

Australian Law Reform Commission

Justice Responses to Sexual Violence

Submission from

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Introduction

This submission addresses Question 38 of Issues Paper 49, drawing on our comprehensive Australian national study of the processes by which guilty pleas are produced¹ and a specific analysis of the guilty plea process in cases of sexual violence.²

Are sentencing indication hearings (or their equivalent) effective in terms of resulting in guilty pleas? Can the process be improved? Are there other ways in which guilty pleas may be encouraged?

Sentence Indication

Our research finds that, in general, sentence indication can be an effective element in resolving charges by guilty plea, and is preferable to using the sentence discount as a tool to elicit guilty pleas.³ Although this research was not specifically directed at sexual violence, many of the conclusions apply to cases involving sexual violence, in some ways even more strongly, as outlined below.

Barriers to resolution by guilty plea in cases of sexual violence

The process in which guilty pleas in cases of sexual violence are determined reflects interaction among several factors which make conviction less likely, many recognised in the Issues Paper. These elements necessarily affect decision making throughout case

¹ Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practices* (AIJA, 1995). This research, though conducted some time ago, remains the benchmark Australian national empirical research into the production of guilty pleas. While changes proposed are now part of the legal process in some Australian jurisdictions, many practices identified and issues raised are still part of current guilty plea processes.

² Kathy Mack and Sharyn Roach Anleu, "Resolution without Trial, Evidence Law and the Construction of the Sexual Assault Victim" in Mary Childs and Louise Ellison (eds) *Feminist Perspectives on Evidence* (Cavendish, 2000) (attached).

³ Mack and Roach Anleu, n 1 149-158; Kathy Mack and Sharyn Roach Anleu, "Sentence Discount for a Guilty Plea: Time for a New Look" (1997) 1(2) *The Flinders Journal of Law Reform* 123. Since these publications, sentence indication has been used in New South Wales, Tasmania and Victoria, with varied experiences and views about their practical value. For a recent critique of the sentence discount, see Jay Gormley and Cyrus Tata, "Guilty pleas, sentencing and sentence 'discounting': who is 'sentence discounting' really for?" in Maximo Langer, Mike McConville and Luke Marsh (eds) *Research Handbook on Plea Bargaining and Criminal Justice* (Elgar 2024).

processing, resulting in several distinct barriers to resolving sexual violence cases by guilty pleas.⁴ These barriers must be addressed beyond the guilty plea process itself.

- The persistence of rape myths in the legal profession, including prosecutors, judges and defence lawyers, affect charging, case management, the prosecution's willingness to maintain charges, the trial process and plea discussions. A victim survivor's behaviour is evaluated according to legal and social norms about prompt complaint, corroboration and other conduct which may not accurately reflect lived experience.
- Rape myths and images of 'ideal' victims persist among the public and jurors.
- Failures of evidence reform, and lack of support, mean that trials can be devastating experiences for victim survivors.
- A crucial factor in guilty pleas is advice from the defendant's legal representative. This advice, sometimes forceful, is strongly based on likelihood of conviction.
 - Conviction in a case of sexual violence can be assessed as unlikely apart from actual guilt, based on factors such as reluctance of the victim survivor to give evidence or conduct that does not conform to rape myths and other social norms.
- The sentence discount for a guilty plea may be generous in sexual violence cases, as it may be based on a belief that the defendant is giving up a real chance of acquittal, and that the victim is being protected from trauma.
- Factors affecting the defendant's willingness to plead guilty, even when advised to do so, include unwillingness to accept the facts of the offense, risk of a harsh sentence, and the prospect of being identified on a sex offenders register. Increasing maximum penalties and expanding the scope of the register may have a negative effect on the likelihood of a guilty plea in a case of sexual violence.
- The prosecution may be too ready to accept a guilty plea to lesser charges because of a prevailing view is that trauma for a victim survivor is reduced if there is a guilty plea. However, this is not necessarily the view shared by those who have experienced sexual violence.

Conclusion

The process by which guilty pleas are produced presents a dilemma for victim survivors of sexual violence. They can choose to give evidence and suffer the distress and humiliation of the trial, which may not result in a conviction. Alternatively, even if they would prefer a trial, they feel compelled to acquiesce in a plea agreement, allegedly for their benefit, which rewards the accused with a lesser charge and/or a lesser sentence.

Too often, the trauma of the process which victim survivors must undergo before and during trial is used as a reason to withdraw or reduce charges. Instead, the remedy must be to improve the pre-trial and trial experience so that trial outcomes, and therefore guilty pleas, more accurately reflect the occurrence of sexual violence.

⁴ Mack and Roach Anleu, n 2; See also Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave MacMillan, 2018) pp. 6-7, 46-50, 135-139, and Monique Moffa, Arie Freiberg and Asher Flynn, "Women and victims: neglected voices in plea negotiations" in Langer et al (eds) above n 3, especially pp 393-4.