



Australian
Human Rights
Commission

31 May 2024

Secretary
Justice Responses to Sexual Violence Inquiry
Australian Law Reform Commission

By email: jrsv@alrc.gov.au

Dear Secretary

Inquiry into Justice Responses to Sexual Violence

The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Australian Law Reform Commission's (ALRC) inquiry into justice responses to sexual violence (Inquiry).

Background

Sexual violence is one part of a continuum of violence against women, which can range from psychological, economic and emotional abuse through to physical and sexual violence. Violence against women, in all its forms, remains endemic in Australia:

- 2 in 5 women (39%) have experienced violence since the age of 15.
- 1 in 5 women (22%) experienced sexual violence.
- 1 in 3 women (31%) experienced physical violence.
- 1 in 4 women (23%) have experienced intimate partner violence.¹

In 2022–23, one woman was killed every 11 days by a current or former intimate partner.² This number is even higher in 2024, with 31 women killed by gendered violence as at the writing of this submission, equating to one woman killed every 4 days.³

The intersection of gender with other forms of inequality results in women with disability and from LGBTIQ+, First Nations and culturally and racially

¹ Australian Bureau of Statistics 2021–2022, *Personal Safety*, [Personal Safety, Australia, 2021-22 financial year | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/Personal-Safety).

² Provisional data from the Australian Institute of Criminology's National Homicide Monitoring Program from July 2022 to June 2023, published in the Domestic, Family and Sexual Violence Commissioner's interim statement, tabled to Parliament on 30 November 2023.

³ As calculated by Counting Dead Women Australia researchers of Destroy the Joint.

marginalised backgrounds experiencing higher rates of violence, and additional barriers to support. In particular:

- Three in five First Nations women have experienced physical or sexual violence.⁴
- Women with disability in Australia are twice as likely to have experienced sexual violence since the age of 15 than women without disability.⁵
- Lesbian, Bisexual and Queer women experience higher rates of sexual violence than heterosexual women in Australia.⁶

While the Government has taken substantive steps in recent years to address gendered violence, it is not enough and more must be done.

Australian Human Rights Commission's concerns

Sexual violence, and gendered violence more broadly, is a human rights issue. Failing to prevent and address it contravenes:

- the right to equality and non-discrimination
- the right not to be tortured or treated in an inhumane and degrading way
- the right to life

The right to equality and non-discrimination

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires all ratifying States to eliminate discrimination against women and girls in all areas and promote women's and girls' equal rights. Sexual violence disproportionately impacts women, particularly First Nations women, in contravention of the object and purpose of CEDAW.

The CEDAW Committee's General Recommendation 19, adopted in 1992, recognised that discrimination against women, as defined under Article 1 of

⁴ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices)*, pg. 44 https://wiyiyaniuthangani.humanrights.gov.au/sites/default/files/2023-03/ahrc_wiyi_yani_u_thangani_report_2020.pdf.

⁵ Centre of Research Excellence in Disability and Health, 2021, *Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia: Research report*. Centre of Research Excellence in Disability and Health, *Violence against young people with disability in Australia Fact Sheet 2*. Australian Institute of Health and Welfare, 2020 *People with Disability in Australia*.

⁶ Australian Bureau of Statistics 2021–2022, *Sexual violence* < <https://www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/latest-release>>.

CEDAW, includes gender-based violence.⁷ This was the first time in which gendered violence was clearly framed as a form of gender-based discrimination, and brought the issue outside the private sphere and into public spotlight. General Recommendation 35, adopted by the CEDAW Committee in 2017, went even further to recognise:

- the prohibition of gender-based violence is a norm of international customary law
- the understanding of violence extends to violations of sexual and reproductive rights
- the need to change social norms and stereotypes that support and perpetuate violence
- the liability of States for failing to prevent violence at the hands of private individuals and companies, protect women and girls from it, and ensure access to remedies for survivors
- the need to repeal laws and policies that directly and indirectly excuse, condone and facilitate violence
- the need for approaches that promote and respect women's autonomy and decision-making in all spheres of life.⁸

Individuals' right to life and not to be tortured or treated in an inhumane and degrading way

The right to life is protected under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). The rate at which women experience sexual violence is not only a violation of women's right to life but also a violation committed with discriminatory intent – whether that is explicit or a result of discriminatory institutions and norms that perpetuate the cycles of harm that exist within our society.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), under Article 2, requires each State to prevent acts of torture without exception. Article 16 requires the prevention of other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. Read together, this is seen to be a blanket prohibition on acts of

⁷ UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 19: Violence against women*, 30 January 1992.

⁸ UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35, 27 July 2017.

gender-based violence. This was further clarified by General Comment 2, adopted by the Committee against Torture (CAT Committee) in 2008, which noted that States' failure to prevent and protect victim-survivors from gender-based violence contravenes CAT.⁹

In its 2022 Concluding Observations to Australia (Concluding Observations), the CAT Committee expressed its concerns regarding the 'continued and consistent reports of high levels of violence against women and girls, including domestic violence, which disproportionately affects indigenous women and women with disabilities'.¹⁰ It also expressed its concern regarding the underreporting of cases of domestic and sexual violence, and the insufficient and 'uneven geographic repartition' of shelters for victim-survivors of gender-based violence throughout Australia.¹¹

Current failures

Australia's justice response to sexual violence falls short of human rights standards. This is exemplified by the fact that:

- Victim-survivors must navigate incredibly complex legal structures, with little access to legal assistance.
- The justice system often serves to protect perpetrators and re-traumatise survivors. For example:
 - victim-survivors are often re-traumatised through cross-examination
 - victim-survivors are silenced through the misuse of confidentiality
 - judges, prosecutors and defence lawyers continue to draw on outdated, stereotypical attitudes to women in their work within sexual assault trials
 - the legal system does not ensure that juries are properly informed of the impact of trauma on memory and response to sexual violence
- Responses from police, legal professionals and judges are not trauma-informed.

⁹ UN Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, CAT/C/GC/C, 24 January 2008.

¹⁰ UN Committee Against Torture, Concluding observations on the sixth periodic report of Australia, CAT/C/AUS/CO/6, 5 December 2022.

¹¹ UN Committee Against Torture, Concluding observations on the sixth periodic report of Australia, CAT/C/AUS/CO/6, 5 December 2022.

- Front-line services are under-resourced.
- There are limited alternative approaches to justice available which may be preferred in some communities.

Key areas for change

Legal frameworks

Victim-survivors often experience re-traumatisation through inappropriate, lengthy, and/or aggressive questioning during cross-examination. Judges fail to intervene to ensure that juries understand the impact of trauma within sexual violence and the range of responses that many women have when they experience sexual violence. Jury directions often fail to address misconceptions about consent, trauma, sexual violence, and family and domestic violence.¹²

Recommendation 1: The Commission recommends the development of frameworks and policies by State and Federal governments to prevent unsafe legal processes that re-traumatise victim-survivors.

Recommendation 2: The Commission recommends the introduction of specific, required directions to the jury in sexual assault trials about the impact of trauma on memory and responses to sexual assault.

The Commission's Respect@Work Report identified that non-disclosure agreements (NDAs), or confidentiality agreements, are widespread and have the potential to be harmful and counter-productive by silencing victim-survivors and concealing the behaviour of perpetrators, enabling them to continue their perpetration of violence. In recognition of this, and in accordance with Recommendation 38 of the Respect@Work Report, the Respect@Work Council developed Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints (the Guidelines). The Guidelines called for any confidentiality clauses to be clear, fair, in plain English and translated or

¹² See Women's Legal Services Australia's key priorities for more.

interpreted where necessary, considered on a case-by-case basis and limited in scope and duration.¹³

However, despite the Guidelines, NDAs continue to be misused, with research indicating that 75% of the legal profession has never reached a sexual harassment settlement without strict NDA terms and that 50% of respondent solicitors have never advised their clients that sexual harassment matters can be resolved without strict confidentiality terms.¹⁴ Further studies conducted by the UK organisation Speak Out Revolution, found that 95% of people who have signed an NDA experience negative impacts on their mental health related to the NDA and the inability to speak about their experiences.¹⁵

The Respect@Work Report also found that the way in which Australia's defamation laws function discourage sexual harassment victims from making complaints, including to the Commission. The 'weaponisation' of defamation laws against victim-survivors only serves to act as another mechanism by which victim-survivors are silenced. The Commission encourages the defence of absolute privilege to be available in matters reported to police, as well as other authorities with statutory complaints-handling powers, to ensure victim-survivors do not feel silenced.

While the implementation of the Positive Duty in the *Sex Discrimination Act 1984* is an important step forward in moving from a reactive to a proactive system in addressing gendered violence in the workplace, justice responses to sexual violence more broadly remain inadequate. As they stand, legal mechanisms cause significant harm to victim-survivors, discourage engagement and protect perpetrators. They should be critically assessed for compliance with our international obligation to repeal laws and policies that directly and indirectly

¹³ The Respect@Work Council, Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints, 19 December 2022, <<https://www.respectatwork.gov.au/resource-hub/guidelines-use-confidentiality-clauses-resolution-workplace-sexual-harassment-complaints>>.

¹⁴ The University of Sydney Law School, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work Report, 2024, https://rlc.org.au/sites/default/files/2024-03/Let%27s%20talk%20about%20confidentiality%20final_0.pdf.

¹⁵ The University of Sydney Law School, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work Report, 2024, <https://rlc.org.au/sites/default/files/2024-03/Let%27s%20talk%20about%20confidentiality%20final_0.pdf>.

excuse, condone and facilitate violence, as stipulated in CEDAW's General Recommendation 35.

Recommendation 3: The Commission recommends the provision of sufficiently funded training by law societies on the appropriate use of non-disclosure agreements in very limited circumstances and in accordance with the Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints.

Trauma-informed response

In its Concluding Observations, the CAT Committee recommended strengthened capacity building for law enforcement officers on gender sensitive responses to family violence.¹⁶ Current justice responses to sexual violence, and gendered violence more broadly, often fail to adequately understand the trauma victim-survivors can experience. This extends to interactions with victim-survivors by police, legal professionals, judges and interpreters.

Recommendation 4: The Commission recommends the creation and funding by State and Federal governments of a specialised response system to sexual violence, with specialist judges, court staff, prosecutors, police, legal assistance and support services to ensure a trauma-free experience for victim-survivors.

Recommendation 5: The Commission recommends the revision of the effectiveness of judicial training, and judicial understanding of sexual violence and trauma.

Recommendation 6: The Commission recommends the introduction of targeted training for all barristers on the nature of sexual violence and trauma-informed responses to it.

¹⁶ UN Committee Against Torture, Concluding observations on the sixth periodic report of Australia, CAT/C/AUS/CO/6, 5 December 2022.

The need for trauma-informed police training was recognised in Victoria's Royal Commission into Family Violence. Recommendation 42 called for the establishment of a Family Violence Centre of Learning, which is a scenario-based facility dedicated to family violence, and how to ensure police are able to respond in a trauma-informed manner. This training needs to be extended to all police forces, legal practitioners, judges and interpreters to enable trauma-informed and culturally safe justice responses.

Recommendation 7: The Commission recommends the introduction of targeted recruitment of female police officers, and frameworks that ensure victim-survivors have an accessible, trauma-informed, culturally appropriate place to report/disclose violence.

Resources for front-line services

Front-line services are vital to providing victim-survivors with the tools and support to leave a violent situation or take action against a perpetrator. The CAT Committee's Concluding Observations called for victim-survivors to have access to safe and adequately funded shelters and receive the necessary medical care, psychosocial support and legal assistance that they require.¹⁷ This was echoed by the CEDAW Committee's General Recommendation 35, which requires States to ensure access to remedies for survivors.

The Government must appropriately fund First Nations family violence prevention legal services, women's legal services and other community legal services and legal aid. There needs to be investment in social housing and proper income support so women leaving violent men can support themselves, such as a specific domestic violence payment for women leaving violent men paid through Centrelink. We also need prevention and early intervention, such as men's behaviour change programmes, consent education, and safe reporting pathways.

Recommendation 8: The Commission recommends appropriate funding be provided to front-line services, such as women's and community legal services,

¹⁷ UN Committee Against Torture, Concluding observations on the sixth periodic report of Australia, CAT/C/AUS/CO/6, 5 December 2022.

housing, and counselling, as well as access to appropriate emergency funding to help women leave harmful situations by State and Federal governments.

Behaviour change

The CAT Committee's Concluding Observations also called on Australia to reinforce efforts to change behaviours and attitudes that lead to violence against women and encourage reporting by launching awareness-raising campaigns on reporting mechanisms and remedies.¹⁸ This was also reflected in CEDAW's General Recommendation 35, in which the need to change social norms and stereotypes that support and perpetuate violence was highlighted.

That stereotypes and norms contribute significantly to gendered violence, and must be addressed in order to achieve gender equality, was addressed in the Government's Working for Women: A Strategy for Gender Equality. It noted how breaking down gendered norms and stereotypes is beneficial for all men, women and gender diverse individuals. Some proactive steps that can be taken to address behaviours and attitudes that contribute to gendered violence is consent education and men's behaviour change programmes.

Consent education from an early age is vital in teaching children about respectful relationships, consent, and working to address constrictive social norms that dictate the way boys and girls are expected to act. This can, in turn, perpetuate the cycle of poor mental health in men, gendered violence, and harmful attitudes towards LGBTIQ+ communities.

Men's behaviour change programmes are predominantly group-based programmes and services that focus on working with men to provide them with the skills and tools necessary to change their behaviour and maintain respectful relationships. Despite some concerns that dedicating funding to men's programmes can divert needed funds from women's services, they still play an important role in prevention and early intervention. This is particularly the case when participation in the programmes is voluntary rather than court ordered.

In addition to programmes that are explicitly targeted towards ending violence, there are programmes designed to change men's attitudes towards gender more

¹⁸ UN Committee Against Torture, Concluding observations on the sixth periodic report of Australia, CAT/C/AUS/CO/6, 5 December 2022.

broadly. For example, programmes that are aimed at motivating men to be better fathers – providing tools to better listen to children, help around the house, etc. Through these programmes, men are also taught broader lessons about care, breaking down gendered roles in the family, better communication and healthy relationships.¹⁹

To change the gendered attitudes and norms that exist, there is significant education and re-education that needs to occur throughout society. For these programmes to succeed, they require appropriate resourcing and should be locally developed and relevant responses, rather than a ‘one size fits all’ approach.

Recommendation 9: The Commission recommends funding be provided by State and Federal governments for consent education from an early age and men’s behaviour change programmes.

Alternative approaches to criminal prosecution – Justice Reinvestment

By creating effective diversionary and treatment programmes, justice reinvestment addresses the underlying causes of crime and stopping crime from occurring in the first place. Crucially, justice reinvestment represents a shift away from governments coming in and telling communities what is best, and moves towards what is shown to work: local solutions coming from and being implemented by communities.

An example of this is the Maranguka project in Bourke, the first Aboriginal-led place-based model of justice reinvestment in Australia. It is a collaboration between the Bourke Tribal Council, Just Reinvest NSW and the community of Bourke. It involves the participation of local police, State Revenue, and Service NSW in regular forums.

The programme targets issues likely to push Aboriginal people into the justice system that arise from a child’s earliest years into adulthood. For example, the community identified the following as issues: access to birth certificates, driving lessons, support for families and programmes for young people. Through

¹⁹ See more here: <https://www.equimundo.org/>

addressing the concerns highlighted by the community, there was a 23% decrease in incidences of domestic and family violence.²⁰

This programme represents a model of Indigenous self-governance and serves to empower First Nations communities. When communities are invested in, and their lives, roles and knowledge are recognised and reflected in surrounding systems, children thrive, economies grow, communities are cohesive, and harms and violence are minimised.

Recommendation 10: The Commission recommends funding be provided by State and Federal governments for justice reinvestment programmes, with the aim of supporting alternative approaches to sexual violence justice response.

Recommendations

To provide an appropriate justice response to sexual violence in Australia, the Commission makes the following recommendations:

Recommendation 1: The Commission recommends the development of frameworks and policies by State and Federal governments to prevent unsafe legal processes that re-traumatise victim-survivors.

Recommendation 2: The Commission recommends the introduction of specific, required directions to the jury in sexual assault trials about the impact of trauma on memory and responses to sexual assault.

Recommendation 3: The Commission recommends the provision of sufficiently funded training by law societies on the appropriate use of non-disclosure agreements in very limited circumstances and in accordance with the Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints.

Recommendation 4: The Commission recommends the creation and funding by State and Federal governments of a specialised response system to sexual

²⁰ KPMG, Maranguka Justice Reinvestment Project: Impact Assessment, 27 November 2018, <<https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/resources/files/maranguka-justice-reinvestment-project-kpmg-impact-assessment-final-report.pdf>>.

violence, with specialist judges, court staff, prosecutors, police, legal assistance and support services to ensure a trauma-free experience for victim-survivors.

Recommendation 5: The Commission recommends the revision of the effectiveness of judicial training, and judicial understanding of sexual violence and trauma.

Recommendation 6: The Commission recommends the introduction of targeted training for all barristers on the nature of sexual violence and trauma-informed responses to it.

Recommendation 7: The Commission recommends the introduction of targeted recruitment of female police officers, and frameworks that ensure victim-survivors have an accessible, trauma-informed, culturally appropriate place to report/disclose violence.

Recommendation 8: The Commission recommends appropriate funding be provided to front-line services, such as women's and community legal services, housing, and counselling, as well as access to appropriate emergency funding to help women leave harmful situations by State and Federal governments.

Recommendation 9: The Commission recommends funding be provided by State and Federal governments for consent education from an early age and men's behaviour change programmes.

Recommendation 10: The Commission recommends funding be provided by State and Federal governments for justice reinvestment programmes, with the aim of supporting alternative approaches to sexual violence justice response.

The Commission is happy to provide further assistance to the Committee in its consideration of this matter.

Yours sincerely



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