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Review by the ALRC of Justice Responses to Sexual Violence in Australia

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"The legal system is designed to protect men from the superior power of the state but not to protect women or children from the superior power of men. It therefore provides strong guarantees for the rights of the accused but essentially no guarantees for the rights of the victim. If one set out to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law."

Judith Lewis Herman

About QSAN

QSAN is the peak body for sexual violence prevention and support organisations in Queensland. We have 23 member services, including specialist services for Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, women with intellectual disability, young women, men and children and our membership are located throughout Queensland, including in rural and regional locations.

Our network of non-Government services is funded to provide specialist sexual assault counselling, support, and prevention programs in Queensland. QSAN is committed to working towards ensuring all Queenslander's who experience sexual violence recently or historically, regardless of age, gender, sexual orientation, cultural background receive a high-quality response in line with best practice, client-centred principles.

Our work and analysis of sexual violence is from a feminist perspective and addressed within a trauma-informed framework. In their daily work with victim-survivors our members work are trauma specialists, as defined by the Royal Commission into Institutional Child Sexual Abuse Royal Commission.

We are committed to engaging with government and other bodies to raise systemic issues of concern, and to ensure the voices and experiences of victim-survivors of sexual violence are considered in the formulation of policy and legislation that impacts on sexual violence victim-survivors in Queensland.

QSAN acknowledges there are many people within our current institutions, courts, and legal and service systems that everyday work positively to provide a trauma informed response to victim-survivors of sexual violence who may be seeking justice, safety, and accountability for the crime that they have experienced.

Whilst acknowledging their individual work there is little doubt our current approach is not meeting the needs of most victim survivors, as evidenced by their low engagement with formal reporting approaches.

Despite individual effort, there are large structural, legislative, and cultural impediments to improved responses and it is imperative that we seek to address these through systemic reform these working in collaboration and with the human rights and needs of victim survivors at the centre.

QSAN's approach to this submission

The Women's Safety and Justice Taskforce (WSJT) in Queensland recently conducted an extensive review of the legal system's response to sexual violence and rape and delivered a final report to government on 1st July 2022. These major reforms were mainly accepted by government and the reforms are in a variety of stages of being delivered.

The changes are extensive including introducing affirmative consent and criminalising coercive control and a variety of changes to the Evidence Act 1977 (QLD).

QSAN supports in principle the reforms relating to sexual violence and is eagerly awaiting the operationalisation of affirmative consent in Queensland.

Considering the extensive work already undertaken in Queensland, our approach is to briefly outline the WSJT reforms that we support and could be implemented in other jurisdiction but instead focus on new or other additional reforms that are not part of the Queensland reform package nor considered by the Taskforce.

The current landscape

All indications are that sexual violence prevalence in our community is increasing and indeed the latest statistics from the Personal Safety Survey confirm this.[1]

Anecdotal feedback from QSAN services is that over the last near 15 years, the violence associated with the sexual offences is getting worse (more sadistic, dangerous and degrading) and the victims are getting younger.

The number of people reporting sexual assaults has continued to increase over the past five years. According to the 2024 report of the Productivity Commission, the rate of victimisation in sexual crimes in 2022 was 124 per 100,000 population. In 2016, the rate was 95 per 100,000.[2]

The Personal Safety Survey[3] also confirms that younger women are at most risk of victimisation with key findings being:

- The 2021-22 PSS estimated that 1 in 8 (12%) women aged 18-24 experienced sexual violence in the 2 years before the survey.

[1] Personal Safety, Australia, 2021-22 financial year | Australian Bureau of Statistics (abs.gov.au)
[2] 6 Police services - Report on Government Services 2024 - Productivity Commission (pc.gov.au)
[3] Young women - Australian Institute of Health and Welfare (aihw.gov.au)

- In 2022, younger women were most likely to be victims of sexual assault than older women (56% were under 18 years old and 30% were aged 18 – 34).

The extent of sexual violence in our community is larger and the impacts more widespread than we previously thought[4]:

Australian National Research Organisation on Women's Safety research found:

- 51% of women in their twenties
- 34% of women in their forties
- 26% of women in their late sixties and seventies.

And the Royal Commission into Aged Care Quality and Safety found there are 50 sexual assaults per week occur nationally in aged residential care.

The latest figures from the ABS are only 8 % of women report sexual violence to the police. As a community therefore, we have a lot of work to do to appropriately respond and prevent sexual violence.

We appreciate the Australian Law Reform Commission's focus on this issue.

Impacts of the crime – sexual violence is a more serious crime than people realise.

The impact of sexual violence is profound and has detrimental impacts across a person's life including their social life, mental health, health in general, relationships, education and financially and alcohol and drug use and wellbeing in general. If the sexual violence occurred in childhood the impacts can impact on the development of a person's whole self and can increase their risk of being susceptible to further sexual violence and domestic and family violence and/or targeted by perpetrators and causing ongoing harm, into adulthood.

"The main finding is that sexual violence causes persistent suffering for women and girls. In childhood and adolescence, the main consequences include a feeling of unbearable secrecy, threat and humiliation; disconnection of body and soul; great fear and constant insecurity; damaged self-image, self-accusation and guilt; experiencing being compelled to take full responsibility for the crime; as well as various physical and mental health problems, e.g., suicidal thoughts. In adulthood, the consequences are also multifaceted and varied, including vaginal problems, recurrent urinary tract infections, widespread and chronic pain, sleeping problems, chronic back problems, and fibromyalgia, eating disorders, social anxiety, severe depression, and chronic fatigue. In conclusion, sexual violence has these extremely negative and long-term consequences because of the interconnectedness of body, mind, and soul. The seriousness of the consequences makes a trauma-informed approach to services essential to support the healing and improved health and well-being of survivors."

"Our body is designed to be healthy and has built-in balance management to maintain the equilibrium of the various systems of the body. When women and girls are sexually violated, everything in the

[4] https://anrowsdev.wpenginepowered.com/wp-content/uploads/2022/08/ALSWH-Prevalence_SV.pdf

body tries to prevent the immune system from being damaged and, therefore, decreasing the chances of the person suffering from a physical or mental illness. Psychoneuroimmunology is an interdisciplinary field of study in which the emphasis is on understanding the relationship between what happens to us and the resulting consequences for the central nervous system, endocrine system, and the immune system."

Please see https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7918207/ for further information about the impact of this stress on all aspects of the health of women and girls who have been sexually violated and the strong links between trauma, and disease and a discussion about why sexual violence is a much more serious crime than people realise.

Thematic reflections on sexual violence in Queensland

Our network has observed a significant increase in service demand over the last decade. There are also changing patterns of demand with not only more clients presenting to specialist services, but services are seeing, as previously stated, an increase in the number of young people seeking support.

This may be for the following reasons:

- The increase in access and at a younger age to pornography, including violent pornography.
- The lack of broad-based and quality sex education in schools. Historically, education has been abstinence and heteronormative focused, instead of adopting a harm minimisation approach.
- The rise in the use of dating apps, gaming and other devices which increases an ability of those with predatory behaviour to access victims.
- The lack of accountability for sexual violence in the criminal justice system and other court systems.
- The pervasive nature of and acceptance of "rape culture' in our society and the acceptance of the superiority of men and/or prioritising men's needs and a belief in the subordination of women and children.

How do sexual violence prevention services differ from domestic and family violence services?

In our experience, many decision makers may be familiar with the work of domestic and family violence (DFV) services but less with the work of sexual violence prevention services and many believe we do the same work. Though we work closely with the DFV sector, there are key differences.

We thought it might be helpful to explain this further.

A key difference from domestic and family violence services is that sexual violence support services respond to abuse in a wide range of relationships and over the course of a person's lifetime. Sexual violence services support many clients who have experienced sexual violence outside of familial and intimate relationships whilst DFV services are geared towards crisis which occurs around separation.

Sexual violence support services also respond to clients in crisis for example, following a recent rape but they also provide long-term counselling and support to help people heal from violence and abuse.

People impacted by sexual violence can access QSAN services at any time in their lives. Victim-survivors may dip in an out of services throughout their lives to support their healing journey.

Specialist sexual violence counselling and support services work with clients to address the deep impacts of trauma. In terms of the definitions used widely in the National Plan to End Violence Against Women and Children, the services provide both response and recovery (though the long-term recovery aspect of their service delivery is increasingly under pressure because of underfunding and increasing client demand).

Trauma specialist counselling delivered by QSAN services is client centred.

Counselling focuses on emotional safety and stabilisation, trauma processing, addressing the impacts of sexual violence, resourcing people with coping mechanisms and developing and enhancing client support networks.

QSAN services also assist victim-survivors with practical issues including housing, reporting to police, medical referral and support, assistance with relevant applications, including financial applications and referrals to appropriate services. When resources permit, the services support clients to participate in criminal court processes and trials, which can be, as stated previously a retraumatising process for many victim-survivors.

The work of a sexual violence prevention service is specialised and complex. The counsellors are experts in their field, have extensive experience and many have post graduate degrees. The work is demanding and requires a high level of skill to respond appropriately to highly vulnerable and traumatised clients, especially where there is increasing client demand and limited resources.

Women's Safety and Justice Taskforce Legal Reforms

As previously stated QSAN substantively supports the reforms recommended from the WSJT recommendations, Report 2 relating to sexual violence. We have included these necessary legal reforms as an appendix to our submission for ease of reference.

Please see the main recommendation for legal changes below, relating to consent and mistake of fact:

- **(Recommendation 43) These are the substantive changes to consent and mistake of fact in Queensland.** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence amend sections 348 (Meaning of consent) and 348A (Mistake of fact in relation to consent) to provide that: a) consent must be freely and voluntarily 'agreed' rather than 'given' b) the non-exhaustive list of circumstances in which consent cannot be freely and voluntarily agreed at section 348(2) be expanded to reflect the circumstances set out in section 61HJ of the Crimes Act 1900 (NSW) c) if the person who alleges the sexual violence has suffered resulting grievous bodily harm, those injuries must be taken to be evidence of a lack of consent unless the accused person can

prove otherwise d) no regard must be had to the voluntary intoxication of an accused person when considering whether they had a mistaken belief about consent to sexual activity e) an accused person's belief about consent to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consented to the sexual activity f) the requirement in (e) above does not apply if the accused person can show, on the balance of probabilities, that they have a cognitive impairment, mental impairment or another type of impairment that impacted on the accused person's ability to communicate and that impairment was a substantial cause of the person not doing or saying anything. g) the amendments in (e) and (f) above will not commence until: – the expert panel for sexual offence trials has been established (recommendation 80), and – appropriate and equitable funding has been provided to the Office of the Director of Public Prosecutions and Legal Aid Queensland to obtain any necessary expert reports. The Bill containing these amendments will commence no sooner than six months after debate and passage of the Bill, to allow a comprehensive community education campaign to be undertaken.

In relation to the amendments contained in the legislation introducing affirmative consent https://www.legislation.qld.gov.au/view/html/bill.first/bill-2023-007/lh QSAN did had some concerns with the drafting. The Mistake of Fact excuse provides, in essence an excuse to a crime, and therefore we should be carefully considering who can access it.

QSAN's proposed amendments to further limit or clarify the limitations around Mistake of Fact however, these were not supported.

We acknowledge the Queensland approach to Mistake of Fact is an improvement on NSW's drafting because of the requirement to prove a link between the mental and/or cognitive impairment as the reason as the why the person did not do or say anything at the time of the sexual interation.

Obviously getting the balance right is very important and if we do not, there is a concern the wrong message can be sent to the community. That is, on the one hand, people with disabilities are unable to have healthy relationships and consensual sex and on the other, if the excuse is drawn too widely it may become unworkable, which has impacts on justice, safety, timeliness of trials and ultimately may impact on the victim-survivor's right to a fair trial.

QSAN still holds concerns about how this provision will work in practice and specifically how it would be interpreted by police resulting in matters not proceeding if an accused has a diagnosed 'impairment' including, for example, depression or anxiety.

The QSAN proposed amendments to the drafting in our submission on the legislative amendments were essentially:

- *The face of the legislation should include the statement 'a person may withdraw consent to an act at any time by words or actions.'*

- *That the definition of consent should include 'informed'.*

- *That it should be made explicit on the face of the legislation that consent is required for each different, changed, stage of the sexual act.*

- *That the provisions be amended to include an additional circumstance where a person is incapable of consenting or incapable of withdrawing consent because they are being strangled or because of some other act preventing communication.*

- *That an additional general assumption provision be legislated similar to the Victorian jury directions:*

  "A belief by a person that another person consented to an act is not reasonable if the belief is based solely on a general assumption (or a combination of matters including a general assumption) about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence)"

- *Limiting the extent of 'impairments' that may be covered by this excuse especially those that may not be permanent.*

- *Similarly, QSAN believes the mental impairment excuse is too widely drafted and should be limited in the interests of safety and justice. If a large percentage of the population is, prima facie able to access this excuse, this will mean it is potentially open to misuse, unnecessarily lengthening proceedings and could negatively impact victim survivors' engagement with the trial process.*

The Criminal Justice System is Offender Centric, Trauma Uninformed and Victim Peripheric.

Specialist sexual violence services in Queensland are not funded to support victim survivors through the criminal justice process but many do. When support of this nature is provided the time frames are long, the work is intensive, and the work often extends after the trial has finalised as services help victim survivors to make sense of what happened.

The criminal justice system, from the perspective of victim survivors is offender centric, 'trauma uninformed' and 'victim peripheric', where the victim's needs are unimportant and peripheral.

Despite the crime being inflicted on their body, attacking their sense of self, autonomy, and safety and many believing they were in danger of losing their life and their own body being the "crime scene", they are a mere witness to the case and their needs and rights can be easily forgotten in a larger system that has its own priorities, requirements, and timelines.

There is little to no focus on the human rights of the victim-survivor and no organisation tasked with prioritising or advocating to protect them in the broader system.

If a matter proceeds to sentencing, this process is arguably even more focussed on the offender than the trial and pretrial processes because victim survivors are even more ancillary to the process. At least in the trial and pre-trial the victim survivor has utility as a witness to the system, whilst this role is concluded by the time of sentencing. Arguably this lack of utility means victim-survivors is even less visible, as sentencing is principally focussed on the offender.

For victim-survivors to engage more fully, the process needs to be much more victim centric, and trauma informed.

Victim-survivor expectations are different from legal reality.

Victim-survivor expectations about what they want from the criminal justice system are very different from the legal reality. Victim-survivors seek to tell their truth, and this will be heard and believed, the legal reality is about 'finding proof'. Specialist sexual violence services spend a lot of time with victim survivors preparing them for this reality.

The criminal justice system is systems driven.

As was previously stated the criminal justice system has its own priorities, requirements, and timelines. In other words, the criminal justice system is system driven doing things in a way that suits and prioritise the needs of the system, rather than accommodating the needs of the victim survivor or the trauma they endured.

As one sexual violence professional described it, victim-survivors and the legal system are on, "parallel train tracks" with little overlap.

Aboriginal and Torres Strait Islander women

Murrigunyah, the only specialist sexual violence service funded in Queensland for Aboriginal and Torres Strait Islander women provides the following feedback:

Many Aboriginal and Torres Strait Islander women have no confidence in formal processes and have concerns about the inherent racism and misogyny. It's damning of a system that a system set up to provide justice and accountability for all, is too risky and culturally unsafe for Aboriginal and Torres Strait Islander women to use.

Why do victim-survivors engage with formal processes?

In QSAN's experience, most victim-survivors commence formal action to stop their perpetrator committing an offence again against another person. They are seeking both justice, accountability, and safety for themselves as well as safety for other women, children and other members of the community.

A new starting point – the rights of the victim-survivor need to be given more weight.

QSAN seeks a change in the criminal justice system to bring the victim-survivor and their needs much more into view.

Human Rights of Victim Survivors

The rights of the offender are prioritised in the criminal justice system, and the human rights of the victim-survivor are given little weight.

Queensland's Human Rights Act specifically protects the human rights of the accused in the criminal justice system but not the victim-survivor, including children victim-survivors.

We are aware that the rights of victims in the criminal process *may* be recognised to a limited extent by other provisions, however, the lack of specific reference in the Human Rights Act QLD for the protection of victim's rights whilst specifically recognising the rights of the accused is problematic because:

- It reinforces the historical focus in the criminal justice system on the accused's rights to the exclusion of all other rights.
- The accused has a defence lawyer who can focus exclusively on their human rights, but victims do not have their own lawyer who is able to provide a similar focus.
- Specific clauses tend to be given precedence in interpretation than generalised protections – therefore, an accused's rights that are specifically recognised will be given precedence over other rights, even if they do exist, for example, such as a right to a 'fair trial'.
- The specific focus on the rights of the accused has a broader impact in the system, as human rights in the criminal justice system are interpreted as only meaning the protection of the human rights of the defendant.
- The Human Rights Act requires courts to interpret legislation, where possible, in a way that is consistent with human rights. Again, this can further elevate the accused's rights in the criminal justice system, vis-à-vis the rights of the victim.
- We note in Queensland's *Women's Safety and Justice Taskforce Report*, *Hear Her Voice* Report, Volume 2, Recommendation 20 recommended that the recognition of the rights of victims in the criminal justice system be specifically considered and the next statutory review of the Queensland Human Rights Act, which has just recently been announced.

We note the Human Rights Bill put forward by the Australian Human Rights Commission for consultation last year also only specifically protected the human rights of the accused in criminal justice processes, rather than victim-survivors, including children. This is a concern as this limited provision might also be nationally accepted.

Victim-survivor rights must be explicit in legislation and policy.

Our experience over decades working in this area is for victim-survivor rights to be recognised in any meaningful way, these rights need to be explicit and clear, especially in the criminal justice system which traditionally has focussed on defendant's rights and not on the rights of victim-survivors.

Victim-survivors experience of the trial process.

Victim-survivors experience of the criminal justice process has been described as "horrendous". It is elongated and long, involving many court applications, mentions and adjournments during a time of high stress for the victim survivor. There can be about an 18-month time period between reporting to police until an outcome and post Covid this is now around 2 ½ years. During this time, specialist counsellors are working with victim survivors to stabilise their emotions, support their confidence through therapeutic intervention and build them up for the court experience.

Unfortunately, victim-survivors stability and confidence, understandably can deteriorate through constant delays and adjournments.

If the offender is out in the community awaiting trial, they can continue to harass and intimidate the victim survivor, defaming them to all their support networks and causing increased social isolation and sabotaging their support networks during a time when support is critical. Some victim survivors must relocate because of the level of harassment and abuse. These issues are exacerbated in small communities and regional towns where everyone knows, despite the anonymity of the process, who is involved. Of course, some victim survivors will withdraw from the process because of the intimidation.

Social support is one of the most important aspects of healing after sexual violence and the criminal justice process can, for many victim survivors increase isolation.

If there is disappointment at the sentencing outcome victim survivors can then regress in their healing and intensive time is then spent supporting them after the sentencing outcome.

It is little wonder so many victim-survivors question whether it was worth going through the process at all.

Support for Victim-Survivors and Current Funding levels for QSAN services and justice navigators.

QSAN services are critically underfunded and receive less than 13% of the core ongoing funding of their closest equivalent and aligned non-government sector, the domestic and family violence sector. They are not funded to provide consistent system's advocacy and court support. This has an impact on the ability of victim-survivors to engage with formal processes.

The Queensland Domestic and Family Violence Death Review and Advisory Board commissioned a rapid international review of the evaluation literature in 2018 on what worked in the criminal justice system vis a vis domestic and family violence.

One strong finding was of the efficacy of what they termed, "legal advocacy". What was meant by this was system's advocacy, or having an advocate walk beside the victim-survivor through the legal process. The findings from this review, included systems advocacy in sexual violence cases.

> "The legal system can be complex to navigate, and thus advocacy services often assist victims of DFV through court and legal proceedings. Legal advocacy is victim-focused advocacy that aims to improve victim safety, to ensure that the legal system responds appropriately and sensitively to DFV cases, and to provide victims with information and support regarding legal policies and procedures (Macy, Giattina, Sangster, Crosby, & Montijo, 2009). We identified one systematic review by Macy and colleagues (2009), which synthesised the extant literature on DFV and sexual assault services, including a section specifically on legal advocacy services for victims of DFV. The relevant synthesised literature mostly comprises court advocacy, including accompanying victims to criminal or civil proceedings and assisting them through related processes. **Evaluations of the summarised interventions have found positive results: victims who receive legal advocacy experience greater social support, better quality of life, reduced likelihood of further**

> **abuse, and greater access to community resources** (Macy et al., 2009). **This review strongly stresses that legal advocacy service providers must be highly knowledgeable about the legal system in order to provide DFV victims with the correct information to navigate the judicial and legal systems. It also indicates that long-term approaches and long-term follow-up with victims should be incorporated into legal advocacy to ensure that services are most efficacious (Macy et al., 2009)"**[5]

This evidence makes it clear that not just anyone can perform this advocacy, the advocates or justice navigators must be highly knowledgeable about sexual violence and the criminal justice system and be able to provide long term approaches and follow up, which a specialist sexual violence service is able to do.

Permanent funding for frontline sexual violence prevention services to undertake prevention.

There should be specific funding for frontline sexual violence prevention services to employ prevention and education workers to undertake localised response to prevention to meet the needs of their local communities. Though there is current funding at a national level through Our Watch for national, whole of population strategies. There is a need for both bottom up and top-down approaches to prevention.

Sentencing.

QSAN believes that sentencing needs to better reflect community expectations about the seriousness of these crimes and be more reflective of the actual impact of the crime and the trauma caused to the victim survivor.

No conviction recorded.

Victim-survivors have expressed anger and disbelief when the offender has pleaded guilty or been found guilty and the court decision is to not record a conviction. Particularly when there is a focus on the background of the offender and possible impediments to their future work and life opportunities. Victims-survivors believe that severity of the offence and the impact on them and their future opportunities is not fully taken into consideration. On occasions, the offender's work provides them with some level of credibility which is questionable after the conviction and may provide them access to vulnerable persons, which is incredulous, but our members report this occurring.

Suspended sentences.

Suspended sentences that are increasingly outcomes of sentencing in these matters can feed into a community perception that sexual offences have minimal consequences, even after going through the entire criminal justice process.

We receive feedback from victim-survivors that the suspended sentence does not adequately equate to the level of fear, the financial cost, the trauma experienced, and the years of counselling and trauma work required to recalibrate themselves and be able to fully participate in our community.

[5] https://www.coronerscourt.qld.gov.au/__data/assets/pdf_file/0008/723689/systematic-review-of-criminal-justice-responses-to-domestic-and-family-violence.pdf p.47

The impact of the crime will stay with them forever even if they can get themselves back on track. They also have overwhelming fear when the offender is released and a sense of injustice if this occurs immediately after the trial. Victim-survivors, and more broadly the community question the release of offenders for time already served. The time served by an offender on remand is considered in determining their sentence and some may walk free or within a short time after the sentence has been handed down. If a person is on remand because they are a risk to the community and/or the victim-survivor and were unable to convince a court of ways to mitigate this risk, it seems at odds that with no further mitigation of risk, they can benefit from a quick/immediate release taking into account time already served.

Risk within families and relationships.

There is a perception that the impact of the crime of child sexual abuse and also domestic violence (involving ongoing harm) is not treated as seriously as they should or as seriously as one-off stranger violence.

"You can't get any more intimate than somebody being physically inside you. This is a part of your body that you don't share with everybody else, it's a part of your body that you've been told is private. Really, it's an incredibly—it's the most intimate part of your body that you can possibly imagine . . . to have someone violate that is just beyond anything else that anybody could do to you. Absolutely beyond anything else anyone could do to you."

Not serving whole sentence

Both the victim-survivors and the community expect offenders to serve their whole sentence or at least most of it. Victim-survivors are shocked to find out they may only serve a fraction of their sentence. The victim's perception is the offender is a serious violent offender. However, research has found only a fraction of serious violent offenders are declared.

Transparency in the system fosters greater accountability. So, we are in favour of a system that is as transparent as possible about its decision making.

Recognising Victim Harm and Victim Justice

We support the need to achieve a just outcome in all the circumstances and this must specifically incorporate "justice" for the victim-survivor, not only the defendant.

We also support the notion of the need to protect the victim from future harm and not just the community in general.

Rehabilitation

Many victim-survivors may be supportive of the offender being mandated to attend rehabilitation programs to address their offending behaviour. However, there are currently no such courses in the community and limited opportunities whilst in custody. The development and delivery of effective, evidence-based offender treatment programs needs to be further explored to both hold offenders accountable and assist in improving community safety.

As stated, these courses would need to be evidence based and victim centric in their approach. It is possible, that a non-custodial sentence would be more palatable to victim-survivors if the offender was required to undertake a course of rehabilitation, if this was available in the community and they were monitored to attend and there was accountability if they refused to participate.

Good Character References and Negative Consequences for the Offender

QSAN is strongly opposed to the use of good character references in any sexual violence matters.

The good character of the offender is often used in a grooming process and the "good character" can be weaponised to deter the victim survivor reporting and to demean, minimise and dismiss the victim survivor's experience.

For victim survivors to have to listen to testimonials and/or know that good character references are being handed to the judge for consideration in sentencing and in addition, listen to how the offending has impacted on the offender's employment, financial situation, and relationships, is highly distressing. We do not believe these character references and the negative impact of the offending has a place in the sentencing process and are not aligned to justice as understood by victim-survivors. The defence could still have access to the use of other mitigating factors, such as genuine remorse.

Restorative Justice

QSAN supports an examination of the role of restorative justice in certain circumstances but does not want it to replace appropriate accountability and sentencing in sexual violence. It should not become an easy or cheap alternative to the criminal justice system.

There are some victim-survivors of sexual violence in some circumstances who do seek a restorative justice approach. The process must be appropriately resourced and use trained staff who are also trained in sexual violence. It must be genuinely victim centric, and victim led.

After the Royal Commission into Institutional Child Sexual Abuse, a process was established for some institutions to engage with victim-survivors and say "sorry". Some victim-survivors did enter this process in good faith, but some have provided feedback to QSAN they have regretted their decision and wished they held the offender accountable as "sorry" was not enough.

This is a current process and a good reminder about undertaking this work carefully.

In smaller communities, it must be carefully undertaken as some of the community leaders may also be perpetrators of violence which is extremely problematic.

The Immigrant Women's Support Service believes the model, for some communities in Australia is more culturally aligned and familiar.

Some QSAN services felt restorative justice may be an alternative for young offenders but were concerned about its use for adults. 18-year-old boys can engage in high level offending, be highly dangerous to the victim survivors and the community.

QSAN have had variable experience of the youth restorative justice process in Queensland and there has been some experience of it being offender centric and we therefore support the recommendation for its independent review by the Women's Safety and Justice Taskforce.

Interpreters

IWSS raised the issue of the need for quality interpreters to be available across the entire criminal justice system for victim survivors.

The quality of interpreters can be problematic with the interpretation not being accurate as there may be different dialects and misinterpretation of phrases and terminology.

There also needs to be an immediate process in place for when the interpretation is not up to an acceptable standard and for the prosecutor and ultimately the court, to be alerted during the trial process.

We have heard feedback that in the UK the interpreting service is run and certified by the Justice Department and there is more oversight and monitoring for quality. A similar approach would be appreciated in Australia.

Sexual Offending Risk Assessment

We have concerns about the use of these as evidence in the courts and that the defence obtains this evidence. These reports need to be independent and conducted by experienced forensic psychologists who are using standardised and measurable approaches and have experience with working with victim survivors and apply a trauma informed lens.

They should be engaged and appointed by the court and not by the defence. They need to be highly qualified professionals who can see through the manipulation and lies of offenders.

Victim Impact Statements

Victim Impact Statements can be a powerful way in which the court and the community and the offender can hear from the person most deeply affected by the crime. Some victim-survivors do not want to participate as they do not want the perpetrator to know how deeply the crime impacted on their life. On other occasions the process is rushed and pressured as the offender has made a late plea.

Victim-survivors believe this is finally their time to tell their story but soon realise that the process is subject to many constraints and rules around what can be spoken about and not wanting to provide anything that may cause an appeal point. For example, if the offender was initially charged with 18 crimes but 10 were dropped then the victim survivor is unable to allude to the other criminal acts or somehow brings in new evidence.

Victim impact statements must be meticulous in their framing to comply with these rules and regulations, and this takes away from the victim's voice and reinforces the system's offender centric approach.

Victim Impact Statements– Process Issues

There is a further issue in situations where the ODPP ask for the Victim Impact Statement early before going to trial. The victim-survivor can spend many hours on their statement and if a not guilty verdict is returned there is no place for their victim impact statement to be included and their reality to be heard. Victim-survivors are told "*This is your chance to have your say*", often by other participants in the system rather than sexual violence services, and then when a not guilty verdict is returned the process of writing the victim impact statement has zero therapeutic value. This is not trauma informed and can have a profound impact on the victim-survivor whose reality is never heard in court. It is not uncommon for victim-survivors to be very angry about this.

We do not want to extend or draw out the sentencing process, but the system needs to understand the victim- survivor is buoyed by doing the statement and it gives them hope for a just outcome.

There needs to be thought about how the process can be changed to better accommodate victim-survivor needs and to be more trauma informed.

Case uplift

QSAN supports a consideration of sentencing uplift in sexual violence matters in Queensland, including child sexual violence matters so that the sentencing better reflects community standards and the objective gravity and the moral culpability of the offending.

We understand that in Victoria, the ODPP appealed an incest case to the Court of Appeal and High Court, and their decisions collectively "meant that sentences for incest in Victoria not only should increase to better acknowledge the seriousness of this type of offending and better accord with community expectations, but also should do so immediately, not incrementally.

Though the case uplift only related to incest, it has been suggested that the implications of the various decisions – particularly the commentary around the seriousness of child sex offences – have indirectly affected sentencing practices for child sex offences other than incest.

Incest

The current Queensland Incest provision Section 222 states "any person" who engages in incest can be charged with the crime. This is highly problematic for those women where the abuse continues into their adulthood can and are also be charged with the crime. This ignores the true victim in the case and the highly complex nature of these relationships that have started in childhood.

This may well be an issue across Australia and needs to be changed to protect victims and encourage reporting of these crimes.

Specialist sexual violence courts (fund a pilot)

It has been QSAN policy for a considerable period to support the establishment of specialist sexual violence courts. We believe that it is time for Australia to consider funding a pilot of a model that would include the following components:

- Single decision-maker and oversight
- Tight case management with specific requirements to control delays and defence tactics.
- Ground rules hearings – to determine the extent and coverage of cross examination.
- Use of recorded evidence.
- More ability for the court to intervene and protect the victim survivor from harassing questions, sarcastic and/or demeaning questioning.
- Special witness protections provided as a given and options provided to victim survivors.
- Trained court personnel
- Training for the judiciary, counsel in sexual violence and trauma informed information.
- Access to sexual violence specialist court support throughout the process from police report to court.
- Different exit and entry point to ensure victim survivor safety and safe spaces for the victim survivor at court.
- Independent lawyers with standing to protect the human rights of the victim survivor during the court process.
- Use of rape/ sexual assault experts.

We also believe that specialist sexual violence services should be involved in developing the model perhaps partnering with university, to ensure a trauma informed and victim centric approach.

Independent lawyers with standing

We support the establishment of sexual violence specialist legal services to provide a range of legal advice and services to victim survivors of sexual violence include defamation law, family law, domestic and family violence protection orders, tenancy laws, employment, privacy considerations, information about the criminal process, bail hearings etcetera.

Coercive Control

Coercive control has been criminalised in Queensland and will be operationalised in 2025. The new offence may provide an additional criminal response in prosecuting matters involving intimate partner sexual violence because the course of conduct approach will not require as much specific detail. It also will allow more details about the coercive elements of the relationship to be detailed before the jury. The Queensland offence also specifically allows for both specific charges and a coercive control offence to be brought at the same time. This means that a rape charge and a coercive control charge may be brought together which again might strengthen the evidentiary weight in these cases.

Victorian Sexual Offences - Preamble

QSAN supports a general preamble in the Criminal Code that provides legislative guidance when responding to sexual violence matters. Please see the Victorian Preamble below:

CRIMES ACT 1958 - SECT 37B Guiding principles

CRIMES ACT 1958 - SECT 37B

Guiding principles

It is the intention of Parliament that in interpreting and applying Subdivisions (8A) to (8G), courts are to have regard to the fact that—

(a) there is a high incidence of sexual violence within society; and

(b) sexual offences are significantly under-reported; and

S. 37B(c) amended by No. 47/2016 s. 7.

(c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment or mental illness; and

(d) sexual offenders are commonly known to their victims; and

(e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

Right to silence, disclosure of a defendant's criminal history, mistake of fact

In recent comments to the Australian, after the Lehrman defamation trial judgement the former West Australian Supreme Court Judge Kenneth Martin called publicly for the "right to silence" to be re-evaluated in sexual assault cases.[6]

He said "*the Lehrmann defamation matter should catalyse reform for how silence is treated in rape trials. He says because "only two people know what happened" in a sexual assault case, both parties should be required to give evidence, and have that evidence be tested*."

We support Martin's position and for the ALRC to revisit these issues:

The right to silence is a common-law principle preventing an accused person from incriminating themselves with evidence that comes from their own mouth.

It is in keeping with the burden of proof in a criminal trial and the concept of innocent until proven guilty. That is, it is up to the state to prove a crime occurred, and not a defendant's job to prove they did not commit that crime.

But Martin argues society may have progressed past a place where the right to silence is necessary. "Historically, the right to silence is understandable in circumstances where you had the power of the state marshalled against some impoverished, illiterate person. It would be a very one-sided, crushing situation," he says, acknowledging his opinion may position him as "a bit of an outsider". "But I think with education and a rebalancing of that over time, you now have someone like Bruce Lehrmann who is highly educated, university-qualified, obviously intelligent and articulate, who knows what happened because he's the active participant – or non-participant – on his case. Yet he can choose to stay silent, and ... have his version of no contact put vigorously to the complainant.

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6 https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Finquirer%2Fshould-bruce-lehrmann-have-been-allowed-a-right-to-silence%2Fnews-story%2Fb2f1f57d5377fd5db91e88cf8d03e3b2&memtype=anonymous&mode=premium&v21=GROUPA-Segment-2-NOSCORE&V21spcbehaviour=append

"If you want to get a fair perspective of what happened … a limited cross-examination in terms of testing what he said doesn't strike me as particularly unfair when he's represented."

Martin's sentiments build on prior comments by Justice Atkinson in her valedictory speech to the profession in 2018:

"Topics that might be worthy of further investigation include whether, and in what circumstances, a jury ought to be told by a Judge that they are entitled to draw an adverse inference against a defendant by his or her failure to give evidence in a criminal trial, or silence when questioned by police; to what extent the jury might be entitled to know about a defendant's criminal history, particularly where it is relevant to the behaviour alleged against the defendant in the criminal trial before the jury; and to what extent the defence of honest and reasonable mistake as to consent has provided a barrier to complainants in sexual assault cases from being dealt with fairly in the Courts."

https://archive.sclqld.org.au/judgepub/2018/holmes20181129.pdf

We strongly support a re-evaluation of these rights in this review.

Bad Character Evidence

We support the introduction of a similar provision to the UK that allows for the admissibility of the defendant's bad character into criminal proceedings if one of the following "gateways" are satisfied.

The admissibility of evidence that falls outside the definition of bad character within the meaning of section 98 is governed by section 101 of the Act which provides that

"In criminal proceedings evidence of the defendant's bad character is admissible if, **but only if –**

1. all parties to the proceedings agree to the evidence being admissible;
2. the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross examination and intended to elicit it;
3. it is important explanatory evidence;
4. it is relevant to an important matter in issue between the defendant and the prosecution;
5. it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant;
6. **it is evidence to correct a false impression given by the defendant; or**
7. **the defendant has made an attack on another person's character.**

Please see more information about this legislation below:

https://www.cps.gov.uk/legal-guidance/bad-character-evidence

Disclosure of prior inconsistent statements by the accused

As stated by Atkinson, again this should be reconsidered in Australia. We understand that this is allowed in the United Kingdom.

Consent to serious harm for sexual gratification not a defence

We support the introduction of a similar provision that exists in the United Kingdom, but it needs to ensure strangulation is included.

A person is unable to consent to the infliction of harm that results in ABH (Actual Bodily Harm) or other more serious injury, for the purposes of obtaining sexual gratification.

A defendant will be unable to rely on a victim's consent to the infliction of such harm as part of any so-called 'rough sex' defence and will remain liable to prosecution for ABH or GBH.

Domestic Abuse Act 2021 (legislation.gov.uk)

A new civil approach

QSAN strongly supports the ALRC considering a new accessible civil approach to responding to sexual violence to provide more choice to victim survivors in obtaining justice, accountability, and safety.

Please see Appendix C for QSAN's proposal for a new proposed civil alternate approach to commence this discussion.

Please see Appendix A for QSAN's recommendations.

If you have any other questions or clarification, please do not hesitate to contact me.

Kind Regards,

[redacted]

Angela Lynch
QSAN Executive Director

Appendix A

What needs to change?

Recommendation 1

The victim-survivor's needs and human rights need to be elevated and brought more into view in the criminal justice system.

Recommendation 2

That the victim-survivors human rights in the criminal justice system needs to be specifically referenced in the Human Rights Act QLD and any future Federal Human Rights Act.

Recommendation 3

That the legal reality of the criminal justice system better aligns with victim-survivor expectations of the system.

Recommendation 4

That at every relevant point, justice in the system needs to specifically reference justice for the victim-survivor not just the defendant.

Recommendation 5

The focus in sentencing and other relevant aspects of the criminal justice system should be on the safety, accountability, and justice for the victim-survivor and that this be acknowledged and separate from general community safety and deterrence.

Recommendation 6

That specialist sexual violence services receive a significant increase in funding to respond to community need and to be able to provide a specialised, timely and quality response to victim survivors and that the chronic historical underfunding be addressed in any future funding allocation.

Recommendation 7

That victim-survivors be provided with expert sexual violence advocates from specialist sexual violence services during the entire criminal justice process and that QSAN services be appropriately funded to undertake this role.

Recommendation 8

That specialist sexual violence services be specifically funded to provide prevention work in their local community addressing localised and specific issues.

Recommendation 9

That the legal responses as set out in the Women's Safety and Justice Report 2 and set out in Appendix B be adopted.

That in relation to consent and mistake of fact, in addition to the recommendations of the Women's Safety and Justice Taskforce include:

- That the definition of consent should include 'informed'.
- That it should be made explicit on the face of the legislation that consent is required for each different, changed, stage of the sexual act.
- That the provisions be amended to include an additional circumstance where a person is incapable of consenting or incapable of withdrawing consent because they are being strangled or because of some other act preventing communication.
- That an additional general assumption provision be legislated similar to the Victorian jury directions:
  "A belief by a person that another person consented to an act is not reasonable if the belief is based solely on a general assumption (or a combination of matters including a general assumption) about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence)"
- Limiting the extent of 'impairments' that may be covered by the mistake of fact excuse especially those that may not be permanent.
- Similarly, the mental impairment excuse should also be further limited in the Queensland legislation in the interests of safety and justice. That anxiety disorder and affective disorders be removed as they are too widely drafted.

Recommendation 10

That process of obtaining Victim Impact Statements should be change and become more trauma informed.

Recommendation 11

That sentencing practice should be more aligned to community expectations and the gravity and impact of these crimes on victim survivors and a sentencing uplift for sexual violence, including child sexual abuse be considered.

Recommendation 12

That investment is required into the development of appropriate and evidence-based rehabilitation courses for sexual violence offenders both inside correctional facilities and in the community, including programs that are on country, culturally appropriate and include cultural healing approaches.

Recommendation 13

That access to interpreters be as of right for victim-survivors and that the quality be standardised and monitored by an independent agency.

Recommendation 14

That stronger sentencing guidelines be developed specifically in response to the making of suspended sentences and no convictions recorded in sexual violence matters, and particularly the access to vulnerable people by the offender, be considered and mitigated.

Recommendation 15

That good character references and impacts of the commission of the crime on the offender be removed from sentencing practice, in all sexual violence matters in Queensland because they are not appropriate or just.

Recommendation16

That there be judicial and legal education on sexual violence and the impact of the crime on victim-survivors.

Recommendation 17

That the crime of Incest be amended to ensure the protection from charge for victim survivors who have been abused during childhood and this continues into adulthood.

Recommendation 18

That sexual offending risk assessment reports should be conducted by highly qualified professionals engaged and appointed by the court and not by the defence. The professionals should use standardised testing and have experience in working with victim survivors and a trauma informed approach.

Recommendation 19

That specialist sexual violence services be engaged to develop a sexual violence court model to operationalise and pilot in at least 3 sites in Australia with the assistance of both federal and state funding. That is model be independently evaluated. That a key component of this model is independent legal representation for the victim survivor.

Recommendation 20

That specialist sexual violence legal services be developed and funded.

Recommendation 21

That similar to Victoria, all states adopt a preamble setting out guiding principles for approaching sexual violence matters in their Criminal Codes and Acts.

Recommendation 22

That there be a reconsideration of the right to silence in sexual violence criminal matters.

Recommendation 23

That prior inconsistent statements of the accused be available for use by the prosecution in evidence in a criminal trial.

Recommendation 24

That the right to introduce "bad character" evidence similar to the UK be legislated.

Recommendation 25

That the right to consent to serious harm for sexual gratification be legislated to not be a defence.

Recommendation 26

That an appropriate model for restorative justice where there is sexual violence be developed in partnership with a specialist sexual violence service.

Recommendation 27

That a new accessible civil approach to rape and sexual assault in Australia be considered and, if recommended by developed in partnership with specialist sexual violence services, particularly QSAN.

Appendix B

A range of other recommendations were also made by the WSJT about prevention, community education, school programs, collaborative working arrangements, specialist multi-disciplinary pilots to respond to victim-survivors, the training of professionals within the legal system and beyond and other issues.

- **(Recommendation 13)** The Queensland Government embed a **trauma-informed system of safe pathways for victim survivors** of sexual violence across the sexual assault and criminal justice systems to create a cohesive and consistent response to victim-survivors and greater accountability to reduce attrition rates following reports to police. These pathways will be designed from a victim's point of first contact with the service system and throughout their engagement with the service or criminal justice system.

- **(Recommendation 20)** The Queensland Government, in the **next statutory review of the Human Rights Act 2019, include a specific focus on victims' rights** and consider whether recognition of victims' rights or the Charter of victims' rights in the Victims of Crime Assistance Act 2009 should be expanded and incorporated into the Human Rights Act 2019.

- **(Recommendation 42)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence review and amend if and where necessary Chapter 22 (Offences against Morality) and Chapter 32 (Rape and sexual assaults) to ensure that the Criminal Code: – **treats the capacity of children aged 12 to 15 years old to consent to sexual activity in a way that is trauma- informed and consistent with community standards** – addresses sexual exploitation of children and young people aged 12 to 17 years old by adults who occupy a position of authority over those children – provides internal logic across the two chapters so that the applicable maximum penalties reflect a justifiable scale of moral culpability.

- **(Recommendation 44)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence amend sections 348 **(Meaning of consent) to: a) provide that a person who consents to a particular activity is not by reason only of that fact to be taken to consent to any other activity** b) provide a legislative example for the provision in a) that a person **who consents to sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.**

- **(Recommendation 46)** The Attorney-General and Minister for Justice, Minister for Women and Minister for Prevention of Domestic and Family Violence develop and establish an **independent sexual violence case review board that is chaired by the proposed victims commissioner (recommendation 18).** The board will consist of representatives from the Office of the Director of Public Prosecution, Queensland Police Service, professionals with sexual violence expertise, people with lived experience of sexual violence and Aboriginal and Torres Strait Islander peoples. The board's functions and powers will be provided for in

legislation and should include the independent review of sexual violence cases that are not progressed, or cases requested to be considered by the victims' commissioner. The board will: – independently review reports prepared and provided by the Queensland Police Service and the Office of the Director of Public Prosecutions about the respective agencies' involvement in each case – identify opportunities and make recommendations to agencies and to the Queensland Government about practice, policy, performance and systemic improvement – focus on encouraging a culture of continuous improvement and learning – publish annual reports about the findings and recommendations of the board and the responses of agencies and the Government to the board's recommendations.

- **(Recommendation 50)** The Queensland Police Service and the Office of the Director of Public Prosecutions **establish a clear, robust, transparent and easily accessible internal 'right to review' process of police and prosecutorial decisions for victim-survivors of sexual violence.** The internal right of review will include an ability for a victim-survivor to request that a police decision to discontinue charges, and a prosecution decision made on behalf of the Director of Public Prosecution, be reviewed by another more senior officer. The outcome of the review could be for the decision to be changed, affirmed or an alternative decision made. The outcome of an internal review process including the reasons for the decision will be clearly communicated, using plain English to the victim-survivor.

- **(Recommendation 53)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence **progress amendments to the special witness measures at section 21A of the Evidence Act 1977** to state that a special witness is entitled (but may choose not) to give evidence in a remote room or by alternative arrangements in similar terms to section 294B of the Criminal Procedure Act 1986 (NSW). This recommendation will not commence until recommendation 49 of Hear her voice: Report One, Addressing coercive control and domestic and family violence in Queensland is implemented in relation to upgrading the technology in courtrooms throughout Queensland, to facilitate victims giving video link and telephone evidence.

- **(Recommendation 54)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to the Evidence Act 1977 **to provide that evidence of the victim or special witnesses in sexual offence proceedings be video and audio recorded and stored securely for use in any retrial,** in similar terms to Chapter 6, Part 5, Divisions 3 and 4 of the Criminal Procedure Act 1986 (NSW). This recommendation should not commence until recommendation 49 of Hear her voice: Report One, Addressing coercive control and domestic and family violence in Queensland is implemented in relation to upgrading the technology in courtrooms throughout Queensland, to facilitate victims giving video link and telephone evidence.

- **(Recommendation 55)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to the Evidence Act 1977 to provide that **victim-survivors of sexual offences are able to choose whether to give a videorecorded interview with police, which would be able to be tendered as all or part of their evidence in-chief in court proceedings.**

- **(Recommendation 56)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to **section 21 (Improper questions) of the Evidence Act 1977**, to include examples of improper questions including those provided at section 41 of the Evidence Act 1995 (NSW).

- **(Recommendation 57)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to the Evidence Act 1977 to **introduce the use of ground rules hearings for domestic and family violence and sexual offences**, in similar terms to sections 389A-389E of the Criminal Procedure Act 2009 (Vic).

- **(Recommendation 58)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress the following amendments to the Criminal Law (Sexual Offences) Act 1978: − amend section 4 of the Criminal Law (Sexual Offences) Act 1978 to reflect that **'leave should not be granted unless the court is satisfied that the probative value of any evidence about a complainant's sexual activities outweighs any distress, humiliation, embarrassment or other prejudice that the complainant may suffer as a result of its admission'**, and − amend section 5 of the Criminal Law (Sexual Offences) Act 1978 **to clarify that the court should be closed when a complainant is giving evidence, whether during a pre-recording of evidence in court or remotely; during the playing of the pre-recorded evidence at trial or on appeal; and while the complainant is giving evidence in person in court.**

- **(Recommendation 59)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress **amendments that remove section 4 and 5 Criminal Law (Sexual Offences) Act 1978 from the Act to form dedicated parts in both the Evidence Act 1977 and Youth Justice Act 1992 that deal with proceedings for sexual offences.**

- **(Recommendation 60)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to **Part 3A of the Penalties and Sentences Act 1992 regarding non-contact orders, to extend the duration of a non-contact order to 5 years.**

- **(Recommendation 61)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence give consideration to a **review of the naming of sexual offences contained in the Criminal Code**, in particular in Chapters 22 and 32, any offences referring to 'carnal knowledge', and the offence of maintaining a sexual relationship with a child.

- **(Recommendation 65)** The Queensland Government, when reviewing the legislative changes implemented in response to this report (recommendation 186), **consider whether**

there is a need to extend the right of victim-survivors to be represented during trial proceedings beyond matters related to protected counselling communications.

- **(Recommendation 73)** The Chief Justice and Chief Judge consider developing and **implementing a sexual assault benchbook for the Supreme and District Courts of Queensland to support judicial officers and lawyers in sexual violence cases**. The sexual assault benchbook could include relevant procedural requirements and timeframes, data and statistics, information about community attitudes and rape myths, information about the impacts of trauma on victim-survivors of sexual violence and relevant laws and procedure.

- **(Recommendation 74) The Director of Public Prosecutions, in consultation with the Queensland Government, consider designing and implementing a new operating model for the prosecution of sexual violence cases within the Office of the Director of Public Prosecutions.** The model should include governance and leadership arrangements, the development and implementation of ongoing competency based training and professional development for all staff and lawyers, and support for staff and lawyers to avoid vicarious trauma. The model should ensure all staff and lawyers are able to provide trauma-informed responses to victims of sexual violence and recognise the specialist expertise required in the prosecution of sexual violence cases. The model will support the Office of the Director of Public Prosecutions to implement recommendations in this report within the Office and to actively participate in the implementation of recommendations across the broader criminal justice system. The Queensland Government will provide adequate resources and assistance to the Director of Public Prosecutions to design, implement and evaluate the operating model in a way that continues to acknowledge the independence of the Director's role.

- **(Recommendation 75)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence **amend the law relating to similar fact (coincidence) and propensity (tendency) evidence**, in relation to all offences of a sexual nature including child sexual offences outlined in Chapters 22 and 32 of the Criminal Code in Queensland, by amending the Evidence Act 1977 to include provisions in terms of sections 97, 97A, 98 and 101, contained in Part 3.6 of the Evidence Act 1995 (NSW).

- **(Recommendation76)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence **amend the Evidence Act 1977 to expand the admission of preliminary complaint evidence in section 4A of the Criminal Law (Sexual Offences) Act 1978 to all domestic violence offences**. In consideration of the expanded use of preliminary complaint evidence, section 4A of the Criminal Law (Sexual Offences) Act 1978 should be moved in its entirety into the Evidence Act 1977 as a discrete Division.

- **(Recommendation 77)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence **progress amendments to the Evidence Act 1977 providing for jury directions to be given that address the following misconceptions about sexual violence:** – the circumstances in which non-consensual

sexual activity occurs – responses of a victim to non-consensual sexual activity when it occurs 23 Recommendations – lack of physical injury to the victim-survivor, violence or threats made by the accused person – victim-survivor responses to giving evidence about an alleged sexual offence at trial – behaviour and appearance of a victim-survivor at the time of an alleged sexual offence – perceived flirtatious or sexual behaviour (such as holding hands or kissing) implying consent to later sexual activity Commencement of the Bill containing the amendments should be delayed for a period that is sufficient for the Director of Public Prosecutions' 'Director's Guidelines' (recommendation 47) and the Supreme and District Courts Benchbook (recommendation 73) to be updated to reflect the new provisions and for training of lawyers and judicial officers to take place.

- **(Recommendation 79)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to the Evidence Act 1977 that: – **allow for the admission of expert evidence about the nature and effects of domestic and family violence and sexual violence**, in similar terms to section 388 Criminal Procedure Act 2009 (Vic). – adopt sections 76 -80, and section 108C of the Uniform Evidence Law, with any necessary adaptations, for the purpose of criminal proceedings for domestic and family violence offences and sexual offences in Queensland. These amendments should not commence until the expert panel (recommendation 80) has been established and appropriate and equitable funding has been provided to the Office of the Director of Public Prosecutions and Legal Aid Queensland to obtain expert reports.

- **(Recommendation 81)**The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to the Criminal Law (Sexual Offences) Act 1978 to: – **update and modernise the language of all provisions in the Act generally – clarify that it is a defence to the prohibition against publication of identifying information about victims of sexual offences** that an adult victim-survivor with capacity consented to the publication and that the publication was consistent with any limitations set by the victim-survivor – ensure that publication continues to be prohibited where publication would identify or lead to the identification of another victim-survivor without their consent or a child (including a child offender) – include a requirement that the court, when considering making an order allowing the publication of identifying information, must take into account the views and wishes of the victim-survivor – enable victim-survivors of sexual violence to self-publish identifying information, at any stage of the proceedings, so long as it does not identify another victim-survivor without their consent or a child (including a child offender) and does not put at risk the fairness of future court proceedings – enable children who are victim-survivors of sexual offences to self-publish, or consent to the publication of, identifying information with safeguards to ensure that the child has the capacity to consent, is making a free and informed decision, and has understood the potential consequences of their decision. The publication must not identify another victim- 24 Recommendations survivor (without their consent) or a child (including a child offender) and must not put at risk the fairness of future court proceedings – enable the Director-General of the Department of Justice and Attorney-General to release transcripts of proceedings for sexual offences for approved research purposes on the basis that anonymity of victim-survivors would be preserved based on the model in section 189B of the Child Protection Act 1999. The recommended amendments will not commence until the

Queensland Government has developed and implemented a guide for the media to support responsible reporting of sexual violence (recommendation 84).

- **(Recommendation 83)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence **progress amendments to the Criminal Law (Sexual Offences) Act 1978 to: – remove the restriction on publication of the identity of an adult accused of a sexual offence before a committal hearing** where it would not identify or tend to lead to the identification of a victim-survivor – require a court to take the views of the alleged victim into consideration when deciding whether to order that the identifying details of an accused person should be suppressed. The recommended amendments will not commence until the Queensland Government has developed a guide for the media to support responsible reporting of sexual violence (recommendation 84).

- **(Recommendation 89)** The Minister for Children and Youth Justice and Minister for Multicultural Affairs **undertake an independent review of the use of youth justice conferencing in cases involving sexual offences**, with a particular focus on the experience and justice outcomes achieved for victim-survivors. The review will identify any opportunities for improvement to better meet the needs of victims and child offenders, including in relation to sexual offences.

- **(Recommendation 90)** The Queensland Government, led by the Department of Justice and Attorney-General, **develop a sustainable long-term plan for the expansion of adult restorative justice in Queensland** and appropriately fund that plan for victim-survivors to access this option throughout the state.

- **(Recommendation 91)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence co-design with people with lived experience, Aboriginal and Torres Strait Islander peoples and service and legal system stakeholders **a victim-centric legislative framework for adult restorative justice in Queensland.** The framework will: – articulate overarching principles for the use of restorative justice in adult criminal cases, with particular principles and safeguards for its use in relation to sexual offences and domestic and family violence-related offences – set out operational processes including a clear framework for referrals and suitability assessment processes – set out how restorative justice interacts with the criminal justice system – establish criteria and process to assess the qualifications, expertise and suitability of convenors and provide for their functions and powers – consider the diverse needs of victim-survivors, including First Nations victims, and how best to structure the framework to meet individual needs – provide adequate protections and safeguards for participants, underpinned by a gender sensitive and trauma-informed approach. Legislation to establish an adult restorative justice program in Queensland will not commence until a sustainable and funded long-term plan for the expansion of adult restorative justice in Queensland has been developed (recommendation 90).

- **(Recommendation 92)** The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence fund and **undertake a pilot**

restorative justice program for adult sexual and domestic and family violence offences, to be independently evaluated to inform further statewide roll-out. The commencement of a pilot will be supported by additional investment and the commencement of a legislative framework.

Appendix C

Potential Model for Civil Alternative in Adult Rape/Sexual Assault Matters

"As a community we have a problem with sexual violence, prevalence is increasing, the victims are getting younger, but the overall reporting rates are decreasing. We need to be innovative in our search for solutions to improve victim survivor choice to increase their ability to access to justice, safety, and accountability. The criminal justice system cannot and is not the whole answer to a crime that is so personal in its nature."

Proposed by Angela Lynch, QSAN Executive Officer [7]

Background:

Rape and Sexual Assault are one of the most under reported, under prosecuted and under convicted crimes with only 8% of victim-survivors reporting to police and conviction rate of less than 2%. At the moment, the only available justice options for victim-survivor are criminal proceedings or, if available, restorative justice approaches (very limited) and alternative reporting options (when a criminal matter is not commenced but information is provided to the police to assist with any future investigations).

Sexual violence may also be raised in other civil legal matters, for example, the domestic and family violence courts and family court, if there has been intimate partner sexual violence. Where a victim-survivor seeks victim's compensation (statutory approach) this may also provide another alternative legal setting for justice.

Other limited legal options may exist for some victim-survivors who may wish to seek compensation from the accused in a civil court, however they are dependent on the perpetrator having assets, can be lengthy and complex, expensive to run as there is no legal aid, can be risky and may open the victim-survivor up to a costs order, if the case is unsuccessful.

The Problem:

The lack of choice and accountability has impacts on-:

- the victim-survivor (not being believed) and the lack of individual accountability and justice for the crime;
- the community more broadly (lack of accountability and safety of other women and individuals); and
- making the crime invisible to government in public policy. If only 8% report, then the crime is for all intents and purposes, "out of sight and out of mind".

[7] These views expressed are the author's but have been informed by discussions with the Honourable Margaret McMurdo AC, former President of the Queensland Court of Appeal and Chair of the Queensland Women's Safety and Justice Taskforce.

Similarities with Domestic Violence Orders (DVO)s

Legislation establishing the right to obtain a domestic violence protection order was introduced in the late 1980s in Queensland. Up until this time, DV victims had no effective legal redress or right to protection, except for taking criminal action against their partners or ex partners. Even if a victim survivor wanted to commence a criminal action there were many barriers including, for example, police attitudes and responses that did not view domestic violence as a crime.

A major difference in the use of DVOs is they are civil orders and use civil processes and are determined on the balance of probabilities. For some victim survivors they were an attractive alternative as they were not a criminal offence and their (ex)partner did not get a criminal record (unless they were convicted of a breach). They not only provided protection for the victim-survivor but over time are now routinely used as evidence of the existence of domestic violence in other civil courts and in administrative decision making.

At the same time, the existence of DVOs make the issue of domestic violence more "visible" to government, who can 'see the problem' because they can easily access the numbers of protection orders made annually, have a breakdown of each regional court and the number of breaches.

These statistics are helpful in developing policy, legislative and funding responses. It ensures that domestic violence is "seen" by governments, law enforcement agencies, the courts, and the community and increases the likelihood of a whole of community response, which is not the case for sexual violence.

The proposed model – a starting point for community discussion:

At the National Roundtable on Sexual Violence held in August 2023, QSAN asked the terms of reference for the ALRC inquiry to be broad enough to investigate and develop a new, accessible civil model, as an alternative option for victim survivors.

QSAN has developed a model and offers this as a starting point for discussion, and openly admit it is not fixed or finalised.

The idea of a new civil approach being investigated by the ALRC was supported at the National Sexual Violence Roundtable by the National Women's Safety Alliance, RASARA and NASASV (National Association of Services Against Sexual Violence).

Civil standard, evidence, adverse inferences

A civil approach would hear and test evidence using the civil standard. Importantly in a civil case, the respondent would be required to give evidence and be subject to cross examination. Unlike a criminal matter, adverse inferences can be drawn if evidence is not given.

Alternative to, not replacing a criminal justice approach

The civil approach would not replace the criminal approach but be an alternative, similarly to restorative justice thus increasing the range of legal options available to victim survivors.

The recent Lehrman defamation proceedings, though a completely different legal process from a new civil model, has at least provided the community a "window" into the possible operation of such a model.

Sexual violence harm order

A potential model would involve a court determination, on the balance of probabilities about the acts of sexual violence and, ultimately, if the evidence exists, lead to the making of a "*sexual violence harm order*" or a *"harm order*" against the respondent (the accused). The order would prove certain acts of sexual violence occurred but there would not be a need for the victim-survivor to 'prove' harm. There would need to be a closed court for the giving of evidence by the applicant and supports and protections available.

The model might:

- be open initially for those matters that have been reported to the police and there has been a criminal charge. The model would be an option or further alternative and would sit alongside the criminal approach and restorative justice. The adoption of a civil option would be a decision of the victim-survivor, their lawyer (if they have one) and the ODPP.
- Another option is to commence a court application without a police report but perhaps with some court oversight to determine if there was sufficient evidence to allow a civil case to commence.
- Be open to anyone making a court application.

It would involve a trial and cross examination of both the victim-survivor (applicant) and the accused (the respondent) and both parties would need to be legally represented. If the respondent chooses not to give evidence, then inferences can be drawn by the court in the usual way.

Such an approach would require new legislation and would need to exempt any evidence provided or disclosures made from use in a later criminal prosecution. It will involve additional resources, particularly legal aid resourcing and additional funding for sexual violence support through the legal process.

What orders could be made?

For some victim survivors the making of a harm order could be incredibly powerful providing institutional confirmation of sexual harm for the victim survivor.

If a 'harm order' is made, the court could also consider:

- making a personal injunction order against the respondent, similarly to DVOs for no contact and for these to continue for a period (e.g. 5 years). This might be useful in matters involving cases where there is potential ongoing interaction e.g. young people at school, universities, housemates.

- It might also involve the court making an order that the respondent not engage in any offences of a sexual nature for a period (e.g. 5 years). If this order is breached, then the breach could also be subject to an additional charge.
- The 'harm order' could be placed on the respondent's police file, similarly to a DVO. It is not a criminal offence and would not form part of a person's criminal record, however, this would be available to authorities.
- The harm order could be used as evidence in other proceedings e.g. Family court and other civil proceedings.
- Consideration could be made for the making of a victim's compensation order at the same time.

It is proposed that a respondent can only have one harm order made against them and further offences would need to be criminally prosecuted.

There are a range of issues that would need to be resolved including further consideration of an appropriate model and its feasibility, legal aid availability, how public the proceedings are, how public any harm order would be, its use in evidence in other civil courts, its interactions with claims for compensation and victim's compensation, what if there are other charges of a non-sexual nature? If the best approach is to require police charge, how far along in the criminal proceedings the alternative is considered, can the ODPP override the victim-survivor's decision?

Culturally safe

There is also a need to make any model as culturally safe as possible to ensure that victim survivors who are Aboriginal and Torres Strait Islander may feel able to engage with the process. This needs to be specifically addressed in any model that is developed.

These are issues that the ALRC could consider in more depth.

We believe there is strong merit in the ALRC considering a civil alternative for victim-survivor of sexual violence to provide more choice than currently exists.

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20th June 2024

Australian Law Reform Commission
PO Box 209
Flinders Lane
Victoria 8009

Dear Commissioners,

RE: JUSTICE RESPONSES TO SEXUAL VIOLENCE IN AUSTRALIA

As you are aware QSAN is the peak body for sexual violence prevention and support organisations in Queensland and we previously provided a submission on this topic on the 23rd May 2024.

We are writing to also bring your attention a small but important matter about the new standalone offence of coercive control and its probable intersection with sexual violence prosecutions in Queensland and also to provide some further clarification to the possible involvement of victim-survivor lawyers in sexual violence matters in the future.

1. Coercive Control

The Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 passed in the Queensland Parliament on 6th March 2024 and created a new offence of coercive control with a maximum penalty of 14 years. The new offence will criminalise adult behaviour and is expected to commence some time in 2025.

The elements of the new standalone offence in Queensland are:

- the person is in a domestic relationship with another person;
- the person engages in a course of conduct against the other person that consists of domestic violence occurring on more than one occasion;
- the person intends the course of conduct to coerce or control the other person; and
- the course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm (with 'harm' defined in the Bill to mean any detrimental effect on the person's physical, emotional, financial, psychological or mental wellbeing, whether temporary or permanent).

Intimate partner sexual violence is a key relationship dynamic that is almost always a part of coercive control relationships. Intimate partner sexual violence has a profound impact on victim survivors as it can often be ongoing and is exacerbated by the breach of trust as a married couple or partners.

The new coercive control offence may provide support and assistance in the prosecution of intimate partner sexual violence in two ways:

A. Section 334 (c) (6) of the Amendment Act makes it clear that a person may be charged with a coercive control offence and one or more other domestic violence offences eg. Rape, strangulation.

   Currently Section 132 B of the Evidence Act (QLD) allows for 'relevant evidence' of the history of the domestic relationship between the defendant and the person against whom the offence was committed to be admissible in evidence in the proceeding. Therefore, some history of the dynamic and history of violence in the relationship is currently allowed into evidence, where this is deemed relevant.

   However, a standalone coercive control charge will provide greater certainty about the extent and nature of the evidence of controlling behaviour that will be allowed into evidence without argument, as these behaviours will now form part of the new coercive control offence and will be separately charged. The new offence will provide certainty and weight to these behaviours being considered by the jury as there is often argument about the nature and extent of behaviour that is "relevant" under Section 132B.

B. As the new coercive control offence is a "course of conduct" offence it will mean that sexual violence within a relationship will be more easily captured under such an offence, without the specificity required for a stand-alone rape or sexual violence charge. For example, under a coercive control offence it may be alleged as part of the offence that the accused raped her every night for 5 years after each NRL grand final and the State of Origin games.

   Haley Dean in her article in the NSW Law Society Journal, *Advising Clients Charged Under the New Coercive Control Legislation* says that the NSW "course of conduct" provision of the NSW coercive control offence is modelled on the approach of the prosecution of the persistent child sexual abuse provision. We are not experts in criminal law, but it may be that the new coercive control offence in Queensland might also work in a similar way.

We would recommend that there is specific education for both the police and prosecutions around using the coercive control offence in the context of sexual violence offending as this may not necessarily be at the forefront of their considerations about this new offence.

Other issues:

Cultural Defence

One of our member services, the Immigrant Women's Support Service raised an issue, at the time of the parliamentary debates on the new offence in Queensland about a 'cultural defence' being used as Section 223C (10) allows for a defence of "reasonable in the context of the relationship".

That is, that an accused argue they are not guilty of coercive control as they are merely doing what their father and grandfather did and what is acceptable in their culture. The women may not have consented or approved the behaviour but because of the nature of the relationship and the power dynamics they never had the opportunity to say no or oppose the behaviour.

It raises the issue of the importance of broad community education and specific education for communities in language they understand.

QSAN argued unsuccessfully for an additional provision to be included to limit the use of such a defence as set out below.

Recommendation

Section 334 (10) defence to coercive control be limited as follows:

A course of conduct is not reasonable if it is based on a general assumption or a combination of matters (including a general assumption) about the circumstances in which people consent to living arrangements, interactions and behaviour in a relationship (whether or not that assumption is informed by any particular culture, religion or other influence).

Girlfriend/Boyfriend relationships

It is also important to note that in Queensland, the offence of coercive control uses the definition of 'couple relationship' under the Domestic and Family Violence Act 2012. This definition does not automatically cover boyfriend/ girlfriend relationships which means victim-survivors in these relationships *may* not be able to access a domestic violence protection order and/or the coercive control offence. Dangerous relationships can escalate quickly, and our laws should better accommodate this.

2. A system's response to service delivery (including legal)

Following on from the ALRC consultation yesterday about the introduction of independent legal representation for victim-survivors and the inter-relationship between specialist sexual violence services we would make the following points-:

- QSAN supports independent legal services for victim-survivors.
- We also support piloting the use of independent legal representation for victim survivors, possibly in a sexual violence specialist court setting.
- We further support the development of new approaches and models that build on the existing service infrastructure and utilise and acknowledge the skills of the specialist sexual violence sector.
- Each sexual violence sector in each state is different. We believe it necessary for the ALRC to specifically engage with the sector to fully understand the current approaches to working with victim survivors and, how specialist sexual violence services engage around reporting issues, the criminal justice system and other legal issues. This is important otherwise assumptions can be made and service models that may be proposed may double up on existing ways of doing things. Some of the recent sexual violence legal service pilots were developed, unfortunately without consultation with the sexual violence specialist sector and without an awareness of the extent of the sector's experience and role in providing advocacy, advice and assistance to victim survivors when deciding about formal reporting and other options. These issues are now being addressed but should have been worked out in the development of the model rather than afterwards.
- We believe the best approach for victim-survivors is for the legal services to partner with a sexual violence specialist service so that both legal advice and trauma informed counselling and

advocacy can be provided at the one location or at least a familiar location known to the victim-survivor.

- That this partnership model be underpinned by new legislation to protect legal professional privilege, and that the legislative protection explicitly extend to cover discussions with sexual violence counsellors working with the same victim-survivor.
- We believe the partnership model would assist the lawyer's development of trauma informed skills and communication with the victim survivor and that the counsellors would develop greater legal knowledge and skills. This partnership approach would assist against isolation of the lawyer and burnout issues. Victim survivors of sexual violence are different clients to existing legal cohorts and require very specialised responses.
- That "justice navigators" be recommended to provide system's advocacy through the legal and reporting systems and specialist sexual violence services be funded to undertake this role.
- That the first point of call for a victim-survivor will in most circumstances be a specialist violence service who will provide an immediate counselling response including a crisis response, then case management inclusive of legal (as they already do for the victim-survivor's engagement with other services eg. Housing, financial, health). This does not take away victim-survivor choice who may firstly see a lawyer but be referred to a specialist service for support.

We hope this is of assistance and if you require anything further, please do not hesitate to contact us.

Kind Regards,

[redacted]

Angela Lynch,
Executive Officer
QSAN