

Australian Law Reform Commission Inquiry into Justice Responses to Sexual Violence

Submission

Fair Agenda

May 2024

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About Fair Agenda

Fair Agenda is a campaigning movement of 41,000 people advocating for a fair and equal future - where we can all live with safety, security, and agency over our lives and bodies, no matter our gender.

Fair Agenda supports our members to take collective action on gender justice issues that matter to them - to focus a spotlight on systemic issues, and to build momentum for the implementation of solutions.

One of the issues our members care deeply about is sexual violence.

In recent years thousands of Fair Agenda members have expressed their concern and support for change in three key areas:

1. Ensuring victim-survivors can access service support they need in a safe and timely manner,
2. Allowing victim-survivors to testify on their own terms, and
3. Holding police accountable when they cause harm to victim-survivors.

These are therefore the areas that we address in the below submission.

Further information about our work is available at www.fairagenda.org

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Summary of recommendations

In relation to improving access to service support

1. Expand access to services that support the wellbeing of victim-survivors at all stages from disclosure to healing. For victim-survivors who engage with the legal system, this support should be available throughout their engagement with the system.

This service support should be easily accessible no matter a victim-survivor's citizenship or visa status, and regardless of where the incident occurred, or where they enter the service system. Services must also be culturally appropriate, gender responsive, accessible to people with disability, and run by those with specialist expertise in responding to sexual violence, with a focus on programs by and for the communities they are serving.

The Commission should specifically consider the role and need for:

- specialist sexual assault services, including their trauma counselling work (and the need to address unacceptable wait lists),
- independent sexual violence advisors to provide wrap-around support, and
- advice available to a victim-survivor before they engage with the legal system, and
- legal representation throughout the criminal legal process, and
- specialised Aboriginal legal services, disability and mental health legal services.

2. Improve the availability of staff trained to conduct forensic medical exams, especially in rural and regional areas. In particular:

- Consider the potential increased scope of registered nurses and midwives, nurse practitioners and Aboriginal healthcare practitioners/workers across jurisdictions, and reforms and investment that would be needed to enable and support this, and
- Improve the availability of healthcare practitioners with appropriate qualifications across locations and times. For example – ensuring that someone with appropriate training is available at all public hospitals at all times, and

3. Expand locations, and rooms within existing locations, to allow for improved access to forensic medical exams across Australia.

- Specifically, consider NASASV's proposed pilot project to establish on-site forensic and medical services within the community-based sexual violence support service in the Peel region of WA.

4. Consider the need for gender appropriate examiners. In particular:

- Ensure more female examiners are trained across Australia, and
- Considering whether a victim-survivor should have the right to specify the gender of a forensic medical examiner.

5. Ensure "Just in Case" exams are available nationwide to any victim-survivor, without the requirement of a police report.

6. Consider improving the availability of wrap-around support for victim-survivors when accessing a forensic medical examination - so that services like forensic medical exams,

specialist sexual assault trauma counselling and others services are available at the same location.

7. In addition to increasing the number of staff trained to perform forensic medical exams, consider the potential role of equipping more community healthcare staff to be able to direct victim-survivors to self-collect evidence through the use of Early Evidence Kits (EEK).

In relation to expanding access to pre-recorded testimony

8. Make amendments to the relevant legislation to allow complainants in sexual offence trials and contested hearings to give the entirety of their evidence in the form of a pre-recording. This should be available as a standard protection for complainants, granting sexual assault victim-survivors the choice to elect a pre-recording if they wish.

9. Replace any use of 'vulnerable witness' language with more respectful and inclusive terminology that emphasises victim-survivors' rights to access to justice and necessary accommodations.

10. Amend legislation to allow for pre-recorded evidence to be made available in subsequent appeals and re-trials.

11. Invest in infrastructure that will support the utilisation of pre-recorded evidence.

Specifically, all courts should have sufficient:

- remote witness facilities to meet demand.
- technology to support high-quality audiovisual recording to ensure clarity and accuracy of the recorded testimonies. This requires reliable recording equipment and secure storage solutions to safeguard the integrity and confidentiality of the evidence.
- accessible remote witness facilities designed and developed in line with principles of universal design.
- access to associated support and resources for people with disabilities, and culturally and linguistically diverse people to fully participate in court proceedings, including the provision of information in Easy Read, Plain English or other formats, sign and other language interpreters, and mechanisms for supported decision-making to enable people with disabilities to exercise their legal capacity.

12. Investment in legal support to ensure that victim-survivors know their rights to access pre-recorded evidence and to guide them through that process.

13. Investment in training judicial staff in navigating the technology effectively, minimising potential disruptions or user errors that could compromise the utility and reliability of the pre-recorded evidence.

14. Investment in training relevant court staff involved in the pre-recording process on best-practice interviewing of victim-survivors of sexual assault.

15. Consider the impact of expanding pre-recorded evidence on timing for trials across the system, and ensure that the expansion is done in a way that does not increase delays to trial dates.

In relation to holding police accountable when they cause harm to victim-survivors

16. Provide avenues to hold police accountable when they cause harm - including a mechanism to independently investigate complaints about police misconduct and systemic failings, and to provide oversight and accountability.

1. Ensuring victim-survivors can access service support they need

From the point of disclosure, to navigating legal systems, and recovery - access to support from services that are focused on their options, agency, wellbeing and recovery can make a significant difference to victim-survivors' experience of reporting and navigating systems. But right now the service support available and accessible to victim-survivors is vastly inadequate.

Fair Agenda recommends that the Commission consider the benefit of different specialist services in supporting victim-survivors' wellbeing and recovery outcomes at all stages from disclosure to healing.

We note that these services should be easily accessible no matter one's citizenship or visa status, where the incident occurred, or where they enter the service system. Services must also be culturally appropriate, gender responsive, accessible to people with disability, and run by those with specialist expertise in responding to sexual violence, with a focus on programs by and for the communities they are serving.

Recommendation: Expand access to services that support the wellbeing of victim-survivors at all stages from disclosure to healing.

The Commission considers the full spectrum of service support that should be made available to support the wellbeing of victim-survivors at all stages from disclosure to healing. This should include consideration of:

- specialist sexual assault services, including their trauma counselling work to support healing and recovery, and
- independent sexual violence advisors to provide wrap-around support, and
- advice available to a victim-survivor before they engage with potential legal process, and
- legal representation throughout the criminal legal process, and
- specialised Aboriginal legal services, disability and mental health legal services.

Specialist sexual assault services

We note that the impacts of being subjected to sexual violence are lifelong and can impact a survivor's sense of self worth, relationships, and health. The impacts of sexual assault can also include:

- Physical health issues - including but not limited to, issues relating to sexual and reproductive health (such as avoiding cancer screenings), and substance misuse.
- A range of mental health and wellbeing impacts such as anxiety and depression, PTSD, and suicidal ideation.
- Intergenerational physical and mental health impacts of trauma and stress, with long term effects on children of people who have experienced sexual violence.

- Trauma and related mental health impacts can also lead to homelessness and barriers to societal, educational and employment opportunities and involvement.

People impacted by sexual violence need specialist support to navigate and recover from the impacts of the trauma they have experienced. Timely and specialist interventions can reduce or prevent long-term harm from sexual violence.¹

The role that trauma-specialist counselling and support plays for a victim-survivor of sexual violence can be vital. Specialist sexual assault services provide medium to long term counselling focused on healing and recovery. Their staff are qualified and experienced therapists, many of whom have postgraduate qualifications in a range of trauma therapy modalities.

As stated by the Victorian Law Reform Commission's inquiry *Improving Justice System Responses to Sex Offences Report (The VLRC Report)*:

*'specialist sexual assault services are at the heart of the sexual assault system. They help people to heal through counselling, and they support people by, for example, connecting them to services and advocating for them as they navigate a complex system. They are experts in sexual violence and in the journeys their clients take through legal and service systems.'*²

Right now, specialist sexual assault services are consistently underfunded by governments, and do not have the capacity to respond to requests at the scale they are received. This means victim-survivors who reach out for trauma counselling support often cannot receive timely support, and instead have to be placed on months-long waitlists to access assistance.

Fair Agenda understands that sexual assault services aim to respond to all service contacts as quickly as possible; but with such limited resourcing are generally forced to prioritise and triage a crisis care response to victim-survivors contacting them about the most recent sexual assaults (for example, an assault that has occurred in the past 7 days). Sexual assaults within 7 days are prioritised as this is the crucial window for a medical forensic examination to be undertaken. However, at current resourcing levels, the volume of need for such services is so significant that triaging pushes all other people's requests down a waitlist, creating other crises.

To manage overwhelming demand and waiting lists, services can also be forced to provide time-limited counselling episodes resulting in victim survivors frequently having to end their counselling well before they have 'recovered'. This can be re-traumatising for clients and can negatively impact and delay their recovery.

A recent Report into 'The National Situation of Sexual Assault Services' from the National Association of Services Against Sexual Violence outlines dire waiting lists around the country as of May 2022.³ This report showed that for victim-survivors reaching out for

¹ Brunton, R., & Dryer, R (2021) Sexual violence and Australian women: A longitudinal analysis of psychosocial and behavioral outcomes. *Social Science and Medicine*.

² Victorian Law Reform Commission (2021) *Improving the Justice System Response to Sexual Offences*. Melbourne, Victoria: VLRC.

³ Full Stop Australia (2022) *The Situation Report: The National Situation of sexual assault services*, prepared May 2022 in collaboration with members of NASASV. Sydney, NSW: Full Stop Australia

counselling support more than 7 days after their sexual assault wait lists were excessive because demand far exceeds service capacity to respond.⁴

Specifically:

- In NSW waiting lists ranged from 1 - 12 months depending on where someone was seeking support.
- In Qld, waiting lists ranged from 3 months up to 18 months. Some areas had closed their waiting lists entirely.
- In Victoria, waiting lists were reported at up to 6 - 8 months in some regions.
- In Western Australia, average waiting periods ranged from 4 - 9 months in some regions; and 3 weeks - 3 months in other areas.
- In Tasmania, waitlists were reported at 3 to 9 weeks across the state.
- In South Australia, where there is only one service; some people requesting counselling within metro areas were waiting up to 6 weeks.
- In the ACT there was a 3 month waiting list for counselling - many people travel to Sydney for medium / long-term counselling.
- In the NT victim-survivors often can't physically access a service, and data on counselling waiting periods was not available.

Fair Agenda understands that as of May 2024, access remains similarly dire. Specifically:

- In NSW waiting lists for counselling continue to range from 1 - 12 months depending on where someone is seeking support.
- In Qld, waiting periods are 12 months in many parts of the state.
- In Victoria waiting lists are between 0-6 months for adults, and 1-4 months for children.
- In Western Australia - waitlists vary in different areas with some as low as 6-8 weeks whereas most are around 3-6 months.
- In South Australia - there is still only one service; with some people requesting counselling within metro areas waiting up to 6 weeks. For the first time the SA service is having to consider a wait list as it is getting much more difficult to meet the current timeframes for counselling.
- In the Northern Territory current waitlist for counselling in Darwin is 6 - 7 months, in Katherine it is 3 - 4 weeks and is sporadic at best in most remote communities.

The VLRC Report recommended increased investment in the sexual assault service system as an urgent priority. They found waiting lists are still far too long.

*"The first and most crucial task of reform is to invest in sexual assault support services. If people cannot get support when they need it, our other efforts—to encourage people to tell their story, to make sure they are believed and supported, and to support them to engage with the justice system if they choose to—are not only wasted, but more likely to cause harm than good."*⁵

⁴ Full Stop Australia (2022) The Situation Report: The National Situation of sexual assault services.

⁵ Ibid.

But the required investment in increased capacity has not been made. We encourage the ALRC to consider recommendations to address wait lists and barriers to service access across all jurisdictions.

Recommendation: the ALRC consider the critical role of specialist sexual assault services and trauma counselling in supporting victim-survivor's wellbeing at all stages, and the need for national investment to address this area of significant need and unacceptable waiting lists.

Independent sexual violence advisors to provide wrap around support

In some jurisdictions, an independent sexual violence advisor is made available to a victim-survivor to provide emotional and practical support; accurate and impartial information; and to provide support before, during and after court.

Recommendation: the Commission consider the potential role of independent sexual violence advisors in Australia, including the potential benefits for victim-survivor wellbeing throughout any legal process, the potential to reduce re-traumatisation, and to help improve trial outcomes.

We recommend consideration of the scope of this role, for example: practical support - such as liaising with police or Prosecutor; helping a victim-survivor understand the process and what they can expect to happen next; and general support throughout the criminal legal process.

Advice before you begin the legal process

We note the importance of victim-survivors being able to access service support before they make a report to police - to be able to understand their rights, options and what will be involved if they decide to report to police.

We note that for some victim-survivors reporting a sexual assault to the police may have implications for other legal matters. For example, someone might need legal advice to understand the impact a report might have on their family law rights, what might happen if child protection becomes involved; what impact it might have on a partner visa and their ability to stay in the country. Access to this advice is vital to supporting wellbeing and justice outcomes.

Recommendation: consider the need to expand access to advice for victim-survivors before they engage with the criminal legal system, and what additional investment will be needed in specialist services to enable them to provide this advice.

Legal representation throughout or at different stages of the legal process

We note the important role that legal service support for victim-survivors can have during the criminal legal process, including to challenge attempts by defence to access a victim-survivor's counselling notes or medical records.

We note our concern that services are not currently funded to meet demand for such services at scale.

Recommendation: consider the vital role of legal representation for victim-survivors engaging with the criminal legal system, and the need to resource specialist services to provide this advice.

Access to Forensic Medical Examinations

For those who seek help immediately after a sexual assault, often one of the first services they will need or seek is a forensic medical exam.

Forensic Medical Examinations (FMEs) are a critical service, serving two functions:

1. Collecting forensic evidence that can verify the type of assault that occurred, support reports of what took place, and potentially identify the perpetrator.
2. Medical screening - including testing and prophylactic treatment for sexually transmitted infections and blood-borne viruses, as well as advice and treatment for possible unwanted pregnancy.

In 2024, despite some good initiatives across different states and territories, there is still not consistent, accessible and timely access to forensic medical examinations.

While delivery systems vary from state to state, there are several common barriers to accessing safe and timely forensic medical exams across Australia.

In considering the reforms needed to improve the availability of forensic medical examinations, we recommend the Commission also consider a victim-survivor's access to other related services at this point - particularly related medical care, and specialist sexual assault trauma counselling.

We also recommend the Commission consider the benefits of reforms that would provide a victim-survivor with access to specialist trauma-informed support that could 'walk alongside' them from the point of forensic medical examination - to provide ongoing advocacy and support around any reporting and engagement with the legal system, as well as healing.

Case studies about current barriers to access

Queensland

There has been a considerable amount of work by service providers, peak bodies and the Queensland Government to improve access to forensic medical exams over the last three years. This has included a relatively recent requirement that hospital and health services accept care and commence an approved Clinical Care Pathway for any person who attends at an Emergency Department and discloses having experienced sexual assault, or is presented by an officer of the Queensland Police Service as a victim of a sexual assault, within 10 minutes of the disclosure or presentation.

Despite this development, in May 2024, frontline service providers in Queensland highlighted to Fair Agenda that they still have ongoing concerns about access to forensic medical exams, particularly in regional, rural and remote areas. They noted that uptake in health workers who are needed to complete the relevant forensic medical exam training is lagging, despite the requirement for health staff to be available 24/7 to undertake an examination. This means that there are still victim-survivors not receiving timely access to forensic medical exams across Queensland.

For a victim-survivor who does receive care within 10 mins of presenting to an emergency department, access to specialist sexual assault services (for follow up trauma counselling) is often not available for several months. For example, following their initial medical assessment, a victim-survivor may be waiting up to 8 months to see a specialist counsellor for therapeutic support in Queensland due to underfunding of the sexual assault services that provide this service.

Western Australia

Forensic medical exams are available in Perth at the Sexual Assault Resource Centre (SARC; through emergency departments at hospitals in Western Australia; and SARC is able to provide support for presentations at regional hospitals.

However, there are some communities in Western Australia that are still very far from regional hospitals.

Where regional hospitals are now able to get some support from SARC to provide forensic medical examinations, those providers may not also be able to provide access to other related services, including follow up trauma counselling that should be provided alongside a forensic medical exam.

The Sexual Assault Resource Centre (SARC) in Perth is the only location in Western Australia that can provide the three critical inter-related services in one place: crisis medical services related to sexual assault, forensic medical exams and crisis counselling services.

One option to ensure better access to exams and follow up support like trauma counselling, is locating more forensic and medical services within community-based sexual violence support services around the state. The National Association of Services Against Sexual Violence, the peak body for over 120 specialist sexual assault services in Australia, has called on the Federal Government to fund a pilot project to establish on-site forensic and medical services within the community-based sexual violence support service in the Peel region. This would provide a model that could be replicated in other regions across Western Australia where there are existing sexual violence support services. So far this initiative has not been funded by the Federal or State Governments. We recommend the Commission consider recommending investment in this option to address service barriers in Western Australia.

We understand that Early Evidence Kits (EEK) are being used in some parts of Western Australia, at very remote sites where a doctor or a nurse or midwife with appropriate training is not available. We understand that when these are used the individual may then return for further forensic examination and specimen collection at a time when a doctor or trained nurse or midwife is next available or be transported to a site that has the capacity for forensic medical exams.

Victoria

In 2021 the Victorian Law Reform Commission (VLRC) proposed a comprehensive reform package to improve the way the justice system responds to sexual offences.⁶ This included:

- An urgent need to invest in more access to forensic medical examinations, especially in rural and regional areas and for children and young people.
- Expanding use of nurses to conduct examinations, to expand access to forensic medical examinations.
- Changes to enable people to request the gender of the forensic medical officer.
- More access to 'just in case' forensic medical examinations, which do not require reporting to police, as is common elsewhere in Australia and across the world.

We understand the Victorian Government is currently working with services providers and other stakeholders to implement these recommendations.

Given the barriers victim-survivors face to accessing other related services in Victoria, we encourage the Commission to consider reforms that could improve access to related services - such as specialist sexual assault trauma counselling, and trauma-informed support to "walk alongside" victim-survivors through next steps; including the possibility of ensuring these services are available at the same location.

⁶ Ibid.

Recommendations

Improve availability of trained staff

In Queensland, Victoria and Western Australia a lack of trained staff has been cited as a major barrier to victim-survivors being able to readily access forensic medical exams. This is particularly apparent in rural and regional areas.⁷

Recommendation: Improve the availability of staff trained to conduct forensic medical exams, particularly in rural and regional areas. In particular:

- Consider the potential role of ensuring more healthcare practitioners are trained to act as forensic medical examiners, including considering the potential use of registered nurses and midwives, nurse practitioners and Aboriginal healthcare practitioners/workers across jurisdictions, and reforms and investment that would be needed to enable and support this. And,
- Improve the availability of healthcare practitioners with the appropriate qualifications across locations and times. For example – ensuring that someone with appropriate training is available at all public hospitals at all times.

Expanding the sites/locations and rooms that can conduct forensic medical exams

Another key issue in many states and territories is the lack of sufficient locations where forensic medical exams can be conducted.

Recommendation: Expand locations and rooms within existing locations to allow for improved access to forensic medical exams across Australia.

- Specifically, consider NASASV's proposed pilot project to establish on-site forensic and medical services within the community-based sexual violence support service in the Peel region of WA.

Expand access to gender appropriate practitioners

The Victorian Law Reform Commission's final report on Victoria's response to sexual offences in 2021 included concerns about victim-survivors not having a choice about the gender of forensic medical examiners.

The report included examples like:

A mother whose daughter had to wait '20 hours, with sperm on her face and chest, to be examined' because the only person available earlier was a 65-year-old man. She said that her 'daughter's first sexual experience had just happened and now she was

⁷ Ibid.

going to have to get naked in front of a male stranger. I told them that that was not ok.’ They were told that if they wanted a woman, they would have to wait until the next morning, and they were not offered other options.

Another person told the VLRC inquiry that a ‘relative ended up showering after 2 days without being examined by a forensic female doctor (because only males were available) and this meant she could not get the evidence needed to prosecute her rapist (who was a stranger)’.

The Victorian Law Reform Commission recommended that victim-survivors should be able to specify the gender of the practitioner conducting the forensic medical exam. This challenge is “a practical one of having enough female examiners “ according to the VLRC, and is linked to an overall lack of trained staff.

In the Victorian context, the VLRC furthermore recommend extending or enhancing the rights in the *Victim Charter’s Act 2006 (Vic)* to set clear expectations about the treatment of people experiencing sexual violence, and to ensure that partners within the sexual assault system are held accountable for that treatment. This includes the right to specify the gender of a forensic medical examiner.

Recommendation: Consider the need for gender appropriate examiners. In particular:

- The need to ensure more female examiners trained across Australia
- Considering whether a victim-survivor should have the right to specify the gender of a forensic medical examiner-

Remove any requirement of a police report to access a forensic medical exam

The involvement of police in access to forensic medical examinations can be a significant barrier and an accessibility issue.

As part of it’s submission to the Victorian Law Reform Commission’s review of Improving the Response of the Justice System to Sexual Offences, Sexual Assault Services Victoria recommended that everyone who experiences sexual assault should be offered an examination ‘as a matter of course’ and not require a police referral. In its view, this would ‘change the experience for victim survivors enormously’.

As outlined in the Meeting of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault (MAG Work Plan 2022-2027) certain victim-survivors may face additional barriers to justice and be at a heightened risk of experiencing compound trauma when engaging with the criminal justice system. For example, First Nations women face barriers to reporting their experiences of family violence, including fearing the threat of child removal, homelessness and potential isolation from their family and community.⁸

⁸ Attorney-General’s Department. (2022) The Meeting of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault. Attorney-General’s Department.

Recommendation: Ensure “Just in Case” exams are available nationwide to any victim-survivor, without the requirement of a police report. We understand that reform is currently needed only in Victoria to enable this.

Consider the importance of related service access

Recommendation: Consider improving the availability of wrap-around support - so forensic medical exams, specialist sexual assault trauma counselling and others services are available at the same location.

Consider the role of Early Evidence Kits

We understand that Early Evidence Kits are already used in some parts of Western Australia, NSW and the Northern Territory.

Recommendation: In addition to increasing the number of staff trained to perform forensic medical exams, we recommend the Commission also consider the potential role of equipping more community healthcare staff to be able to direct victim-survivors to self-collect evidence through the use of Early Evidence Kits (EEK).

2. Allowing victim-survivors to testify on their own terms

Fair Agenda is in support of victim-survivors of sexual assault having the option to use pre-recorded evidence for evidence in chief, cross-examination and re-examination in all jurisdictions.

We recommend the Commission recommend legislative reform to enable this in all jurisdictions, and consider associated practical and policy changes that might be needed to enable victim-survivors to access pre-record effectively.

The importance of the method of pre-recorded evidence

We understand that depending on the jurisdiction pre-recorded evidence could be taken through any of the following methods:

1. **Special Hearing:** A special hearing can be held either before or during the trial to record the entirety of the complainant's evidence. The complainant's evidence is presented in the form of a recording during this hearing. It is a closed-court process, and the recording is later played during the trial. They allow a complainant to pre-record most of their evidence and not be impacted by trial delays which can be highly distressing.
2. **Pre-recording at a Remote Witness Facility:** This allows witnesses to provide their testimony from a remote location, reducing the need for them to be physically present in court. The witness appears via video link from a remote witness facility, and their testimony is recorded for use during the trial.
3. **VARE (Video Audio Recorded Evidence):** refers to audiovisual recordings of an interview or interviews with the victim at a police station with a police officer, which are typically done shortly after the complaint is initially disclosed. This is sometimes referred to as 'evidence of interview'.

While we acknowledge there are potential benefits of Video-Recorded Evidence (VARE), we are hesitant to advocate for expansion of this method due to concerns about police capacity to conduct these interviews appropriately for the purpose of a criminal trial.

One problem is that a VARE interview serves a dual purpose. On one hand, it aims to assemble a robust case for prosecution, and on the other, it seeks to secure the best possible evidence for the trial. Police are then required to balance their investigative needs with what is required as evidence for the judge and jury, to render a fair verdict.

VAREs were introduced in 2003 in England and Wales for victim survivors of sexual assault, and have faced criticism by the Stern Review, that identified "substantial problems with the effectiveness of this procedure" and recommended its review.⁹ Both the Stern Review and a study by Westera, Kebbell, and Milne in New Zealand found that poorly conducted

⁹ Stern, V. (2010) The Stern Review. Government Equalities Office: Home Office, UK.

interviews by the police can adversely impact the credibility of the witness's accounts, which could influence jury perceptions.¹⁰

In light of these concerns, Fair Agenda advocates for pre-recording evidence at either a Special Hearing or Remote Witness Facility. Unlike VARE, these methods focus solely on the evidence for the trial, rather than the broader investigative process. These methods also capture the complainant's full testimony, not just the evidence-in-chief, making it a more streamlined and comprehensive process. For the purpose of this submission we note that when we refer to pre-recorded evidence this does not include the use of VARE.

The advantages of pre-recorded evidence

We note that the Commission is already aware of previous recommendations from past inquiries and reports around pre-recording evidence as a means of minimising trauma in the criminal justice process.

We are aware that the issues paper noted previous inquiry findings that:

“The advantages have been considered to outweigh disadvantages. The intention has been to promote a trauma-informed approach, for example, by minimising the number of times complainants need to re-tell their experience, reducing the impact of delay upon complainants associated with lengthy trial lists, and enabling complainants to avoid further trauma arising from giving evidence in a courtroom.”

To add to this understanding we have detailed the advantages of utilising pre-recorded evidence citing the literature below:

Improves Overall Court Experience and Reduces Trauma:

Pre-recorded evidence can help reduce the trauma experienced, as it allows victim-survivors to provide their evidence in a less intimidating environment, without the direct confrontation of an alleged perpetrator and without being scrutinised before a jury.¹¹

Julia Quiltera and Luke McNamarab published a report in 2023 through the NSW Bureau of Crime Statistics aimed at understanding the effectiveness of reforms that have been progressively introduced in NSW sexual assault trials since the *Crimes (Sexual Assault) Amendment Act 1981 No.42 (NSW)*. Only pre-recorded evidence used for retrial was evaluated as part of this study, but they did note that “the use of recorded evidence in retrials appears to be meeting the policy objective of reducing trauma to complainants in having to give evidence again in a retrial.”¹²

¹⁰ Westera, N., Kebbell, M., Milne, R. (2012). It is better, but does it look better? Prosecutor perceptions of using rape complainant investigative interviews as evidence. *Psychology Crime and Law*. 19. 10.1080/1068316X.2012.656119.

¹¹ Hollywood, C. V. (2022). The “Sexual Violence Legislation Act 2021”: Pre-recorded cross-examination and the right to a fair trial. *Victoria University of Wellington Law Review*, 53(2), 281–302.

¹² Quilter, J. & McNamara, L. (2023). Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis (Crime and Justice Bulletin No. 259). Sydney: NSW Bureau of Crime Statistics and Research.

In the Northern Territory, stakeholders have noted the effective use of pre-recorded evidence in sexual offence proceedings, particularly benefiting adult complainants in remote and Indigenous communities. The use of pre-recorded evidence was seen as important in increasing reporting of offences against Indigenous women in Central Australia and reducing the trauma attributable to giving evidence on multiple occasions and seeing the defendant in court.¹³

Reduced stress and anxiety around lengthy wait times

Pre-scheduled recording dates tend to be more reliable and earlier than trial dates, reducing the wait times and unpredictability of the court system.¹⁴ While there is potential to be recalled to answer extra questions during trial - it wouldn't be the whole of the complainant's evidence, and the questioning would be limited. If they were recalled, this evidence would also be pre-recorded. This helps reduce any stress and anxiety of waiting for a trial to commence, and is particularly important so that victim-survivors can move on with their lives and gives them space to start to recover.

Increased choice and agency

Expanding the options for how victim-survivors participate in the trial can help increase their agency and choice during a trial. By increasing access to alternative evidence methods like pre-recorded cross-examination, complainants are given more control over their participation in the trial's most daunting aspects.¹⁵

Reduced Stress around Cross-Examination

Many victim-survivors report cross-examination as the most traumatic part of the trial. Studies have found that pre-recording cross-examination reduces the stress of being in the presence of the defendant in and around the court and being insensitively examined before the jury.¹⁶

On top of this, studies found that pre-recorded cross-examination reduced the stress of witnesses as it was done earlier, reducing wait times surrounding giving evidence, without the potential for unexpected delays.¹⁷

Another study found cross-examination done in this way is less disruptive for the judge to interview if the jury isn't present.¹⁸ The judge can redact any lines of questioning that shouldn't have been permitted, which could help with reducing the prevalence of rape myths used in cross-examination, and eliminate the risk of jury exposure to these lines of questioning.

¹³Australian Law Reform Commission. (2010) Family Violence – A National Legal Response (ALRC Report 114). Australian Law Reform Commission.

¹⁴ Hanna, K., Davies, E., Crothers, C., & Henderson, E. (2012). Child Witnesses' Access to Alternative Modes of Testifying in New Zealand. *Psychiatry, Psychology, and Law*, 19(2), 184–197.

¹⁵ Hollywood, C. V. (2022). The "Sexual Violence Legislation Act 2021": Pre-recorded cross-examination and the right to a fair trial. *Victoria University of Wellington Law Review*, 53(2), 281–302.

¹⁶*Ibid.*

¹⁷ Hanna, K., Davies, E., Crothers, C., & Henderson, E. (2012). Child Witnesses' Access to Alternative Modes of Testifying in New Zealand. *Psychiatry, Psychology, and Law*, 19(2), 184–197.

¹⁸ *Ibid*

Access to pre-recorded evidence should be expanded so it is an accessible option for victim-survivors who may feel less vulnerable and exposed with less people present. As a result the victim-survivor as a witness may be more likely to be more coherent and give better and more reliable testimony.

Improved Quality and Reliability of Evidence

Research also suggests that pre-recording before a trial can improve the quality of evidence from a victim-survivor. In pre-recorded evidence victim-survivors provide an account closer to the time of the assault, rather than attempting to recall events much later in a trial.

Research suggests that witnesses will remember more when interviewed closer in time to an event rather than later on.¹⁹ In a study of prosecutors' attitudes to the use of recorded evidence, one respondent noted: *The video is usually made much closer to the time of the alleged offence. It is therefore more likely that the complainant will have a more detailed recollection as to what occurred.*²⁰

Recording the interview also allows the evidence to be elicited in an environment that is less pressured and overall more conducive to accurate recall. Given that many aspects of sexual assault are incredibly difficult for victim-survivors to talk about, recalling this information in an environment with less people present is more likely to facilitate accurate reports than when this occurs in front of a whole court. As one prosecutor stated: *The reduced stress may also improve the complainant's ability to recall and his/her willingness to divulge details that might otherwise be embarrassing.*²¹

As demonstrated, pre-recorded evidence results in the jury likely receiving better quality evidence from the victim-survivor, and that evidence is more likely to be obtained in a less stressful environment.

Access is inconsistent across different jurisdictions

Inconsistent laws regarding pre-recorded testimony across Australian states and territories mean that while some jurisdictions have provisions for pre-recording testimony, others lack comprehensive legislation or have limited access to this crucial option. This inconsistency creates barriers for survivors seeking justice, as they may face different processes and limitations depending on where they were assaulted.

Generally speaking, laws allow for a 'vulnerable witness' or a 'special witness' to be able to access pre-recording, in some states this definition will include children or people with a cognitive impairment, in others it will include victim-survivors of sexual assault.

¹⁹Read, J., Connolly A. (2007) "The Effects of Delay on Long-term Memory for Witnessed Events", in Toglia M, Read, J., Ros, D., Lindsay R, Handbook of Eyewitness Psychology: Memory for Events. Lawrence Erlbaum Associate.

²⁰ Westera N, Kebbell M and Milne B, "It is Better, but Does it Look Better? Prosecutor Perceptions of Using Rape Complainant Investigative Interviews as Evidence" (in review) Psychology, Crime & Law.

²¹ Ibid

We have summarised the access to pre-recorded testimony for victim-survivors of sexual assault from our analysis of laws across different jurisdictions in the table below:

	Can all victim survivors rely on VARE for evidence in chief?	Can all victim survivors rely on other pre recorded evidence?	Does this include cross examination and re examination?
NSW	No	No	No
VIC	No	No	No
Queensland	No	Yes	Yes
ACT	Yes	Yes	Yes
South Australia	No	Yes	Yes
Northern Territory	Yes	Yes	Yes
Western Australia	No	No	No
Tasmania	Yes	Yes	No

The states in which access to this critical tool trails farthest are: NSW, Victoria and Western Australia (noting that Tasmania doesn't allow for pre-recording of cross-examination, only evidence in chief).

We urge the commission to make recommendations to ensure all states provide access to pre recorded evidence so that all victim survivors can choose this option when recording their evidence.

Key reform considerations

Survivor Autonomy and Choice

It is paramount that legislation allows for the use of pre-recorded evidence, while not making it the only option. A victim-survivor should ultimately have the right to choose their method for giving evidence.

There are cases where it is advantageous to the healing journey of a victim-survivor to speak publicly. As stated previously by NASASV “*For example, a fourteen year old girl who recently reported a sexually abusive man to police expressed a strong desire to give evidence in court, in his presence. Her healing and her court case may be strengthened by the opportunity to do so, rather than to provide evidence via video recording.*”²²

²²Ibid

Process Transparency and Support

Alongside legislative reform, there must also be work to ensure supporting infrastructure is in place to ensure victim-survivors are well-informed about the entire process, and to ensure they are aware of their rights, the potential outcomes, and the implications of their choices.

For example, victim-survivors should be aware that in some states, such as in Victoria, once pre-recorded evidence is submitted, the decision to continue the trial largely rests with the Director of Public Prosecutions (DPP). If a victim-survivor decides to pull the plug on the trial, their wishes are considered but they are not granted the authority to halt proceedings, meaning that once evidence is recorded proceedings can go on without them and potentially against their wishes.

We support legal support for victim-survivors and intermediaries to guide survivors in understanding and accessing this option.

Education and training to support reform

Given that pre-recorded evidence requires a specific use of technology, there are several considerations the Commission should consider when making recommendations to governments to ensure that processes are in place to capture evidence appropriately.

Firstly, the infrastructure must support high-quality audiovisual recording to ensure clarity and accuracy of the recorded testimonies. This requires reliable recording equipment and secure storage solutions to safeguard the integrity and confidentiality of the evidence. Given that in all jurisdictions pre-recorded evidence is already used for some categories of witnesses, governments should review current processes to ensure that they are appropriate for all victim-survivors of sexual assault.

All relevant court staff involved in the pre-recording process should receive comprehensive education about legislation, authorising the use of pre-recorded evidence in sexual assault proceedings, and training in relation to interviewing victims of sexual assault and pre-recording evidence. Additionally, there should be provisions for technical support and training to assist judicial staff in navigating the technology effectively, minimising potential disruptions or user errors that could compromise the utility and reliability of the pre-recorded evidence.

Improve language for providing these rights

In most jurisdiction the mechanism for allowing victim-survivors of sexual assault to pre-record their testimony is to expand the category of 'vulnerable witness' within legislation. Pre-recorded testimony is already an option for some people already captured by this definition, namely children or people with a cognitive impairment, it would be a matter of adding victim-survivors of sexual assault to this category. However there are language concerns around this terminology that may have unintended consequences that must be considered.

It is important that language is strengths-based, focuses on accountability and is language with which a victim-survivor identifies. People are not vulnerable simply because, for example, their age, a cognitive impairment, or a traumatic experience; it is systems,

structures, discrimination, and other barriers to equality, justice and safety that must be challenged.

The concept of a 'vulnerable witness' is designed to protect certain categories of witnesses, but there are concerns that the term 'vulnerable' could perpetuate assumptions about vulnerability, capacity or credibility as a witness. This is particularly concerning for women with disabilities who are up against discriminatory and ableist attitudes. Within the court system, women with disability are often seen as not having the capacity to testify and are again, not believed or otherwise, have their voice side-lined in favour of that of a guardian or support person, which is particularly problematic when that same person is their perpetrator.²³ We must ensure that language around vulnerability is not inadvertently weaponised to undermine an individual's legal capacity or credibility. People with disabilities are not inherently vulnerable, but are placed in vulnerable situations due to a denial of or failure to uphold human rights.

We emphasise the fundamental right of all people to access to justice, which requires that facilities and services be universally accessible, and that appropriate accommodations be made to facilitate access to justice for certain individuals who may need more support.

We advocate for more respectful and inclusive terminology within legislation that emphasises the rights to access to justice and necessary accommodations. This change in language could resolve the tension between recognising individuals who require additional support to participate in court processes, and perpetuating assumptions about vulnerability, capacity or credibility as a witness.

Recommendations

Specifically we recommend that the Australian Law Reform Commission make recommendations to governments to:

1. Make amendments to the relevant legislation to allow complainants in sexual offence trials and contested hearings to give the entirety of their evidence in the form of a pre-recording. This should be available as a standard protection for complainants, granting sexual assault victim-survivors the choice to elect pre-recording if they wish.
1. Replace any use of 'vulnerable witness' language with more respectful and inclusive terminology that emphasises the rights to access to justice and necessary accommodations.
2. Amend legislation to allow for pre recorded evidence to be made available in subsequent appeals and re-trials.
3. Invest in infrastructure that will support the utilisation of pre-recorded evidence. All courts should have sufficient:
 - remote witness facilities to meet demand
 - technology to support high-quality audiovisual recording to ensure clarity and accuracy of the recorded testimonies. This requires reliable recording equipment and secure storage solutions to safeguard the integrity and confidentiality of the evidence.

²³Frohman, C. (2023) Women With Disabilities Australia (WWDA) submission concerning the Senate inquiry into the current and proposed sexual consent laws in Australia. Women With Disabilities Australia.

- accessible remote witness facilities designed and developed in line with principles of universal design
 - access to associated support and resources for people with disabilities, and culturally and linguistically diverse victim-survivors to fully participate in court proceedings, including the provision of information in Easy Read, Plain English or other formats, sign and other language interpreters, and mechanisms for supported decision-making to enable people with disabilities to exercise their legal capacity.
4. Investment in legal support to support victim-survivors in knowing their rights to access pre-recorded evidence and to guide them through that process.
 5. Investment in training judicial staff in navigating the technology effectively, minimising potential disruptions or user errors that could compromise the utility and reliability of the pre-recorded evidence.
 6. Investment in training relevant court staff involved in the pre-recording process on best-practice interviewing of victim-survivors of sexual assault.
 7. Consider the impact of expanding pre-recorded evidence on timing for trials across the system, and ensure that the expansion is done in a way that does not increase delays to trial dates.

3. Holding police accountable when they cause harm

Fair Agenda members have expressed deep concern that police often fail to provide appropriate responses or support to victim-survivors of sexual violence, and can also cause increased trauma and harm. Fair Agenda supports calls for independent oversight and accountability of police.

We note our members concern in response to the recent Independent Commission of Inquiry into Queensland Police Service responses to domestic and family violence, which found that multiple male police officers were known to be perpetrators of sexual assault against their colleagues.²⁴ And where one senior sergeant was found by an internal investigation to have committed nine sexual assaults of junior female officers.²⁵

We note that that Commission of Inquiry found in relation to domestic and family violence that:

- Queensland Police Service responses do not consistently meet community expectations, and police officers do not always meet their human rights obligations to victim-survivors,
- the failures of the Queensland Police Service in this area persist despite multiple previous reviews and reports, and
- Queensland Police Service responses can fall short of community expectations and human rights obligations at every state of interaction with a victim-survivor, including from initial report, throughout an investigation and during court proceedings.²⁶

We encourage the Committee to consider the likelihood that these same issues arise in relation to police responses to sexual violence.

Where there are such systemic failings, or complaints about misconduct by members of the police service, it is vital that there is independent oversight and accountability if standards are not met.

Recommendation: Provide avenues to hold police accountable when they cause harm - including a mechanism to independently investigate complaints about police misconduct and systemic failings, and to provide oversight and accountability.

We further note Fair Agenda's recommendation that any investment to improve the wellbeing and outcomes for victim-survivors be directed towards expanding access to specialist services that are focused on the needs of victim-survivors; and not invested further into police systems.

²⁴Richards, D. (2022) Final report: Commission of Inquiry into Queensland Police Service responses to domestic and family violence 2022, page 153 - 155.

²⁵Smee, B., Gillespie, E., (2022) 'Fear of speaking out': Queensland police officer's sexual assaults went unreported for years, inquiry told, The Guardian.

²⁶Richards, D. (2022) Final report: Commission of Inquiry into Queensland Police Service responses to domestic and family violence 2022, page 63.