

Your Reference: Justice Responses to Sexual Violence  
Our Reference: LSCEC/24/1498  
Date: 24 May 2024

The Hon Justice Mordecai Bromberg  
President  
Australian Law Reform Commission  
PO Box 209 Flinders Lane  
MELBOURNE VIC 8009

By email only: [jrsv@alrc.gov.au](mailto:jrsv@alrc.gov.au)

Dear Justice Bromberg,

**Re: Inquiry into Justice Responses to Sexual Violence**

I refer to your letter of 26 April 2024 and the Issues Paper in respect of the above-named Inquiry.

The Legal Services Commission (Legal Services) provides legal assistance to victims of domestic violence through our Women's Domestic Violence Court Assistance Service (WDVCAS) in the State Magistrates Courts and through our Family Advocacy and Support Service (FASS) and the Family Violence and Cross-examination Scheme in the FCFCOA.

We provide legal assistance to victims of domestic violence through our Domestic Violence Unit and through our Health Justice Partnerships with major hospitals. We provide legal assistance to children in families affected by domestic violence through the South Australian Safe and Well Kids program.

We also provide general legal advice and assistance, duty lawyer services, and grants of legal aid for persons facing charges for major indictable offences including sexual assault. Our grants of aid are subject to an assessment of means, merit and guidelines and to the provisions of the *Criminal Law (Legal Representation) Act 2001*.

In the 2022/2023 financial year, Legal Services provided 14,158 grants of aid in the criminal law jurisdiction in South Australia of which 3,467 were for major indictable matters. Of these, we provided 242 grants of aid for persons facing charges relating to serious child sex offences and 516 grants of aid relating to serious sexual offences.

**Issues Paper: Justice Responses to Sexual Violence**

We have considered the Issues Paper and would like to make the following comments.

**Legal Assistance for Victims**

Legal Services supports the proposal that victims have access to legal advice and assistance.

We consider it is important to develop a specific model for this adviser role that does not interfere with the prosecutor's role or place the defence at greater disadvantage by having effectively, two legal counsel for the prosecution.

A victim's legal adviser could advise on legal process, options for giving evidence, cross-examination, identification as a vulnerable witness, defence requests for access to personal documents, victim impact statements and restorative justice measures and provide advice to the prosecution on the victim's cultural needs. The legal adviser would be effectively acting as a legal intermediary for the victim.

We further submit, as an alternative, that improvements could be made to the current system. We consider that victims would benefit greatly from having the same prosecutor assigned to their matter from the commencement of proceedings until their conclusion. Such a measure would strengthen the prosecutors role of taking into account the victim's views and allow victims to build a working relationship with the prosecutor.

### **Specialist lists or courts.**

Legal Services supports the establishment of special court lists for offences involving sexual violence.

### **Vulnerable Witnesses and Special Hearings**

The South Australian *Evidence Act 1929*<sup>1</sup> (the Act) makes special provision for the giving of evidence by vulnerable witnesses at trial and provides for the court to arrange a *pre-trial special hearing* which could be regarded as a type of ground rules hearing (s.12AB). The provisions are very comprehensive, addressing a wide range of matters designed to facilitate the giving of evidence and to support the witness as much as possible. In particular, section 13BA permits the admission of evidence in the form of an audio visual record. There is no requirement, as some legal commentators have suggested, at a ground rules hearing for the defence to reveal its proposed cross-examination questions.<sup>2</sup>

In the interpretation provisions of the Act, section 4, victims of sexual violence are not specifically referenced but the term "vulnerable witness" includes –

- (c) a witness who is the alleged victim of an offence to which the proceedings relate—*
  - (i) where the offence is a serious offence against the person; or*
  - (ii) in any other case—where, because of the circumstances of the witness or the circumstances of the case, the witness would, in the opinion of the court, be specially disadvantaged if not treated as a vulnerable witness;*

---

<sup>1</sup> [Evidence Act 1929 | South Australian Legislation](#)

<sup>2</sup> *Civil Approach to Rape Trials would set dangerous precedent*, The Australian, 13 May 2024

A victim of sexual violence could no doubt fall into the category of someone who has suffered “a serious offence against the person” but the absence of a specific reference does not encourage the identification of these witnesses as ‘vulnerable’.

In Part 2 of the Act, specifically dealing with witnesses, the definition for this category of special witnesses is slightly expanded and includes “vulnerable witnesses” and others. Child victims of sexual offences are specifically mentioned here but not adult victims. Under this part, activation of the *pre-trial special hearing* requires an application to the court (s.12AB (1)).

Using the South Australian law as an illustration, broadening the category of vulnerable witnesses to specifically include adult victims of sexual violence together with provisions that expressly require a special hearing in all matters involving sexual violence, as well as removing the need for a specific court application for a special hearing, would assist in trauma-informed practices being followed for these victims.

### **Evidence and Burden of Proof**

Legal Services does not support any lessening of the burden of proof in criminal matters from “beyond reasonable doubt” and in particular, we do not support the adoption of the civil standard of “balance of probabilities” for serious sexual offences.

A detailed analysis of the different burdens of proof and the long standing jurisprudence that led to their development is set out to an exemplary standard by Lee J in *Lehrmann v Network Ten Pty Limited* (p. 21).<sup>3</sup>

While we recognise that the right of the accused not to give evidence (the right to silence) has raised concerns in cases that turn one person’s evidence against another’s, we continue to support this fundamental principle of the justice system. We note that Australian legislation allows that a defendant can be found “reckless” as to lack of consent in cases of sexual violence and such a finding can lead to conviction. The concept of recklessness introduces the possibility of objectivity into the determination of these matters by considering the actions of the accused.<sup>4</sup>

In *Lehrmann*, his Honour stressed the importance of witness credibility in reaching a determination regardless of the burden of proof:

“In accepting this specific aspect of Ms Higgins’ evidence, I have directed myself to bear in mind that like in any case where criminal conduct is sought to be proven based largely or exclusively on a single witness, it is important I am satisfied to the appropriate standard that the witness is both honest and accurate in the account given,” (p. 97).

---

<sup>3</sup> (Trial Judgment) [2024] FCA 369 (15 April 2024)

<sup>4</sup> *Gillard v The Queen*, [2014] HCA



### **Jury Directions and Judge Alone Trials. Experts.**

Legal Services would support legislation which required judicial officers to specifically reference public misconceptions about victims in summing up, and to state that they have explicitly turned their minds to such matters when delivering judgment in judge alone trials.

The difficulties in dealing with so-called “rape myths” are discussed at length by Lee J in *Lehrmann*. His Honour emphasised the fundamental role of the court to educate juries on the importance of reaching decisions on a strong factual basis (p. 24 and p. 96) and not to fall into preconceived ideas about how a victim of sexual assault might behave. He considers expert advice on how, sometimes, a victim’s behaviour is “counterintuitive”.

On the role of the judge in a judge-alone trial Lee J commented:

“I considered it would be appropriate to direct myself as to the impact of alleged counterintuitive conduct in a manner consistent with some foundational propositions referred to in the proposed evidence which, it seemed to me, simply reflected the accumulated experience of the common law (seen in standard directions) or in ordinary human experience.” (p. 25)

His Honour considered that expert evidence on responses to trauma could play an important role in assisting juries and the court to reach an appropriate conclusion on the credibility of witnesses. His commentary opens up debate on whether the calling of independent expert witnesses on trauma should become a customary part of trials for serious violent sexual offences.

### **Sentencing and Restorative Justice**

We submit that restorative justice affords an opportunity to take into account the cultural and personal needs of the victim. For some victims, being present at the sentencing hearing and the opportunity to provide a victim impact statement helps provide closure. In South Australia, the laws governing victim impact statements have recently been broadened to restrict the ability of counsel to edit such statements.<sup>5</sup>

For other victims, particularly where the parties are known to each other, a victim could have the right to participate in a sentencing conference with the offender if the victim wishes. In South Australia, sentencing conferences are available as part of the sentencing process for Aboriginal offenders and have proved successful in that context.<sup>6</sup> We submit an extension of these conferences to offences of sexual violence would assist some victims but should not be compulsory.

### **Prevention and Education**

The justice system can play a role in the prevention of sexual violence through education of judicial officers and the broader legal profession. We submit that programs to assist offenders to address the causes of their violence is also critical to reducing this form of offending.

---

<sup>5</sup> [A stronger voice for victims | Premier of South Australia](#) and [Sentencing Act 2017 | South Australian Legislation](#)

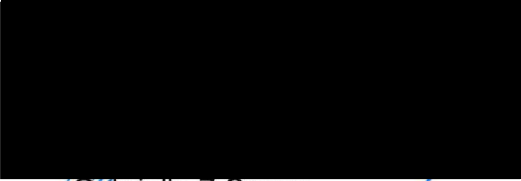
<sup>6</sup> [Nunga Court \(Aboriginal Court Day\) \(lawhandbook.sa.gov.au\)](#)

Community education and public message reinforcement are an important part of addressing violence of all kinds against women and children. We are aware that this is a difficult task, and the solution is not as simple as an advertising campaign. The commentators Hill and Salter have conducted an extensive analysis of the effectiveness of public campaigns against sexual violence compared to other successful public health messaging.<sup>7</sup> They comment:

“According to multiple metrics, the gender equality approach has not only failed to actually reduce and/or prevent violence, it has achieved only marginal improvements to community attitudes over the past decade. We (Australia) may be world leaders in funding and developing primary prevention – and that is certainly laudable - but we are not world leaders in *actually preventing* violence.”

Thank you for the opportunity to make a submission to the Inquiry.

Yours sincerely,



Gabrielle Z Canny  
Director (CEO)

---

<sup>7</sup> Jess Hill, Prof Michael Salter, [Rethinking Primary Prevention \(substack.com\)](https://substack.com), 17 April 2024