024.

outcome of law reform and changes to police practice would result in this myth being challenged.

It is unlikely that the subjective opinion of police is the sole reason that restricts their actions. Police need a Crimes Act they can apply in these circumstances and a prospect of a successful prosecution. The fault may not lie with police alone but with the limits of charges that can apply. If responsibility of an assault was shared with care providers for example, then the police would have more scope and reason to investigate.

Police could be supported by:

**Review of legislation** that can be applied in circumstances where the complainant resides in a secure facility. This should include a review of relevant legislation across disability, criminal justice centres, children's services and aged care to ensure uniformity.

**Training for police officers:** This is necessary to bust the myth that sexual violence does not occur for older people. Sexual violence is about power, not desire, and it is happening against older women. Police officers should receive comprehensive training on the specific dynamics of elder sexual violence. This training should cover the physical, emotional, and psychological aspects of abuse, emphasising respect and empathy for older victims. They should also be aware that predators exist in the same way as pedophiles with gerontophiles and other opportunists targeting those who are unable to report.

**Trauma-informed care:** Implement training programs focused on trauma-informed care to ensure officers understand the impact of trauma on older survivors and respond in a manner that minimises re-traumatization.

**Sexual Violence Liaison Officers:** Appoint liaison officers who can act as a point of contact for older victims, providing continuity and a familiar face throughout the investigation process. These officers should be trained to sensitively handle the specific needs of older survivors.

**Reporting:** There is likely to be pressure on police to follow through only on cases that are likely to get a conviction, limiting the data that is collected. However, good collection of data is necessary to understand how to investigate and increase the likelihood of positive outcomes for the victim and police. A study of assaults in nursing homes between 2000 and 2015 recommended that 'data should be standardized, validated, reliable, and gathered prospectively across Australia and internationally.'<sup>15</sup> It is as important to understand the offender as it is the victim.

A recent report summarised what was needed for older women in these cases:<sup>16</sup>

- Training police to interview those with dementia and other cognitive impairments.
- Video-recording of initial evidence.

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<sup>15</sup> Legal Medicine, Volume 36, February 2019, Pages 89-95, **The epidemiology of sexual assault of older female nursing home residents, in Victoria Australia, between 2000 and 2015**, Daisy Smith et al.

<sup>16</sup> Sexual violence & older women: working towards justice Dr Bianca Fileborn School of Social Sciences, UNSW

- Developing techniques for prosecuting cases involving victim with cognitive impairment.
- Strengthening relationships with ageing experts and service providers.

### ***Prosecution responses***

#### **Question 10 Do you have ideas for improving ODPP responses to the prosecution of sexual violence?**

Given the barriers to reporting and police responses, the DPP does not have the opportunity to review cases, and if it did, the number of resources required would be significant. They are also hindered by the lack of reporting of cases by police, so that repeat offenders are not identified.

Public condemnations such as the one recently made by Judge Robert Newlinds who criticised the Director of Public Prosecutions over an 'unwritten policy' when prosecuting sexual assaults places more pressure on the DPP when deciding to proceed.

The DPP responded that the law in NSW recognises a complainant's evidence no longer requires to be corroborated by other evidence. 'Where it is assessed that there are reasonable prospects of conviction, it is appropriate that the case proceeds to trial, where the evidence can be tested by the accused and the outcome determined by a jury drawn from the community.' These conditions are difficult when it comes to evidence for an older woman, including:

- Most women who are sexually assaulted in aged care die within 12 months of an assault<sup>17</sup>.
- Delays in collecting evidence, or interviews conducted over a period of time is problematic if the victim survivor has a progressive illness.
- There are no legal studies assessing how courts have managed sexual assault cases with older adults, and the rate of success. Media reports on court outcomes focus on acquittals and the lack of prison terms for those found guilty, it is not clear whether this represents a consistent pattern.

For older women, the DPP needs:

- Alternate options to the trial process that allow negotiation of restorative justice options.
- A way to fast track their internal processes for cases that do have merit.
- To ensure that assault is not labelled 'elder abuse', but to fall under specialist teams that already assess sexual assault.
- To consider test cases where the providers and carers can be held to account.
- An internal review of their case management systems, and to allocate a specialist team to assess and work with older adults.
- To report on an annual basis the cases that came before them and the reasons for not proceeding.

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<sup>17</sup> Burgess, Ann & Dowdell, Elizabeth & Prentky, Robert. (2000). Sexual Abuse of Nursing Home Residents. Journal of psychosocial nursing and mental health services. 38. 10-8. 10.1201/9781420042375.ch4.

- Test cases where older women can give pre-recorded evidence, give evidence supported by an intermediary, or may not be alive at the time of trial.

Various studies support the importance of recording and analysing the results of investigations of this nature. One study specifically on older women found a significant proportion of offenders committed repeat offences. The study encouraged investigators to routinely expand their initial investigations to determine if more than one victim was involved in the assault. 'Doing so should strengthen the case, which is particularly necessary in cases with cognitively impaired victims. ...When encountering these cases, the presence of other victims may help to overcome obstacles that arise when working with victims who are cognitively impaired.'<sup>18</sup>

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

There is a wealth of evidence about the detrimental effect of women experiencing days of aggressive questioning as a witness. Changes in NSW have attempted to alleviate this burden; however, it is likely that older women will not experience this as the DPP will decide the woman does not have the cognitive ability to swear to evidence or the length of the process will probably mean the victim has died before being called to give evidence. Therefore, prosecution is not likely unless there is another third party witness.

Studies, such as the recent one reported on in the *Interview study: Experiences of complainants of sexual offences in the NSW criminal justice system*,<sup>19</sup> is fairly typical in describing the re-traumatising effects of the trial for complainants. In terms of giving evidence this included: lack of support during the trial process, status as a witness, lack of psychological support and the cross-examination process.

Support could be increased if restrictions were lifted on access to support persons for vulnerable persons in prescribed sexual assault and domestic violence offences. In addition to this, it will be helpful to have specialised intermediaries who are trained to facilitate communication between the complainant and the court, as happens in the Victorian legal system. They can help to simplify and clarify questions put to the complainant and ensure that the complainant's responses are accurately conveyed.

The justice system needs to adapt its evidentiary standards and procedures to better accommodate cases involving older victims. This might include the use of video testimonies to avoid re-traumatization and to assist those who may have mobility or health issues that make court appearances difficult. Courts should also be equipped to handle cases where victims may have cognitive impairments, ensuring their testimony is given appropriate weight and consideration. This includes ensuring all victim-survivors can pre-record their testimony, thereby reducing the trauma associated with courtroom proceedings.

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<sup>18</sup> Payne, B. K. (2010). Understanding Elder Sexual Abuse and the Criminal Justice System's Response: Comparisons to Elder Physical Abuse. *Justice Quarterly*, 27(2), 206–224.

<sup>19</sup> Elena Campbell (Centre for Innovative Justice, RMIT) and Frances Lockie (KPMG), 2023

### Question 17

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

**Victim Support Services:** Courts should have access to victim advocates who specialise in working with older adults. These advocates can assist victims throughout the legal process, from reporting the abuse to navigating the court system. Providing psychological support and legal assistance tailored to the needs of older women can help them come forward and sustain their involvement in often lengthy judicial processes.

Support persons for people with cognitive issues are usually not permitted to assist in sexual assault cases. This restriction should be lifted.

As noted above, we believe the use of specialist intermediaries who are trained to facilitate communication between the complainant and the court will be helpful when the complainant is called to give evidence and is being cross-examined. Such facilitation mitigates the adversarial approach often adopted by defence counsel, promoting a more equitable and trauma-informed examination process.

### ***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 that research? 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)?**

OWN is aware of research on memory and responsive behaviour in the context of sexual violence trauma. This research highlights that trauma can significantly impact how individuals recall and report their experiences. Key findings from this research include:

a) **Fragmented and incomplete memories:** Trauma can cause fragmented, incomplete, or non-linear memories. Survivors may remember certain details vividly while other aspects of the event may be unclear or forgotten.

b) **Delayed reporting:** Many survivors delay reporting their experiences due to fear, shame, confusion, or distrust of the justice system. This is especially pertinent for older women, who may face additional barriers related to generational stigma and dependence on their abusers.

c) **Dissociation and coping mechanisms:** Survivors may exhibit dissociation or other coping mechanisms, which can affect their ability to recall events consistently. This is a protective response to severe trauma.

d) **Behavioural responses:** Survivors of sexual violence may respond in a variety of ways, including freezing, appeasing the perpetrator (fawning), or showing signs of compliance, which can be misinterpreted by those unfamiliar with trauma responses.

## ***Views on the Research:***

**OWN strongly support the findings of this research, which provide crucial insights into the psychological and physiological impacts of trauma.** Understanding these impacts is essential for the fair and compassionate treatment of survivors, especially older women, who may have additional complexities related to age, health, and social support networks.

Prosecutors and expert evidence: We firmly believe that all prosecutors should call expert evidence about how people recall traumatic events and how survivors of sexual violence typically respond. This expert testimony can serve several important functions:

(i) **Educating the court:** Expert evidence can educate judges and juries about the nuances of trauma, helping them understand why a survivor's account might seem inconsistent or why they may have delayed reporting the abuse.

(ii) **Counteracting misconceptions:** By providing a scientific basis for understanding trauma responses, expert testimony can counteract common misconceptions and biases that often disadvantage survivors, such as the belief that immediate and coherent reporting is the norm.

(iii) **Supporting survivor testimony:** Expert evidence can support the credibility of the survivor's testimony by explaining how trauma affects memory and behaviour, thereby enhancing the overall understanding and sensitivity of the judicial process.

(iv) **Specific considerations for older women:** Older women may have age-related cognitive changes that interact with trauma responses. Expert evidence should address how aging can impact memory and the expression of trauma, ensuring that these factors are taken into account during trials.

*Health and dependency Issues:* Older women may also have health conditions or be dependent on their abusers, which can further complicate their responses and reporting behaviours. Understanding these dynamics is crucial for fair legal proceedings.

*Generational differences:* Generational attitudes towards sexual violence and trauma can influence how older women report and recall their experiences. Experts should be prepared to discuss these sociocultural factors.

## **Judge-alone trials**

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

More research needs to be done in this area for an informed opinion. For older women, it could be less intimidating and also proceed to trial faster. However, it would be reassuring to know that the judge had received specialist training in understanding the consequences of sexual assault on older women, and how the myths surrounding rape discount the experience of older women.

## ***Cross-examination and the law of evidence***

**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?**

Understanding as we do now about how memory works, this issue should be redundant. For older women, and others who are likely to rely on intermediaries to assist them make a complaint, it makes even less sense. The question above on responsive behaviour applies to this question.

## ***Personal information***

### **Question 28**

**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 the legislative provisions?**

There should be uniform provisions giving certain material such as counselling information privilege. Claims to access this material should be made with the woman’s consent or she should be represented in hearing that seek to access this information.

There are several examples of family members who have sought police and care provider reports relating to the reporting of the assault. In this, there were unsubstantiated and subjective comments about the victim survivors’ state of mind, referring to the claim as a ‘fantasy’. Information within such documents should be scrutinised and substantiated before they are permitted to be used in the trial process.

## ***Specialisation and training of judges and counsel***

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

The benefit of a specialist court is to ensure that the court and its processes are trauma informed, and all personnel are trained. However, it can cause delays if the court is not funded to meet the demand for its service. Older women cannot afford delays in their case. Specialist courts may not be made available to women in regional areas. This will mean women in regional areas may appear in a court with a magistrate who has not been trained, and is managing traffic offences in the morning and sexual assault in the afternoon. There is the possibility that if all resources are allocated to a specialist court, no one in a regional court will develop skills or receive training.

We are advocating for trauma-informed court personnel at work in all courts. Incorporating these skills into the existing network could be more equitable, especially in smaller jurisdictions.

Other improvements, referred to in this Issues Paper could also improve the court system such as

- Keeping victim survivors informed of their case.
- Allowing support services to work in the court, including intermediaries.
- Establishing the ground rules for questioning.
- Pre-recorded evidence.

**Question 34 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?**

In principle this should be required. It will depend on what is required for that accreditation and who grants the accreditation. In most states, legal professionals are expected to retain their authority to practice by undertaking a certain number of hours of professional training to gain 'CDP points' for solicitors. A similar scheme could be constructed for those practising in this area, however it needs to be independently assessed.

Training in this area could be explored with universities in consultation with support services and sexual assault counsellors with lived experience of the court system.

### ***Sentencing***

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

Victims, and often family carers, want many things from the justice system. The victim may want a sentence that acknowledges their suffering and represents the community's condemnation of the crime. They may also want to know that the sentencing has made a difference and that it will ensure the crime is not repeated. The sentencing process may not deliver this. Victim statements from older women or family members go some way to assisting that their voice is heard.

It is sometimes difficult to obtain the outcomes of court cases, particularly for the general public that has not been party to the proceedings and has only media reports for information. More information about sentencing may assist in understanding court outcomes.

Sentencing can be retraumatising if the sentence does not validate harms of lived experience. Victim-survivors should be asked if they wanted to attend court to see the verdict. Support should be available for the victim-survivor at the time of sentencing.

Considering restorative justice models embedded into the court process should be investigated. As in the New Zealand model ( <https://www.justice.govt.nz/assets/Restorative-Justice.pdf>), it may meet more outcomes for the victim than sentencing alone.

**Character references for convicted sexual assault perpetrators should be disallowed** because they serve to diminish the experience of the survivors and undermine the severity of the crime. These references work to portray the perpetrator in a positive light, focusing

on the public face of their character and contributions to the community, which can skew the perception of their actions and detract from the gravity of the offence.

The aim of character references is essentially to influence sentencing potentially leading to leniency that does not reflect the seriousness of the crime or the impact on the victim. Furthermore, it perpetuates a culture of minimising sexual assault and contribute to the stigmatisation and re-traumatisation of survivors, who may feel that their suffering is being dismissed or diminished in the face of the perpetrator's character testimony.

Character references also disproportionately benefit those with money and power, skewing the justice system in their favour. Wealthy and influential individuals can more easily obtain glowing character references from prominent figures, leveraging their social and professional networks to present themselves in a favourable light. This allows those with significant resources to potentially mitigate the consequences of their actions through positive testimonials, while those without such advantages face the full weight of the legal repercussions. This disparity not only undermines the principle of equality before the law but also perpetuates a system where the rich and powerful can escape full accountability for their crimes.

To ensure justice and uphold the integrity of the legal process, the focus should remain on the crime committed and its consequences, rather than on subjective character assessments that can obfuscate the true nature of the offense. For this reason, we fully support the campaign "Your Reference Ain't Relevant" run by Harrison James and Jarrad Grice<sup>20</sup>, and urge the scrapping of character references not just in child sexual abuse convictions, but all sexual abuse convictions.

#### **Question 44. What are your ideas for improving the appeals process?**

Appeal processes and any re-trials are traumatic for the victim-survivor. For those that experience this, ongoing support should be available.

The last few years have seen rapid change to sexual assault law in some jurisdictions – directions to juries, definitions of consent and so on. Until they are applied and the trial processes completed, we do not know if or to what extent they will be effective in preventing re-traumatising victim survivors; or increasing the likelihood of women reporting assaults.

Ongoing research and review of legislative and procedural changes need to be undertaken to ensure that they are implemented (if discretionary) and there are no unforeseen consequences in increasing the likelihood of appeals. Although dated, an example, is from the 90's when judges were directed to stop giving warnings that uncorroborated testimony of the victims in sexual assault cases was unreliable. Despite this, judges continued to give warnings, sometimes due to unreformed attitudes, others because of the risk of an appeal. Appeals were successful because of the *Longman case*<sup>21</sup>, where an appeal was won

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<sup>20</sup> <https://www.abc.net.au/news/2023-11-03/act-calls-remove-paedophile-sentencing-good-character-references/103057246>

<sup>21</sup> *Longman v The Queen* (1989) 168 CLR 79.

because a judge did not give a warning.<sup>22</sup> This became known as the 'Longman warning'. Assuming legislative changes attempt to create balance in the court for the victim, this can be undone if appeals are successful because of these changes. We do not know what the effect will be of changes, appeals are one way of testing the strength of these changes.

## **Civil proceedings and other justice responses**

### ***Restorative justice***

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

Older women who experience sexual violence can face unique challenges, particularly when they are dependent on their abuser for care or do not want to disrupt broader family dynamics. A restorative justice approach can offer a way to address harm while preserving relationships and providing support.

There is a low percentage of assaults that get reported, and of this, only a small percentage goes to trial of which only one percent gets convicted. Considering the time it takes to get to trial and possible appeals, a restorative option can be viewed as a practical alternative. It addresses the time consideration which may be critical for a victim survivor of any age who has deteriorating health, but particularly for older women.

However, given that restorative justice requires the parties to face each other at a conference table, this may be an option victims would not wish to take if they have not been adequately prepared. It could also give the perpetrator an opportunity to openly dismiss the truthfulness of the complainant and to downplay anything that might have happened.

While there may be some benefits of restorative justice such as preserving relationships and empowering the victim in cases where it is carried out with sensitivity and full regard for the needs of the victim, this approach may not be suitable where sexual assault has been alleged. If the perpetrator is unwilling to acknowledge the harm they have caused, this process would not be 'restorative', but traumatising.

### ***Compensation schemes***

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

Some work has begun that considers reparation for older people with cognitive disabilities experiencing abuse and neglect in long term care institutions. A study published in 2023 which OWN contributed to described an approach to redress that recommended: immediate

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<sup>22</sup> Kathy Mack, Emeritus Prof, *You should scrutinise her evidence with great care*, (59-76) in *Balancing the Scales*, Patricia Easteal Ed, 1998, Federation Press, Australia.

recognition, accountability, and institutional change<sup>23</sup>. Further work needs to be done on how the delivery of reparations is made by industry and practitioners. The study found that:

redress must be multi-faceted and consist of a range of complementary measures that can be flexibly tailored to meet individual needs. Redress must respond to impacts of harm as experienced by specific individuals while also responding to impacts of harm on people living with dementia as a collective. Redress must turn to deal with what has happened in the past while also proofing future laws, systems and practices against repetition of such harm.

For victim services, jurisdictions need to build in flexible options; for example counselling may be useful but only by psychologists experienced in working with people with cognitive disabilities; and alternative modalities of therapy such as music or art therapy should be funded. In other cases, the best option would be to fund a move to another facility either for the perpetrator, or where the resident was continually triggered, for her to be moved. The study found that relatives were not necessarily interested in cash payments, unless it forced a provider to take responsibility and institute change.

Other recent studies support feminist scholars advocating for 'victim-centred' justice (Clark, 2010, 2014; Daly, 2014)<sup>24</sup>. This approach requires a compensation scheme to include the victim survivor so that they can:

- Have a 'voice'
- Be believed and have their experience validated
- Have an experience of control
- Experience the perpetrator's apology and recognition of their action
- Participate in the punishment and vindication through submitting a victim impact statement

This can be delivered with either formal or informal justice responses. For older women, formal criminal justice responses may be inappropriate in some instances (e.g., perpetrator with a cognitive impairment). More work is required to develop a practical application of this model. Existing victim's compensation legislation should apply equally to the payment of compensation to an older victim for any mental or physical injury incurred as the result of an assault even where there has been no successful criminal conviction.

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<sup>23</sup> Linda Steele et al, Reparations for people living with dementia: Recognition, accountability, change, now!, *Dementia*, 2023, Vol. 0(0) 1–19

<sup>24</sup> Sexual violence & older women: working towards justice, Dr Bianca Fileborn School of Social Sciences, UNSW, Increasing Access to Justice for Older Adult Victims of Sexual Assault: A Capacity Building Approach funded by the Justice Canada Victims Fund, 2018

## ***Victims' charters***

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

OWN recommends the adoption of the "Ready to Listen" campaign<sup>25</sup>. It provides resources that educate and support aged care providers in preventing and responding to sexual assaults. The initiative includes a Charter of Sexual Rights and emphasises the importance of trauma-informed care and comprehensive training for staff to better handle these situations, see: <https://opan.org.au/get-support/i-need-information-on-my-rights/>.

A victim's charter should be consistent with human rights legislation in respect of such matters as being protected from cruel, inhuman or degrading treatment, and being treated with respect and dignity.

OWN NSW is currently developing a suite of training resources for frontline services in how to better respond to disclosures of sexual assault by older women. Once these resources have been launched, they should form part of the training for all frontline services, including the police.

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<sup>25</sup> <https://opan.org.au/education/training-for-aged-care-professionals/ready-to-listen/>