

# Justice Responses to Sexual Violence

A TLA submission to the ALRC Issues Paper

**May 2024**

For publication

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## Executive Summary

TLA welcomes the Australian Law Reform Commission's (ALRC) inquiry into justice responses to sexual violence and appreciates the invitation to contribute to the inquiry. We have provided our responses and recommendations in the attached report and have limited our response to the criminal justice system as an area where we have direct experience in representation and support of both victim survivors and perpetrators.

TLA represents clients charged with criminal sexual offences, as well as acts for clients who have experienced domestic and sexual violence. This experience provides TLA with unique insight into the ways in which the justice system is both experienced by and impacts perpetrators and victim survivors of sexual violence. TLA has approached this submission from a client-centric perspective and as an opportunity to outline some of the critical services that would assist in improving responses to sexual violence in the justice system.

TLA acknowledges the experience of victim-survivors being retraumatised by the criminal justice system and, like National Legal Aid, supports any measures that would make the criminal justice system less combative and traumatic for them to navigate. These measures must, of course, be balanced with the rights of the alleged to a fair trial.

Family and domestic violence including a range of behaviour types such as physical violence, sexual violence and emotional abuse. Where we refer to family and/or domestic violence throughout this submission, we include sexual violence.

TLA makes the following recommendations for consideration in ALRC's review:

- Service systems be designed to support various pathways towards reporting, including:
  - Providing sufficient capacity in legal services to provide victim-survivors with information, assistance, representation and referrals.
  - Providing sufficient capacity to allow clients of legal and non-legal services to have multiple interactions so that clients can become comfortable to disclose.
  - Providing community legal education and professional development for non-legal service workers.
  - Integrating services response and/or health-justice partnerships.
- Police, lawyers and others working with family violence have training to allow them to do so in a trauma-informed manner likely to encourage victim-survivors to disclose sexual abuse.
- If first disclosures are made by the victim-survivor to their lawyer, consideration be given to whether first-disclosure evidence is obtained from that lawyer and the impact on the lawyer-client relationship; including supporting lawyers to comply with professional ethics.
- Police clearly provide victim-survivors with information about processes, timeframes and time limits.
- Consideration be given to what can be done to preserve evidence for possible future prosecution.
- That more resources be provided to the ODPP in order to improve their responses to the prosecution of sexual violence
- That more resources be provided to the ODPP to establish dedicated Sexual Assault Witness Assistance Officers
- That the existing Memorandum of Understanding/Provision of Advice service between Tasmania Police and the ODPP be revised to set out with greater certainty the circumstances in which Tasmania Police should make charging determinations without referring the matter to the ODPP.
- Trauma informed training for prosecutors and all staff, including how to recognise trauma responses and de-escalate.
- The ODPP explore ways of working with the family violence response system.
- Database systems for, and coordination of, information about indictments, linked lower-court charges, FVOs, and bail include the Supreme Court and ODPP and family violence services. These be updated promptly, and responsibility for informing complainants of outcomes be assigned to an organisation or service.
- Guidelines be developed in relation to ODPP responsibility for seeking ongoing protective Orders.
- That the ALRC explore different ways for the provision of remote evidence that are fair, and trauma informed for the victim survivor and also promote the accused's right to a fair trial.
- That courts and police are adequately resourced with up-to-date recording technology and information technology systems and that recording is checked immediately after or during (for example a break) in the recording process.
- That Court staff are trained in the use of audio-visual recording facilities

- That witness access to recordings of them be facilitated, particularly for the purpose of other legal processes.
- That Police have training in relation to trauma presentations, and Courts and police apply these understandings to use of body worn cameras and other forms of recorded evidence.
- The Intermediary scheme should apply to all children and people with extra communication needs who are involved in the criminal justice system or alternatively, Intermediary scheme should extend to include all children who are under investigation for, or who have been charged with sexual offences.
- That a bench book guide and training guide Judges in identifying and challenging lines of questioning which engage prejudicial social assumptions.
- That ongoing research assess over time the language used in trials and in decisions.
- That consideration be given to what training and guidelines are needed for police, lawyers and courts to use interpreters effectively.
- That Courts make directions to require defendant and the ODPP to ensure both the witness and the therapeutic professional are aware of the ability to object to the production and use of personal therapeutic information.
- That complainants be separately represented, and resources be provided for that.
- That therapeutic services also be provided with the opportunity and (financial and expertise) capacity to object.
- Funding and support should be provided for specialised training and professional development including professional debriefing for judicial officers and counsel conducting sexual assault cases.
- Greater resources provided for lawyers in the ODPP and TLA, with specialised training for sexual assault cases.
- A review of the Tasmanian preliminary proceedings lists and whether they are causing increased delay in sexual assault matters being committed to the Supreme Court.
- A review of the trial listing system and the efficiency of directions hearings and case management in the Supreme Court of Tasmania relating to sexual assault cases.
- There should be a statutory discount for early pleas of guilty or courts should state the effect of the guilty plea on the sentence.
- Defendants should be required to disclose matters they intend to put in mitigation, the ODPP should, where relevant, seek victim-survivor input and determine whether to object.

## About TLA

Tasmania Legal Aid (TLA) is an independent statutory body established by the Legal Aid Commission Act 1990 (Tas) and funded by the State and Commonwealth Governments to provide legal information, advice and representation to members of the Tasmanian community who are unable to pay for those legal services.

In 2020, the Commission rebranded and is now known as Tasmania Legal Aid (TLA). TLA's functions include the provision of legal aid, liaising with private practitioners and their professional and peak bodies, as well as ensuring aid is provided in the most effective, efficient and economical way to the Tasmanian community.

Tasmania Legal Aid (TLA) is a main provider of legal assistance in Tasmania. In 2022-2023 we were responsible for delivering over 72,000 client services. TLA is the largest government-funded legal assistance service in Tasmania, with offices in Hobart, Launceston, Devonport and Burnie.

## Our victim-survivor and representation services

TLA's state-wide service delivery includes the following services to victim-survivors and alleged perpetrators of sexual violence:

- Safe at Home (SAH) (not means tested): for victim-survivors of family and sexual violence, including provision of legal information, advice and liaison; and representation concerning protective orders
- Family Advocacy and Support Service (FASS): integrated legal (including duty lawyers) and social work support services for people affected by family violence with family law issues
- Family Law:
  - Representation of parties in the Federal Circuit and Family Court of Australia (FCFCOA) for parenting arrangements and property settlement (small pool property mediation)
  - Representation of parents in Care and Protection proceedings
  - Representation of children who may be victim-survivors of sexual abuse or showing problem sexual behaviours as Independent Children's Lawyers in the FCFCOA or as Separate Representatives for the child in Care and Protection proceedings
  - Funding for representation and representation under the Family Violence and Cross-Examination Scheme where a ban on cross examination has been made because of the presence of family violence
  - Just Healthy Families: Health Justice Partnership delivering legal help into health and social settings with the aim of reducing family violence
- Criminal Law:
  - Duty lawyer services provided in the Magistrates Court
  - Representation as counsel, including for youth, in the Magistrates and Supreme Court, including bail, pleas of guilty, contested hearings and trials
  - Assistance for accused persons with the cross examination of complainants in sexual assault/family violence hearings and trials where an accused person is unrepresented, by order of the court.
- Related services (where both victim-survivors and perpetrators of sexual violence are likely to need services):
  - Advice and Legal Services (advice and information delivered face to face, video, phone or webchat for a wide range of issues)
  - Senior Assist (support to seniors experiencing elder abuse)
  - Mental health legal services (assistance in mental health and guardianship tribunals)
  - Your Story Disability legal support (legal supports to people with disability)
  - Community Legal Education (delivery of education in schools and other community settings)

## Criminal Justice Responses to Sexual Violence

### Providing a safe opportunity for victim survivors to share their stories and Improving police responses to sexual violence through reforms

TLA operates the Safe at Home program offering legal services to prevent and respond to family violence. This program is part of the broader integrated criminal justice response to family violence established by the Tasmanian Government, which also includes specialised police services, victim support services, offender support services, financial support for victims and accommodation services. Safe at Home has been delivered for the past 20 years.

Family violence is wide ranging and many of TLA's Safe at Home clients have experienced sexual violence alongside other acts of violence.

Observation of clients in the Safe at Home program suggests:

- Victim-survivors may not start thinking about the nature of the behaviour to which they have been subjected until they begin to be safer and have some 'mental space'.
- Victim-survivors will seek assistance by different pathways which may end up in a justice response. Such pathways include calling police immediately, telling a professional (such as a hospital, GP, counsellor or lawyer), telling a support service, and telling friends or family members. Ensuring all the pathways work as well as possible will increase the likelihood of victim-survivors having good information about the potential responses and making informed choices at key moments in time.
- Where victim-survivors make their first disclosure to a lawyer assisting them with family law or family violence issues, and then report to police, it is important to have good systems around allowing the first-report evidence without the client waiving legal professional privilege generally, and to deal with issues of the lawyer being unable to continue acting if a witness in the case.
- Community knowledge of justice systems and responses is generally poor, is influenced by myths and rumours, and this makes victim-survivors not only more vulnerable to offending behaviour in the first place, but also less likely to seek justice responses. Community and service legal education is very important and can be provided through programs such as lawyers in schools, and early prevention services – especially where multidisciplinary service groupings make it easier to report by providing trauma-informed support for people to report to police.
- Victim-survivors may contact services for assistance for issues other than the sexual assault. They are very likely not to disclose the sexual assault during the first contact – many victims of sexual abuse or of family violence will provide a few details first, and then will or will not disclose more 'embarrassing' or sensitive information depending on whether the response they receive feels supportive to them. Police and legal services assisting victim-survivors therefore need to use trauma-informed practices, to be able to pick up on cues to ask about sexual abuse and have the capacity to spend time with clients on more than one occasion.
- Due to the co-occurrence of family violence and sexual assault, it is particularly important that all police responding to reports of family violence respond well to the family violence disclosures, or the sexual offending is likely to remain unreported.

Integrated services may offer better opportunities for victim-survivors to get information and advice:

- TLA and the Women's Legal Service Tasmania partner with Child and Family Learning Centres and Child Health Nurses to provide a health-justice partnership addressing family violence, Just Healthy Families. Lawyers attend CFLCs regularly and are available for consultations with workers. This gives services a familiar referral option, the opportunity to ask questions about legal processes for clients and allows lawyers to leverage the client's relationship with the service to build trust, as well as building services' understanding of the law.
- Tasmania has recently commenced the ARCH centres to respond Family and Sexual Violence (with a focus on sexual violence): this co-locates police (not in uniform) with sexual assault and family violence counsellors, and child safety workers. A stated aim is to be a safe place where adults and children can get information and support if they are affected by sexual harm. It does allow victim-survivors to access the services without being required to report to police.
- Tasmania's Safe at Home whole-of-government response involves police and others, such as health services, victim services, offender rehabilitation, and schools, to respond to family violence. Access to shared information means that support services can assist victim-survivors to get information about their options, understand the process, and seek the outcomes they want, alongside addressing the risk of future family violence with the best information available.

Further, it is important that victim-survivors have information about processes, timeframes and time limits, and that some investigation can occur without necessarily bringing a complaint, preserving the opportunity to prosecute in the future with the best available evidence. 'Historical' sexual assault can be regarded as more difficult to prove or to defend because over time the evidence which may have assisted a determination becomes unavailable, and there is greater reluctance to rely on witness' memories. Forms of evidence which can be lost if not secured early can include, for example, CCTV footage. One form of evidence which has been collected at the time and the victim-survivor has the choice whether to put the matter forward for prosecution is rape kits collected by the Forensic Medical Examiner, which are only provided to Police with victim-survivor consent<sup>1</sup>.

#### Recommendations:

- Service systems be designed to support various pathways towards reporting, including:
  - Providing sufficient capacity in legal services to provide victim-survivors with information, assistance, representation and referrals.
  - Providing sufficient capacity to allow clients of legal and non-legal services to have multiple interactions so that clients can become comfortable to disclose.
  - Providing community legal education and professional development for non-legal service workers.
  - Integrating services response and/or health-justice partnerships.
- Police, lawyers and others working with family violence have training to allow them to do so in a trauma-informed manner likely to encourage victim-survivors to disclose sexual abuse.
- If first disclosures are made by the victim-survivor to their lawyer, consideration be given to whether first-disclosure evidence is obtained from that lawyer and the impact on the lawyer-client relationship; including supporting lawyers to comply with professional ethics.



- Police clearly provide victim-survivors with information about processes, timeframes and time limits.
- Consideration be given to what can be done to preserve evidence for possible future prosecution.

## Improving ODPP responses to sexual violence through reforms

The Tasmanian Office of the Director of Public Prosecutions (ODPP) provides an advice service to Tasmania Police prior to charging a person(s) with sexual assault crimes. The Director's Prosecution Policy and Guidelines outline that this service occurs in circumstances where there may be a question as to the appropriateness of charges or the sufficiency of evidence. The reality is however that Tasmania Police refer the majority of sexual assault allegations to the ODPP for advice, seeking advice as to whether charges ought to be laid. There appears to be greater reluctance, or inconsistency on whether and/or when Tasmania Police could make a determination about charging without referring the matter to the ODPP for charging advice.

The Guidelines further outline the return of advice will be provided within a period of six weeks of receipt of the request (accompanied by the file). Given the sheer number of advice files referred to ODPP by Tasmania Police, the return of advice has increased from the recommended time period of six weeks. The impact of this delay on victim survivors is significant. The delay between complaint and charging can result in a period of over twelve months before an offender first appears in court if the recommended advice is to charge. From that point, matters may take further months or years to progress to finalisation, particularly if the matter remains disputed and requires a trial or hearing. Reasons as to delay may not be properly explained to victim survivors or communicated to them at all due to the lack of resourcing in the ODPP which contributes to their distress.

Decisions to not continue with charges are communicated to victims by prosecutors, with the assistance of Witness Assistance Officers. Prosecutors also interact and communicate with victims throughout the court process, which can be lengthy. It is recommended that regular trauma informed training is provided to prosecutors and witness assistance officers to improve communication with victim survivors.

The ODPP is not part of the Tasmanian Government's Safe at Home whole-of-government response to family violence. This is a lost opportunity for timely communication and information sharing about sexual offences that involve family violence. Reconciliation of this would require further resourcing to the ODPP.

Current information systems concerning bail, bail conditions, interim and final orders do not include the ODPP and the Supreme Court of Tasmania in such a way as to allow family violence services to keep victim-survivors informed. Due to resourcing, the ODPP is not able to call complainants immediately after court appearances. This means many victim-survivors do not know what has happened including whether an alleged offender has been remanded in custody, or alternately, if they should start following their safety plans.



Victim-survivors have reported a need for a coordinated approach when offenders are charged with offences and crimes which arise either as part of the same overall incident or during different incidents, but which are going through the court system at the same time.

Often, the Supreme Court matters are dealt with first being that they are more serious and may impose much longer terms of imprisonment. In some circumstances, the Supreme Court will be asked to sentence the offender on both the indictable matter and linked offences which have been referred up from the Magistrates Court. At other times, because there is an insufficient nexus between the indictable charge and the other alleged offending, the Magistrates Court matters will be adjourned 'sine die' (with no next Court date yet set), expecting that they will be re-listed after the Supreme Court charges are finished. Any matters with pleas of not guilty will be heard, and the Magistrates Court will then have the benefit of knowing – if the offender is found guilty - what sentence was imposed, and the reasons for the approach taken. From clients' descriptions, sometimes the re-listing of the lower court charges does not occur in a timely manner, suggesting a lack of communication or automatic follow-up. This extends the delay before the offences are dealt with.

Family Violence Order applications, usually heard in the Magistrates Court, may be adjourned sine die alongside the offences, and the re-listing issues therefore affect them also.

It is also common for final Family Violence Orders to be made in the Magistrates Courts alongside the early mentions of charges, and therefore the Orders (generally made for 12 months) expire before the Supreme Court charges are determined. Because of the limitations with information sharing and resourcing, sometimes protective orders are not extended during the course of proceedings, or on sentence.

### Case Study

Wendy came from an abusive family and was sexually assaulted during her childhood. She was not supported by family members, either to report or to recover. She was able to gain university qualifications and worked in a professional role.

In her 20s, she formed a relationship and had children. The relationship was problematic and developed into one with family violence involving coercive control, isolation, financial abuse, verbal abuse and emotional abuse.

Wendy suffered from anxiety and periods of being overwhelmed, at times being described as 'hysterical'. When Wendy called police to an incident, instead of dealing with the family violence, police took her for mental health assessment at the hospital. Although the hospital released her, saying she was experiencing situational distress and pointing out her injuries, there was no follow up on the family violence.

The family violence worsened as the relationship broke down, including physical violence, and a sexual assault. The relationship eventually ended, and some family violence continued. Wendy sought help, including advice concerning family law matters, and a Family Violence Order. She reported the family violence to police, including the sexual assault. Tasmania Police investigated and sent the file to the ODPP. The file was lost for about 6 months, and Wendy had to follow up

repeatedly between the ODPP and Police. ODPP repeatedly told her there was no record with them at all, and at times she heard the administrative staff reacting to her calling as if she was crazy, which was deeply upsetting. She described the DPP sending her a nasty email telling her to stop harassing the administrative staff. After she sought intervention from a member of parliament, the file was located.

The alleged offender was interviewed, and Wendy was terrified about how he might retaliate. Wendy became increasingly anxious about the situation, including fearful of the alleged offender and was also afraid that his actions would be unrecognised and unpunished. She was diagnosed with complex PTSD, and at times her mental health deteriorated, often appearing extremely anxious.

The alleged offender made application to the Family Court concerning the children, seeking orders that she believed would place them at risk. Wendy was aware that the outcome of any criminal prosecution could significantly affect the family law proceedings and was concerned that if the other party was not charged, he would say that it was because police agreed she was lying. The police files were repeatedly subpoenaed in the Family Court, but full documentation was not provided.

Around 24 months after she reported to police, Wendy was informed that the ODPP would not prosecute. She received a phone call out of the blue to tell her and was unprepared for the news. She had her young child with her and started hyperventilating and crying. After she was informed, she went through deep psychological distress.

In other proceedings, the alleged offender was found guilty of breaching the Family Violence Order, after coming to the children's school, approaching her and contacting her.

Wendy was distressed to the extent that she was no longer able to work.

Wendy could live with the outcomes from the Family Law proceedings and the family violence behaviours largely ceased, but Wendy remains deeply afraid of the alleged offender, and distressed about the alleged offender not being held accountable for his actions over and over again, and the way in which the potential prosecution for sexual assault had unfolded.

Wendy says that she was never able to talk to the DPP about why he was not charged. This made it difficult to accept the decision and have confidence in the legal system and processes.

Wendy's experience could have been significantly different. If the initial police response had been trauma informed, and recognised her as a victim, rather than 'hysterical'; had Wendy received a follow up after the initial report of family violence, and there been a timely and coordinated trauma informed response between the Police and the ODPP in relation to her file including regular communication to Wendy about its progress; support for Wendy throughout the process, particularly in relation to receiving news of the decision not to charge; and had an avenue for her to make a complaint about police/ODPP responses and decisions.

### Recommendations:

- That more resources be provided to the ODPP in order to improve their responses to the prosecution of sexual violence.
- That more resources be provided to the ODPP to establish dedicated Sexual Assault Witness Assistance Officers.

- That the existing Memorandum of Understanding/Provision of Advice service between Tasmania Police and the ODPP be revised to set out with greater certainty the circumstances in which Tasmania Police should make charging determinations without referring the matter to the ODPP.
- Trauma informed training for prosecutors and all staff, including how to recognise trauma responses and de-escalate.
- The ODPP explore ways of working with the family violence response system.
- Database systems for, and coordination of, information about indictments, linked lower-court charges, FVOs, and bail include the Supreme Court and ODPP and family violence services. These be updated promptly, and responsibility for informing complainants of outcomes be assigned to an organisation or service.
- Guidelines be developed in relation to ODPP responsibility for seeking ongoing protective Orders.

## Improving court processes for providing evidence

Some victim survivors have asked why, when they do not want to appear face to face with the accused, it is them that are removed from the courtroom when giving evidence, whereas the alleged perpetrator has the benefit of in-person interaction with the judge, jury and counsel.

Some victim survivors would prefer the option of choosing to attend at the Court and for the alleged perpetrator to appear remotely with their Counsel during their evidence. This and other means of promoting fairness warrant exploration when considering ways of improving processes for victim survivors giving evidence. We do not hold the view that processes such as these would fundamentally undermine the right of the accused to a fair trial, and in fact, align closely with trauma informed practices.

### Recommendation

- That the ALRC explore different ways for the provision of remote evidence that are fair, and trauma informed for the victim survivor and also promote the accused's right to a fair trial.

## Use of recorded evidence

Tasmanian Legislation provides that the audio-visual evidence of a child, victim of sexual assault and/or family violence or a special witness is admissible as all or part of the witness's evidence in chief. In prescribed proceedings, application can be made by the prosecutor for the whole of an 'affected persons' evidence to be taken at a special hearing and audio visually recorded.

The experience in this jurisdiction with audio-visual recordings and pre-recorded evidence has been mostly positive. However there have been examples where evidence has been poorly recorded due to outdated equipment and/or systems held by the court. In one instance, this was not realised until a number of years after the pre-recording took place (with COVID 19 also contributing to the delay in the matter being listed for trial) as there was no requirement for the court to check the recording at the time the evidence was taken or shortly after. There have also been instances where the court's technology and capabilities have resulted in complainants having to pre-record their evidence again.

In circumstances such as these, the impact of the loss or potential loss of the evidence would have significant detrimental impacts on children and vulnerable witnesses. Poor quality recordings will also not adequately capture the subtle emotions of a witness.

#### Recommendations:

- That courts and police are adequately resourced with up-to-date recording technology and information technology systems and that recording is checked immediately after or during (for example a break) in the recording process.
- That Court staff are trained in the use of audio-visual recording facilities
- That witness access to recordings of them be facilitated, particularly for the purpose of other legal processes.
- That Police have training in relation to trauma presentations, and Courts and police apply these understandings to use of body worn cameras and other forms of recorded evidence.

### **Improving intermediary schemes**

The Witness Intermediary Scheme makes witness intermediaries available to all children who are victims or witnesses in court proceedings relating to sexual offence and homicide matters, and to adults in such proceedings who have extra communication needs.

Operating since 1 March 2021, it is considered the intermediary scheme in Tasmania is working well. Intermediary assessment reports are provided in a timely manner and are generally positively received by trial counsel. In once recent instance, the intermediary was in fact able to advocate for a speedier trial date.

TLA would support the intermediary scheme being extended to **all** children and people with extra communication needs who are involved in the criminal justice system - particularly children and young people charged with criminal offences. A recent trial in Tasmania involved a charge of rape with both the complainant, defendant and most civilian witnesses involved being under the age of 18. The complainant and witnesses were assisted by an intermediary (as well as remote witness facilities) however the youth defendant was not, with no mechanism to evaluate whether they needed assistance engaging in the trial process.

#### Recommendation:

- The Intermediary scheme should apply to all children and people with extra communication needs who are involved in the criminal justice system or alternatively, Intermediary scheme should extend to include all children who are under investigation for, or who have been charged with sexual offences.

### **Trial by judge alone**

There have been no trials by judge alone for sexual assault and violence matters in Tasmania.

## Cross examination and the law of evidence

Given that rape myths and social norms can be effective in undermining complainants' evidence, disproportionately to their probative value, some limitations of cross-examination in sexual violence matters have been enacted. However, affirming the judicial role in challenging lines of questioning which seek to engage these myths may help lessen their impact. It is too late to address these insinuations in the judge's summing up, as the biases and assumptions will have continued to operate during the time the jury is assessing the witness.

To understand and address these issues, further and ongoing research and monitoring is required, including 'spot checks' on the language used during trials and decisions, including during cross-examination.

### Recommendations:

- That a bench book guide and training guide Judges in identifying and challenging lines of questioning which engage prejudicial social assumptions.
- That ongoing research assess over time the language used in trials and in decisions.

## Use of Interpreters

The phrasing in the review paper suggests that the only issue with interpreters is ensuring that a well-trained interpreter is available, engaged and they know what to do. This is important but not the only requirement for effective communication. Using interpreters well is a skill, requiring training and development for Courts, police and lawyers. Some considerations and suggested approaches were set out in a letter from the Australian Institute of Interpreters and Translators Inc, addressed to members of the Australian Judiciary and tribunals, lawyers, courts and tribunal staff, policy makers and language service providers, circulated by the Tasmanian Law Society in their newsletter in November 2023<sup>1</sup>.

### Recommendation:

- That consideration be given to what training and guidelines are needed for police, lawyers and courts to use interpreters effectively.

## Personal Information

Records of counselling or other therapeutic interventions sought prior to or during the trial may support or undermine the witness's version of events. There are strong public policy reasons for ensuring that people know they can safely seek help.

In family law proceedings, a party may seek to use the other party's medical or counselling information, and that examination of where those provisions are used well or badly may inform this review. It is noted that both the patient and the therapist may have reason to object to the use of personal information and both should have the opportunity. It is not the role of the ODPP to protect the interests of the complainant, other witnesses or the therapeutic professional. Additionally, we do not believe that the ODPP is sufficiently resourced to fill that role.

### Recommendations:

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<sup>1</sup> Recommendations can be found here: <https://ausit.org/reports-feedback-courts-tribunals/>

- That Courts make directions to require defendant and the ODPP to ensure both the witness and the therapeutic professional are aware of the ability to object to the production and use of personal therapeutic information.
- That complainants be separately represented, and resources be provided for that.
- That therapeutic services also be provided with the opportunity and (financial and expertise) capacity to object.

## Specialisation and training of judges and counsel

TLA supports the provision of training to judges and counsel who conduct trials and hearings that involve allegations of sexual assault. Sexual offences are a complex area of legal work and require those working in the system to understand the nature of sexual offending and trauma, as well as the complex laws and procedures. Such training could include education programs on sexual assault (both in the context of family violence and otherwise) and training in trauma informed practices. The benefits of such training would include reducing further trauma for complainants and help build their trust in the system.

TLA considers that the Tasmanian criminal justice profession is not large enough to have some form of special accreditation for lawyers who appear in sexual offences cases. There are not currently enough criminal trial counsel to conduct general trial work in Tasmania, and having or requiring special accreditation for counsel who work in sexual offence cases would significantly reduce the pool of lawyers available to appear in such cases. As a result, delays could become worse – not better.

However, as noted above, TLA considers there is great benefit in specialised training, education, and professional development for those involved in the conduct of sexual assault cases. This would include supporting TLA in-house trial counsel with further training and professional development and building up the TLA in-house practice to have a specialised group of counsel who have carriage of sexual assault cases. This should also include professional debriefing/supports to mitigate against vicarious trauma for practitioners who undertake this work.

TLA considers that specialised training would significantly improve the justice system response to sexual offences. The benefits of specialised training and education could result in improved cross examination practices (as described above), creating a more respectful court environment, and judges and prosecutors intervening when there is improper questioning of complainants. It would also improve the wellbeing of the professionals doing this work.

### Recommendation:

- Funding and support should be provided for specialised training and professional development including professional debriefing for judicial officers and counsel conducting sexual assault cases.

## Delays

The Tasmanian criminal justice system is under increasing pressure as a result of both a backlog and an increase in cases in both the Supreme and Magistrates Court. The Tasmanian system is also

experiencing a decline in lawyers undertaking criminal defence work. These factors have contributed to delays being experienced in the Tasmanian criminal justice system.

Other sources of delays include, but are not limited to:

- Significant delays in the assessment of charges from Tasmania Police by the ODPP, as noted above.
- The committal process – the model in the Tasmanian justice system allows for an accused person to apply for a Preliminary Proceedings Hearing (previously called “committal hearing”) in the Magistrates Court prior to committal to the Supreme Court. The number of matters adjourned into the Preliminary Proceedings (PP) list is capped, and there are only one or two dedicated PP lists a month in each regional location. Accompanied with disclosure issues (expanded on below) these lists have increased the time between charge and committal to the Supreme Court.
- Delay between committal and trial – as a result of many factors including
  - delay in police investigation or further investigation required
  - lack of/slow disclosure by the police
  - a reduced number of prosecutors and inexperienced prosecutors in the ODPP
  - a reduced number of criminal defence lawyers conducting complex trial work.
- An increase in pre-trial directions hearings and special hearings under the *Evidence (Children and Special Witnesses)* Act. Whilst the provisions under this Act are well used and of benefit, they can contribute to delays.
- An inefficient trial listing system with limited case management. Matters are generally listed for directions hearings dozens of times before being listed for trial with no effective case management.

Reviewing committal processes and providing more funding to the ODPP and TLA for in-house counsel to conduct trials is highly likely to result in reducing the delays in the court system. Indeed, the report of the Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings, in their published findings stated:

There is a relatively small pool of counsel, Crown and defence with experience in sexual offence cases. The DPP said this causes issues with continuity of counsel and adds to delays. The DPP further stated that the criminal backlog cannot be properly addressed without a sizeable increase in ongoing funding to the ODPP and corresponding funding for criminal defence services.

It is further noted that since the DPP’s statement to the Commission of Inquiry in 2022, the Tasmanian Government has increased funding for staff in the ODPP to help reduce the backlog of criminal matters in the system. However, no additional funding has been provided to TLA to assist in reducing the criminal backlog and delays, with particular reference to sexual offence cases<sup>2</sup>.

Delays in criminal prosecution of sexual violence significantly impact upon TLA clients. This impacts on the victim survivor’s experience of the criminal justice system and consequential psychological harm (please see Case Study above). Also delay before trial results in assertions about memory. Conversely, swift resolution assists other Courts to ascertain the facts and make decisions that are

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<sup>2</sup> ibid



relevant to more than just the criminal proceeding—for example in family law matters where an inquiry is protective of children’s psychological and emotional wellbeing, in addition to supporting determinations about how to address unacceptable risk of harm.

### Recommendations:

- Greater resources provided for lawyers in the ODPP and TLA, with specialised training for sexual assault cases
- A review of the Tasmanian preliminary proceedings lists and whether they are causing increased delay in sexual assault matters being committed to the Supreme Court.
- A review of the trial listing system and the efficiency of directions hearings and case management in the Supreme Court of Tasmania relating to sexual assault cases

## Guilty pleas and sentencing

### Early pleas of guilty

Late pleas of guilty are a significant issue in the Supreme Court in Tasmania, with many pleas being entered after a matter is listed for trial. Unlike other jurisdictions, in Tasmania there is no legislative provision that recognises a reduction of a sentence for a plea of guilty. Sentencing comments from the Supreme Court indicate that a guilty plea (and the timing of that plea) is identified as a relevant sentencing factor in many cases. However, in terms of identifying an actual benefit to reflect the utilitarian value of the plea, the traditional approach of the Supreme Court has not been to state the value of the reduction in sentencing attributable to the utilitarian value of the plea. [OBJ]

TLA would support amendments to the *Sentencing Act 1997 (Tas)* that would encourage early pleas of guilty, which not only avoids the trauma of the court process for complainants and witnesses but has an overall benefit on the administration of justice by saving costs to the prosecution, legal aid and the court system generally. It is considered that a discount for an early plea of guilty would also assist in the reduction of the delay currently experienced in the finalisation of sexual assault cases.

Suggested amendments would include ones that would require the court to state whether the sentence has been reduced because of an early plea of guilty and if so, the sentence that would have been imposed but for the guilty plea.

### Communicating pleas to victim survivors

TLA clients who have been victims of sexual assaults and victims of other family violence offending describe the content of pleas in mitigation and sentencing comments profoundly affecting their perception of whether justice has been effective.

Pleas of guilty are heard in the Supreme Court after the filing of a Crown set of Papers. These include the statement of facts relied upon by the DPP, the defendant’s record of prior convictions and any victim impact statement. These papers are required to be filed in advance of a plea of guilty, to allow sufficient time for instructions to be obtained by defence counsel and is a requirement of the court.

The provision of Crown papers before the plea provides an opportunity for the defendant to object to any of the matters intended to be raised at a sentencing hearing. However, the defendant is not

required to give any notice of matters to be raised with the ODPP, giving no opportunity to seek victim input. This results in victim-survivors hearing (if present), reading (news articles and sentencing comments) or being told of often emotionally charged misrepresentations or what they consider to be lies, made by the offender to reduce their moral culpability.

When pleas in mitigation are heard, the ODPP is able to challenge inaccuracies they know about but are put in a position where they cannot challenge inaccuracies they don't know about, as there is no chance for them to seek information and/or context prior to the plea being made. Further, victim survivors cannot manage personal disclosures that are made about them which become public. Police prosecutors and the ODPP frequently do not object to dubious assertions because they perceive that it will not make a significant difference to the penalty given: they may be correct, but that does not assist the victim-survivor, and often contributes to victim-blaming and exculpatory narratives.

Whilst it would take additional time, consideration should be given to when a disputed facts hearing on the contents of the plea provides a benefit, allowing the ODPP to seek input from the complainant or to check the defendant's assertions in mitigation. This would significantly improve the victim-survivor's perception of justice being done. Procedurally, an additional appearance to check facts may be no different to obtaining pre-sentence reports.

### Case Study

Amelia was raped by her husband during the breakdown of their marriage, in a context of family violence. He was tried and convicted. Immediately after his sentencing, Amelia started receiving phone calls from hurt and angry family and friends – why hadn't she told them that they had suffered a stillbirth just before the incident? Didn't she trust them? The family and friends had followed the proceedings, and the offender said that his grief had contributed to his offending. Amelia had not gone through a stillbirth – she had had a miscarriage in the very early weeks of pregnancy, well before it is considered safe to announce, quite some time before, and he had been relieved. The defendant's conduct not only constructed a false narrative to excuse his violence but resulted in harm to the victim's support relationships.

Had there been an opportunity for the victim survivor to have prior knowledge of the facts to be put in mitigation, she would have had the opportunity to personally make and manage that disclosure with her family and friends.

### Recommendation:

- There should be a statutory discount for early pleas of guilty or courts should state the effect of the guilty plea on the sentence
- Defendants should be required to disclose matters they intend to put in mitigation, the ODPP should, where relevant, seek victim-survivor input and determine whether to object.

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<sup>i</sup> <https://www.health.tas.gov.au/campaigns/sexual-assault-and-family-violence-forensic-services/your-options-following-sexual-assault>