



WIRRINGA BAIYA

ABORIGINAL WOMEN'S LEGAL CENTRE INC

Wurringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

7 June 2024

Australian Law Reform Commission

By email: jrsv@alrc.gov.au

Dear Commissioners,

JUSTICE RESPONSES TO SEXUAL VIOLENCE: ISSUES PAPER 49

Wurringa Baiya Aboriginal Women's Legal Centre thanks the Australian Law Reform Commission (ALRC) for the opportunity to provide input into the questions raised in the Justice Responses to Sexual Violence: Issues Paper.

The Limitations of this Submission

Our submission to this Issues Paper is not as comprehensive as we would like. There are many aspects of the legal response that we would have liked to have addressed in more depth. While law reform is critical work, and we greatly value the opportunity to contribute to important law reform topics such as this, it is difficult to find the time to draft submissions in a busy schedule of client work, community legal education and multiple other advisory group meetings. Our Centre would greatly benefit from a dedicated and funded law reform solicitor.

At the time of writing this submission, our Centre is experiencing a significant increase in demand of services from women in custody. A large majority of our clients in custody have experienced sexual violence as children and in adulthood, and have complex legal needs that are inherently caused by the legacy of the resultant trauma.

Given the limitations of our written submissions, we would welcome the opportunity to have further discussions with the ALRC.

About Wurringa Baiya

Wurringa Baiya Aboriginal Women's Legal Centre is a state-wide community legal centre for Aboriginal women, children, and young people across New South Wales. The Centre's focus is assisting victims of violence, particularly those who have experienced domestic and family violence, sexual violence, and child sexual assault. We regularly provide legal advice to Aboriginal women who have experienced sexual violence in adulthood and childhood and provide casework support including victims support applications, redress applications, family law matters and child protection matters. Where resources allow, we also provide court support to Aboriginal women going through court processes.

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Wurringa Baiya is a non-profit organisation managed by Aboriginal women.

ABN: 60 382 206 441

Although our service is available to both Aboriginal and Torres Strait Islander women, children, and young people, close to 99% of our clients are Aboriginal. Accordingly, throughout this submission, we will refer to the issues and needs of Aboriginal women and their communities.

Our Governing Committee is comprised of Aboriginal women and our CEO is an Aboriginal woman. We currently have four Aboriginal-identified positions, and our legal staff consists of four full-time and four part-time solicitors.

Our submissions are informed by the Aboriginal women we work with, and the clients we support.

Wirringa Baiya is also a member of Women's Legal Services Australia (WLSA), and as a member of that network we contribute to their law reform submissions.

Summary

Crime statistics consistently reflect an overrepresentation of Aboriginal women and children as victims of sexual violence, when compared to their non-Aboriginal counterparts. As Aboriginal women, our clients have particular vulnerabilities that exist at the intersection of racial, gender and economic disadvantage. We acknowledge the strength and resilience of our clients, many of whom are the primary caregivers and breadwinners for multiple generations in their family and kinship networks.

Many of our clients have trauma histories which began when they were children. Many of our clients have been exposed in childhood to domestic and sexual violence from adults they should have been able to trust. Sexual assault and domestic violence for our clients exist as acts of violence within a cycle of abuse that can last for years. They have spent their lives developing strategies to keep themselves safe.

Our clients report sexual violence perpetrated in adulthood and in childhood. Sexual violence in childhood is often perpetrated against them by:

- Members of their family (kin and foster families);
- Employees of institutions, including juvenile detention officers; and
- Friends of the family.

Sexual violence in adulthood is often perpetrated against them by:

- Intimate partners;
- Employees of institutions, including correctional officers;
- Work colleagues; and
- People unknown to our client (although this is rare).

Our clients commonly endure sexual violence alone and do not report it to police or seek medical help for their injuries. Shame, a well-founded mistrust of white authorities, and a fear of community retribution are all factors which inhibit disclosure. Often, when clients engage with Wirringa Baiya, it is the first time they have spoken about what they have experienced. Other times, it is the first time that they are believed.

Our clients live across New South Wales and their access to mobile phone credit, email and computers varies depending on their age, level of literacy, level of digital literacy, financial situation and whether they are incarcerated. Internet connection or coverage depends on where they live. Some clients do not have access the internet or cannot use email. We communicate via letters which we read to them over the phone. For those clients who do not have mobile credit they rely on Wirringa Baiya to call them.

Clients in Custody

The vulnerabilities listed above are compounded for our clients in custody. We note that domestic violence and sexual violence is recognised as a key underlying driver of Aboriginal and Torres Strait Islander women's offending. Despite being less than 3% of the NSW population, Aboriginal women make up 40% of the female inmate population.¹

Women in custody have extensive histories of victimisation, which includes sexual abuse and sustained violence from intimate partners and carers. For many of our clients who end up in custody, some of their protective strategies have included drug use to 'numb the pain'. This drug use has then in turn regularly been a driving factor of their criminal behaviour.

There has been research to profile the experiences of Aboriginal women in custody. We refer to the findings of the Inspector of Custodial Services 'Women on Remand' report prepared in February 2020 and the ALRC's 'Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' report published in 2017.²

The ALRC's 'Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' report provides a comprehensive look at the literature in relation to the incarceration of Aboriginal women in chapter 11. It reported that Aboriginal women are generally incarcerated for short periods, cycling in and out of custody.³ They experience multiple disadvantages.⁴ A NSW study in 2003 showed that for Aboriginal women in custody at that time, 70% experienced child sexual assault, 44% experienced sexual abuse as adults and 78% experience violence as adults.⁵ They experience high levels of homelessness before and after incarceration, have low levels of education and literacy.⁶

There is insufficient access to psychological treatment of NSW Correctional Centres. Psychology treatment needs to be provided independently from CSNSW and Justice Health. There needs to be multiple psychologists, including Aboriginal and female psychologists, who have a particular expertise in working with victims of domestic and sexual violence and Aboriginal women.

¹ NSW Bureau of Crime Statistics and Research, 'Custody Statistics', *NSWBOCSAR* (Web Page, 4 15 May 2024) <

² Inspector of Custodial Services, *Women on Remand* (Report, February 2020); Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017).

³ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 351.

⁴ Ibid.

⁵ Rowena Lawrie, 'Speak Out Speak Strong: Rising Imprisonment Rates of Aboriginal Women' (2003) 5(24) *Indigenous Law Bulletin* 5.

⁶ Ibid.

The history of trauma that most women have in custody has been failed to be considered by most of their interactions in the criminal justice process. We see police and courts regularly misidentify Aboriginal women as perpetrators of violence, when they are in fact the victim. Once in custody, the system provides no real recognition of their status as victims, rather they're seen by CSNSW staff as 'criminals'.

Correctional Centres are by their very nature not trauma informed. Custodial settings have been primarily designed to house male offenders. Male offenders are frequently described as high risk, low need, whereas female inmates are described as high needs, low risk.

Inmates are exposed to countless, unnecessary strip searches, compounding their trauma. Countless, because CSNSW fails to log the number of strip-searches they carry out on women. And unnecessary, because of the limited amount of contraband actually found, and the other available methods (including body scanners and x-rays) by which to find contraband.

We have had women report to us that they are in serious psychological distress and acute distress at various times within custody. There is no support for this acute crisis. We know that if we report this to the Centre, the only option for the woman is for her to be put in an observation cell. Our understanding is that these are basic cells, with no other people and no personal effects. They are monitored by camera but not supported. This is not trauma informed, this is not healing, and this is not safe practice.

Currently, there are insufficient support services and protection for women in custody who are victims of crime committed upon them in custody.

When women in custody start to talk about their traumas, this might be the first time they're dealing with it without the self-medication of drugs and alcohol to help numb the pain. It opens old wounds in an unsafe place. There is no family support, insufficient psychological services and no safe places for women to sit with these feelings and heal from their traumas.

The Need for Primary Prevention

The focus of any justice response to sexual violence must include primary and secondary prevention strategies that address the underlying drivers of sexual and gender-based violence. Any primary prevention strategy must be multi-layered, addressing all domains of social and public life. Investment must be directed towards ensuring the implementation of the most effective social, legal and support systems to prevent sexual violence and protect women's rights to live lives free from gender-based violence. These strategies must seek to dismantle the patriarchal structures that provide space for sexual violence to occur, as well as the other forms of prejudice that contribute to sexual violence, such as racism, homophobia, and transphobia.

Crucially, any strategy must be culturally appropriate for, and designed to meet the needs of Aboriginal communities. For these communities, support services must be, at the very least, culturally safe, but they should ideally be provided by Aboriginal controlled services. To this end, our Centre has advocated for the establishment of a crime prevention unit in NSW, staffed by Aboriginal workers with different expertise, to focus exclusively on early intervention of sexual and domestic violence in

Aboriginal communities.⁷ This model should include Aboriginal specialists from a range of disciplines, including counselling, early-, middle- and adult- education, refuge services, child protection, law enforcement, legal, health, employment, and housing.

Any service must be locality appropriate. What may work for one community in a metropolitan area may be quite different for what works for different Aboriginal communities in rural areas. It is also important to not homogenise metropolitan, regional, and remote Aboriginal communities when designing support services, as there are variations in each.

Sexual Violence in the Context of Domestic and Family Violence

Sexual violence is frequently an element of broader patterns of coercive control, relationship dependence, power imbalances, and violence. However, sexual violence often gets lost in broader discussions about domestic and family violence. This is a complex issue that has previously been addressed by the ALRC in the ‘Family Violence – A National Legal Response’ report, which emphasised that cases of sexual violence in the context of family violence are ‘precisely [the] cases that the criminal justice system deals with least effectively’.⁸

For clients of our Centre, sexual violence is a common feature of the violence that they speak about when discussing domestic violence. This is often the most difficult to speak about and is generally the last to be disclosed. In some cases, actual or threatened violence occurred immediately before sexual violence to ensure the victim’s submission. However, for the most part, our clients describe a general fear to say no to sexual activity in a relationship where regular control, threats, physical abuse, and intimidation are used to instill and maintain ongoing fear. For Aboriginal women, threats of reports to the Department of Communities and Justice or removing children if they refuse their partner’s demands are especially powerful, given the complex family law system and the epidemic of Aboriginal children in the care system.

LEGAL ASSISTANCE FOR VICTIM-SURVIVORS

For victim-survivors, navigating a legal system that does not necessarily act in their interest can be a particular challenge.

The Victorian Law Reform Commission has acknowledged that victims have an ‘inherent interest’ in the criminal justice process, and that they must be recognised as key participants.⁹ Specialist legal assistance available to victims is crucial to ensure that their substantive legal rights are upheld, including their rights to communication and consultation by the police and prosecution, to privacy, and to be treated with courtesy, compassion, and respect. Victim-survivors with limited or no experience with the law may also need legal assistance to engage throughout the investigation and trial phases, for requests including special witness arrangements, drafting victim impact statements, or applications to protect confidential records. This legal representation should be available to a victim-survivor throughout the process, to ensure that their needs are acknowledged and met.

⁷ Wirringa Baiya Aboriginal Women’s Legal Centre, Submission to NSW Law Reform Commission, *Report 148: Consent in Relation to Sexual Offences* (29 June 2018) 3.

⁸ Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report No 114, October 2010) 67.

⁹ Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016).

For Aboriginal women in particular, independent legal representation is especially important, due to the heightened barriers they face throughout the justice system. A culturally trained independent legal advocate who is able to work with the victim to address their concerns about reporting, act as an advocate during police engagement, and support them through investigations and prosecutions, is an important step to assist victims who have difficulties navigating a system that does not effectively respond to their needs. Advice may also be useful to assist a victim to understand the consequences of reporting, particularly when sexual violence is occurring in the context of family and domestic violence, or to access alternative reporting options, as discussed below. This is an important part of the work our Centre does.

We also note that any number of civil and family law issues may be triggered by a sexual assault, including applications for victims support, civil remedies for compensation, AVO proceedings, and possible Family Court or Children's Court proceedings when there are children from a sexually violent relationship. Access to an independent legal advisor throughout the process can help a victim-survivor understand all their options and provide appropriate referral pathways where necessary.

There is widespread support for models of independent legal assistance for victim-survivors within Australia. For example, the Victorian Law Reform Commission's recent review of the justice system response to sexual offences highlighted a gap in legal assistance for victim-survivors, resulting in a lack of understanding of legal rights and options, and concluding that the Victorian Government should pilot a scheme of separate lawyers for complainants in sexual offence cases.¹⁰ This need for access to legal assistance and specialised legal advice was similarly recognised by the Meeting of the Attorneys-General as something that can provide victim-survivors with greater support, allowing them to better engage with the justice system.¹¹

Movements towards legal representation for victim-survivors is also reflective of broader trends within common law systems, where rights to separate representation have been introduced in relation to a variety of issues, including applications by defendants to introduce evidence about prior sexual history and disclosure of medical and counselling records.¹²

We initially support the recommendations of the Victorian Law Reform Commission, which proposed a model similar to a pilot program introduced in Northumbria, England.¹³ This program provided lawyers to advise on the reporting process, attend police interviews to ensure police followed procedures and victims were aware of their options, protect privacy rights during the investigation and disclosure, and act in the complainant's best interest in relation to the right to cross-examination on sexual history.¹⁴ Reviews of this program were positive, indicating that it was able to strike a balance between the accused's right to a fair trial and the rights of the victim.¹⁵ However, further targeted

¹⁰ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 263-7.

¹¹ Attorney-General's Department, *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault* (Meeting of Attorneys-General, 12 August 2022) 9.

¹² John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) 167-9, 171.

¹³ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 267.

¹⁴ Olivia Smith and Ellen Daly, *Evaluation of the Sexual Violence Complainants' Advocate Scheme* (Final Report, December 2020) 43-5.

¹⁵ *Ibid* 8.

consultation is needed to ensure that this model is appropriately designed for the needs of Aboriginal women.

Recommendation

Victim-survivors navigating the justice system should have access to independent legal assistance at every stage of a criminal proceeding, from the report to trial, and while addressing intersecting legal issues.

For Aboriginal women, this model must be culturally safe and appropriately designed for their needs. Further consultation with Aboriginal communities is required.

CRIMINAL JUSTICE RESPONSES TO SEXUAL VIOLENCE

We acknowledge that our Centre does not provide criminal law services and that we do not have experience prosecuting or defending sexual violence offences. Our submissions in relation to criminal justice responses to sexual violence are informed by our extensive experience working with and supporting women and young people who have experienced sexual violence, as well as our work with many other services, workers and members of the Aboriginal community who do the same. We have had very few clients experience a sexual assault trial, this is mostly because their experiences of sexual violence are not reported to the police for a variety of reasons, as discussed above and below. However, when they do report, they have mixed experiences with police.

For victim-survivors proceeding through the criminal legal system, this can often be a traumatic experience, due to their interactions with various members of the criminal legal system. For some time our Centre has chosen not to use the term ‘criminal justice system’ because for many of our clients it is not a system of justice. For this reason, we will refer to the criminal legal system.

A key part of the mistrust and fear surrounding the criminal legal process arises from the secondary victimisation that complainants experience, including having to revisit details of the violence, undergo invasive medical examinations, and give evidence in court.¹⁶ This can be compounded through a lack of properly trained and sensitive staff available to work with victims.¹⁷

For Aboriginal communities in particular, existing service responses have largely been culturally inappropriate and ineffective.¹⁸ This is as a result of a number of factors, including a lack of Aboriginal-specific support services, and a lack of Aboriginal staff working in mainstream services; a lack of reporting mechanisms in remote locations; a lack of integrated and coordinated service delivery practices; services that lack cultural awareness, or fail to consider local context, family

¹⁶ Jan Jordan, ‘Worlds Apart? Women, Rape and the Police Reporting Process’ (2001) 41(4) *British Journal of Criminology* 679; Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report, Commonwealth Office of the Status of Women, 2003); Matthew Willis, *Non-Disclosure of Violence in Australian Indigenous Communities* (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 3.

¹⁷ Matthew Willis, *Non-Disclosure of Violence in Australian Indigenous Communities* (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 3.

¹⁸ Kathy Prentice, Barbara Blair and Cathy O’Mullan, ‘Sexual and Family Violence: Overcoming Barriers to Service Access for Aboriginal and Torres Strait Islander Clients’ (2017) 70(2) *Australian Social Work* 241.

connections and responses that support healing; and unsustainable responses that rely on short-term government funding.¹⁹

Research suggests that levels of reported crime at least partly reflect the community's confidence in the legal system, and the system's willingness and ability to respond effectively, particularly in relation to police responses.²⁰ While incremental reform in relation to sexual violence has occurred across the country, designed to improve the prosecution of sexual assaults, there has been little change in conviction rates, and there are high attrition rates at all key decision-making points.²¹ Sexist views and rape myths persist amongst those who work in the criminal legal system (be it police, prosecutors, counsel and members of the bench), as well as within the community at large, from which juries are selected. Additionally, despite standardised laws and procedures, police, lawyers, and judges have a significant amount of discretion and autonomy when responding to cases involving sexual violence, leading to inconsistencies in outcomes.²²

Widespread and systemic change is required. Significant effort needs to be put towards improving responses to complainants at each point across the criminal legal system, and address the lack of comprehensive and robust understanding of how a victim's circumstances and trauma effect how they engage with criminal proceedings.²³ Any approach to reform must be guided by, and focused on imbedding, the principles of trauma-informed practices to ensure that services are delivered effectively and harm is minimised.²⁴ It is also crucial that attention is directed towards ensuring that services are culturally safe and able to respond to the unique needs of Aboriginal victims, and CALD communities more broadly, as well as to people with a disability and members of the LGBTQIA+ community. As new procedures and programs are introduced across the country, there must be continued consultation with community groups that work with victims of sexual violence to make sure these programs are able to meet the needs of victim-survivors.

¹⁹ Aboriginal Family Violence Prevention and Legal Service Victoria, *Strengthening On-the-Ground Service Provision for Aboriginal and Torres Strait Islander Victims/Survivors of Family Violence and Sexual Assault in Victoria* (FLPLSV Policy Paper Series, June 2010); Australian Institute of Health and Welfare, *Family Violence Prevention Programs in Indigenous Communities* (Resource Sheet No 37, December 2016); Queensland Centre for Domestic and Family Violence Research, *Prevention, Early Intervention and Support for Aboriginal and Torres Strait Islander People who have Experienced Sexual Violence* (Practice Paper, February 2019) 6.

²⁰ Carlos Carcach, *Reporting Crime to the Police* (Trends and Issues in Crime and Criminal Justice No 68, Australian Institute of Criminology, March 1997); Matthew Willis, *Non-Disclosure of Violence in Australian Indigenous Communities* (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 2.

²¹ See, e.g., Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39(1) *Crime and Justice* 565; Inga Ting, Nathanael Scott and Alex Palmer, 'Rough Justice: How Police are Failing Survivors of Sexual Assault', *ABC News* (online, 3 February 2020) <<https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>>.

²² Juliet Quilter and Luke McNamara, 'Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis' (Crime and Justice Bulletin No 259, NSW Bureau of Crime Statistics and Research, August 2023) 36.

²³ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (Report, 2020) 18-20, 170; Rita Shackel and Judy Cashmore, 'Research on Sexual Assault to Inform the Courts and Legal Professionals' (2022) 34(2) *Judicial Officers' Bulletin* 15.

²⁴ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (Report, 2020) 18-20, 170.

Reporting the Experience of Sexual Violence Safely

A victim's experience through the criminal legal system often involves making a report to police early in their engagement with the process. Ensuring that this is safe for victim-survivors is essential to increasing reporting of sexual violence offences and reducing the high attrition rates as matters progress. We note the very recent report released by NSW BOCSAR which reports that only 7% of sexual assaults reported to NSW Police resulted in a guilty outcome in court.²⁵ BOCSAR reports that 'the vast majority of sexual assaults do not progress any further in the criminal justice system beyond the initial police report. The largest point of attrition of sexual assaults from the criminal legal system occurs between the initial police report and the commencement of criminal proceedings'.²⁶

Many of our clients are reluctant to engage with the police due to a number of barriers, including their well-founded fear that the legal system will not provide a culturally safe, trauma informed or effective response. Our clients report that, in many cases, police do not respond to their calls for help, or cut off their reports of domestic violence (let alone sexual violence). When they are able to make a report, they experience a lack of available female officers, or officers that apply racist myths about Aboriginal women and do not believe their reporting of violence, persuade the complainant that the act of violence is too difficult to prove, or are misidentified as the aggressor.

Victims who had negative experiences, including police failing to act, responding slowly, disrespecting the victim, demonstrating cultural insensitivity or exhibiting victim-blaming behaviours, were less likely to make another report.²⁷ Victims of sexual violence offences are also significantly less likely to make police reports where they do not expect any action to be taken to punish the perpetrator,²⁸ or where they have a lack of trust in the criminal legal system.²⁹ When police do not respond in the way communities expect, or fail to support the person reporting sexual violence, it leads to distrust and perceptions that they are disbelieving, disinterested or inactive, which all contribute to non-disclosure.³⁰

This lack of confidence in the legal system's ability to result in positive outcomes is especially true for Aboriginal communities who have experienced racism and ill-treatment by police and other authority figures, as well as the effects of government decisions such as the forced removal of children.³¹ Research from across Australia indicates that sexual violence survivors have expresses an unwillingness to disclose incidents of sexual violence if they anticipate inadequate or culturally

²⁵ Brigitte Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System* (Crime and Justice Statistics Bureau Brief No 170, May 2024).

²⁶ Ibid 12.

²⁷ Aboriginal Family Violence Prevention and Legal Service Victoria, *Strengthening Law and Justice Outcomes for Aboriginal and Torres Strait Islander Victims/Survivors of Family Violence and Sexual Assault and Women and Children: National Policy Issues – A Victorian Perspective* (FLPLSV Policy Paper Series, June 2010); Matthew Willis, *Non-Disclosure of Violence in Australian Indigenous Communities* (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 5.

²⁸ Rachel Jewkes and Naeema Abrahams, 'The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview' 55(7) *Social Science and Medicine* 1231.

²⁹ Elaine Mossman et al, *Responding to Sexual Violence: Environmental Scan of New Zealand Agencies* (Ministry of Women's Affairs, September 2009).

³⁰ Matthew Willis, *Non-Disclosure of Violence in Australian Indigenous Communities* (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 6.

³¹ Matthew Willis, *Non-Disclosure of Violence in Australian Indigenous Communities* (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 3.

inappropriate responses from police,³² which is echoed in the experiences of clients of our Centre. This barrier was also identified in the recent interview study of complainants of sexual offences in NSW commissioned by BOCSAR: ‘This is my story. It’s your case, but it’s my story’.³³

Even when statements are taken, investigations of their sexual assaults (especially historical assaults), languish for months or even years, deemed too hard to prove, or neglected due to lack of detectives and/or police resources.



Challenges our Clients Experience when Reporting

Safety

In relation to Aboriginal women in particular, police often apply gender-based and racist myths about how they experience and react to sexual violence offences or are misidentified as perpetrators. This stereotyping by police can also be linked to the increasing incarceration rates of Aboriginal women.

The issues facing women trying to safely report to police are exemplified in Amira’s story:

³² The Aboriginal and Torres Strait Islander Women’s Task Force on Violence, *The Aboriginal and Torres Strait Islander Women’s Task Force on Violence Report* (Report, March 2000); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: ‘Little Children are Sacred’: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Report, 2007); Matthew Willis, *Non-Disclosure of Violence in Australian Indigenous Communities* (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 5.

³³ NSW Bureau of Crime Statistics and Research, *‘This is My Story. It’s Your Case, But It’s My Story’* (Interview Study, July 2023) 25-6.

Case Study: Amira

Amira approached us when she was 21. She had been in a relationship with her ex for nearly 3 years.

She reported that she had been experiencing sexual assaults by her partner multiple times a week over a two-year period. She would wake to find him sexually assaulting her, despite repeatedly telling him not to do this when she was awake. It wasn't until she spoke to a counsellor that she understood that what he was doing to her was sexual assault. There were also high levels of coercive control in the relationship.

She reported this to police at the police station. There were issues with the police response from the outset that made her uncomfortable:

1. Her initial reports were made over the counter at the station.
2. The officer she was talking to said they were the most junior in the station. He then asked her to hold on while he called a senior officer to come down and assist. Instead of coming down, the junior told our client that he would ask questions and send the notes up to the senior officer.
3. She told that officer that she hadn't changed her sheets since the last sexual assault that had taken place within the last week. They said they'd send an officer over and call her first. That night three male police officers came to her house. They attended without making an appointment with her.
4. They questioned her in the room where she had been sexually assaulted.
5. They were verbally abusive and dismissive towards her, asking why the sheets weren't already off the bed, telling her she was doing it all wrong. They went backwards and forwards – mucking around with bags, they didn't bring enough gloves and were trying to match things up.

She told us she 'felt traumatised by the police.' They were not telling her what's going on. No one was getting back to her, and they kept saying a detective will call but they didn't.

At this point, we advised about the NSW Charter of Victims Rights and how to make a complaint. Our client didn't want to do anything that could jeopardise the matters. She gave us permission to provide anonymous feedback in various stakeholders meetings but not to disclose the area she was in. She told us she'd think about doing a complaint when it's all over.

Later, she was told that her case had been assigned to a detective. She told us that he doesn't normally deal with domestic violence and sexual assault, he normally deals with more major crimes. She wanted to make a complaint about it but was wary to do so because she was concerned that it would make it harder for her to deal with them.

She was finally able to make a statement to the detective, nearly four months after first reporting the sexual assaults. Police charged him with two counts of sexual assault.

Months later our client asked the police that the matter not proceed for the time being. This was because she had had a falling out with the person who had previously been her support and was the first person to whom she had disclosed the sexual abuse. She felt uncomfortable now having that friend be a witness in the matter.

About 18 months after the sexual assault, she approached us saying her therapist had recommended EMDR therapy. She wanted to know if it would impact her ability to ever have him charged with sexual assaults. After discussions with experts, it was our advice that she if she chose to proceed with the recommended therapy, the defence could try to use this against her to discredit her.

Accessibility

A lack of available services, especially in regional and remote areas, combined with a lack of awareness about the services that are available, contributes to limited disclosures, particularly for Aboriginal victims.³⁴ For example, in Victoria, a lack of female forensic officers in regional areas has been identified as a barrier for Aboriginal women in reporting sexual violence.³⁵

The lack of accessible and safe reporting options is illustrated in Sam's story:

Case Study: Sam (part 1)

Sam was a young mother with a newborn and had just left a violent relationship when she accessed our service.

Sam struggled to give a statement to detectives about a sexual assault by her ex-partner. She went to her local police station to report the sexual assault and police told her that she'd have to make a statement to detectives, who worked out of a different station. Sam spent two months chasing up the detective team to arrange to give a statement. The detectives asked if Sam was sure she wanted to report, that it was going to be difficult, that she should think about it. Sam felt discouraged from reporting.

Sam reported sexual and physical assaults against her by her ex-partner. She also reported that her ex-partner had assaulted their child. The police applied for an AVO that only listed Sam, not the child. Police told Sam that they didn't want to name the child on the AVO as it would 'stop the father seeing his child' and that this was a family law matter. They said the child was protected by the AVO mandatory conditions. Sam made further disclosures of more violent sexual assaults against her and police applied to list her child on the AVO as a protected person.

Sam felt like she had to convince the police to take her statement and strengthen the AVO protecting her and the child.

³⁴ See, e.g., Aboriginal Family Violence Prevention and Legal Service Victoria, *Strengthening On-the-Ground Service Provision for Aboriginal and Torres Strait Islander Victims/Survivors of Family Violence and Sexual Assault in Victoria* (FVPLSV Policy Paper Series, June 2010); Matthew Willis, 'Non-Disclosure of Violence in Australian Indigenous Communities' (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 7.

³⁵ Aboriginal Family Violence Prevention and Legal Service Victoria, *Strengthening On-the-Ground Service Provision for Aboriginal and Torres Strait Islander Victims/Survivors of Family Violence and Sexual Assault in Victoria* (FVPLSV Policy Paper Series June 2010, June 2010); Matthew Willis, 'Non-Disclosure of Violence in Australian Indigenous Communities' (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 7.

Accountability

A key aspect of ensuring effective justice is delivered is the accountability of police forces for the decisions they make throughout the reporting and investigation of sexual violence offences.

Accountability frameworks must be introduced to address the systematic racism that continues to pervade police forces.³⁶

These should include independent research and evaluations to measure progress and identify systematic racism and bias within the police force, and mechanisms for independent reviews of police misconduct complaints.

The Experiences of Women Reporting Sexual Violence from Custody

As stated above, given the significant work we do with Aboriginal women in prison we wanted to bring to ALRC's attention the particular needs of this group of women.

There is a lack of knowledge among inmates of the services available to assist with complaints, including of services such as Wirringa Baiya Aboriginal Women's Legal Centre. Women do not know what they can do or how they can do it.

While information may be available on tablets provided by CSNSW, the tablets are not accessible to all inmates. The tablets require literacy and technological literacy. Many inmates have limited education, low levels of literacy, and high instances of disability and brain injury. Many of our clients also struggle with technology. While smart phones and tablets are commonly used in the wider community, in lower socio-economic groups, such as the inmate population, many women have not had access to this technology in the community.

The Ombudsman, the police and other services are available for women to call on the CADL to report. Those calls are limited to ten minutes. It is extremely unlikely that an Aboriginal women would pick up the phone and make a call to a service and make such a disclosure within a 10-minute call.

Aboriginal women are routinely let down by government systems. This is even more true for Aboriginal women in custody. We advise clients in custody and in the community about complaints processes.

Women in custody are fearful of being seen to be talking to the police. There is a strong culture of not being seen as a 'dog'. A client who recently did report sexual abuse by Astill, a former corrections officer recently convicted of sexually abusing at least 14 women in custody, was given a police event card but refused to keep it in her cell in case someone else saw it.

By the time women are in custody, their trust in systems has been so completely eroded it is unreasonable to suggest that a woman could, with no support, pick up the CADL phone and call the CSSL or the Ombudsman and report sexual assault. Aboriginal women need to have culturally

³⁶ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (Report, 2020) 103.

appropriate support to make these calls and to receive ongoing cultural support and healing in the time following.

We have spoken to women who have wanted to report to the police sexual assault that they have experienced in the community prior to coming into custody. However, they want an outside service such as our Centre to assist them doing this as they don't want CSNSW staff knowing this sensitive information.

Case Study: Talia

Talia was incarcerated. She wanted to report a sexual assault that had happened before she was taken into custody. She requested that we make a time for her to report and be in attendance when this statement was made, as her support person.

We spoke to the local police station to explain the situation and to request an appointment be made to facilitate Talia's report. We were advised that the police were unable to make an appointment, as their procedure to respond to incidents in order of priority meant that they would only get to her when they were able to.

When we emphasised Talia's right to have a support person with her when making the report, and the need to have a scheduled appointment to allow this to happen, the officer became hostile and accused us of making the situation about us. She would not explain the process for arranging to see someone in custody, and was not understanding of the client's need to have a support person with her when the report was made.

This was explained to Talia, who felt too discouraged to make a report from custody. She still hasn't reported this sexual assault, as a direct result of the response from the police.

Legal Education and Advice in Prison (LEAP) program

For victim-survivors of sexual violence who are currently in custody, it is especially important that services are developed to address their particular needs and challenges. The possibilities to improve experiences of sexual violence victims in custody are exemplified in the LEAP program.

We think it is important for ALRC to know the work of LEAP. In 2009, Warringa Baiya Aboriginal Women's Legal Centre, Women's Legal Service NSW and Western Sydney Community Legal Centre (then called Hawkesbury Nepean Community Legal Centre) established the LEAP program (Legal Education and Advice in Prison) in response to the high levels of unmet need amongst women in custody for family and civil law services.

The LEAP program is a unique specialist, unfunded legal program provided in partnership by our service in partnership with Women's Legal Service NSW (WLS NSW) and Western Sydney Community Legal Centre (WSCLC). The LEAP program aims are to:

1. Reduce reoffending rates for women prisoners by responding to their complex experiences of sexual violence and domestic and family violence.
2. Reduce reoffending rates for women prisoners by preserving and restoring relationships with children and working to break the cycle of children transitioning from care to criminalisation.

3. Provide culturally safe programs to Aboriginal women that recognise the importance of kinship and culture.

Since the program began, LEAP has assisted hundreds of women in custody and post release including those under supervision in the community. We assist women in custody across the state via telephone. LEAP provides regular face to face legal outreach clinics for women at the following prisons:

- Dillwynia Correctional Centre
- Emu Plains Correctional Centre (currently on-hold while centre is 'mothballed')
- Silverwater Women's Correctional Centre

Women can also make a free ten-minute legal call from all female correctional centres in NSW to our service by dialling #20 on the CADL and to Women's Legal Service by dialling #21.

LEAP receives referrals from a range of sources including individual women, Corrective Services staff, Department of Communities and Justice co-located child protection caseworkers, Women's Justice Network, Community Restorative Centre, Legal Aid, Aboriginal Legal Service and rehabilitation services. These referrals are ad-hoc and as a result of building a few really strong relationships with key individual workers in the centres. As staff at CSNSW move on, we lose that relationship and those referral pathways, and the women are left with less options and knowledge of their rights.

Women with Previous Involvement with the Criminal Legal System

There is an additional barrier for women reporting sexual violence to the police when they themselves have had previous interactions with the police as persons of interest in other matters. The people to whom they need to make the reports are the same people who have arrested them. In an increasing number of matters, they're the same people who have misidentified them as the perpetrators of domestic violence, when they have experienced significant domestic violence and sexual violence.

Requiring women to report to the police requires the woman to suspend their memories and traumas of their own arrests. It also requires the police to recalibrate their view of the woman and set aside their prejudices against her and see her as victim of sexual violence, not as a 'criminal'. In our experience the police do not do this well.

Case Study: Kirra

Kirra was the victim of a sexual assault that occurred in a pub. After reporting the sexual assault, and during the course of the police investigation, Kirra herself was charged with an offence and bail refused. Kirra had also previously been paroled for other offences. These offences, despite having no relation to the assault, were mentioned at multiple points in the police records.

The police rejected Kirra's version of events, on the basis that there she had been seen on CCTV kissing the accused, that she had followed him out of a room at the pub, and that there were condom wrappers on the floor of her room. Instead of supporting Kirra, the police listed her as a suspect for a public mischief offence.

In determining that Kirra's allegations had no merits, they emphasised that she had refused to make a signed statement or speak to investigators further. The police records also indicated the presence of drugs in Kirra's system and noted that she could be questioned about this if she chose to make a statement. They reported her to the Parole Board for a breach of her parole conditions.

Case Study: Lauren

Lauren was sexually, emotionally and physically abused by her husband, Alex for many years. Alex is a non-Aboriginal man. The abuse occurred throughout their entire relationship. Beyond the physical and sexual violence Lauren experienced, there was a pattern of behaviour that was covert, manipulative, and impossible to explain.

Lauren and Alex's relationship was characterised by control and shame. Alex had access to Lauren's social media accounts, her banks accounts, her outfit choices and even tracked her location through shared tracking devices on her phone. He alleged on many occasions that she was having affairs, which she vehemently denied over and over. The control worsened once they had children and Alex became abusive towards them.

Finally, on an occasion that wasn't particularly more violent than any other time, Lauren had enough. Alex ridiculed their child and threatened physical violence. Lauren threw herself in between them and assaulted him to stop his abuse. After this occurred, he uttered the words "I've got you know". A phrase that well articulates a perpetrator's terrifying control of their victims and the sense of fear that pervades all elements of a victim's life.

Alex called the police and Lauren was arrested for assault. She spent the day in custody while Alex was left alone with the children at home. The police also took out an AVO against Lauren. Alex then drained their bank account and hired a private lawyer to initiate family law proceedings.

It took Lauren two weeks after this incident occurred to start talking to the police about the abuse she suffered. Lauren was worried she could not articulate what she was experiencing, and importantly, that the police would not believe her. We supported her make a statement to police about the sexual violence.

Lauren grew up in a large Aboriginal family where there was domestic violence, and the police were often called to the house. She recalls her mother trying to tell the police what happened, but nothing happened and the abuse worsened.

The childhood trauma she experienced, and the repeated lack of action taken by the police, has affected Lauren's capacity to trust authority figures. In effect, Lauren's experience is one of silence.

Improving the Police Response

Wirringa Baiya supports the adoption of the various recommendations extracted in the Issues Paper, particularly specialist face to face training for police officers responding to reports made by victims of sexual violence, and the adoption of victim-centred and trauma-informed policies and procedures. We note that victims of sexual violence who experience positive experiences when reporting to police are

likely to make further reports in the future.³⁷ Research focusing on women experiencing sexual violence indicates victims in the general community are more likely to disclose incidents to the police if:³⁸

- The victims are believed and validated;
- Police show sensitivity to victims' specific needs;
- Police provide support and assurance of safety from perpetrators;
- Police give victims information about the justice process and their rights;
- Victims have an advocate or support person with them throughout the process;
- An officer or detective trained in sexual assault are immediately assigned to the case, and the same officer or detective supports the victim throughout the reporting and justice system process;
- Counsellors or sexual assault services work with the police; and
- The matter is likely to be investigated.

Specialisation of Policing

While we are aware that NSW Police Force has a Sex Crimes Squad, which has a number of investigation teams, these teams are centrally located and provide a 'major crime response to allegations of serious sexual offences that are protracted, complex and require a high-level specialist response'.³⁹ This means that many sexual assaults reported to police are not investigated by a detective that is a member of one of these specialist teams, such as in the case studies of Amira and Vanessa above. It is therefore the luck of draw as to whether a victim will be allocated a detective that has the requisite communication skills and specialist practice skills to investigate their complaint of sexual violence.

Recommendation

We recommend that each police area command have specialist investigative teams of detectives that investigate reports of sexual violence and domestic violence. These specialist teams should not only include detectives but other specialist workers, such as dedicated liaison officers. The focus of these teams should be delivering trauma-informed, safe and culturally sensitive responses to reports of sexual and domestic violence. Female officers should be integrated into these teams and available for victims to make reports to.

³⁷ Aboriginal Family Violence Prevention and Legal Service Victoria, *Strengthening Law and Justice Outcomes for Aboriginal and Torres Strait Islander Victims/Survivors of Family Violence and Sexual Assault and Women and Children: National Policy Issues – A Victorian Perspective* (FLPLSV Policy Paper Series, June 2010)

³⁸ Matthew Willis, 'Non-Disclosure of Violence in Australian Indigenous Communities' (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 7; NSW Bureau of Crime Statistics and Research, *This is My Story. It's Your Case, But It's My Story* (Interview Study, July 2023) vii. See also Women's Legal Service Qld, Submission to the Women's Safety and Justice Taskforce, *Discussion Paper 3: Women and Girls' Experiences across the Criminal Justice System as Victims-Survivors of Sexual Violence and also as Accused Persons and Offenders* (2022) 6.

³⁹ NSW Police Force, 'Sex Crimes' (Web Page)

<https://www.police.nsw.gov.au/crime/child_abuse_and_sex_crimes/sex_crimes>.

Dedicated Liaison Officers

Another step towards improving the reporting process for victims, and ensure their ongoing safety throughout the investigation process, is to make a Victims Liaison Officer available from the beginning, as soon as a victim presents to report.⁴⁰ Separate to independent legal assistance, the role of a VLO should be to provide a victim-centric and trauma-informed pastoral response to complainants. Their priority should be the wellbeing of the victim-survivor, providing referrals to support and safety services, serving as a consistent support person, and acting as the central contact-point throughout the investigation. For Aboriginal victims, female Aboriginal Liaison Officers should be available.

We note that there are moves towards embedding this support within police forces in common law countries. In England and Wales, independent sexual violence advisors (usually social workers or counsellors) are available to provide emotional support to people who have experienced sexual violence. A similar model has been piloted in Scotland.⁴¹ Independent evaluations have observed this program as ‘an example of a reform to a system that is effective, cost-effective and affordable ... [and its] establishment ... is hard to beat’.⁴² While this has been successful,⁴³ there are reform efforts underway to strengthen this model, focused on things like funding to expand these services and legislating their role.⁴⁴ Closer to home, the Queensland Police Service reported positive outcomes from their 12-month trial of dedicated SVLOs at two trial sites, including improved perceptions of the QPS response to victims, increased referrals offered to and accepted by victims, increased reports of sexual violence, an increased number of distinct victims, decreased withdrawn offences, and decreased unfounded outcomes, which led to the expansion of the SVLO role across the state and its inclusion as an action in the QPS’ *Sexual Violence Response Strategy 2021-2023*.⁴⁵

Recommendation

The SVLO program should be expanded, to ensure that all victim-survivors reporting sexual violence offences have access to this support throughout the reporting and investigation process. Specific attention must be directed towards recruiting female and Aboriginal SVLOs.

⁴⁰ Women’s Legal Service Qld, Submission to the Women’s Safety and Justice Taskforce, *Discussion Paper 3: Women and Girls’ Experiences across the Criminal Justice System as Victims-Survivors of Sexual Violence and also as Accused Persons and Offenders* (2022) 7.

⁴¹ Oona Brooks-Hay et al, *Evaluation of the Rape Crisis Scotland National Advocacy Project* (Briefing No 01/2018, Scottish Centre for Crime and Justice Research, January 2018).

⁴² Vivien Stern, *The Stern Review: An Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Home Office (UK), 2010) 105; Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Report, Victims’ Commissioner for England and Wales and University of Portsmouth, March 2016) 5; Oona Brooks-Hay et al, *Evaluation of the Rape Crisis Scotland National Advocacy Project* (Briefing No 01/2018, Scottish Centre for Crime and Justice Research, January 2018).

⁴³ Marianne Hester and Sarah-Jane Lilley, ‘More than Support to Court: Rape Victims and Specialist Sexual Violence Services’ (2018) 24(3) *International Review of Victimology* 313, 324–5.

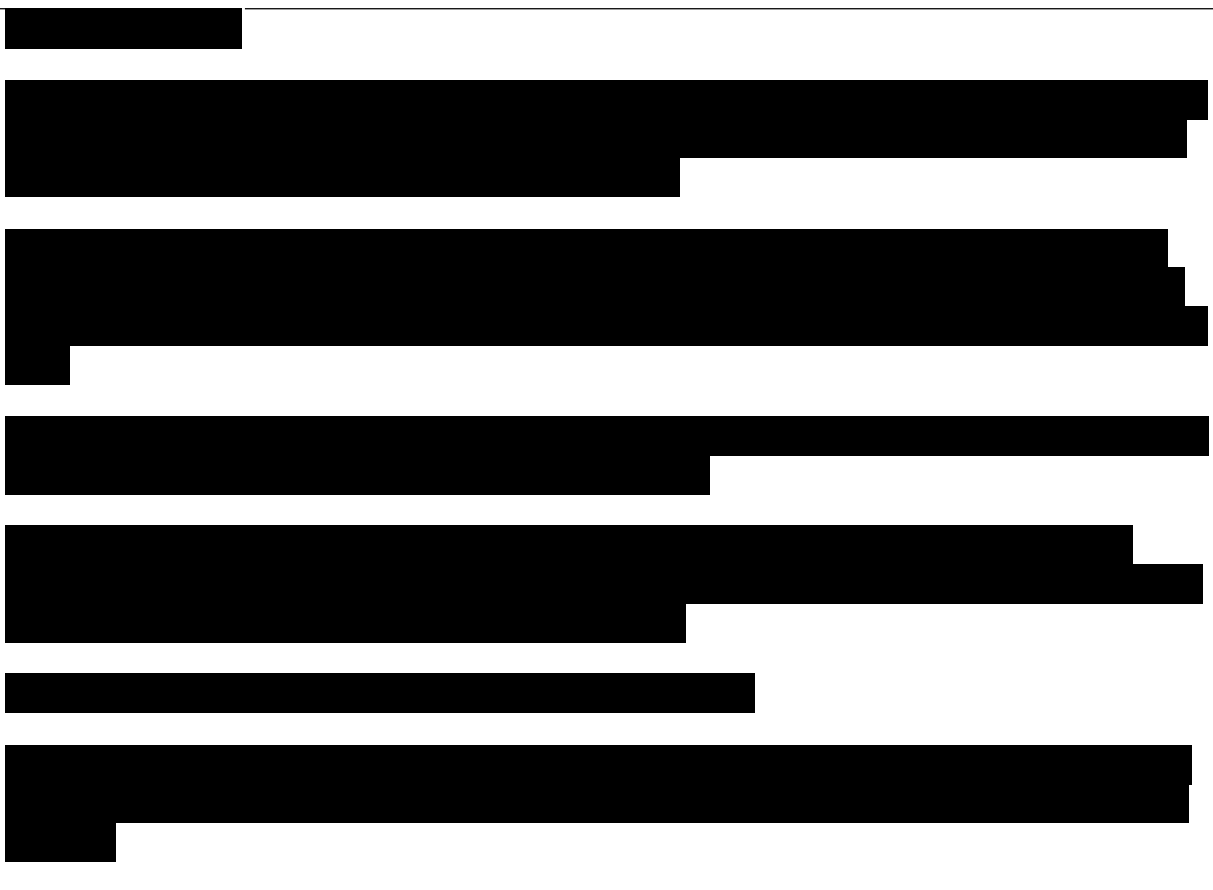
⁴⁴ Ministry of Justice (UK), *The End-to-End Rape Review Report on Findings and Actions* (Consultation Paper No 437, June 2021) [55]– [60].

⁴⁵ Queensland Police Service, Submission to the Women’s Safety and Justice Taskforce, *Discussion Paper 3: Women and Girls’ Experiences across the Criminal Justice System as Victims-Survivors of Sexual Violence and also as Accused Persons and Offenders* (2022) 19-20.

Training

A lack of properly trained and sensitive police officers available to work with victims compounds the secondary victimisation complainants experience during the criminal justice process.⁴⁶ For example, a study on the attitudes of Australian police towards sexual assault victim-survivors found that police were more likely to consider a victim to be credible if the sexual assault was perpetrated by an ex-partner rather than by a current partner or husband.⁴⁷

While we advocate for specialisation, we advocate that all police officers must have extensive and ongoing face to face cultural awareness training that educates officers about the specific experiences of Aboriginal victims of sexual violence offences. This should include an understanding of the intersectional challenges and discrimination faced by Aboriginal victims through a complex mixture of race, gender, age, and other attributes.⁴⁸ Police training about sexual violence (and domestic violence) needs to be developed and delivered with significant input from and co-facilitation with sexual, domestic and family abuse experts, Aboriginal cultural safety experts, disability experts, LGBTIQA+ experts, specialist legal services and informed by the lived experiences of victim-survivors.



⁴⁶ Matthew Willis, *Non-Disclosure of Violence in Australian Indigenous Communities* (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 3.

⁴⁷ Denise Livemore (2005), *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Australian Institute of Criminology, June 2005) 52.

⁴⁸ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (Report, 2020) 97.

[REDACTED]

[REDACTED]

Recommendation

Emphasis needs to be placed on ensuring all police force officers have face to face training in how to appropriately respond to victims of sexual violence. This training must address the specific experiences of a diverse range of victims, including Aboriginal women.

Current training of police must be evaluated for its effectiveness and any future training must also be regularly evaluated for its effectiveness. Furthermore, evaluation reports must be published.

Recruitment

While training is part of the picture, police forces need to be sure they are recruiting the best people.

There must be ongoing reviewing and monitoring of police recruitment policies and procedures to ensure racist, sexist, homophobic and transphobic views (both conscious and unconscious bias) are comprehensively tested for on recruitment, and throughout a police officer's employment. Such policies and procedures that test racist and sexist views should be developed by independent cultural safety experts and gender safety experts.

In addition, we support calls for police recruitment and retention strategies designed to increase and retain the number of Aboriginal women in leadership roles within the police force across local, regional and state offices.⁴⁹

Recommendation

There must be ongoing reviewing and monitoring of police recruitment policies and procedures to ensure racist, sexist, homophobic and transphobic views (both conscious and unconscious bias) are comprehensively tested for on recruitment, and throughout a police officer's employment. Such policies and procedures that test racist and sexist views should be developed by independent cultural safety experts and gender safety experts.

Police recruitment and retention strategies must be designed to increase and retain the number of Aboriginal women in leadership roles within the police force across local, regional and state offices.

⁴⁹ See, e.g., Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (Report, 2020) 103.

The Sexual Assault Reporting Option

Alternative reporting options should also be considered as a useful tool to expand reporting options, having ‘significant potential’ for meeting victim survivors’ therapeutic needs and assisting police.⁵⁰ Anonymous informal reporting options are available in NSW (SARO), Queensland (ARO) and the ACT (for non-recent sexual assault).⁵¹ Internationally, there has been a significant increase in the use of informal reporting options.⁵²

Although there has been limited research examining the efficacy of anonymous reporting options in Australia,⁵³ studies examining the impact of alternative reporting options on victim-survivors in Australia have highlighted that it is vital to have alternative reporting options to enable them to record their experience, seek out a supportive community, and get help and information.⁵⁴

Having access to an alternative reporting mechanism is particularly important for clients of our Centre who are reluctant to engage with police due to histories of police mistreatment, as this can facilitate access to victims support, without them being required to make a formal report or engage in the investigation or trial process.

We have supported many clients make a SARO and to date none have been anonymous. While apprehensive even doing this, they describe relief that they have finally been able to name their offender and put them on ‘the system’ with the understanding that a SARO will not trigger an investigation. Nearly all of our clients indicate on their SARO a willingness to be contacted by police if the police want to speak further to them about their disclosure, especially if it means assisting other victims in the investigation of the same offender.

Health Justice Partnerships and Integrated Responses

Victims of sexual violence need an accessible, trauma-informed and culturally appropriate place that they can go to report or disclose their experiences of sexual violence. This place may not always be a police station. In particular, Aboriginal victims of sexual violence offences are much more likely to turn to health services, family and kin, and elders for help, before the police.⁵⁵

We note that there have been efforts to introduce multi-agency integrated responses, both within Australia and overseas, as examples of models that improve outcomes for victims. Victoria has introduced seven Multi-Disciplinary Centres which provide co-located services (including specially trained police investigators, counselling and advocacy support, private counselling rooms and group therapy spaces, rooms for evidence to be recorded, clinic rooms for well-being and forensic medical

⁵⁰ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 151-4; Georgina Heydon, Nicola Henry and Rachel Loney-Howes, *Models of Reporting Sexual Assault to Police* (Critical Policy Brief, Gendered Violence and Abuse Research Alliance, 2021).

⁵¹ Georgina Heydon, Nicola Henry, Rachel Loney-Howes and Sophie Hindes, Trends and Issues in Crime and Criminal Justice No 678, Australian Institute of Criminology, November 2023) 2.

⁵² Ibid 3.

⁵³ Ibid 2.

⁵⁴ Ibid 3.

⁵⁵ Matthew Willis, ‘Non-Disclosure of Violence in Australian Indigenous Communities (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 5.

assessments, and remote witness facilities). Initial assessments of this system have been positive.⁵⁶ The pilot program also noted these systems could significantly contribute to a cultural shift in attitudes of police.⁵⁷ A similar model is used in the UK. Research from the UK suggests that there is a role for these multi-disciplinary teams, but these need to be supplemented by independent voluntary organisations (which have similar services, but no police presence), due to fear of police and/or child protective services.⁵⁸ This may be especially relevant for Aboriginal communities in the context of systematic child removal.⁵⁹

Recommendation

Resources should be directed towards developing and expanding multi-disciplinary response centres that assist victim-survivors report and access help for sexual violence in a trauma-informed and culturally safe environment.

Prosecution Responses to Allegations of Sexual Violence

Ensuring effective prosecution responses to allegations of sexual violence is a core component of improving the criminal justice system responses to these offences.

The challenges facing victims in navigating prosecution responses to sexual violence allegations is illustrated in Vanessa's story that was also referred to above and below.




⁵⁶ See Martine B Powell and Rita Cauchi, 'Victims' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2013) 14(3) *Police Practice and Research* 228, 239-40; Martine B Powell and Rebecca Wright, 'Professionals' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2012) 23(3) *Current Issues in Criminal Justice* 333, 338-43; Success Works and Department of Justice (Vic), *Sexual Assault Reform Strategy* (Final Evaluation Report, Department of Justice (Vic), January 2011) ii, 24-5; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 93-4.

⁵⁷ Martine B Powell and Rebecca Wright, 'Professionals' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2012) 23(3) *Current Issues in Criminal Justice* 333, 350.

⁵⁸ Amanda Robinson and Kirsty Hudson, 'Different yet Complementary: Two Approaches to Supporting Victims of Sexual Violence in the UK' (2011) 11(5) *Criminology & Criminal Justice* 515.

⁵⁹ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 96.



When considering whether to charge an offender, the DPP should be involved in reviewing and instructing on the most appropriate charges at an earlier stage, providing binding instructions. For example, ‘early investigative advice’ is used in England and Wales, which is a process that allows police to ask for guidance and advice in serious, sensitive, or complex cases (including all sexual assault matters), with a recent review finding promising results from the early stages of this system.⁶⁰ This will provide a vehicle for ongoing communication between police and the ODPP, and ensure that victims receive accurate information and appropriate support.

Sam’s story demonstrates the importance of minimisation of trauma to make the trial process as safe as possible for victims of sexual violence:

Case Study – Sam (Part 2)

Finally, after many months back and forth with police, Sam’s ex-partner was charged. He pleaded not guilty. A final hearing date was set for 18 months in the future.

Before the trial

The period between Sam’s offender being charged and the courts allocating a hearing date was extremely difficult for Sam. There was a lot of uncertainty during this time. It took several months for a trial date to be allocated. Finally, the trial was listed for a date 8 months in the future. Sam felt like she could not move on with her life until the trial was over.

Sam was introduced to her caseworker at the Witness Assistance Service (WAS). Sam had a lot of questions, and it was useful for her to have a point of contact with the ODPP through her Witness Assistance Support worker.

During this time, Sam told her WAS caseworker that she wanted to talk to the ODPP legal team about her statement and case strategy. She wanted to make sure they didn’t need anything else from her. Sam was repeatedly told that she had to sit tight and wait until closer to the trial.

Three weeks before the trial, Sam’s legal team advised her that she’d have to update her statement. Sam was upset, because she had asked about this several months prior, hoping to avoid exactly this situation. Sam had to amend her statement in a period of extreme anxiety and found this experience to be re-traumatising.

During the trial

Sam’s ex-partner was charged with sexually assaulting Sam. The trial took place approximately 18 months later. Sam gave evidence for three days.

⁶⁰ Ministry of Justice (UK), *The End-to-End Rape Review Report on Findings and Actions* (Consultation Paper No 437, June 2021) 43.

Measures that supported Sam during the trial:

- Witness intermediary – critically important support during her evidence
- Facilities outside the courtroom from which to give evidence
- Culturally safe WAS caseworker

Sam's perpetrator received a guilty verdict and is yet to be sentenced.

Victim Impact Statement

Sam wanted help to write her Victim Impact Statement. The WAS provided her with guides and information, but no one was available to sit with Sam support her to write it. Sam came to Wirringa Baiya and spent two hours drafting what she wanted to say in a culturally safe and supportive environment.

Additionally, the Centre supports the adoption of the recommendations identified in the Issues Paper, as key policies and practices that would facilitate improvements to the justice system for victims of sexual violence. In particular, we emphasise the need for a cultural capability plan that provides specific guidance and training to ODPP staff in relation to work with Aboriginal victim-survivors, along with broader ODPP guidelines to ensure that their work is being conducted in a trauma-informed manner.

Recommendation

ODPP guidelines must be updated to assist staff working with victim-survivors to respond in an effective, trauma-informed and culturally safe way. Consideration should also be given to adopting models used overseas, such as early investigative advice.

Specialist Courts

A common theme in recent reports of law reform bodies is the emphasis on the need for specialisation of staff involved in criminal trials for sexual offences.

Wirringa Baiya supports the call for the establishment of specialist sexual assault lists which respond only to sexual violence offences, that have their own rules and procedures, and that are staffed by trained judges, legal practitioners, and support staff. This should include mandatory training of all court personnel concerning trauma-informed principles.⁶¹

We refer the ALRC to the work of Professor Anne Cossins in her book *Closing the Justice Gap for Adult and Child Sexual Assault*, and support her model for a specialist court which includes:

- The creation of complainant-friendly environments in order to relax the formality of the court environment and to eliminate possible triggers for re-traumatisation;
- Allowing sexual assault complainants to use police interviews or pre-recorded evidence as their evidence in chief, as well as allowing pre-recorded cross-examination and re-examination;

⁶¹ Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan London, 2020) 639.

- Time-limited cross-examination and vetting of cross-examination questions in order to eliminate the cross-examination effect and achieve best evidence;
- The employment of a specialist examiner to prevent the cross-examination effect, thereby reducing re-traumatisation and achieving best evidence; and
- Restricting improper or aggressive questioning or questioning that reinforces rape myths.

This is a common theme in law reform reports; the suggestion that people who respond to sexual offences have some degree of specialised knowledge. A key benefit of specialisation is that the people who work regularly in an area will be more skilled in it. Specialisation can also support legal and practice reforms, such as training.⁶² Most of the submissions to the 2021 VLRC review supported an introduction of a specialist court or a specialisation within sexual offence lists.⁶³ The VLRC ultimately suggested the inclusion of sexual violence lists, to avoid the significant costs associated with sexual violence courts and judges burning out, among other issues.⁶⁴

In NSW for example, the Criminal Justice Sexual Offence Taskforce recommended a number of changes to improve experiences at court, including specialist case management hearings, specialist judges, specialist prosecutors, proactive case management, separate entrances to the court room, and access to CCTV, which have yet to be implemented in full.⁶⁵

New Zealand recently ran a successful trial of sexual violence specialist courts that operated within its District Court. This trial reported positive outcomes in relation to the victim's experience, time management, increase in guilty pleas, and a better quality of case review hearings and trials (including judges intervening more often to prevent unacceptable questioning).⁶⁶

Recommendation

Specialist courts or court lists should be introduced across Australia, that only deal with sexual violence offences. These should have their own rules and procedures, and should be staffed by specialised judges, legal practitioners, and support staff, including Aboriginal specialists.

Training of Judges

Across Australia, there are varied approaches to trial management by trial judges, particularly in relation to questioning by defence counsel.⁶⁷ The development of specific policies and training may improve the judicial response to sexual violence cases.

⁶² See Patrick Parkinson, *Specialist Prosecution Units and Courts: A Review of the Literature* (Research Paper No 16/26, The University of Sydney Law School, March 2016) 6–10.

⁶³ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 391-2.

⁶⁴ *Ibid* 394.

⁶⁵ Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Attorney General's Department of NSW, December 2005).

⁶⁶ Gravitas Research and Strategy Ltd, *Evaluation of the Sexual Violence Court Pilot* (Report, Ministry of Justice (NZ), June 2019) 3, 17, 79-80.

⁶⁷ Juliet Quilter and Luke McNamara, 'Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis' (Crime and Justice Bulletin No 259, NSW Bureau of Crime Statistics and Research, August 2023) 29.

In NSW, there is varied management by trial judges and considerable difference in how trials, particularly questioning by defence counsel, was managed.⁶⁸ Between 2014 and 2022, there was only limited use of s 41 of the *Criminal Procedure Act* across 302 sexual assault trials, despite the fact that it places a positive duty on the trial judge to disallow improper questions.⁶⁹

Additionally, despite the existence of the ‘rape myth correcting’ directions available to judges between 2014 and 2022, these are not implemented effectively.⁷⁰ The s 294 direction was available in 69 trials, but was only given in 26 (38%), despite 84% of these trials being instances where the complainant appeared to have been cross-examined in a way that suggested a delay or imperfect complaint.⁷¹ In most trials where the s 294 direction was used, this was presented as a brief postscript to the complaint direction (which is based off the problematic assumptions that s 294 is designed to counteract).⁷² This combination is likely to be confusing to jurors, and raises doubt about whether the intention behind the s 294 direction is being fully realised, especially given complainants are still regularly being cross-examined about their failure to respond.⁷³

The adoption of legislated guiding principles provisions, which focus on providing guidance to judicial officers about the interpretation or application of sections of an Act, may also assist members of the bench and other decision-makers (such as police consulting legislation) better apply updated consent and sexual violence principles, in line with contemporary understandings and values. Victoria was the first Australian jurisdiction to legislate sexual offence-specific guiding principles. S 37B of the *Crimes Act 1958* (Vic) sets out guiding principles for interpreting and determining sexual violence matters, which assist judges make decisions and give appropriate jury directions. These were added with the aim of ensuring the provisions of sexual offences laws are interpreted consistently with the goals of the legislation, giving added weight to jury directions, and underwriting the interpretation of provisions in the Act.⁷⁴ A similar approach has been recommended to be adopted in other Australian jurisdictions as useful for sexual violence court proceedings.⁷⁵

Judges in England and Wales must be authorised to try sexual offence cases, requiring judges to attend a Serious Sexual Offences course every three years, designed to equip them with tools to handle cases confidently and sensitively.⁷⁶ A similar system has been introduced in Canada.⁷⁷

In relation to Aboriginal victims, our Centre notes the conclusions drawn by the ‘Wiyi Yani U Thangani Report’, which emphasised the benefits of judicial officers engaging in cross-cultural training, including that judicial officers would develop a greater level of cultural awareness and understanding of social and historical influences on Aboriginal and Torres Strait Islander

⁶⁸ Ibid 29.

⁶⁹ Ibid 29.

⁷⁰ Ibid 29.

⁷¹ Ibid 29.

⁷² Ibid 29.

⁷³ Ibid 30.

⁷⁴ Victorian Law Reform Commission, *Sexual Offences* (Interim Report, 2003) [8.88].

⁷⁵ Queensland Sexual Assault Network, Submission to the Women’s Safety and Justice Taskforce, *Discussion Paper 3: Women and Girls’ Experiences across the Criminal Justice System as Victims-Survivors of Sexual Violence and also as Accused Persons and Offenders* (2022) 17-18.

⁷⁶ Joyce Plotnikoff and Richard Woolfson, *Falling Short? A Snapshot of Young Witness Policy and Practice* (Report, NSPCC, February 2019) 121.

⁷⁷ Department of Justice (Canada), Judicial Continuing Education in Sexual Assault Law and Social Context (Web Page, 4 February 2020) <<https://www.justice.gc.ca/eng/csj-sjc/pl/jt-fj/index.html>>.

disadvantage.⁷⁸ Although this recommendation was targeted at diverting offenders and addressing the disproportionate rates of Aboriginal people within the criminal justice system, a similar approach would be useful for victims of sexual violence offences.

Recommendation

All judges hearing cases involving allegations of sexual violence should receive appropriate training directed towards improving judicial understanding of sexual violence, cultural safety and trauma responses.

Training of Counsel

As part of a specialist court model, specific training for lawyers appearing in sexual violence cases should also be developed.

In Victoria, the OPP ran a Sexual Offences Interactive Legal Education Program as a pilot, involving professional development and training for lawyers. It included online modules, four interactive advocacy workshops, and confidential peer review after sexual offence trials. Although it was strongly supported and positively evaluated, it stopped after funding was exhausted.⁷⁹ New Zealand's Sexual Violence Court Pilot involved educating lawyers as a key aspect of the program, reporting positive outcomes, even amongst lawyers who initially resisted the training.⁸⁰

In addition to trauma informed practices, it is essential that any model of specialisation adopts a culturally sensitive perspective that is able to respond to the unique circumstances and presentations of Aboriginal victim-survivors. For example, this should include cultural competency training that equips practitioners with a strong understanding of the transgenerational trauma experienced by many Aboriginal people, and how the impact of Australia's history has resulted in profound levels of mistrust of government, the legal system, and mainstream services by Aboriginal communities.

An acknowledgement of the significant barriers, deep shame, and fears that Aboriginal women experience when disclosing sexual violence must also be at the forefront of training, to ensure that it effectively serves Aboriginal communities. Legal practitioners and judges need to understand how those who have experienced trauma may present when being interviewed or providing evidence, and how this is compounded by transgenerational trauma.

Recommendation

All legal practitioners appearing in cases involving allegations of sexual violence should receive appropriate training directed towards improving their understanding of sexual violence, cultural safety and trauma responses.

⁷⁸ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (Report, 2020) 7.

⁷⁹ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) [4.72].

⁸⁰ See Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 403.

Improving the Experience of Victim-Survivors throughout the Trial Process

In the absence of a specialist court model, or while further consideration is given to its adoption, attention must be directed towards improving the experiences and safety of complainants giving evidence in trials concerning sexual violence offences.

Provisions for Witnesses

For complainants who give evidence in sexual violence offence trials, they experience a process that is not victim-centred, which often leads to secondary traumatisation on the witness stand. Efforts to improve complainants' experiences through the justice system is crucial to improving reporting and conviction rates, by promoting safety and minimising the re-traumatisation that victims expect to experience in court. The special measures identified in the Issues Paper, most of which have been implemented nationally, go some way to assist victim-survivors navigate giving evidence in the safest way possible.

We support the commitment of the Attorneys-General to develop a national approach to education and training to foster an informed, shared understanding among judicial officers, legal and justice sector professionals of the common myths and misconceptions about sexual assault.⁸¹ This is a first step in the system-wide change to policies and procedures that is required to minimise the re-traumatisation of sexual violence victims in criminal trials, however continued effort must continue to be directed at this issue, guided by trauma-informed principles and with cultural safety at the forefront.

However, entrenched harmful beliefs and court practices continue to inform how sexual assault trials operate. The recent sexual assault trial study commissioned by BOCSAR showed that, while examination of complainants has improved, they are still routinely questioned in ways that place them at the centre of intense scrutiny and judgement that is underpinned by rape myths and associated assumptions about the attributes of a 'real' rape.⁸² This is illustrative of limited practical change, despite significant law reform.⁸³ The authors of this report makes a number of recommendations for reform which includes introducing ground rules hearings for all sex offence hearings in NSW.⁸⁴ In the absence of specialist courts ground rules hearings should be introduced as a minimum.

Recommendation

Protections for witnesses involved in sexual violence cases should continue to be reviewed and developed to prevent entrenched rape myths leading to secondary traumatisation of victims and dictating the outcomes of trials. At a minimum, this should include the adoption of ground rules hearings.

⁸¹ Attorney-General's Department, *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault* (Meeting of Attorneys-General, 12 August 2022) 9.

⁸² Juliet Quilter and Luke McNamara, 'Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis' (Crime and Justice Bulletin No 259, NSW Bureau of Crime Statistics and Research, August 2023) 35.

⁸³ Ibid 35.

⁸⁴ Ibid 38-40.

Protecting Counselling and Therapeutic Records

For many of our clients, counselling is an important step in promoting their recovery after experiencing sexual violence. We also note that these records form a key aspect of claims for victims support, which is often the only remedy our clients can access after experiencing sexual violence.

We support calls by organisations such as Women’s Legal Services Australia for greater legislative protections for counselling records, accompanied by regular training for police, legal practitioners and judicial officers.⁸⁵ Mechanisms for early referrals to specialist legal advice and representation for victim-survivors should continue to be expanded, providing support for complainants and therapeutic organisations to object to subpoenas of therapeutic records.

Jury Directions and Training

Despite legal reform, community values and rape myths held by fact-finders in sexual violence trials will influence their findings. These values and rape myths are particularly concerning in cases involving Aboriginal victims, as these can be compounded by racist views about Aboriginal women and promiscuity.⁸⁶

An Australian Institute of Criminology study showed that: ‘juror judgements in rape trials are influenced more by the attitudes, beliefs and biases about rape which jurors bring with them into the courtroom than by the objective facts presented, and that stereotypical beliefs about rape and victims of it still exist within the community. As jurors are members of the community and are randomly drawn in order to be representative of it, the two studies together indicate that successful prosecutions of sexual assault will remain low until we acknowledge that jurors interpret what they see in light of their own beliefs, experience and expectations.’⁸⁷

It is important that jury directions be given at the outset of proceedings in all sexual offence trials, as evidence shows that the potential for such directions to influence the outcome of a trial is dependent on their being given early. In a comparative study of 10 rape trials, which used the timing of jury direction as the key variable, early introduction of jury directions showed a higher conviction rate compared to when they were introduced later.⁸⁸ Repetition of jury directions also assists in jury comprehension.⁸⁹

⁸⁵ Women’s Legal Services Australia, Submission in Response to the 2022-23 Federal Budget, *Specialised and Trauma-Informed Legal Services Pilot for Victims and Survivors of Sexual Assault* (15 May 2023).

⁸⁶ Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Report, 1996).

⁸⁷ Natalie Taylor, ‘Juror Attitudes and Biases in Sexual Assault Cases’ (Trends and Issues in Crime and Criminal Justice, Australian Institute of Criminology, August 2007) 1.

⁸⁸ Emma Henderson and Kirsty Duncanson, ‘A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?’ (2016) 39(2) *UNSW Law Journal* 750, 759.

⁸⁹ Department of Justice and Regulation (Vic), *Criminal Law Review, Jury Directions: A Jury-Centric Approach* (Report, 2015) 9.

CIVIL PROCEEDINGS AND OTHER JUSTICE RESPONSES

Restorative Justice

We are aware that the limited evaluations of restorative justice in sexual violence offences have shown benefits for the victim and the offender, and that this system meets various justice needs, offering a ‘fairer, more satisfying, more respectful, and more legitimate’ process.⁹⁰ There is evidence that there are good grounds for considering the possibilities of restorative justice in cases of sexual violence.⁹¹

To date we have not had any clients who have participated in a restorative justice process for sexual violence. Our Centre is open to further discussions about restorative justice and would welcome a much better and deeper understanding of the benefits and disadvantages for Aboriginal people who have experienced sexual violence. We do not hold any firm views for or against such processes.

We understand that restorative justice processes may be either an alternative to a criminal legal trial or available to complainants post- sentencing or trial. While we have significant concerns about the impact of sexual assault trials on complainants and the trauma it causes, we are not suggesting that that the logical conclusion is that restorative justice is the appropriate alternative.

It is a given that any restorative justice model must be trauma-informed and do no further harm. We refer the ALRC to Professor Anne Cossin’s discussion of restorative justice in her book *Closing the Justice Gap for Adult and Child Sexual Assault* and the essential requirements of a trauma-informed model.⁹² We are not aware of any restorative justice processes for sexual violence that have been specifically designed and delivered by Aboriginal community- controlled organisations, or Aboriginal individuals. It is critical for our clients that any restorative justice model for sexual violence is culturally safe, developed by Aboriginal people for Aboriginal people and is gender safe.

Recommendation

Aboriginal communities should have an opportunity to consider the benefits and disadvantages of restorative justice for community members who have experienced sexual violence.

Any restorative justice model must be designed by Aboriginal community- controlled organisations and/or Aboriginal violence prevention specialists. Any such model must centre the input of Aboriginal victims, in particular Aboriginal women, with lived experience of sexual violence.

⁹⁰ Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016); Meredith Rossner, ‘Restorative Justice and Victims of Crime: Developments and Directions’ in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Routledge, 2017) ch 12, 238; Marie Keenan, ‘Training for Restorative Justice Work in Sexual Violence Cases’ (2018) 1(2) *The International Journal of Restorative Justice* 291, 291; Vince Mercer and Karin Sten Madsen, *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (Report, 2015) 12–13; Centre for Innovative Justice, RMIT University, *It’s Healing to Hear Another Person’s Story and Also to Tell Your Own Story: Report on the CLJ’s Restorative Justice Conferencing Pilot Program* (Report, October 2019) 17-18; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 190.

⁹¹ Clare McGlynn, Nicole Westmarland and Nikki Godden, ‘Is Restorative Justice Possible in Cases of Sexual Violence’ (SASS Research Briefing No 5, Durham University, November 2011) 1-2.

⁹² Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan London, 2020) 635-8.

Civil Litigation

Civil litigation can be an important justice option for victims of sexual violence, particularly for victims who want recognition of their harm but do not want the offender to go to prison, or where the beyond reasonable doubt threshold of a criminal trial is too high.⁹³ However, it has significant drawbacks, as it can be adversarial, costly, lengthy and re-traumatising.⁹⁴ It does not appear that this is a system that is widely used in common law jurisdictions, particularly against individual offenders (as opposed to institutional negligence claims).

We do not run civil litigation matters. The complexity, cost, and time-consuming nature of the work is beyond the resources of our community legal centre. In any event, most of the sexual violence experienced by our clients is perpetrated by individuals with few to no assets, and do not involve an institution. However, when a personal injury/tort claim is a viable option, we refer clients to firms that do run civil litigation matters (often referred to as abuse cases). These referrals to date have been for women who experienced sexual violence in childhood where an institution was involved.

Our clients report back to us their engagements with private law firms and the legal process, and there have been mixed experiences. Given this work is mostly done by firms who take on matters on a no win-no fee cost basis, there are lengthy and confusing costs agreements to be signed by clients. These proceedings take many months, even if they are negotiated settlements. Some clients do not find their engagement with the lawyer or the legal team running their matter as positive. Some clients find their lawyers are time poor and do not always prepare their clients well for the stages of the matters, or do not appreciate the literacy and digital literacy hurdles for some of our clients. Some clients are deeply disappointed by the sums of money they obtain on settlement.

Case Study - Melissa

We have been working with Melissa who has been in and out of custody her whole life, including as a juvenile. Almost all of her offending has been in relation to theft and property offences. She has experienced many acts of sexual and domestic violence against her. After working with her for four years, she disclosed that she had been sexually abused while in Juvenile Detention by one of the guards.

She wanted to pursue civil action. We assisted her by organising a firm to act for her in this matter. While at the outset the client was happy with that firm, it became apparent that we needed to continue to be engaged in this matter too. We would regularly check in with the client about how the matter was progressing and provide the client's contact details to the firm. On one of these check ins, the firm told us that the client had a medico legal appointment booked that week. The client did not know that and had not been advised such. She did not know what that appointment was going to entail and she had not seen a copy of her statement for a long time.

We were able to get her statement from the firm but there was insufficient time to mail it to her and correspondence sent via emails to the correctional centre is then accessible by staff. Due to the sensitivity of the statement, we went to the centre she was in and provided it to her confidentially. We

⁹³ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 230.

⁹⁴ Ibid 233.

were able to emotionally prepare her for the meeting and line up counselling with her psychologist for after the appointment.

The client was then moved to a different part of the centre. When the person conducting the medico legal appointment called that day, they were told she was unavailable. No-one told this to the client. She called us later in the day, wondering what had happened. She had prepared herself mentally as best she could for the appointment, but no-one called her.

For some of our clients, we have offered support throughout the civil litigation process working in collaboration with the private solicitor running the matter, which has ensured the client remains engaged. Ideally, clients pursuing a civil claim would have a team of support workers to assist lawyers. We note the VLRC has recommended that plaintiffs have access to legal representation through a legal aid scheme or another body, with funding directed particularly towards cases which raise important systematic issues, or where the victim faces multiple barriers to justice and their case has reasonable prospects of success.⁹⁵ Any such scheme would need to include support teams for the plaintiff, including Aboriginal specialist workers.

Time Limits for Civil Claims

The Royal Commission into Institutional Responses to Child Sexual Assault documented how common it was for victims of child sexual abuse to take many years, if not decades, to disclose their sexual abuse.⁹⁶ The revelations and learnings from this Commission were instrumental in persuading the NSW Government to amend the *Limitation Act 1969* (NSW) to remove any time limits for personal injury claims for child sexual abuse.⁹⁷

Many of our clients who experienced sexual violence in adulthood also take many years, in some case decades, to make disclosures for similar reasons. The same barriers exist when disclosing sexual violence by a perpetrator that was an employee of an institution such as a correctional officer, essentially a person in a position of authority. Yet the time limit for bringing a civil claim for the sexual assault of person 18 years or older is 3 years.

Case Study - Sharon

We met Sharon in 2023. She reported to us that in 2008 she was sexually assaulted by a correctional officer when in [REDACTED]. She provided very specific details about the sexual assault.

She has been out of custody since that time, terrified to return. She hadn't reported to anyone. Now that she was back in custody she had become extremely triggered by the violence and was experiencing heightened CPTSD symptoms.

⁹⁵ Ibid 235-6.

⁹⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report – Volume 4: Identifying and Disclosing Child Sexual Abuse, 2017).

⁹⁷ *Limitation Act 1969* (NSW) s 6A.

She reported the sexual assault to us, wondering if there was anything that she could do. She also reported to CSNSW for them to follow their internal processes. At the time she reported, there was an inquiry into the sexual misconduct of former officer [REDACTED].

We sought legal advice from two separate experts inquire about the possibility of civil action. Both experts advised that she would be unable to pursue civil action due to both the expiration of the time limit, and also provisions limiting actions that arose from actions within a correctional centre.

She is also out of time for an application for NSW victims support, with their strict 10 year time limit.

We have spoken to a number who were sexually assaulted by the NSW Corrective Services' officer Wayne Astill. Astill's prolific offending triggered a special ministerial inquiry.⁹⁸ Many of the women we have spoken to were sexually assaulted by Astill more than 3 years ago. We have referred these clients for advice in relation to the class action against the State of NSW, but it remains to be seen whether they will be granted leave to join the class action.

Recommendation

Each jurisdiction should remove time limits for making a personal injury claims for sexual violence of any kind, but at the very least for claims against person in a position of authority.

Compensation Schemes

Redress

We have assisted clients with applications under the National Redress Scheme, pursuant to the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth). This has been for clients who have received advice from personal injury lawyers that a civil claim would be too challenging to pursue, or clients who were too stressed by the prospect of litigation and all its complexities.

Our clients mostly need help with completing the sizeable application form. Our Centre also assists in locating any records from the institution that shows the link between the client and the alleged perpetrator to show that the institution was primarily responsible for our client having contact with the perpetrator, as required by the scheme.

One of the major benefits of the scheme is not requiring an applicant to provide any independent evidence of harm caused by the sexual violence. While an applicant is asked to identify the impact of the abuse on the form, they are not insulted and traumatised with any requirement to prove that the sexual violence had any impact. The scheme rightly understands that traumatic harm is a given when a person has experienced sexual violence.

We also note that the standard of proof is reasonable likelihood that someone experienced sexual abuse, which is lower than the civil standard on the balance of probabilities, thus making the sexual

⁹⁸ Astill Inquiry, 'Inquiry into Offending by Former Corrections Officer Wayne Astill at Dillwynia Women's Correctional Centre' (Web Page, 2024) <<https://astillinquiry.dcj.nsw.gov.au/>>.

abuse less difficult to prove than in other compensation schemes, including the NSW statutory scheme (as discussed below).

Victims Support

NSW has a statutory scheme which makes support available to victims of violence pursuant to the *Victims Rights and Support Act 2013* (NSW) ('*VSRA*'). The agency delegated with overcoming this scheme is Victims Services, within the NSW Department of Communities and Justice. The scheme is known as the Victims Support Scheme.

The support provide by the Scheme is often the only form of financial assistance and recognition that our clients will receive for the violence they experience. It is the backbone of the supports available in New South Wales. Without it, a client is left to navigate to a patchwork of slow and locally administered programs. The assistance our clients receive under the Scheme can sometimes make the difference between whether they leave violence or remains trapped and exposed to risk.

A Background Paper circulated as part of the NSW Statutory Review states that 58% of all applications received by Victims Services relate to acts of domestic violence, 16% relate to child sexual assault and 6% relate to sexual assault. The majority of our clients' applications are for acts of violence which include domestic violence, sexual violence and child sexual assault. Frequently our client experience sexual violence within the context of an intimate partner relationship.

Immediate Needs Support Payment (INSP)

Separation is a risk factor for severe, life-threatening or lethal violence for a person leaving a domestic violence relationship.⁹⁹ Clients leaving violence need urgent practical support to relocate or install security measures. The Immediate Needs Support Package (INSP) is, in our experience, the most effective form of financial assistance available to keep our clients safe. It is the most accessible and has the quickest processing times.

While the INSP is available to applicants who have experienced domestic violence, which may include sexual violence, it is not available to a person who has experienced sexual violence in a non-domestic violence context and in need of urgent assistance. In the absence of qualifying for an INSP, a person who needs urgent financial assistance to say move or upgrade their security, must provide either a receipt or invoice for the service or product with an application for financial assistance.

Case Study: Mary

Mary, a woman in her early 60s, was sexually assaulted by a neighbour who forced her way into her property. We assisted Mary with an application with a recognition payment and she was successful. Mary was not able to live in her apartment block anymore and was able to secure a reasonably urgent transfer. Because the sexual assault was not in the context of domestic violence she was not entitled to apply for INSP. Due to the urgency of the move, she used her recognition payment to pay for a removalist, and then sought reimbursement from Victims Services.

⁹⁹ Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (2021) 4.2.

Due to high anxiety caused by the trauma of the sexual assault, and the lack of security doors in her new place, she also sought financial assistance for security doors on her new place. This was another administrative process she had to pursue to seek financial assistance.

The Escaping Violence Program, in our experience, takes far too long to administer. Additionally, while it is available to a person escaping domestic violence it is not available to someone who needs assistance to relocate if they have experienced sexual violence in non-domestic violence context, such as in Mary's case.

The Centrelink Crisis Payment is only available to existing Centrelink recipients who contact Centrelink within 7 days of leaving violence and it is only equal to a week's Centrelink income.¹⁰⁰ Once again, it is only available to people who have experienced domestic violence or family violence. In any case our clients, in the trauma and confusion of this time, often miss this window to apply. Other localized programs are often at capacity and cannot assist our clients, who live across New South Wales. The Victims Support Scheme is a critical safety net for our clients leaving violence.

Recognition Payment

Recognition payments awarded under the Victims Support Scheme are often the only way our clients will receive any acknowledgement of their trauma. They cannot afford to seek remedies via civil litigation and the perpetrators of their abuse rarely have any assets even if they could.

Sexual Violence

As described above, many of our clients' experiences of sexual abuse are unreported. The Victims Support Scheme is the most effective way of securing assistance and recognition for our clients who have experienced sexual violence.

For many of our clients, their experiences as survivors of adult or child sexual assault have impacted their whole lives – they might be unable to work, suffer mental health problems, self-medicate with alcohol or drugs. Their capacity to participate in their community and maintain a job is severely reduced. A recognition payment is the most accessible way to recognise their trauma and the impact it has had on their life.

While it is the most accessible scheme, particularly compared to civil litigation options, the amounts payable are small. The maximum amount a victim of sexual violence can be paid to recognise their trauma is only \$10,000¹⁰¹. Under the previous scheme, that ceased in May 2013, it was \$50,000. This compares to the maximum of \$150,000 under the National Redress Scheme.

Recommendation

The NSW Victims Support Scheme must be amended to significantly increase recognition payments payable to victims of sexual violence.

¹⁰⁰ For further context, the weekly jobseeker payment for a single woman with dependent children is \$345. See Services Australia, 'How Much You Can Get' (Web Page, 2024) <<https://www.servicesaustralia.gov.au/how-much-jobseeker-payment-you-can-get?context=51411>>.

¹⁰¹ *Victims Rights and Support Regulation 2019* (NSW) cl 41(c).

Legal Assistance to Access the Victims Support Scheme

As mentioned above our clients live across New South Wales and their access to mobile phone credit, email and computers varies depending on their age, level of literacy, financial situation and whether they are incarcerated. Internet connection or coverage depends on where they live. Some clients do not have access the internet or cannot use email. We communicate via letters which we read to them over the phone. Some clients do not have mobile credit to call our service and rely on Wirringa Baiya to call them.

The racial, gendered and economic vulnerabilities of our clients mean that the Victims Support Scheme is not something they have capacity to navigate alone. Our clients need assistance accessing and filling out Victims Services forms, arranging counselling, accessing their records, understanding legislated time limits, making internal reviews, understanding the merits of their claim.

Time Limits for Victims Support

We have significant concerns about the strict time limit for victim/survivors of domestic violence, adult sexual assault and child abuse imposed under s 40 of the VSRA. Ten years for an application for a recognition payment is not sufficient time for these groups of victim-survivors.

Many of our clients struggled with the consequences of the violence for many years before reaching a point where they could seek compensation and counselling. Some describe a life of half living, feeling numb and distant from their children and friends, or highly anxious, phobic and housebound; unable to talk about the terrible trauma they endured. Other clients self-medicated with alcohol or drugs for years to block out the memories of their abuse.

A report commissioned by the Department of Communities and Justice and produced by PricewaterhouseCoopers, *NSW Attorney General and Justice: Review of the Victims Compensation Fund*, 2012 (the PwC report), stated the following:

We recognise that any change in eligibility requirements would have a significant impact on victims. In particular, imposing stricter time limitations would have a significant impact on victims of violence which occurred many years ago, in particular those related to child sexual assault and domestic violence. We acknowledge that as the societal attitude to violence has changed and victims of historical claims have had time to reflect and come to terms with their past trauma, and feel more supported by changing cultural attitudes, they have started to come forward in increasing numbers and report these acts of violence.

It has taken a long time for many Aboriginal victim-survivors to feel safe and secure to talk about their experiences of sexual and domestic violence, given the well-documented and tragic history of forced removals of children and deaths in custody.

It is not clear from the PwC report why a cap of ten years was considered appropriate, despite acknowledging that the last Chairperson of the now redundant Victims Compensation Tribunal had recommended 20 years. We understand that no other state has such an absolute cap on out of time applications, and most have provisions with discretion to grant leave.

Equally we submit that the two-year time limit for financial assistance for loss of earnings and medical and dental expenses is too restrictive. This time limit applies to all victim-survivors of

violence, including child sexual assault (the two exceptions being judicial and out of pocket expenses for victim-survivors of child sexual assault). For the same reasons stated above, many victim-survivors take years to come forward and access the Victims Support Scheme.

Recommendation

The NSW scheme should be amended to remove upper time limits on recognition payments for victim/survivors of domestic violence, sexual assault and child abuse.

The NSW scheme should also be amended to remove the 2-year time limit for financial assistance for victim-survivors of domestic violence, sexual assault, child sexual abuse and child abuse including for loss of actual earnings and medical and dental expenses.

Requirement to Separately Prove Injury

Sexual Assault – Adult and Child

Section 39 of the VSRA requires an applicant who had made an application for a recognition payment to provide independent evidence of their injury, be it a medical report, a dental report or a counselling report. Victim-survivors of sexual assault should not need to separately prove injury in their Victims Services applications. Sexual assault by its nature is a crime that involves serious harm in the most intimately invasive way. Sex offences under the *Crimes Act 1900* (NSW) ('the *Crimes Act*') attract some of the most serious penalties, which reflects the severity of the offending. By requiring a victim to provide evidence of injury, the VRSA assumes it is possible to be sexually assaulted without suffering harm. This is particularly offensive to victims of child sexual assault.

We have clients who have strong evidence to establish that they survived a sexual assault, including child sexual assault. In many cases, these clients have never sought counselling for a range of reasons, including a lack of culturally appropriate counselling services and a desire to avoid retraumatisation. To apply for a recognition payment, these clients have been forced to seek counselling to obtain a counselling report satisfy the legislative requirement for proof of harm.

We submit that requiring proof of harm in circumstances where the nature of the offence makes harm self-evident undermines a victim-survivor's agency and the strategies they have developed to keep themselves safe. The proof of harm requirement in these circumstances is in conflict with s 6.1 of the NSW Charter of Victims Rights, which demands 'respect for the victim's rights and dignity'.

As noted above, the National Redress Scheme for Institutional Child Sexual Abuse (National Redress Scheme) does not require evidence of harm and submit that the VRSA should adopt a similar trauma-informed approach in cases of adult and child sexual assault.

Recommendation

The NSW scheme should be amended to remove the requirement to prove harm for victims of sexual violence offences.

Counselling

Victims Services-approved counsellors need to provide a flexible and culturally safe service for Aboriginal women. We have experienced disgruntled counsellors who resent when clients ask for a Certificate of Injury. We submit this attitude does not recognise or respect the diverse strategies our clients have employed their whole lives to live with their traumas.

Case study: Deborah

We assisted Deborah, an older Aboriginal woman, to apply for a recognition payment for an historic sexual assault. Deborah contacted a Victims Services counsellor who also worked with Deborah on a separate domestic violence matter. Deborah chose this counsellor because she listed her experience on the Victims Services website as including adult sexual assault.

The counsellor eventually engaged with Deborah about her sexual assault. The Centre and Deborah separately requested a certificate of injury. The counsellor refused until we advised that they were required to under the Victims Services guidelines.

When the counsellor finally provided the certificate of injury, they made comments that Deborah's story was improbable due to the length of time she had taken to report it. The comments demonstrated an alarming lack of understanding about the factors that may impede disclosure of sexual assault for sexual assault victims generally, but especially Aboriginal women: shame, a mistrust of police, a lack of cultural safety in the criminal legal system.

Deborah's experience with this Victims Services was not safe for her as a survivor of a sexual assault and as an Aboriginal woman.

Recommendation

All counsellors with any victims support scheme must have appropriate experience working with Aboriginal people and with people who have experienced multiple traumas, especially sexual violence.

Sexual violence against women in custody and children in juvenile detention centres

As discussed above, we have assisted a number of women in custody who were sexually assaulted by Wayne Astill, as well as other correctional centre staff. We have also spoken to a number of women who were sexually assaulted by staff at juvenile detention centres in NSW.

While we note the NSW special ministerial inquiry in relation to the offending of Wayne Astill, we submit that a broad inquiry needs to occur in relation to the sexual violence against women in custody and children in juvenile detention centres across the country, to truly understand the extent of the abuse in these centres across each jurisdiction. This issue is of particular concern to our Centre given the abuse of power by people in positions of authority, the particular vulnerabilities of women and children incarcerated, and the fact that Aboriginal women and children are significantly over-represented in correctional centres and juvenile detention centres.

Recommendation

The Commonwealth government hold a special inquiry in relation to the sexual violence against women in custody and children in juvenile detention centres

Family Law

While this Issues paper is focused on ‘justice’ responses to sexual violence it is important to note that experiences of sexual violence are a feature of family law court proceedings. This could be when a parent has experienced sexual violence and is in dispute with the offending parent/partner, or where children have experienced sexual violence by a parent. The *Family Law Act 1975* (Cth) rightly gives great consideration to the safety of children and not expose them to an unacceptable risk of family violence, but the same evidentiary challenges apply when persuading the court that there has been sexual violence or a risk of it happening.

It is our experience that many of our clients who have experienced domestic violence have experienced sexual violence. For some of our clients, their children were likely conceived in sexual acts where there was no consent. Our clients may not describe them as sexual assaults, but they do describe a relationship where they say the coercive control was so constant that it was impossible to refuse any demands for sex. This admission is often only made once there is a relationship of trust with their solicitor. While they hold that experience of a regime of terror, where there is no consent, our clients would not identify the conceptions of their children as acts of sexual assault in any family law proceedings, more than anything to protect their child’s psychological wellbeing.

We are familiar with *National Domestic and Family Violence Bench Book* and the ongoing work of the Federal Circuit and Family Court (FCFCOA) to improve systems in response to sexual and domestic violence allegations, such as the Evatt list and the Magellan list. However, we think there is room for the FCFCOA and family law practitioners to be more cognisant of the likelihood of sexual violence in relationships where there is coercive control, and how that will play out in any family law proceedings.

CONCLUSION

Once again, we thank ALRC for the opportunity to contribute to this discussion paper. We would welcome any further opportunities to contribute to improving the legal responses to sexual violence.

If you would like to discuss our submission, please contact Rachael Martin, principal solicitor [REDACTED] or Christine Robinson, CEO [REDACTED] or by calling 02 9569 3847.

Yours faithfully,

Wirringa Baiya Aboriginal Women’s Legal Centre

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