WOMEN'S LEGAL CENTRE ACT

Submission to ALRC Inquiry to Justice Responses to Sexual Violence

31/05/2024

Acknowledgement

1. We acknowledge the people who have been subjected to sexual violence, with whom we work and whose experiences have enabled us to write this submission, in the hope of achieving substantial change.

2. Where our clients' experiences are drawn on in this submission, they have consented to their information being used as a case study. All clients' names have been changed.

3. The Women's Legal Centre ACT acknowledges the traditional custodians of the lands on which we work. We recognise this land was never ceded and the experience of colonisation and loss continues to affect the lives of Aboriginal and Torres Strait Islander women and communities today. Despite this, Aboriginal and Torres Strait Islander people's connection to land, sea and community is strong and continuing. We pay our respects to elders past and present, and to Aboriginal and Torres Strait Islander children and future leaders, for they hold the memories, the traditions, the cultures, and the hopes of First Nations peoples.

Who we are and what we do

4. This submission is from the Women's Legal Centre. It has been informed by our direct work with people who have been subjected to sexual violence through the Sexual Violence Legal Service (**SVLS**) and our experience working in the Australian Capital Territory (**ACT**) criminal justice system, both prior to our work in, and within, the service.

5. The SVLS is a partnership between the Women's Legal Centre ACT and Victim Support ACT. It is a Commonwealth funded pilot program, with a duration of three years. The SVLS began in February 2024.

6. The SVLS is a multidisciplinary team of two solicitors and two victim support workers. It is a free legal service which provides legal advice, representation and wraparound support for women, transgender people, non-binary people and children who have been subjected to sexual violence. We operate on a trauma-informed model and our key priority is to provide our clients with information and legal advice, so they are empowered to make the right decisions for them.

7. The legal advice we provide covers the entirety of a person's engagement with the criminal justice system and we take referrals throughout this process – including prior to reporting to police, during an investigation, and throughout any subsequent prosecution. The legal representation we provide can include seeking leave to appear in court as an interested party, where appropriate.

Terminology

8. We believe language is important. We typically use the language of 'people who have been subjected to sexual violence', to refer to women, children and others who have been subjected to sexual violence in any of its forms. It is our preference to use this language, rather than 'victim', 'survivor' or a combination of the two, as it does not wholly define a person by their experience of violence.

9. However, throughout our submission we may refer to people who have been subjected to sexual violence as complainants or victims. This is where we are referring to a particular legal process, where a person who has been subjected to sexual violence is considered as either a 'complainant' or 'victim' by the legal system.

10. Anyone can be subjected to sexual violence, however the research and experience of our clients indicates that sexual violence is predominantly perpetrated by men against women. This is reflected throughout our submission and our use of gendered language.

Contact us

For further information, please contact:

Erin Priestly
Head of Practice, Sexual Violence Legal Service
Women's Legal Centre
[redacted]

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OVERALL SYSTEM

1. People who have been subjected to sexual violence remain unrecognised as full participants in the criminal justice system. They are witnesses for the prosecution, not a party to proceedings. With this, comes an isolation throughout the process with difficulty accessing information, receiving advice, and providing their views.

2. There has been an increased recognition of the rights and entitlements of victims. However, without the availability of free, confidential legal advice victims remain unaware of these rights and entitlements, unaware of when they have been breached, and unable to act if they have.

3. Access to legal advice and representation is best practice for people who have been subjected to sexual violence accessing a fair trial as victims in the criminal justice system. It also supports the functioning of the criminal justice system more broadly – enabling police, prosecutors and the court to have confidence that a victim has received adequate information and advice and is making informed choices.

4. Any reform aimed at improving the experiences of people who have been subjected to sexual violence in the criminal justice system can only be effective when partnered with access to independent legal advice (and, by extension, representation).

5. We note that, to date, there has been a separate focus in the criminal justice system on sexual violence and family violence. We know that treating these forms of violence separately ignores the high incidence of sexual violence in the context of an intimate partner, or family relationship. There must be a greater focus on, and acknowledgement of, this.

REPORTING THE EXPERIENCE OF SEXUAL VIOLENCE SAFELY

6. In the ACT, sexual violence can be reported either in person at one of five general duty police stations or online (if the sexual violence occurred more than 6 months ago). A person can choose to report for the purpose of information gathering only or with a view to providing a formal statement and having police investigate.

7. Certain sexual violence matters, including penetrative offences and any offending involving children, are referred through to the Sexual Assault and Child Abuse Team (**SACAT**).

8. In our experience, the option to report sexual violence online has made the process of reporting easier for some clients. It has allowed them to provide the information from a safe place, without the need to attend a police station.

9. However, it is not possible to anonymously make a report for information purposes, and any person making such report must provide personal details and contact information. This has been a deterrent to some clients reporting information to police and can hinder the ability of police to detect patterns of offending by a person responsible for sexual violence over a period of time.

10. The need to report more recent sexual violence to a general duty police officer is not a safe process for people who have been subjected to sexual violence. We have found the quality of, and the capacity for, response differs greatly based on who happens to be on the 'front desk' at the time of reporting.

11. If clients access our legal advice and assistance prior to reporting to police, we are able to advocate for a safer reporting process. This involves reporting directly to SACAT, at a time that is suitable for our client.

12. To ensure the process of reporting is safe for all persons subject to sexual violence, there needs to be:

    a. Adequate resourcing of legal services to allow for independent legal advice prior to reporting;
    b. Adequate training of all police officers in relation to sexual violence, in order to ensure a consistent and appropriate response to in person reporting;
    c. Increased and targeted recruitment of female police officers; and
    d. A framework that ensures accessible, trauma-informed and culturally appropriate reporting options (which might include being able to make anonymous reports, or report at a place other than a police station).

POLICE RESPONSES

13. A recent report, the *Sexual Assault (Police) Review Report* (**SAPR Report**), assessed the low charge rates of sexual violence in the ACT between 1 July 2020 and 31 December 2021.

14. This report has made a series of recommendations regarding police responses to sexual violence. Some of these recommendations have already been, or are in the process of being, implemented.

15. However, we believe this report missed the opportunity to highlight the significant degree to which independent legal advice and representation can assist people who have been subjected to sexual violence in the police investigation stage.

16. The report of Dr Rachael Burgin and Jacqui Tassone, which informed the SAPR Report,[1] highlighted the need for pathways to access legal advice to be provided at the time of reporting sexual violence to police and, particularly, before participating in a formal statement. As was noted in this report (emphasis added) at p 120:

> Much of the extant literature about legal representation for victims of sexual violence focuses on the prosecution stage. However, the findings of the Police Process Review point to a **need for victims of sexual offences to have access to legal representation during an investigation**. This is important because most reported sexual offences never proceed beyond this point, and often on the basis of extra legal factors or a misinterpretation of the law. Victims should be supported to access legal representation prior to reporting to police, where the report is facilitated through another agency... Where it is not, ACTP should be obligated to advise victims that they are able to seek legal representation. An independent legal advocate can advise victims about matters that have no probative value to the facts in issue in the case, including those which are not admissible (such as sexual reputation evidence). Legal representatives can also provide advice to victims about requests from police that infringe on their privacy, such as to access or possess victims' phones.

17. The rights and interests of people who have been subjected to sexual violence that are invoked during a police investigation can only truly be protected where these people have ready access to legal advice, protected by legal professional privilege.

18. Whilst several services throughout Australia (including Victim Support in the ACT) can provide valuable advocacy throughout the criminal justice processes, these relationships are not protected by legal professional privilege. The risk of people who have been subjected to sexual violence disclosing information in the context of these services are that such disclosures are not completely confidential. In the ACT they can be subpoenaed and, even in the case of protected confidences (counselling communications), can be accessed in certain circumstances. The protection of legal

[1] Rachael Burgin and Jacqui Tassone, 'Beyond Reasonable Doubt? Understanding police attrition of reported sexual offences in the ACT' (2024).

professional privilege gives complete control and choice to the person subjected to sexual violence of who, if anyone, can access that information.

19. However, legal advice and representation must be delivered in an integrated model. This ensures that people who have been subjected to sexual violence have access to a range of services to address their multitude of needs – including legal advice, safety planning, counselling and financial assistance.

20. We have a positive working relationship with SACAT and are grateful for the support they have provided our program. We have found SACAT officers to be responsive to our requests for information and open to facilitating different approaches for clients who have additional needs or heightened safety concerns. We acknowledge that a significant difficulty for SACAT, which is reflected broadly across the criminal justice system, is under resourcing.

PROSECUTION RESPONSES

21. In the ACT, the ACT Office of the Director of Public Prosecutions (**ODPP**) prosecutes all sexual violence offences, including those in the ACT Magistrates Court, ACT Childrens Court (**the lower courts**) and ACT Supreme Court.

22. The ODPP has a Sexual Offences Unit (**SOU**), which consists of solicitors who have day-to-day carriage of matters and may appear in sexual violence matters which proceed to finality in the lower courts.

23. Experienced Crown Prosecutors and Crown Advocates more commonly appear in sexual violence matters that proceed to trial or sentence in the Supreme Court.

24. A senior prosecutor from the SOU is stationed at SACAT and provides legal advice to officers conducting investigations, where necessary. To date, this has appeared to have positive outcomes and we support the extension of this role into the future.

25. However, it is our experience that no prosecutors at the ODPP, including those in the SOU, receive regular, trauma-informed training. The result of this is that the experience of people subjected to sexual violence who interact with the ODPP differs significantly, depending on the allocated prosecutor.

26. Some of our clients have had specific difficulties with the ODPP arising out of a lack of communication, or communication that has not been founded in trauma-informed principles.

27. One client, June, was the victim of intimate image abuse that happened in the context of the breakdown of an intimate relationship. Her abuser was sentenced in the Magistrates Court and received a non-conviction order. June provided a Victim Impact Statement, which was read by the prosecutor at the sentence hearing. Throughout the prosecution, June had no direct contact from the ODPP. She found out about the sentencing outcome through police and, ultimately, had to order a transcript of proceedings to understand what had occurred. Furthermore, portions of June's Victim Impact Statement were redacted without any consultation with her. She discovered this when she received the transcript. A junior prosecutor appeared at the sentence hearing, rather than a prosecutor from the SOU. No submissions were made by the prosecution regarding the intimate image abuse occurring in the family violence context.

28. Another client, Andrea, had charges in relation to the sexual violence she was subjected to discontinued six months out from trial, after the matter had been committed to the Supreme Court for trial. She was not told this decision was being contemplated but was notified once the decision had already been made and reviewed by the DPP.

29. Both June and Andrea were engaged by the SVLS after the prosecutions had come to an end. Ideally, had they had access to legal advice and representation throughout the criminal prosecution they would have been fully advised of their rights and appropriate communication facilitated with the ODPP.

THE TRIAL PROCESS

SPECIAL MEASURES / WITNESS PROTECTIONS

30. In the ACT, there are several 'special measures' in place for sexual offence complainants. Some special measures are available for all sexual offence complainants and some are available for only particular classes of sexual offence complainants, as set out in the table below.

Special Measure	**Class of witness measure available for**
Audiovisual recording of police interview	All sexual offence complainants
Giving evidence at pre-trial hearing	Child sexual offence complainants and 'vulnerable adults'
Giving evidence by audiovisual link	All sexual offence complainants

Intermediaries	Child sexual offence complainants and other sexual offence complainants, on successful applications
Screening of accused	All sexual offence complainants
No cross-examination by self-represented accused person	All sexual offence complainants
Presence of support person when giving evidence	All sexual offence complainants
Evidence given in closed court	All sexual offence complainants, on application to the Court.

31. These special measures have assisted in reducing the trauma involved in giving evidence.

32. The following special measures are discussed in detail below: audiovisual recordings of police interviews, giving evidence at pre-trial hearing, and intermediaries.

AUDIO-VISUAL RECORDINGS FOR EVIDENCE

33. In the ACT, recorded evidence is used in the following ways:
    a. Evidence in Chief Interviews (**EICI**); and
    b. Pre-Trial Evidence (**PTE**).

Evidence in Chief Interviews

34. All sexual offence complainants are entitled to give their police statement as an audio-visually recorded statement – an EICI.[2] In our experience, this is the common, if not exclusive, practice.

[2] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 43, Table 43.4.

35. This EICI can then be, and is often, played as part of a complainant's evidence in chief at an eventual hearing of trial.[3] However, it is the usual course for complainants to answer further evidence in chief questions from a prosecutor, and to be subjected to cross-examination.

36. We have identified several issues with the use of EICI.

37. First, sexual offence complainants are often not told that they may not must provide an audio-visually recorded statement. There are several reasons why any person might prefer to provide a written statement, including communication strengths or preferences, however they are often unaware of their options or given the choice.

38. This could be rectified by police ensuring all sexual offence complainants are advised of the availability of independent legal advice prior to participating in a police statement

39. Second, the quality of EICI can differ greatly based on the police officer conducting the interview. Police officers, who are not legally qualified, are conducting a large portion of evidence in chief (as that is ultimately what the EICI becomes) – a job usually reserved for a prosecutor with legal training. It is sometimes the case that EICI are conducted and the officer does not yet know what offences might ultimately be charged and what elements must be proved to make out those offences. Greater resourcing and training needs to be provided to police to ensure a high quality of EICI is consistent across all sexual offence matters.

40. Third, intermediaries are underutilised by police during EICI. This is addressed further below.

Pre-trial evidence

41. Some sexual offence complainants are entitled to give pre-trial evidence. This is a process by which a witness gives evidence early (as the name would suggest, prior to trial) and it is then recorded and played for the jury at the later trial.

42. Child sexual offence complainants are automatically entitled to give pre-trial evidence.[4] Adult sexual offence complainants who are deemed by the court to be vulnerable adult may also give pre-trial evidence.[5] In order to be classified as a 'vulnerable adult', the court must be satisfied of one of three things:

[3] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52.

[4] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 43, Table 43.4.

[5] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 43, Table 43.4.

a. The complainant has a vulnerability that is likely to affect their ability to give evidence because of the circumstances of the proceeding or the complainant's circumstances; or
b. The complainant is likely to suffer severe emotional trauma, or be intimidated or distressed, by giving evidence in the proceeding otherwise than at a pre-trial hearing; or
c. The complainant needs to give evidence as soon as practicable because they are likely to suffer severe emotional trauma, or be intimidated or distressed.[6]

43. In our view, at least one, if not all, of the above circumstances would apply to all sexual offence complainants.

44. At present, however, the prosecution is required to put on an application, with the necessary supporting evidence, to satisfy the Court that an adult sexual offence complainant is a vulnerable adult. This can then be opposed by the accused.

45. In *R v Incandela* [2021] ACTSC 22 (***Incandela***) the accused opposed the prosecution's application that the complainant be classed a 'vulnerable adult', entitling her to give evidence at a pre-trial hearing. Counsel for the accused submitted that the court needed to be satisfied that an assessment of the complainant as a vulnerable adult must be above what the court would expect of any other witness in the position of the complainant. They further submitted that an assertion by the treating forensic medical practitioner that the complainant appeared to have a cognitive impairment was not sufficient to establish this. The Court ruled, however, that the complainant was a vulnerable adult.

46. It appears fortunate that in *Incandela*, the material relied upon for the application by the prosecution was contained in the brief of evidence. However, it is not difficult to foresee a similar situation where the prosecution would need to obtain additional, private medical material of a complainant in order to support such an application. Further, it appears that significant resourcing went into such an application – both on behalf of the prosecution, the accused's counsel and, most importantly, from the Court.

47. Given that most, if not all, adult sexual offence complainants would meet the definition of a 'vulnerable adult' and the potential for the invasion of privacy, as well as misuse of court time and resourcing, in our view it would aid further in the administration of justice for all sexual offence complainants to be entitled to give pre-trial evidence.

48. This would address the significant distress delay in criminal proceedings can cause for persons subjected to sexual violence. Whilst they would still face delay in hearing the verdict of an eventual trial, their role as a witness would be complete much earlier.

[6] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 42.

‘SPECIAL MEASURES’: INTERMEDIARIES AND GROUND RULES HEARINGS

The use of intermediaries in the ACT

49. An intermediary scheme was introduced in the ACT in January 2020, via a legislative framework under the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) (**EMPA**), by the *Evidence (Miscellaneous Provisions) Amendment Act 2019*.

50. In the ACT, intermediaries are independent officers of the court, who undertake their work impartially, with their paramount duty being to the court.

51. A court may appoint an intermediary in a criminal proceeding for a witness with a communication difficulty.[7] Whilst the term ‘communication difficulty’ is not defined in the Act, s 4AJ provides an example as being a ‘mental or physical disability that impedes speech’.

52. The court must appoint an intermediary for a prescribed witness, unless there is no one available who meets the witnesses’ needs or it is not in the interests of justice.[8] Prescribed witnesses are defined by regulation 3B of the *Evidence (Miscellaneous Provisions) Regulation 2009* (ACT) as a child complainant in a sexual offence proceeding, or a child in a serious violent offence proceeding involving the death of a person. A child complainant in a sexual offence proceeding includes a complainant who was a child at the time of the offence the subject of the proceeding.[9] That is, complainants in historical child sexual abuse proceedings are considered to be ‘child complainants’ even though they may be adults when they give evidence.

53. Once an intermediary is appointed, they will meet with a witness and conduct an evaluation, before preparing a report for the Court. This report is presented at a Ground Rules Hearing,[10] where the Court will consider the communication needs of the witness and how these might best be accommodated. A court can make any direction it considers appropriate, including directing how a witness can be questioned, for how long, the use of aids, and whether a party must put evidence in its entirety to a witness in cross-examination.[11]

[7] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AJ.
[8] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AK.
[9] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 42.
[10] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AA.
[11] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AK.

54. While a ground rules hearing may be directed to be held for a witness in a criminal proceeding without the presence of an intermediary, in the ACT, they have only ever been conducted where an intermediary has been appointed.

55. The ground rules hearing is not an opportunity to cross-examine the intermediary, as they will only be allocated to a matter if they have the relevant professional expertise to meet the witness' communication needs. Despite the DPP making the application, the intermediary should not be considered a prosecution witness, and is an officer of the court.

56. To date, 125 ground rules hearings have been conducted in the ACT with the involvement of an intermediary. In most cases, the recommendations made by the intermediary have been turned into directions by the judicial officer.

57. Directions made by judicial officers have included, but are not limited to; simplification of language, frequent breaks, use of signposting, avoidance of tag (or assertion) questions, use of focus items, introduction and utilisation of communication rules and changes to tone and pace of questioning.

Burden of proving 'communication difficulty' prior to appointment of intermediary

58. In the ACT, if an application for an intermediary is not contested, a Registrar may appoint an intermediary in the matter. In the event an application is contested, it will be heard instead by a Judge or Magistrate. In most cases, these applications are approved, and an intermediary is appointed. There have, however, been strenuous oppositions to the appointment of intermediaries, at times.

59. In *R v QX (No 2)* [2021] ACTSC 244, the accused opposed the appointment of an intermediary for a child sexual offence complainant - a prescribed witness. They argued that it was not in the interests of justice to appoint an intermediary as the complainant had not demonstrated a communication difficulty. The prosecution called three witnesses to establish a communication difficulty, including the child's treating counsellor, and two child psychiatrists.

60. In *R v Ayoub* [2021] ACTSC 181, Counsel for the accused opposed the application an intermediary for an adult sexual offence complainant. In that matter, the complainant was observed by the doctor conducting the forensic medical examination to lapse into an unresponsive state while remaining conscious, when speaking of the assault. This also occurred when the complainant was describing the assault during their EICI. Counsel for the accused opposed the intermediary application due to there being no evidence to establish the complainant would be likely to suffer the same communication difficulty at trial. The Crown filed further

material, including more contemporaneous medical records of the complainant, to rebut this.

61. In our view, the legislative requirement to establish a communication difficulty prior to the appointment of an intermediary has resulted in undue burden being placed on the prosecution to obtain further evidence, frequent opposition to such appointments by an accused, poor use of court time, and unnecessary access to, and ventilation of, a sexual offence complainant's private medical information.

62. It would be more appropriate for an intermediary to be appointed, in the first instance, and for their report to advise the court as to whether any accommodations are required with regard to a communication difficulty. This would protect people who have been subjected to sexual violence from having their broader medical records accessed and would assist in maintaining the confidentiality of their relationship with any treating practitioners.

Intermediaries not effectively engaged at police interview stage

63. As stated above, in the ACT, people who were subjected to sexual violence routinely, if not almost exclusively, give their police statement as an EICI. This is an audio-visually recorded interview with police, which is played as part of a witnesses' evidence at hearing or trial. It often forms a large part of a complainant's evidence in chief at hearing or trial.

64. Whilst police consistently engage with intermediaries in conducting EICI with children (in the sense that they are under 18 years old when giving the EICI), they do not consistently do so with people who were subjected to sexual violence when they were children but are over 18 years old when giving the EICI, or with other categories of people who have been subjected to sexual violence. There is no legislative mandate for police to engage an intermediary for certain prescribed witnesses, as there is for the Court.

65. The benefit of an intermediary is their ability to aid the administration of justice through assisting a witness to give their best possible evidence. This benefit is lost when intermediaries are not routinely or consistently engaged when it comes to a crucial, significant part of giving evidence – the EICI. This is particularly so for witnesses who are not assisted by an intermediary in giving their EICI, but later give further evidence and are subjected to cross-examination with the aid of an intermediary.

Extension of intermediaries to all people who have been subjected to sexual violence

66. Being subjected to sexual violence is a key antecedent to experiencing trauma. It is well established that trauma responses in a person's system leads to communication difficulties, influenced by emotional dysregulation, memory problems, intrusive thoughts and disassociation.

67. Many of our clients who, in their day to day life may not experience communication difficulties, do have communication difficulties when speaking of the sexual violence they were subjected to.

68. In our view, all sexual offence complainants should be prescribed witnesses, such that an intermediary must be appointed (unless it is not in the interests of justice to do so). Whether it is in the interests of justice should always involve the question of what the witnesses' wishes are regarding the appointment of an intermediary.

69. Such a broad use of intermediaries would, necessarily, place a large burden on the intermediary program and can only be facilitated with appropriate resourcing.

ASSESSMENT OF CREDIBILITY AND RELIABILITY

Expert Evidence

70. In the ACT, it is common in sexual offence matters for there to be expert evidence led of immediate responses to sexual violence (flight, fright or freeze) and reasons for delay in complaint.

71. However, in our experience, there is further expert evidence that can, and often should, be led in relation to sexual offence responses. This includes surrounding the fragmentation of memory and trauma responses following sexual violence.

72. We believe this evidence would be particularly useful in the context of sexual violence that has occurred in intimate relationships, especially when there has been a continuation of that relationship following the violence.

Jury Directions

73. Jury directions are just one useful tool, amongst many, for countering myths and misconceptions about sexual violence. However, it is our view that the jury directions that are legislative prescribed in the ACT are not sufficient.

74. At present, the provisions which provide what jury directions may and must be given in sexual offence proceedings are as follows:

    a. The judge must not give the jury any warning or suggestion to the effect that the law regards complainants to be an unreliable class of witnesses;[12]
    b. If evidence is given by a child, the judge must not give the jury any warning or suggestion to the effect that the law regards children to be an unreliable class of witnesses;[13]
    c. The judge must give the jury any warning to the effect that the absence of, or the delay in making, the complaint does not necessarily indicate that the offence committed is false;[14]
    d. The judge must tell the jury that there may be good reasons why a victim of a sexual offence may not make, or may hesitate in making, a complaint about the offence.[15]
    e. The judge must, in a relevant case, direct the jury that a person is not to be regarded as having consented to a sexual act just because:
        i. The person did not say or do anything to indicate that the person did not consent; or
        ii. The person did not protest or physically resist; or
        iii. The person did not sustain a physical injury; or
        iv. On that or an earlier occasion, the person had consented to engage in a sexual act with the accused person or someone else.[16]

75. Given that the law on consent has now changed,[17] in our view there should be a mandatory jury direction that outlines that a person is only to be regarded as having consented to a sexual act when there is informed agreement that is freely and voluntarily given and is communicated by saying or doing something.

76. Further, we believe there should be legislation to the effect that a *Murray* direction cannot be given in a sexual offence proceeding. In word on word cases (as many sexual offence proceedings are) a *Liberato* direction is routinely given with a *Murray* direction. Where an accused does not give evidence, or does not participate in a police record of interview, a *Murray* direction is given.

[12] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80.
[13] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80A.
[14] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80B(2)(a).
[15] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80B(2)(b)
[16] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C.
[17] *Crimes Act 1900* (ACT) s 50B.

77. A *Liberato* direction,[18] appropriately modified by *De Silva v The Queen* (2019) 268 CLR 57,[19] is as follows:

    f. First, if you believe the accused's evidence/account relied on in their interview with police, obviously you must acquit;
    g. Second, if you find difficulty in accepting the accused's evidence/the account relied on by the accused in their interview with police, but think it might be true, then you must acquit;
    h. Third, if you do not believe the accused's evidence/if you do not believe the account relied on by the accused in their interview with the police, then you should put it to one side. Nevertheless, the question will remain: has the Crown, upon the basis of the evidence that you do accept, provide the accused's guilty beyond reasonable doubt?

78. A *Murray* direction,[20] typically sets out that where the prosecution seeks to prove the guilt of an accused based largely or exclusively on the evidence of one essential witness, unless the jury is satisfied beyond reasonable doubt that the witness is both an honest and accurate witness in the account they have given, the jury cannot find the accused guilty. This includes directing the jury that they should very carefully scrutinize and examine the evidence of the witness and satisfy themselves they can act upon it to the high standard required of a criminal trial.

79. In essence, the *Murray* direction is just a restatement of a fundamental principle of the criminal justice system – that in order to find an accused guilty of an offence, the trier of fact must be satisfied beyond reasonable doubt.

80. The *Murray* direction is dangerous in sexual offence proceedings, however, as it can have a similar effect to the *Longman* rule – that required judges to warn juries that it may be dangerous to convict on the complainant's evidence alone.[21] That is, it has the potential to undermine a sexual offence complainant's evidence and perpetuate myths about the reliability of women.[22] Further, it may be interpreted by jurors as an invitation to acquit.[23]

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[18] *Liberato v The Queen* (1985) 159 CLR 507.

[19] In *De Silva*, the High Court considered whether a *Liberato* direction was appropriate in a case where the conflicting evidence of an accused was not given on oath before the jury but rather in a record of interview. They determined such a direction was appropriate if there was a perceived risk the jury may think they have to believe the accused's account before they can convict, or if they thought it was enough to convict if they prefer the complainant's evidence over the accused's version.

[20] Derived from *R v Murray* (1987) 11 NSWLR 12.

[21] *Longman v The Queen* (1989) 168 CLR 70.

[22] NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposal for Sexual Assault Law Reform in NSW* (2004).

[23] Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper* (2009).

81. In NSW, sexual offences are prescribed offences in which the *Murray* direction cannot be given.[24] Whilst the ACT legislation largely mirrors that legislation (but falls short of setting out that a direction suggestion complainants are unreliable witnesses includes prohibiting a direction to the jury of the danger of convicting on the uncorroborated evidence of any complainant) the *Murray* direction continues to be applied in the ACT.[25]

JUDGE ALONE TRIALS

82. Ordinarily, in the ACT all sexual offence trials must proceed by way of a jury trial.[26]

83. However, there are some examples of where sexual offence trials have proceeded by way of a judge alone trial, including:

    a. During the height of the COVID-19 pandemic, when special legislation was introduced to allow sexual offence matters to proceed in front of a judge;[27] and
    b. In a historical sexual offence matter, where the Court determined the legislation was such that the accused could elect for a judge alone trial.[28]

84. We acknowledge there are dangers for sexual offence matters proceeding in front of a single judge, as opposed to twelve members of a jury, as it does not necessarily result in a broad cross-section of community values, and there are dangers that a single judge may hold misconceptions about the nature of sexual violence which are not countered by other members of a jury.

85. However, in our view, it is preferable for sexual offence matters to have the opportunity to proceed by way of judge alone trial, for several reasons.

86. First, in our experience, the perception that in sexual offence matters juries reflect a broader cross-section of society is misplaced. Often, women can be underrepresented on such juries. It is not uncommon for defence counsel to 'challenge' any young woman selected to sit on a jury, resulting in them being dismissed and skewing the makeup of the jury towards older, or male, members. Further, at the outset and before the jury is selected, members of the jury pool have

[24] *Criminal Procedure Act* (NSW) s 294AA.

[25] See, eg, *R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai (No 2)* [2020] ACTSC 274 where her Honour Murrell CJ directed herself that 'as the complainant was the critical prosecution witness and the only prosecution witness capable of giving direct evidence of the central events in question, I must examine her evidence carefully before deciding whether I accept the key aspects of her evidence beyond a reasonable doubt'; *R v Smith (a pseudonym)* [2020] ACTSC 142, where his Honour Mossop J gave himself a *Murray* direction.

[26] *Supreme Court Act 1933* (ACT) s 68B.

[27] *R v Vunilagi; R v Vatanitawake; R v Masivesi; R v Macanawai* [2020] ACTSC 225; *R v Smith (a pseudonym)* [2020] ACTSC 142.

[28] *DPP v Kerry (a pseudonym) (No 7)* [2023] ACTSC 65.

the opportunity to identify any reasons why they may not be able to sit or bring a clear and impartial mind. This can have the result of women who have been subjected to sexual violence themselves requesting that they be discharged and, often, the court and the parties will accede to this request.

87. Second, it is preferable that, if a decision is made based on misconceptions about the nature of sexual violence, the only way for this to be revealed to the parties (and the opportunity to appeal on this basis available) is through written reasons, which only a judge would provide. The criminal justice system already lacks significant transparency for people who have been subjected to sexual violence. A not guilty jury verdict, shrouded in mystery as to why, only deepens this lack of transparency.

88. In our view, the ability for sexual offence trials to proceed by way of judge alone trial should be made available, in certain circumstances. Such circumstances may include where both parties consent (with the prosecution's decision to consent being largely informed by the view of the person who has been subjected to sexual violence); or on application by a party where the court determines that it is in the interests of justice to do so.

CROSS-EXAMINATION AND THE LAWS OF EVIDENCE

89. In the ACT, the legislative provisions in place that are available to protect people who have been subjected to sexual violence during cross-examination include:

    a. A prohibition on unduly annoying, harassing, intimidating, offensive, oppressive, humiliating, or repetitive questioning;[29]
    b. A prohibition on questioning that is put to a witness in a manner or tone that is belittling, insulting, or otherwise inappropriate;[30]
    c. A prohibition on questioning that has no basis other than a stereotype;[31]
    d. A prohibition on cross-examination by a self-represented accused person;[32]
    e. A complete prohibition on questioning regarding a complainant's sexual reputation;[33]
    f. A partial prohibition on questioning regarding a complainant's sexual activities, outside of the specific sexual activities of the complainant with an accused person in the sexual offence proceeding.[34] Leave can be granted by the Court

[29] *Evidence Act 2011* (ACT) s 41(1)(b).
[30] *Evidence Act 2011* (ACT) s 41(1)(c).
[31] *Evidence Act 2011* (ACT) s 41(1)(d).
[32] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 48.
[33] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 75.
[34] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 76.

to lead such evidence where it would have substantial relevance to the facts in issue or is a proper matter for cross-examination.[35]

90. In our view, these legislative provisions alone have not shown to be sufficient to protect complainants during cross-examination.

91. Part of the reason for this is that both prosecutors, judges, and magistrates (where the sexual offence proceeding is heard in the ACT Magistrates Court) can either fail to object or to refuse to allow questioning that might be captured by the s 41 restrictions. This could be attributable to the fact that what is unduly harassing, offensive etcetera can very much be a subjective determination. However, it is perhaps more common that an accused party can be given significant leeway in their cross-examination out of concern that an appeal on the basis that a proper line of questioning was unable to be put and a miscarriage of justice occurred.

92. Whatever the true reason, which may vary from matter to matter, what is apparent to us is that the legislative protections for cross-examination of a sexual offence complainant are not always used to their full potential. In our view, this can be remedied by independent legal representation (including the ability of such representation to appear in court at hearing or trial) being available to all sexual offence complainants. Such representatives would have the ability to object to questioning on any of the basis identified above and could ensure the provisions are effectively utilized.

INTERPRETERS

93. It is the responsibility of the ODPP to provide suitable and adequate interpreters in criminal proceedings

94. Unfortunately, it is our experience that it is difficult to obtain interpreters with appropriate qualifications and that it can be necessary to fund the travel and accommodation of interpreters travelling from interstate. This is an expensive process.

PROTECTING COUNSELLING AND THERAPEUTIC RECORDS

95. In the ACT, there is an immunity for disclosing protected confidence material (counselling communications) in the course of a proceeding, without leave of the Court.[36]

[35] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 77, 78.

[36] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79D.

96. In the case of sexual offence prosecutions, this has been consistently understood as allowing the police to obtain counselling communications during an investigation, but not once a charge is on foot. The usual practice is that this evidence is not provided to the prosecution or defence by police, but that police notify the parties of its existence. The parties can then make an application to the Court, if they wish.

97. Issues have arisen with this practice, however. At times, police have provided this material to the prosecution – perhaps due to the complexity of the legislation and a gap in training. Ordinarily, a prosecutor from the SOU will thoroughly check material before disclosing to defence and any material that has been mistakenly provided is returned to police. Nevertheless, this in and of itself amounts to a breach of the legislation and the privacy of the person who has been subjected to sexual violence.

98. A further issue arises as the decision of whether or not to allow disclosure of a protected confidence (once it has been established there is a legitimate forensic purpose and it is arguable the evidence would materially assist the case),[37] requires a judicial officer to review the material.[38] This, again, breaches the privacy of the person subjected to sexual violence).

99. Perhaps the final, and most concerning aspect, of how protected confidence evidence is assessed is that the view of the complainant as to whether the material should be disclosed is just one of many considerations.[39] Often, the prosecution will proactively seek the views of the complainant, however, this is in the context of them being unable to provide any legal advice surrounding this. The effect of this is the complainant is making an uninformed decision.

100. There are multiple stages of how protected confidence material is dealt with that requires a complainant to have access to independent legal advice and representation:

a. During an investigation when police are requesting consent to access their counselling records;
b. During a prosecution, if police have inadvertently provided the material to the prosecution (and, more concerningly, if has been provided to the accused);
c. During any applications for leave to disclose protected confidence information. This would include the ability for a lawyer to make submissions on any such application on the complainant's behalf.

101. Legal advice and representation at each of the above stages would ensure a complainant was making decisions armed with all of the relevant legal information.

[37] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79F.
[38] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79G.
[39] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79H(3).

102. Further, and as a separate issue, we would question the extent to which protected confidence material assists in sexual offence proceedings. They are perhaps most helpful in historical sexual offence matters, where there have been minimal or no disclosures to other people.

103. However, we would suggest that often evidence could be lead of attendance, or engagement, with a counselling service (that in and of itself does not disclose the communication) that is supportive of a complainant's report of sexual violence. For example, if a complainant has reported they were sexually assault in January of 2019, they began attended a psychologist shortly thereafter and attended consistently for the next two years until a report was made to police, this actual attendance on a psychologist could be led as evidence that is consistent with a person having been assaulted in the way they allege they have.

EVIDENCE

Complaint Evidence

104. In the ACT, evidence of more than one complaint is admissible.[40] In our view, this is preferable as we know that the way a person discloses sexual violence often involves a 'testing of the waters'. That is, a person is not likely to make a full and complete disclosure the first time they tell another person about the sexual violence they were subjected to.

105. If only evidence of first complaint is led, this risks a line of cross-examination suggesting that any of the aspects of the sexual violence not disclosed to that person have been fabricated.

106. Regardless, complaint evidence can be weaponized on cross-examination. Any slight inconsistencies between who was told what, and when, can be used to suggest a complainant is not an honest or reliable witness.

107. It is therefore essential that if complaint evidence is relied on that expert evidence is also led going to the nature of disclosures by people who have been subjected to sexual violence.

[40] *Evidence Act 2011* (ACT) s 66.

Distress Evidence

108. Overall, we do think distress evidence should be admissible. It can be helpful to rely on to satisfy a jury that a person has been subject to the sexual violence they are alleging they were subject to.

109. As has been highlighted, however, the danger of a reliance on such evidence is that it perpetuates myths that 'distress' is the appropriate response to sexual violence.

110. Again, we would highlight the need for their to be fulsome expert evidence led in sexual offence matters setting out the myriad of psychological and emotional responses a person may have as a result of being subjected to sexual violence and, indeed, how this can change over time.

SPECIALIST COURTS, SECTIONS OR LISTS

111. At present, there are no specialist sexual offence courts, sections or lists operating in the ACT.

112. We understand that a Practice Direction is currently being drafted for a specialist Sexual Assault list in the ACT Supreme Court.

113. We believe such a list would be successful, if:

a. It is presided over by a judge with specialist, trauma-informed training;
b. It is attended by prosecutors and defence practitioners with trauma-informed training; and
c. There is the ability for lawyers for the complainant, or person subjected to sexual violence, to appear on their behalf and make submissions where appropriate.

114. Such training should address:

d. The process traumatisation and the impacts of sexual violence; and
e. How to integrate trauma-informed principles (safety, empowerment, choice, collaboration and trust) into the current criminal justice system and within the realms of each of their roles.

DELAYS

115. Generally, for sexual offence matters from charge to trial is a period of anywhere from 18 months to 2 years. This can easily blow out, where there are significant delays in obtaining certain evidence, or pre-trial applications.

116. This delay is significant, despite the existence of the specialist police team, SACAT, and the specialist prosecutors in the SOU. It is our experience that both specialist police and prosecutors in this space are overworked and at capacity.

117. We believe the proposal for the specialist sexual offence list will go some way in reducing delay, as it is the vision of the Court that this process encourages early consideration of the issues and negotiations, which can allow the parties to come to a resolution, without the need to proceed to trial.

118. Beyond this, police and prosecutors needs to be appropriately funded to ensure they can put the necessary resources towards investigating and prosecuting sexual offences.

GUILTY PLEAS

119. There have not been any recent changes in ACT sentencing laws that have impacted upon the preparedness of an accused person to enter pleas of guilty to sexual violence offences.

120. At present, there are no formal sentencing indication hearings in the ACT. There are various directions mention dates, which enable the parties to indicate matters that may be in dispute or how issues might be narrowed. We find the success of this process largely depends on the willingness of defence to engage with the prosecution, and this is not mandated.

SENTENCING

121. In the ACT, a victim of sexual violence may give a VIS (and watch sentencing proceedings) from a remote witness room, if they wish. This is an appropriate, trauma-informed way to enable the participation of a victim in sentence proceedings, with due regard had for both their safety (physical, and psychological), as well as respecting their choice.

122. However, frequently victims of sexual violence are curtailed in their further participation in proceedings given barriers in what they can include, and how they can express themselves, in their Victim Impact Statement.

123. Such a statement is defined as a statement 'made by or for a victim of the offence that contains details of any harm suffered by the victim because of this offence'.[41] This has been interpreted, and objections routinely put, on any information that does not detail harm suffered because of the offending as being inadmissible. This is devastating for people who have been subjected to sexual violence who have been given their first opportunity to speak openly in court, once their abuser has lost the presumption of innocence, and continue to be curtailed in how openly they can speak.

124. The Court has acknowledged that the purpose of a Victim Impact Statement is not purely evidentiary but also, in itself, 'represents an important aspect of participation by a victim in the sentencing process': *DPP v Mitchell (No 2)* [2023] ACTSC 118 (***Mitchell***) at [14], citing *R v Loeschnauer* [2022] 30 at [41].

125. As was noted by his Honour Mossop J in *Mitchell* at [14], the provisions that relate to Victim Impact Statements are such that 'much is left to the judgments of the course as to what use is to be made of the statements and, in particular, whether any findings of significance for the purposes of the sentences should be made on the basis of the contents of those statements'. In our view, it is more appropriate for the parties to enable most material to go before the court, for them to determine the appropriate weight to be given to it.

126. Whilst some judicial officers, prosecturos and defence counsel have adopted this approach, in our experience, the practice of frequent objections (or worse, still, prosecutors pre-emptively redacting portions of the statement – sometimes, without notification to the victim) continues.

127. A further issue with Victim Impact Statements is the inability for victims to comment on the harm(s) caused by the criminal justice system itself.

128. In *R v Iacuone; R v Duffy; R v JR (No 2)* [2014] ACTSC 149, two paragraphs of the Victim Impact Statement were excluded as they described harm caused by cross-examination, rather than because of the offence. His Honour Burns J considered, at [27], that 'any harm suffered by a victim as a result of the ordinary processes of a criminal trial will usually be too remote from the offence itself to be taken into account as harm occurring as a result of the offence.

[41] *Crimes (Sentencing) Act 2005* (ACT) s 47.

129. In *Mitchell*, Mossop J allowed the description of delay in justice system to remain in the Victim Impact Statement as his Honour considered that they were relevant, 'not because they involve criticism of the justice system but because they illustrate and explain the long period that the victims of the offending have had to endure prior to the vindication of their complaints'.

130. It will not always be possible, however, to draw a connection between a description of the harm suffered by the result of a process, or mistreatment, of the criminal justice system and the legislative requirements of a Victim Impact Statement.

131. In our view, it would be appropriate for victims when drafting Victim Impact Statements to be able to comment on the criminal justice process, separate to any link to the harm caused because of the offender. Many of our clients report that the criminal justice system is just as, if not more, traumatizing than the sexual violence they were subjected to itself. Victims should be able to comment on this to the parties, the court, and society more broadly. It is only when this information is included as party of an open justice process that it can be fully acknowledged and rectified.

CIVIL PROCEEDINGS AND OTHER JUSTICE RESPONSES

Intersecting legal needs

132. Often, while a police investigation is on foot, people who have been subjected to sexual violence wish to obtain an order from the Court prohibiting certain contact from the perpetrator of the violence (referred to as Family Violence Orders or Personal Protection Orders in the ACT).

133. Whilst there are services available in the ACT to provide legal advice and representation in obtaining such orders, these services do not extend to providing legal advice and representation in the criminal justice system. The difficulty with this is that, if people who have been subjected to sexual violence wish to obtain advice in multiple legal areas, they are required to disclose their experience of sexual violence multiple times to multiple people. This is a difficult and re-traumatising process.

134. The SVLS has operated on the basis that if we provide legal advice and representation regarding the criminal justice process, we will also provide advice and representation relating to Family Violence Orders and Personal Protection Orders. The benefit of SVLS operating in the Women's Legal Centre is that we are then able to refer clients to different practice areas in the same Centre, to address different

areas of legal need including, family law, migration law, and employment, discrimination and sexual harassment advice.

Civil litigation pathways

135. In our experience, our clients frequently wish to access alternative legal responses instead of, or after the resolution of, criminal justice processes. Commonly, they have questions surrounding civil litigation pathways.

136. It is trite to say that conducting civil litigation is not a cheap process. Unfortunately, there is no free, or low cost, civil legal service available in the ACT for people who have been subjected to sexual violence.

137. The ability for our clients to access pro bono or low bono civil legal assistance relies on our relationships with civil practitioners, and the willingness and capacity of them to take on such work.

138. The result of this is that our clients are often left feeling like the only option available to them is the criminal justice system.

139. Where our clients are acutely aware of the failings of this system for people who have been subjected to sexual violence, they often choose not to engage. They are left, however, wanting the perpetrator to be held accountable.

140. This has highlighted to us the need for there to be ready access to a variety of legal pathways for people who have been subjected to sexual violence.

WOMEN'S LEGAL CENTRE ACT

GPO Box 1726
Canberra City ACT 2601

P 02 6257 4377
E admin@wlc.org.au

1800 634 669
wlc.org.au