



Law Council
OF AUSTRALIA

Issues Paper: Justice responses to sexual violence

Australian Law Reform Commission

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
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Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

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Executive summary

1. The purpose of this submission is to provide a high-level statement of the Law Council's position on several of the key themes canvassed in the Australian Law Reform Commission's (ALRC's) **Issues Paper** of April 2024.¹ Given that the ALRC intends to develop reform proposals after considering submissions received in response to this Issues Paper, we have not made recommendations in this submission. We intend our submission to be a precursor to detailed engagement on specific proposals for reform. We note that the Issues Paper focuses primarily on procedural issues, but future reform proposals will also cover issues relating to substantive law, including laws about consent.
2. The Law Council acknowledges that complainants and victim-survivors of sexual violence have all too often been re-traumatised through their engagement with the criminal justice process. The Law Council endorses the objective identified in the Issues Paper of developing recommendations that seek to ensure that people who have experienced sexual violence and their families are properly supported when they seek help. In this submission, we have affirmed the importance of adopting an approach that centres on the experience of complainants and victim-survivors.²
3. In our view, Australia's international human rights obligations should form the foundation of any evaluation of the justice system response to sexual violence. Accordingly, we have suggested that this inquiry should focus on the need to do more to ensure that complainants and victim-survivors have an effective and accessible remedy—that is, access to justice for affected individuals through a mechanism that is both fair (impartial and independent) and accessible. This means focussing on unmet legal need among vulnerable groups of persons who may experience overlapping forms of discrimination and barriers that undermine their ability to navigate the justice system. In our view, persistent underfunding of the legal assistance sector has severely limited the capacity for justice agencies to respond effectively to sexual violence. We support greater investment in early intervention in supporting justice agencies to better respond to sexual violence.
4. The Law Council acknowledges concern that there is a significant under-reporting of sexual violence because many complainants and victim-survivors choose not to engage with the justice system because they feel unsafe doing so. To address this, we have suggested a focus on reporting allegations of sexual violence safely. At paragraphs 37 and 38, we underline the importance of providing complainants and victim-survivors early access to specialised and independent trauma-informed legal services alongside access to critical supports. Our most significant recommendation, at paragraph 42, is that the ALRC consider models that establish

¹ Australian Law Reform Commission, [Issues Paper: Justice Responses to Sexual Violence](#), Issues Paper 49 (April 2024).

² While we acknowledge different perspectives, the Law Council has adopted the conjunctive terms '*complainants and victim-survivors*' in this submission. In the context of the criminal justice system, the term '*complainant*' refers to a person who has made a report to the police about their experience of sexual assault. As the Issues Paper explains, the term '*complainant*' recognises '...that the person has made a complaint of sexual violence, but the allegation has not yet been tried and proved': Issues Paper, 6 [30]. The term '*victim-survivor*' includes persons who have experienced sexual violence. It is intended to acknowledge the lived experience of victim-survivors as well as their agency and resilience in not being defined by that experience. We recognise that not all victim-survivors are complainants because they decide to not participate in the criminal justice system. We also recognise that people who experience sexual violence may or may not identify with the term '*victim*' and or '*survivor*'. By adopting the terms '*complainants and victim-survivors*' we do not intend to presume how a person who has experiences of sexual violence identifies. By including the term '*complainant*', we are intending to be consistent with terms used in court and do not intend to cause any distress for anyone who has experienced sexual violence (or their families) who may be reading this submission.

adequately resourced access to independent legal advice and/or representation for complainants and victim-survivors at particular stages of the criminal justice process.

5. With that context in mind, we have endorsed certain common-sense proposals for reasonable and proportionate adjustments to be made to the criminal trial process, without compromising fundamental fair trial rights. For instance, we strongly support provisions for complainants and victim-survivors to give live evidence by CCTV, and generally support special arrangements for children and vulnerable witnesses to give pre-recorded evidence. However, we do not support allowing the pre-recording of evidence of adult complainants (who are not vulnerable witnesses) as the default position in all sexual violence matters.
6. One key theme in this submission is that, in certain areas, there are significant divergences in special measures adopted in state and territory jurisdictions that are intended to ensure that the rights of complainants and victim-survivors are given greater weight and to mitigate re-traumatisation. We suggest that the ALRC should focus on consultation with complainants and victim-survivors to develop a national evidence-base to assess the operation and effectiveness of these measures. We consider that one critical function of the ALRC's final report in this inquiry will be to assist state, territory and Commonwealth jurisdictions, through processes such as the Standing Council of Attorney-Generals, to evaluate the effectiveness of recent reforms in this area.
7. Similarly, there are significant differences between jurisdictions in the approach taken to support and services available to people who have experienced sexual violence, from the period prior to reporting to the period after the conclusion of formal justice system processes. We support consideration of best-practice principles to inform a national evaluation of these processes.
8. Considering changes to the processes of a criminal trial—especially where these changes risk impacting fundamental principles underpinning the criminal justice system—is necessarily a complex task, and requires careful thought to avoid unintended consequences. The presumption of innocence, the right to silence, the right to a trial by jury, the burden of proof resting on the prosecution, and the criminal standard of proof (beyond reasonable doubt) are all essential to the integrity of the criminal justice system. There is a substantial risk that any dilution of these core principles will result in the community losing confidence that the criminal justice system can provide an accused person with a fair trial.
9. Finally, the Law Council supports this inquiry giving consideration to transformative approaches to criminal prosecutions, including restorative justice, civil claims and compensations schemes. In suitable cases, these options have the potential to enhance agency, acknowledgment and healing for complainants and victim-survivors.

Introduction

10. The Law Council welcomes the opportunity to provide a submission to the ALRC's inquiry into justice responses to sexual violence.
11. It is clear that many complainants and victim-survivors feel their rights and wellbeing needs are not being adequately addressed by the criminal justice system. These rights include the right to be treated with courtesy, compassion and respect, having access and information to counselling, health and legal services where available, information about the investigation and prosecution, and the right to privacy.³ This inquiry provides an opportunity to carefully examine how legal systems can be reformed to minimise re-traumatisation and improve support to complainants and victim-survivors (and their families) across every stage of the legal process, including greater assistance for complainants and victim-survivors who require support when making a decision to report, throughout the investigation, during the criminal trial and following the verdict.
12. The criminal justice system was developed at a time when the impacts of trauma upon complainants and victim-survivors were not well understood. Improved understandings of the impacts of trauma require that trauma-informed practices and principles are embedded within the court system, legal profession and police practices. The criminal justice system has a responsibility to protect the fundamental rights of an accused person. There is also a responsibility—however complex this may be—for justice systems in each Australian jurisdiction to better support complainants and victim-survivors whilst upholding fundamental criminal justice principles to ensure a fair trial.
13. The Law Council supports the National Plan to End Violence against Women and Children (**National Plan**)⁴ and is committed to advocating for meaningful reform to protect complainants and victims-survivors of sexual violence and uphold a fair, just and accessible legal system in Australia. This warrants multi-faceted and ongoing action across sectors to reduce the incidence of, and prevent, sexual violence across the country. We recognise that such an undertaking requires engagement, understanding, and action in respect of intersecting social and economic issues that affect both the incidence and reporting of sexual violence. These factors include the prevalence of family violence, housing insecurity, child protection, poverty, geographic and other forms of isolation, and access to services, including physical and mental healthcare.
14. This submission maintains the Law Council's consistent belief in, and advocacy for, the presumption of innocence as a cornerstone of our criminal justice system. A consequence of this principle, however, is that there will be some impact upon

³ See for example:

- In New South Wales: Department of Communities and Justice, [Charter of Victims' Rights](#) (15 April 2024).
- In Victoria: there is a legislated charter: *Victims' Charter Act 2006* (Vic). Investigatory prosecution and victims' services agencies must have regard to the principles contained in the charter when dealing with the person (s. 18). The victim may complaint to an investigatory, prosecuting or victim's services agency if the victim believes that they have been treated in a way that is inconsistent with charter principles. The Victorian regime also provides certain baseline requirements for agencies regarding instituting and maintaining accessible complaints processes (s. 19A).
- In Queensland: the Charter of Victims' Rights is set out in the *Victims of Crime Assistance Act 2009* (Qld). The victim may make a complaint about a prescribed person (including prescribed government and non-government agencies as well as officers) that has engaged in conduct that is inconsistent with the rights stated in the charter (s. 19).

⁴ Law Council of Australia, [Ending Violence against Women and Children](#) (Media Release, 18 October 2022).

complainants and victim-survivors because the fundamentals of the criminal justice system ‘necessarily require some focus on the credibility of a person who makes an accusation of sexual violence against another person’.⁵

15. All law reform proposals must be carefully considered and critically evaluated to ensure they do not undermine key safeguards of the criminal justice system. The presumption of innocence, the right to silence, the right to a trial by jury, the burden of proof resting on the prosecution, and the criminal standard of proof (beyond reasonable doubt) are all essential to the integrity of the criminal justice system. These are core features of the criminal law, which have been established in recognition of the immense power and resources of the state and the consequences of a finding of guilt for the accused. As stated by Gaudron J:⁶

It is fundamental to our system of criminal justice that it is for the prosecution to establish guilt beyond reasonable doubt. The corollary of that—and it is equally fundamental—is that, insanity and statutory exceptions apart, it is never for an accused person to prove his innocence. See Woolmington v. Director of Public Prosecutions [1935] UKHL 1; (1935) AC 462. Therein lies an important aspect of the right to silence, which also encompasses the privilege against incrimination.

16. In formulating our submissions, we have carefully considered the compelling voices of complainants and victim-survivors which have been expressed in multiple reports and reviews, through the media and in our communities. We acknowledge that there are diverse experiences and opinions of complainants and victim-survivors on how the system needs to change.
17. Accordingly, in this submission, we have indicated our support for urgent reforms to address the persistent inadequate funding of core legal assistance services, strengthened access to legal and critical non-legal services, independent legal representation for complainants and victim-survivors at certain points in the criminal process, reasonable and proportionate adjustments to the criminal trial process (in the form of special measures) for witnesses with vulnerabilities, and strengthened access to alternative pathways to the criminal justice system including restorative justice and civil compensation. We support further consideration being given to the operation of support services and other initiatives that assist victims navigate and understand the criminal justice system and mitigate re-traumatisation. However, law reform proposals in the above areas should not undermine fundamental principles of the criminal law and, in turn, risk injustice and the ability of an accused person to receive a fair trial.
18. Whilst this inquiry is focused on justice responses to sexual violence, it is critical to keep in mind that providing support and reducing the harm to complainants and victim-survivors requires significant funding and expansion in health (including mental health) and legal services, trauma support, specialist crisis services, housing and other services which are necessary to provide ongoing support to complainants and victim-survivors before, during and after their experience with the justice system. There are opportunities for systemic law reform and changes to processes and practices to better support complainants and victim-survivors, however, a holistic response is required for effective and sustainable improvements to the system for complainants and victim-survivors.

⁵ Queensland Women's Safety and Justice Taskforce, Hear her voice, [Report 2 Vol. 1](#) (Final Report, 2022), 4.

⁶ *Petty & Maiden v R* [1991] HCA 34; (1991) 173 CLR 95, [16].

A rights-based approach for complainants and victim-survivors

International human rights law and the need for an accessible and effective remedy

19. Australia's international human rights obligations should form the foundation of the justice system response to sexual violence. In a previous submission, we have explained why sexual violence infringes the human rights of victim-survivors—who are often women and girls.⁷ Sexual violence violates the sexual autonomy and bodily integrity of victim-survivors. It violates several rights protected under international human rights law, such as the prohibition on torture, inhuman and degrading treatment, and the right to family life.⁸
20. Where the law recognises a human right, the Law Council of Australia's position is that the recognition of the right should be accompanied by provision for an accessible and effective remedy.⁹ The Law Council's position reflects the international human right to an effective remedy,¹⁰ and reflects the following principles:
 - an accessible remedy provides access to justice for affected individuals through a mechanism that is both fair (impartial and independent) and accessible (both legally and in fact, including at a cost that does not prevent or discourage victims from seeking redress), including to vulnerable populations; and
 - an effective remedy must be adequate, effective and prompt, amounting to full and effective redress and reparation (including through monetary compensation, restitution, satisfaction, rehabilitation and guarantees of non-repetition, as appropriate to the circumstances).
21. We reiterate our commitment to promoting the recognition, application and justiciability of international human rights standards in the Australian legal system, federally and in the states and territories and to promote the provision of and access to effective judicial and other domestic remedies for violations of human rights.¹¹
22. The *Convention on the Elimination of All Forms of Discrimination against Women*¹² requires Australia 'to take appropriate and effective measures to overcome all forms of gender-based violence'.¹³ The United Nations Committee on the Elimination of Discrimination against Women, has underlined the obligation to prevent, investigate, prosecute and punish the human rights violations caused by sexual violence.¹⁴

⁷ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Current and Proposed Sexual Consent Laws in Australia](#) (Submission, 5 April 2023), 19–21, [72]–[79].

⁸ *International Covenant on Civil and Political Rights*, signed 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) arts 7 and 17. ('*ICCPR*')

⁹ Law Council of Australia, Policy Statement on Rule of Law Principles (Policy Statement, 2011), Principles 6(c) and 8; Law Council of Australia, Law Council of Australia, [Human Rights and the Legal Profession: Key principles and commitments](#) (Policy Statement, May 2017), 3 [10].

¹⁰ See for example, *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 8; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(3).

¹¹ Law Council of Australia, [Human Rights and the Legal Profession: Key principles and commitments](#) (Policy Statement, May 2017), 6 Commitments [2] and [3].

¹² Opened for signature 18 December 1979, entered into force for Australia 27 August 1983.

¹³ Committee on the Elimination of Discrimination against Women, General recommendation 19, para 24, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), 305.

¹⁴ See for example, Committee on the Elimination of Discrimination against Women, *General recommendation No 35 on gender-based violence against women, updating general recommendation No 19*, UN Doc

23. International law requires Australia to ensure that victim-survivors are treated with compassion, treated fairly and able to access effective mechanisms for redress through the justice system. In particular, the Law Council notes the following key principles contained in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*:¹⁵
- **Article 4**—Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress.
 - **Article 5**—Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.
 - **Article 6**—The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
 - allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected;
 - providing proper assistance to victims throughout the legal process;
 - taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety; and
 - avoiding unnecessary delay in the disposition of cases.
 - **Article 14**—Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and culturally appropriate means.

The unmet legal and wellbeing needs of complainants and victim-survivors

24. The Law Council welcomes the focus in the terms of reference on ‘the particular impact(s) of laws and legal frameworks on population cohorts that are disproportionately reflected in sexual violence statistics, and on those with identities intersecting across cohorts’.¹⁶ In our view, addressing the access to justice barriers faced by persons in these vulnerable groups is crucial to addressing under-reporting of sexual violence.
25. As explained further below, we support consideration by the ALRC of the impact of resourcing on the capacity for justice agencies to respond effectively to sexual violence as a priority matter. Persistent under-resourcing in baseline funding for the legal assistance sector means that complainants and victim-survivors of sexual violence are likely to interact with the justice system in circumstances where they have complex unmet legal needs. In our assessment, this should be an area of focus for this inquiry.
26. Experiences of sexual violence are unique to each person and unmet needs should be understood in the contexts of assessing individual needs and recognising the particular needs of groups who may experience additional barriers accessing justice:

CEDAW/C/GC/35 (14 July 2017) [29](e); See also, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010), [32], [34].

¹⁵ UN GA, Res 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34 (29 November 1985). (*‘Declaration of Basic Principles of Justice for Victims’*)

¹⁶ Australian Law Reform Commission, [Terms of Reference](#) (Online, 23 January 2024).

for example, victim-survivors of domestic violence, First Nations women and girls, people from culturally and linguistically diverse backgrounds, people living with disability and mental health issues, people experiencing socio-economic hardship, people living in regional, remote and rural areas and people who identify as LGBTQIA+.¹⁷ This intersectional approach recognises that all complainants and victim-survivors have needs arising from their particular personal circumstances, experiences, and backgrounds, and varied identities. These unique aspects can expose people, or groups of people to overlapping forms of inequality, marginalisation, and discrimination.

27. We acknowledge that persons who are members of these groups and experience these forms of discrimination inevitably engage with mainstream services, including access to legal services and the justice system, from a position of disadvantage. We support the ALRC giving weight to consultations with members of these groups, taking into account their lived experience, to assess the operation and effectiveness of changes to the criminal processes canvassed in the Issues Paper. We also consider how the justice system can better accommodate the specific legal and non-legal needs of certain vulnerable groups between paragraphs 132 and 157.

Early intervention and prevention of sexual violence

28. The Law Council considers development of, and investment in, early intervention to be critical in supporting justice agencies to better respond to sexual violence. We support consideration by the ALRC of the effect of early intervention on justice responses to sexual violence as a key priority.
29. Early intervention strategies and services aim to prevent harm, including sexual violence, and include a range of initiatives, such as:
 - education on consent and respectful relationships;
 - initiatives supporting and strengthening connection to culture and family;
 - services focused on supporting families to stay together and engage in safe behaviour;
 - youth and child-focused therapeutic and community programs;
 - accessible healthcare, including mental healthcare;
 - disability services;
 - homelessness prevention, through investment in safe, secure and appropriate housing, including safe crisis accommodation;
 - the availability of legal assistance services to provide legal advice, including advice in respect of housing issues, child protection, domestic violence, the sexual assault communications privilege, workplace sexual harassment, and family law (discussed further below);
 - drug and alcohol rehabilitation services; and
 - behavioural change programs for people who have committed acts of family or domestic violence (noting that it is critical that allocation of resourcing in this

¹⁷ The ALRC's Terms of Reference refer to women, First Nations people, people from culturally and linguistically diverse backgrounds; people with disability; people who are Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, Brotherboy, Sistergirl, or who have other genders and sexualities (LGBTQIA+); people who have been convicted of criminal offences and been incarcerated; people who are migrants or newly arrived refugees impacted by an insecure visa status; people living with HIV; people employed in sex work; people in residential care settings; older people (especially those experiencing cognitive decline and young people).

area be based on independent, rigorous and timely evaluation of effectiveness).

30. We are of the view that investing in early intervention is necessary to:
- promote accountability and respectful behaviours;
 - support and protect people at risk of sexual violence;
 - address some of the issues that currently affect the capacity for the criminal law system to respond effectively to sexual violence, including issues of resource scarcity and excessive delay in proceedings; and
 - reduce the incidence of sexual violence associated with drug and alcohol abuse and/or mental health related issues.
31. The Law Council underlines the importance of ensuring a focus on perpetrator accountability and changes in behaviour. This may include consideration of the effectiveness of Men's Behavioural Change Programs. In this regard, we note the findings of the Victorian Royal Commission into Family Violence, including its recommendation regarding the need for further research, trial and evaluation of certain interventions for perpetrators.¹⁸ The Victorian Royal Commission emphasised the need to adopt practice models that build coordinated interventions, including cross-sector workforce development between the men's behaviour change, mental health, drug and alcohol and forensic sectors.
32. The ALRC may consider recent evaluations of four community-based Men's Behavioural Change Program pilots prepared by the University of New South Wales.¹⁹ That evaluation made certain recommendations for improvements in data collection, program design and delivery, and expansion. These evaluations should be viewed in light of commentary that further work is required to ensure that data collection measures success both in terms of outputs, such as participants completing these programs, as well as, in terms of outcomes with reference to the program goals of reducing violent and abusive behaviour.²⁰

¹⁸ State of Victoria, Royal Commission into Family Violence—Summary and Recommendations No 132 (Report, March 2016), 70 Recommendation 87.

¹⁹ Research, Performance and Evaluation, Women NSW, New South Wales Department of Communities and Justice, [Men's Behaviour Change Programs—Evaluation Summary](#) (Report, 2019); See also, Amanda O'Connor, Heather Morris, Anastasia Panayiotidis, Victoria Cooke and Helen Skouteris, 'Rapid Review of Men's Behaviour Change Programs', (2020) 22 (5) *Trauma, Violence and Abuse* 1068–1085.

²⁰ Australia's National Research Organisation for Women's Safety, Research to Policy and Practice—[Men's behaviour change programs: Measuring outcomes and improving program quality key findings and future directions](#) (Report, April 2019).

Reporting allegations of sexual violence safely

33. The Law Council acknowledges concern that there is a significant under-reporting of sexual violence because many complainants and victim-survivors choose not to engage with the justice system. The multi-faceted causes of that under-reporting are described by the Issues Paper in the following terms:²¹

Many victim survivors of sexual violence do not report their experience to anyone, including the police. This may be because they are experiencing feelings of shame, embarrassment, guilt, blame, or fear of not being believed. They may: have a distrust of and lack of faith in the police or the justice system; receive poor responses from family, friends, carers, or services to an attempted disclosure; live in a regional, rural, or remote area, or have insufficient information about the justice process and associated support; or fear consequences in other aspects of their lives (such as loss of employment, impact on family, visa status, or cultural recriminations).

34. Accordingly, we support the ALRC conducting further consultation with complainants and victim-survivors to develop proportionate measures that should be implemented to improve access to justice for complainants and victim-survivors. We consider:

- resourcing for early and ongoing access to specialised trauma-informed legal advice (as explained at paragraphs 37 and 38), and
- fully resourced representation for complainants and victim-survivors at certain stages of the criminal process (as outlined at paragraph 42)

to be critical components of improved outcomes within the context of this inquiry.

35. A recent review of justice responses to family violence in South Australia highlighted the need to improve the quality and consistency of 'first responses' to incidents or reports of family and domestic violence, and concluded:²²

Some police officers, lawyers, court officials and other service providers are responding with care and knowledge, empowering women. But not everyone gets the first response right. [There is a need to] (i)nvest in training that unpacks what 'trauma informed' care really means in practice so that every front-line worker (police officer, registrar, lawyer, social worker) can respond safely, thoughtfully and effectively every time.

36. In our view, it is critical that the first response to allegations of sexual violence be safe and supportive. When complainants and victim-survivors come forward to disclose their experience of sexual violence, whether that be to police, frontline workers or lawyers, they must be provided support and advice to understand their options. They should be supported to navigate the justice system on their own terms.

²¹ Issues Paper, 4 [23].

²² Sarah Moulds & Suryawan Rian Yohanesh, *Powerful Interventions: Improving the use and enforcement of Intervention Orders as a tool to address family and domestic violence in South Australia* (Final Report, 2022) Adelaide SA, University of South Australia, 9.

Scoping specialised and trauma-informed legal services for complainants and victim-survivors of sexual violence

37. In 2023, we welcomed the Australian Government's consideration of ways to provide complainants and victims-survivors of sexual assault with full and supported access to the justice system, including by developing specialist and trauma-informed legal services for complainants and victim-survivors of sexual assault.²³ We consider these measures to be a positive step towards removing barriers faced by complainants and victim-survivors when accessing the support they need.
38. In establishing a model for legal services for complainants and victim-survivors of sexual assault, the Law Council suggested the following matters be taken into account:²⁴
- ensuring the service providers are equipped with the skills to provide legal advice in relation to areas of law which commonly arise for complainants and victim-survivors, including sexual assault communications privilege, apprehended domestic violence orders, family law and victims of crime compensation claims;
 - ensuring that appropriate support services are available to complainants and victim-survivors at all stages after a sexual assault has occurred (including before making a formal report to police). This should include timely referrals to appropriate non-legal services at an early stage and throughout the legal proceedings as well as ensuring the person is connected to the services they require after the conclusion of criminal proceedings.
 - assisting with respect to other legal or administrative issues following the criminal proceedings including obtaining victims compensation and engaging with longer-term support services as appropriate;
 - ensuring continuity of legal service delivery to avoid re-traumatisation by avoiding complainants and victim-survivors needing to retell their stories. The legal services should work with allied health workers, primary health workers, and other service providers to ensure information-sharing (to the extent that this does not breach confidentiality) to establish a long-term support network;
 - maintaining the legal service's independence from the police and prosecution services;
 - referring complainants and victim-survivors for non-legal, social and emotional support throughout the criminal justice process, including by involving social workers where required, and/or providing access to counsellors and psychological services; and
 - ensuring that all services are available and accessible to suit the diversity of complainants and victim-survivors of sexual assault, including those who are also offenders and/or experiencing incarceration.

²³ Law Council of Australia, Submission to Attorney-General's Department, [Scoping the development of specialised and trauma-informed legal services for victims and survivors of sexual assault](#) (Submission, 12 May 2023).

²⁴ Ibid, [7].

39. Subsequently, the Australian Government established pilot models investigating new ways to deliver trauma-informed and specialised assistance to complainants and victim-survivors.²⁵ We support the ALRC considering these pilots' operation and the options for incorporating the lessons learned into existing funding arrangements.
40. However, developing specialist and trauma-informed legal services for complainants and victim-survivors of sexual assault, as outlined above, will be a substantial undertaking and requires significant and substantive consultation with relevant stakeholders in the legal assistance sector, including to avoid any unnecessary duplication of existing services or disparate access to these services.
41. We support increased use of websites and hotlines to provide information to complainants and victim-survivors that advise them on how to obtain support and use technology and new service delivery models including in rural, regional, and remote areas. These types of measures should be accompanied by greater investment in attracting and retaining lawyers in rural, regional and remote areas; noting disparities in remuneration, employment conditions and workloads. In this regard, we have argued for HECS-HELP debt reduction and indexation relief for legal practitioners working in rural, regional and remote locations.²⁶ The *Independent Review of the National Legal Assistance Partnership Report* recommended a HECS-HELP forgiveness scheme directed to rural, regional and remote community sector lawyers and those in private practice doing substantial legal assistance work.²⁷

Legal representation at particular stages of the criminal process

42. The Law Council supports consideration being given to models that establish adequately resourced access to legal representation for complainants and victim-survivors at particular stages of the criminal justice process.
43. As we have explained in our evidence to a recent inquiry, the Law Council supports consideration of reforms to permit representation of complainants and victim-survivors at procedural hearings, in the absence of the jury, in relation to the admissibility of certain types of evidence about the complainant and victim-survivor.²⁸ However, we need to examine carefully any potential prejudice to all parties to proceedings, especially in relation to the roles and functions of the prosecution and judiciary in such matters, and the broader administration of justice—especially if representation is to go beyond these interlocutory issues.²⁹
44. In our view, there are certain points in the criminal process where independent legal representation would improve the experience of complainants and victim-survivors. This should include interlocutory matters that have the potential to significantly impact the rights and privacy of the complainant and victim-survivor. For example,

²⁵ Attorney-General Mark Dreyfus KC MP, [Supporting victims and survivors of sexual violence - piloting new legal services models](#) (Media release, 20 September 2023).

²⁶ Law Council of Australia, Submission to Dr Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Submission, 27 October 2023), [77]–[83]. See further, Law Council of Australia, [HELP debt reduction and indexation relief for legal practitioners working in rural, regional and remote locations](#) (Position Paper, December 2023).

²⁷ Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Final Report, March 2024), Recommendation 26.

²⁸ Law Council of Australia, [Response to questions on notice: Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#) (Supplementary Submission, 19 April 2024), 2.

²⁹ These concerns were articulated in the evidence of Mr Phillip Boulten SC, representing the Law Council of Australia in a recent inquiry: Senate Legal and Constitutional Affairs Legislation Committee, Committee Hansard, [Inquiry into the Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#) (Hearing, 12 April 2024), 24–25.

in relation to applications for the disclosure of confidential counselling notes and other personal information such as telephone records and the contents of mobile telephones. We support the ALRC giving further consideration to other interlocutory issues that may be suitable for independent submissions from the complainant and victim-survivor, without compromising the essential elements of a fair trial, for example, regarding admission of prior sexual experience. The Law Council looks forward to providing more detailed comment on these issues in a future submission.

45. We support the ALRC considering the operation and effectiveness of the NSW Sexual Assault Communications Privilege (**SACP**) provisions³⁰ (in operation since 2010). These provisions enable a '*protected confider*' (for example, the complainant and victim-survivor) to have standing to be represented in relation to applications for leave to compel production or to access documents or adduce evidence of '*protected confidences*' (that is, communications that have been made in confidential, therapeutic settings) in any criminal or apprehended violence order proceeding.
46. A '*protected confidence*' is defined as a counselling communication (that is, for example, a communication made in confidence by a counselled person to a counsellor; or a communication made in confidence about the counselled person by the counsellor in the course of that counselling) that is made by, to or about a victim or alleged victim of a sexual assault offence.³¹
47. Women's Legal Service New South Wales and Legal Aid NSW explain that the privilege protects a broad range of confidential information including: counselling notes, medical notes, mental health records, letters and referrals between health professions, emails from a school counsellor to a parent or teacher.³² Legal Aid NSW operates a specialised SACP Service which provides in-house representation and in some cases funding for private legal practitioners to provide representation to complainants and victim-survivors in SACP proceedings.
48. Further consideration should be given to whether the NSW SACP service provides a model which might be expanded to provide other services which protect the rights and privacy of a complainant and victim-survivor, for example, access to advice prior to making a complaint and other personal information.
49. In conclusion, ensuring timely access to specialised, independent legal services (that is, advice and/or representation) prior to, and at particular stages of the criminal process, is intended to promote the agency of complainants and victim-survivors. For example, providing accurate legal advice about the legal process prior to a report, as explained at paragraph 38, may assist in responding to the needs of complainants and victim survivors to make an informed choice as to whether or not to participate in the criminal justice system. Additionally, providing complainants and victim-survivors access to fully resourced, independent and specialised legal representation at particular stages of the criminal process, as explained at paragraph 44, may partly address the reported perception that complainants and victim-survivors feel sidelined and have limited agency once a report has been made to police. Building legal education and awareness of the safeguards, discussed above, that have been established to regulate disclosure of

³⁰ Part 5, Division 2 of the *Criminal Procedure Act 1986* (NSW)

³¹ *Criminal Procedure Act 1986* (NSW), s. 296(1).

³² Women's Legal Service NSW and Legal Aid NSW Sexual Assault Communications Privilege Service, [Subpoena Survival Guide](#) (September 2016), 26

confidential health and therapeutic information is critical to addressing under-reporting of sexual violence matters.

The importance of a well-resourced and specialised witness advocate service

50. Working alongside lawyers, community liaison officers and advocates can also build trust and forge links with hard-to-reach groups. The Law Council supports the role of non-lawyers in identifying and referring legal problems, assisting with administrative tasks or supporting people to voice their needs. The Law Council's Justice Project Report highlighted evidence of the crucial role played by liaison officers and client advocates.³³
51. Recent reviews highlight the complainant and victim-survivor's need for personalised information, assistance and advocacy. In this regard, the Victorian Law Reform Commission found:³⁴

The timely provision of support and accurate and accessible information can improve victims' experience of the court process, their perceptions of fairness and ultimately their confidence in the legal system. It helps to manage expectations about their role in the criminal trial process and allows them to engage in an informed manner. Victims of crime who spoke to the Commission emphasised the importance of information and support to their journey through the criminal justice system.

52. Currently, states and territories take distinct approaches to the provision of non-legal supports within the context of the criminal trial process. In New South Wales, the Witness Assistance Service, a specialised part of the Office of the Director of Public Prosecution, provides support and information for vulnerable victims and witnesses involved in criminal cases.³⁵ Their role includes liaising with the prosecution legal team to ensure victims are updated on the progress of their matter. In Victoria, the Victims and Witness Assistance Service is also part of the Office of Public Prosecutions. That program provides for social workers and prosecution agency solicitors to work collaboratively to provide information and support to adult victims and witnesses during the court process.³⁶ In other jurisdictions, the witness advocacy service is located outside of the prosecution agency. For example, in Western Australia, the Victim Support Service is not located within the prosecution agency and is instead available at any court in Western Australia including the Magistrates Court, District Court and Supreme Court.³⁷
53. Some jurisdictions have established specialist forms of witness assistance services focussing on the needs of vulnerable cohorts. The Law Council notes that some jurisdictions, for example, in Victoria, have established specialist child witness services to support witnesses throughout the prosecution process.³⁸ In New South Wales, the Justice Advocacy Service is a support service to victims, witnesses and defendants with cognitive impairment participating in criminal justice processes,

³³ Law Council of Australia, [Justice Project Final Report Part 2: Legal Services](#) (Report, August 2018), 29–31.

³⁴ Victorian Law Reform Commission, [Victims of Crime in the Criminal trial Process](#) (3 August 2015, Report), [6.17].

³⁵ New South Wales Office of the Director of Public Prosecutions, [Witness Assistance Service Information Sheet](#) (Online, 7 February 2023).

³⁶ Victoria Office of Public Prosecutions, [Victims and witnesses: How we can support you](#) (Online).

³⁷ Government of Western Australia, Department of Justice, Court and Tribunal Services, [Victim Support Service](#) (Online, 2023).

³⁸ See for example, Government of Victoria, Victims of Crime, [Child and Youth Witness Service](#) (Online, 27 November 2023).

which aims to facilitate their ability to exercise their rights within those processes. It has been recently positively evaluated.³⁹

54. The Law Council is supportive of the ALRC reviewing the strengths and weaknesses of the distinct approaches to delivery of a professional victim advocate service. The ALRC's inquiry and report may play an important role in distilling national principles regarding individualised and trauma-informed support to victims of sexual violence to help them navigate the criminal justice system and beyond. In this regard, as we have explained at paragraph 38, consideration should be given to the importance of multi-disciplinary teams to ensure relevant officers understand both trauma and how the criminal justice system works. It is critical that victim advocates have sufficient training to understand the distinction between legal information and legal advice.
55. As a starting point, the Law Council supports giving consideration to the Queensland Women's Safety and Justice Taskforce principles that suggest the role of a victim advocate should include:⁴⁰
- providing impartial information to complainants and victim-survivors about the criminal justice and service systems and options available to them;
 - supporting complainants and victim-survivors to understand and exercise their rights;
 - identifying and assisting complainants and victim-survivors to address their individual needs including through referrals to services; and
 - liaise across the service and criminal justice systems on behalf of complainants and victim-survivors, and be the consistent point of contact for them throughout their criminal justice system journey.
56. Additionally, this report suggests that the following principles guide the deliver of those services:⁴¹
- aim to empower those experiencing sexual violence;
 - enable advocates to provide holistic, individualised and specialised support, including specialised expertise and understanding of working with children and young people;
 - provide support regardless of whether a person chooses to engage with the criminal justice system; and
 - give priority to people who are under-served and/or who face the most complex interactions between services and systems.
57. The Law Council notes that similar principles were endorsed by the Victorian Law Reform Commission.⁴²

³⁹ For a recent positive evaluation, see further: Ernst & Young; Department of Communities and Justice, [Evaluation of the Justice Advocacy Service](#) (Report, 4 February 2021).

⁴⁰ Queensland Women's Safety and Justice Taskforce, Hear her voice, [Report 2 Vol. 1](#) (Final Report, 2022) Recommendation 9.

⁴¹ Ibid.

⁴² Victorian Law Reform Commission, [Improving Justice System Response to Victims of Sexual Violence](#) (Report, September 2021), Recommendation 45.

Police response

58. The largest point of attrition for sexual violence reports is at the police investigation stage with only 15 percent of reported sexual assaults resulting in a legal action being commenced by police.⁴³
59. The Law Council agrees with the general principles to guide initial police responses to sexual violence recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.⁴⁴ In particular, recognising that a complainant and victim-survivor's initial contact with police will be important in determining their satisfaction with the entire criminal justice response and in influencing their willingness to proceed with a report. The Law Council also suggests that the ALRC give consideration to the extent to which complainants and victim-survivors should have agency, input or involvement in the question of whether, having made a complaint, the complaint should result in charges or the continuation of charges.
60. There is a need for greater certainty in guidance on the threshold to charge as well as provision of training to ensure those thresholds are applied in a consistent manner including:
- greater guidance on the threshold to charge and the considerations which should inform a police officer's application of the threshold to a given case; and
 - training to ensure a consistent understanding among police officers about the threshold to charge and how it should be applied to evidence gathered during an investigation.

Prosecution response

61. Australian courts have emphasised the independent role played by a prosecutor as a '*minister of justice*' who is objective, impartial and fair in a criminal process that is a search for the truth.⁴⁵

Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.

62. We welcome the ALRC's consideration of proposals that are directed to, in broad terms, addressing issues of poor communication, insufficient support, and lack of consultation with complainants and victim-survivors, and to minimise re-traumatisation in the re-telling of the experience.⁴⁶ However, we support maintaining the operational independence of prosecution agencies because this is crucial to a prosecutor fulfilling the broader obligation to safeguarding the proper administration of justice.

⁴³ NSW Bureau of Crime Statistics and Research, Brigitte Gilbert, [Attrition of sexual assaults from the New South Wales criminal justice system](#) (Report, May 2024).

⁴⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Executive Summary and Parts I-II (Report, 2017), 114 [3] (initial police responses).

⁴⁵ [Whitehorn v The Queen](#) (1983) 152 CLR 657, 663.

⁴⁶ Issues Paper, 8 [37].

63. In each of the state, territory and Commonwealth jurisdictions, prosecution agencies have adopted prosecution guidelines to provide greater certainty regarding the manner in which the discretion to commence and continue prosecutions will be exercised.⁴⁷ As the Issues Paper notes, prosecutorial guidelines generally require the agency to be satisfied, based on the witness statements and or records of interview provided by police, that there is a reasonable prospect of conviction, and that the prosecution is in the public interest.
64. These guidelines, to varying degrees, allow for the viewpoint of complainants and victim-survivors to be taken into account. For example, the Commonwealth Director of Public Prosecution Policy underlines that '[i]t is important in all prosecution action that victims are treated with respect for their dignity' and allows for views of complainants and victim-survivors to be taken into account, where it is appropriate in deciding whether it is in the public interest to:⁴⁸ commence a prosecution; discontinue a prosecution; agree to a plea negotiation; or decline to proceed with a prosecution after a committal. The Law Council supports the ALRC giving consideration to the extent to which these guidelines are implemented, in practice, with reference to lived experience of complainants and victim-survivors.
65. The Law Council endorses the general principles to guide prosecution responses recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.⁴⁹ The following key aspects of those principles have general application to sexual violence matters:
- To the extent that is feasible, prosecution agencies should recognise the benefit to complainants and victim-survivors of continuity in prosecution team staffing.⁵⁰
 - Prosecution agencies should recognise the importance to complainants and victim-survivors of the prosecution agency maintaining regular communication to keep them informed of the status of the prosecution (unless they wish not to be kept informed).⁵¹
 - There should be greater resourcing for Witness Assistance Services (often within DPP agencies) so that they are funded and staffed to perform their crucial task of keeping complainants and victim-survivors, and their families informed and facilitating engagement with relevant support services (including culturally appropriate services for First Nations complainants and victim-survivors).⁵²
 - There should be greater transparency in the public reports of prosecution agencies in relation to complainant and victim-survivor experience. In this regard, the Royal Commission into Institutional Responses to Child Sexual Abuse recommended agencies should publicise their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.⁵³

⁴⁷ See for example, New South Wales Office of the Director of Public Prosecutions, [Prosecution Guidelines](#) (March 2021).

⁴⁸ Commonwealth Director of Public Prosecutions, [Prosecution Policy of the Commonwealth](#): Victims of Crime (19 July 2021), 12.

⁴⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Executive Summary and Parts I-II (Report, 2017).

⁵⁰ *Ibid*, 60 [37](b).

⁵¹ *Ibid*, 60 [37](c).

⁵² *Ibid*, 60 [37](d).

⁵³ *Ibid*, 65 [42] and [43].

66. The Law Council supports further consideration being given to the implementation of recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse directed to strengthening internal review processes for key prosecution decisions.⁵⁴ For example, the Royal Commission recommended that guidelines should provide a right for complainants and victim-survivors to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.⁵⁵ It also recommended that each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow complainants and victim-survivors to raise issues where their rights identified in victims' charters have not been respected and, to the extent it is feasible, to seek internal merits review of key decisions.
67. Following the Royal Commission into Institutional Responses to Child Sexual Abuse, the Law Council notes that prosecution agencies across Australia have reviewed their internal guidance documents to better address these matters. Most notably, the New South Wales Office of the Director of Public Prosecutions has established, since 2021, a right of internal review of a decision not to proceed with a prosecution in certain circumstances (applying to all ODPP decisions not to commence, or to discontinue a prosecution at any stage of the proceedings, made on or after 29 March 2021).⁵⁶ However, some jurisdictions have adopted a narrower approach restricted to child complainants and victim-survivors. For example, the Commonwealth Director of Public Prosecution's March 2021 National Legal Direction regarding right of review for prosecutions involving child and certain other complainants has a more restricted scope in relation to certain offences (most notably offences involving a child: e.g., online child exploitation offences and child sex offences outside Australia).⁵⁷
68. The Law Council supports further consultation with complainants and victim-survivors who have participated in internal review processes to understand the effectiveness of these processes where they have been established (e.g., in New South Wales). We support the ALRC exploring with prosecution agencies the resourcing needs to effectively implement these types of internal review processes. If there is evidence supporting the effectiveness of these measures, the Law Council supports extending these processes to sexual violence matters (subject to prosecution agencies being adequately funded and resourced to conduct these types of internal reviews).

⁵⁴ Ibid, 65 [41].

⁵⁵ Ibid, 65 [40](c).

⁵⁶ New South Wales Office of the Director of Public Prosecutions, [Victims' Right of Review Policy](#) (26 July 2021).

⁵⁷ Commonwealth Director of Public Prosecutions, [National Legal Directions: Right of Review—Prosecutions involving child and certain other complainants](#) (March 2021).

The trial process

General comments

69. We recognise that the focus of this Issues Paper is primarily on procedural issues, and not on matters relating to substantive law including laws about consent. However, we outline our position below in respect of a number of fundamental processes of the criminal trial. These matters are dealt with at greater length in our submission to the Senate Legal and Constitutional Affairs Committee's review of Australia's sexual consent laws.⁵⁸
- The rule of law requires maintaining the presumption of innocence as a fundamental principle underpinning the criminal justice system.⁵⁹ Australian courts have clearly identified that the fundamental principle of the common law is that the onus rests on the Crown to prove guilt beyond reasonable doubt.⁶⁰
 - The companion rule to the fundamental principle is that an accused person cannot be required to testify, and that the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.⁶¹
 - The Law Council remains opposed to any change to the standard of proof for criminal proceedings.⁶² Any process involving a standard of proof below the standard of proof beyond reasonable doubt would have to sit entirely outside the criminal justice system, and be subject to separate remedies, as opposed to traditional criminal punishment.
70. The Law Council supports the ALRC conducting a national evaluation of sexual consent laws and recognises the impact of inconsistencies in consent laws across various jurisdictions on the experience of complainants and victim-survivors. However, there are practical impediments, risks and opportunity costs to harmonisation that will require close consideration.⁶³

Assessing the effectiveness of special measures

71. Witnesses are usually required to give oral evidence in court in person. There are, of course, exceptions in each state and territory, for example, in relation to vulnerable witnesses.⁶⁴ In general, the ability for a judicial officer or jury to observe a witness's demeanour is critical to assessing a witness's credibility and reliability in a trial process. Procedural changes that impact upon the court's ability to observe a witness's demeanour could represent a significant departure from what is required for a fair trial and any modification requires careful consideration.

⁵⁸ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Current and Proposed Sexual Consent Laws in Australia](#) (Submission, 5 April 2023).

⁵⁹ Law Council of Australia, Policy Statement, Rule of Law Principles (March 2011).

⁶⁰ *Woolmington v The Director of Public Prosecutions* [1935] AC 462; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; [1993] HCA 74; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 119–120 [46].

⁶¹ *Lee v The Queen* [2014] HCA 20, [33]. *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at 1095 [20].

⁶² Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Current and Proposed Sexual Consent Laws in Australia](#) (Submission, 5 April 2023), Principle 2, 18 [67].

⁶³ *Ibid*, 6–7 [8]–[9].

⁶⁴ See generally, *Criminal Procedure Act 1986* (NSW), Part 6. Section 306U(1) provides that a vulnerable person is entitled to give evidence in chief in the form of a recording. Section 306M(1) defines 'vulnerable person' as a child or cognitively impaired person.

72. The Law Council generally supports measures designed to promote the rights of complainants and victim-survivors, strengthen available protections and provide courts with the necessary tools and flexibility, provided that such measures are carefully balanced against the right of the accused to a fair trial.

Assessing the effectiveness of live evidence by CCTV

73. The Law Council supports approaches taken in most jurisdictions, for example, in New South Wales, to reduce the potential for re-traumatising effects by allowing witnesses to give evidence by video-link from a remote facility (or by the use of other modifications such as screens, or the modification of planned seating arrangements to ensure the accused person is not in the line of sight of the complainant and victim-survivor).⁶⁵ Crucially, the New South Wales scheme preserves the agency of complainants and victim-survivors by recognising that a vulnerable person may choose not to use such alternative arrangements.⁶⁶
74. The Law Council supports the ALRC investigating whether there are gaps experienced by complainants and victim-survivors in the infrastructure necessary to support these special arrangements across jurisdictions.

Assessing the effectiveness of pre-recorded evidence in relation to vulnerable witnesses

75. Recently, the Law Council has expressed support for maintaining special arrangements for children and vulnerable adult witnesses to give evidence in criminal trials for Commonwealth offences.⁶⁷ In this context, the key advantage of pre-recorded evidence is that it is often given closer in time to the date of the alleged offence. In the case of children and cognitively-impaired complainants and victim-survivors, there is an advantage to the jury in being able to see and assess the witness at a time closer to the occurrence of the offence when the evidence is recorded prior to the trial. This is particularly the case for child witnesses because there can be significant differences in a young child's presentation in a 12-month or 2-year period. The recorded evidence preserves the presentation of the child closer to the time of the alleged offending. In this context, we consider pre-recording a reasonable and proportionate departure from the ordinary criminal trial process.
76. However, evidence being recorded at an early stage in the proceedings by police officers may have disadvantages for all parties. Firstly, the questions may be asked by police who may not be adequately trained on the rules of evidence, this may mean that these recordings may require significant editing and deletions may be required to remove prejudicial material. Secondly, the recording may be made at the start of the investigation. These two circumstances may mean that there are often gaps in evidence and applications for further evidence-in-chief at a later stage.
77. In this regard, the Law Council endorses the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse to the effect that interviewing of children and other vulnerable witnesses should only be undertaken

⁶⁵ See for example, Division 4 of Part 6 of the *Criminal Procedure Act 1986* (NSW). Notably, section 306ZG provides that closed-circuit television facilities or similar technology must be operated in such a manner that the persons who have an interest in the proceeding are able to see the vulnerable person (and any person present with the vulnerable person) on the same or another television monitor.

⁶⁶ *Criminal Procedure Act 1986* (NSW), s. 306ZH(4).

⁶⁷ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#) (Submission, 3 March 2024).

by police with specialist training.⁶⁸ This specialist training should address both the developmental and communication needs of children and vulnerable witnesses as well as skill development in planning and conducting interviews, including use of appropriate questioning techniques.⁶⁹

Pre-recording for adult complainants and victim-survivors as a matter of course for all sexual violence offences

78. The Law Council acknowledges the intended purpose of admitting into evidence the earlier recordings of a complainant and victim-survivor's evidence is to reduce the re-traumatisation of vulnerable persons by ensuring they are not required to provide the same evidence on multiple occasions. The Law Council does not support allowing the pre-recording of evidence of adult complainants and victim-survivors (who are not vulnerable witnesses) as a default position in all sexual violence matters. It is crucial to bear in mind that, in uniform evidence jurisdictions, there are provisions for a trial judge to make a case-by-case determination that vulnerable witness protections should be extended to a particular witness.⁷⁰
79. In our assessment, regular recourse to audio-visual recording risks prejudicing all parties to a criminal proceeding. In this regard, the Law Institute of Victoria observes:⁷¹

Such arrangements would cease to be alternative should they became customary. It is considered that all parties would be disadvantaged by the insertion of a layer of insulation between the court proceedings and the complainant's evidence, prosecution, defence and jury alike. Isolation from the courtroom can exaggerate spatial hierarchies, generates barriers to communication, comprehension and confidentiality, and reduces an accused [or a complainant] to pixels on a screen, thereby provoking concerns of "presumptive guilt" instead of presumptive innocence.

80. The Law Council recently expressed caution about the expansion of pre-trial audio-only recordings being used as evidence-in-chief in proceedings because it would expand the operation of what is a significant departure from the normal trial process (where a witness is usually required to give evidence in court in person).⁷² The Law Council's concern was reflected in the recommendation contained in the *Additional Comments by Senator Paul Scarr* contained in the Final Report of the Senate Legal and Constitutional Affairs Committee.⁷³

⁶⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, [Criminal Justice Report—Executive Summary and Parts I – II](#) (Report, 2017), 26 Recommendation 9.

⁶⁹ Ibid.

⁷⁰ See generally, *Evidence Act 1995* (Cth), s. 26(a) (Court's control over questioning of witnesses); *R v Hines* (No 2) [2014] NSWSC 990.

⁷¹ Law Institute of Victoria, Submission to the Victorian Law Reform Commission, Improving the Response of the Justice System to Sexual Violence (Submission, 15 January 2021) (citations omitted).

⁷² Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#), (Submission, 3 March 2024), 14 [42]–[47].

⁷³ Senator Scarr recommended that the Bill be amended to provide additional safeguards around the use of audio-only recordings in the form proposed by the Law Council of Australia or in some other form to address the issues raised by the Law Council of Australia with respect to the use of audio-only evidence: Senate Legal and Constitutional Affairs Committee Legislation Committee, [Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#) (April 2024), [1.35]. Recommendation 4 (Senator Paul Scarr).

81. The Law Council also reiterates concerns that over-reliance on pre-recorded evidence risks delays and inefficiency.⁷⁴ Unless the courts and parties are adequately resourced to hold the balance of the trial soon after the vulnerable witness's evidence is pre-recorded, the proposed measures risk contributing to delay. In this regard, the Victorian Bar observes that in their experience pre-recording of evidence-in-chief has little impact on reducing delays to trial and may, in fact, contribute to delays creating a need for pretrial argument and rulings. It also requires the time taken to record the evidence to be doubled when it is played to the jury, which prolongs criminal trials in many cases, especially where interpreters are involved.

Witness intermediaries

82. While, in principle, witness intermediary schemes have a significant benefit for witnesses with a particular vulnerability or communication need, it is essential that intermediaries are only made available to witnesses who have communication needs or vulnerabilities which would benefit from specialised assistance and a framework is developed to assess the need for intermediaries.
83. The ALRC should carefully consider and compare the approaches taken in various Australian jurisdictions with respect to witness intermediaries.⁷⁵ We note that the Commonwealth is currently conducting a scoping study to explore options to establish a Commonwealth witness intermediary scheme to support witnesses, including complainants and victim-survivors, to give their best evidence in Commonwealth criminal proceedings. That study is expected to take into account lessons from similar schemes operating in Australian states and territories. In this regard, consideration should be given to the positive evaluations of the Child Sexual Offence Evidence Program which was introduced in NSW in 2016 as a three-year pilot in the Sydney Downing Centre and Newcastle District Court.⁷⁶ The successful implementation of that pilot led to the expansion of that scheme in 2023.⁷⁷
84. In New South Wales, Chapter 6, Part 5, Division 1A, of the *Criminal Procedure Act 1986* (NSW), enables eligible child complainants and victim-survivors and prosecution witnesses to give the whole of their evidence, including cross-examination and re-examination, in pre-recorded evidence hearings. A person appointed as a witness intermediary is an officer of the Court and must, to the extent necessary, assist the witness by communicating to the Court as to whether the witness can understand questions put to the witness.⁷⁸ Additionally, the person appointed as a witness intermediary must to the extent necessary explain—to the Court and the person asking questions—the best way a witness can be asked questions the witness can understand.⁷⁹ The witness intermediary has a duty to impartially facilitate the communication of, and with, the witness so the witness may give the witness's best evidence.⁸⁰

⁷⁴ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#), (Submission, 3 March 2024), 15 [49]–[50].

⁷⁵ See for example, Schedule 2, Part 29, Division 3, of the *Criminal Procedure Act 1986* (NSW), which regulates the appointment and use of NSW witness intermediaries.

⁷⁶ Judy Cashmore and Rita Shackel, Evaluation of the Child Sexual Offence Evidence Pilot - Final Outcome Evaluation Report, University of NSW (Report, August 2018), 1.

⁷⁷ The Hon. Michael Daley MP, Second Reading Speech, Criminal Procedure Amendment (Child Sexual Offence Evidence) Bill 2023, NSW Legislative Assembly, Hansard, 20 September 2023, 22.

⁷⁸ *Criminal Procedure Act 1986* (NSW), s. 294L(1)(a).

⁷⁹ *Criminal Procedure Act 1986* (NSW), s. 294L(1)(b).

⁸⁰ *Criminal Procedure Act 1986* (NSW), s. 294L(2)(b).

85. We support the implementation of a Commonwealth witness intermediary scheme to support witnesses (including complainants and victim-survivors), who have particular vulnerabilities and communication difficulties, to give their best evidence in Commonwealth criminal proceedings. In the experience of members of the Law Council's National Criminal Law Committee and the Victorian Bar, the benefits of the intermediary program are more apparent when very young or cognitively-impaired witnesses are giving evidence, as they tend to have more specific communication needs.
86. Any intermediary scheme that is implemented should be governed by a clear legislative framework for the appointment of intermediaries, their use in a particular case, and procedural fairness safeguards.⁸¹ For instance, in New South Wales there are certain minimum qualifications prescribed for suitable persons appointed by the Government as members of the panel of witness intermediaries.⁸² There are restrictions on appointing a witness intermediary for a witness if the person is a relative, or a friend, or has assisted the witness in a professional capacity other than as a witness intermediary.⁸³
87. Not every vulnerable witness will have communication difficulties and benefit from the assistance of an intermediary. Therefore, intermediary schemes should be opt-in only and preserve the agency of complainants and victim-survivors to decide against assistance in this way. For instance, in New South Wales the Court is not required to appoint a witness intermediary if the Court is satisfied that it is unnecessary or inappropriate or it is not otherwise in the interests of justice.⁸⁴ Given the limited resources of intermediary programs, it may be valuable for intermediaries to provide an initial assessment to determine whether intermediary assistance is required at all during the criminal trial process, rather than the allocation of an intermediary being an assumed requirement.
88. There are risks that intermediaries may interject during questioning in ways other than those agreed upon with the judge at a ground rules hearings. This can result in unfairness to an accused and their counsel in the conduct of the defence case. To ensure the fair trial of the accused, we have also recommended consideration of express safeguards defining the role of the witness intermediary in the proceedings.⁸⁵ We are aware of instances where defence counsel sought to cross-examine intermediaries and exclude pre-recorded evidence based on alleged improper conduct of intermediaries.⁸⁶ In that case, the court rejected the application because the meetings were recorded and police present at all times. To address these risks, it is imperative to ensure that steps are taken to appoint and train a panel of suitably qualified and skilled witness intermediaries in each jurisdiction capable of professionally discharging their important functions in the criminal trial process.

⁸¹ See further, the Law Council opposed an earlier Commonwealth exposure draft that proposed establishing a witness intermediary scheme without first establishing this governance framework: Law Council of Australia, [Exposure Draft: Crimes and Other Legislation Amendment \(Strengthening the Criminal Justice Response to Sexual Violence and Other Measures\) Bill 2022](#) (Submission, 1 March 2022) 9–10.

⁸² *Criminal Procedure Act 1986* (NSW), s. 294M(2).

⁸³ *Criminal Procedure Act 1986* (NSW), s. 294M(5).

⁸⁴ *Criminal Procedure Act 1986* (NSW), s. 294M(4)(c) and (d).

⁸⁵ *Ibid*, [34]. A lack of clarity in the role of the witness intermediary risks appeals and delays: see *SC v R* [2020] NSWCCA 314

⁸⁶ *Nicholas Bradley (a pseudonym) v The Queen and the Secretary to the Department of Justice and Community Safety* [2021] VSCA 63.

Leave to seek personal information

89. As stated above, some jurisdictions have recently established provisions to require that leave be sought from the court to admit the personal information of a complainant and victim-survivor. For example, as discussed at paragraph 48, the New South Wales sexual assault communications privilege pertains to communications that have been made in confidential, therapeutic settings. A different approach has been taken in Victoria. Section 32C(1) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) provides that, in a criminal proceeding, a document containing a confidential communication⁸⁷ or protected health information⁸⁸ is not to be produced (and evidence of a confidential communication or protected health information is not to be adduced) 'unless the court grants leave to compel the production of the document or to produce it or to adduce the evidence'. Then, section 32D restricts the circumstances in which leave may be granted to where the court is satisfied, on the balance of probabilities, that:
- the evidence will, either by itself or having regard to other evidence produced or adduced or to be produced or adduced by the party seeking leave, have substantial probative value to a fact in issue; and
 - other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available; and
 - the public interest in preserving the confidentiality of confidential communications and protected health information and protecting a protected person from harm is substantially outweighed by the public interest in admitting, into evidence, evidence of substantial probative value.
90. In determining whether the public interest in preserving confidentiality outweighs the probative value of the evidence sought to be adduced, the court may consider factors such as: the likelihood, and the nature or extent, of harm that would be caused to the protected person if the protected evidence is produced or adduced; the extent to which the protected evidence is necessary to allow the accused to make a full defence and the need to encourage victims of sexual offences to seek counselling and the extent to which victims may be discouraged from doing so.⁸⁹ The Victorian Court of Appeal recently provided guidance on the balancing exercise to be undertaken in the context of section 32D.⁹⁰ The Law Council underlines that, in certain cases, disclosure will be necessary to allow the accused to make a full defence.⁹¹
91. Victorian Legal Aid has a program to fund complainants and victim-survivors for representation in relation to an application for personal information under section 32C of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).

⁸⁷ That is, communication made in confidence by a complainant and victim-survivor to a registered medical practitioner or counsellor in the course of the relationship whether before or after the acts constituting the offence occurred or are alleged to have occurred: *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s. 32B(1) ('confidential communication').

⁸⁸ That is, in criminal proceedings relating (wholly or partly) to a charge for a sexual offence, the health information is about the complainant and victim-survivor and the person who recorded or collected the information did so in a professional capacity: *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s. 32BA(1).

⁸⁹ *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s. 32D(2).

⁹⁰ *Duncan (a pseudonym) v The King* [2024] VSCA 27, [31]–[35]. ('*Duncan*')

⁹¹ In *Duncan*, at [34], the Victorian Court of Appeal considered that 'the counselling notes are replete with confidential communications which have significant probative value with respect to the credibility and reliability of the complainant's memory, and hence the principal fact in issue on each charge. To make a 'full defence', the applicant must be capable of adducing material that will bear directly on the credibility and reliability of the complainant's memory of critical events'.

92. In our view, the provisions set out above strike a balance between the need to fully arm the accused with relevant material in relation to any defence while also protecting confidential personal and health information. Judicial discretion—in determining the balance between whether the material sought to be adduced has substantial probative value to a fact in issue as against the public interest in preserving the confidentiality of such communications—is an appropriate safeguard. However, the efficacy of such provisions hinges on building community awareness that the right exists and is actionable, and the adequate provision of legal assistance in exercising that right.

Sexual reputation and experience evidence

93. The Law Council maintains our recently expressed position to a parliamentary review of the protections for vulnerable witnesses in trials for Commonwealth offences.⁹² That is, while we support appropriate restrictions on adducing evidence relating to past sexual activity for vulnerable witnesses, there should be appropriate exceptions for properly relevant and highly probative evidence to be adduced with leave of the Court.

Cross-examination and the law of evidence

94. The Law Council generally considers existing safeguards, for example, rules with respect to disallowable questions, to be adequate, however there is scope to continually improve the application of such rules. The Law Council notes that '[a] primary function of the trial judge is to control questioning that could jeopardise a fair trial' and that '[t]heir judicial authority, independent of objections [raised by counsel], requires them to ensure that counsel observe accepted standards in the manner in which evidence is elicited'.⁹³ That position is also reflected in statute law.⁹⁴
95. As a general principle, questions put to a witness during cross-examination must be relevant to a fact in issue in the proceeding.⁹⁵ If it is relevant, but may cause harm, distress or humiliation to the witness, then the judicial officer must balance the probative value of the line of questioning against the harm to the witness.
96. Section 41 of the *Evidence Act 1995* (Cth) and equivalent provisions in other jurisdictions impose an obligation on the court to disallow improper questions put to a witness in cross-examination in criminal and civil proceedings, including sexual assault matters. One of the grounds for a disallowable question is that the court is of the opinion, that the question is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive.⁹⁶ Another is that the question is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate.⁹⁷ In certain jurisdictions, there are more specific provisions designed to protect complainants and victim-survivors from inappropriate questioning and unnecessary trauma during cross-examination, for example, a prohibition on

⁹² Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (Submission, 3 March 2024), 10–11.

⁹³ *Roger Ward (A Pseudonym) v The Queen* [2017] VSCA 37, [129] (Maxwell P and Redlich JA) citing *Libke v The Queen* (2007) 230 CLR 559, 577 [35] and *Rees v Bailey Aluminium Products Pty Ltd* (2008) 21 VR 478, 504 [87].

⁹⁴ *Evidence Act 1995* (Cth), ss. 26 and 29.

⁹⁵ The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding: *Evidence Act 1995* (Cth), s. 55.

⁹⁶ *Evidence Act 1995* (Cth), s. 41(1)(b).

⁹⁷ *Evidence Act 1995* (Cth), s. 41(1)(c).

questions concerning sexual reputation and requiring leave of the court to be sought to allow questions and evidence concerning sexual activities.⁹⁸

97. Spigelman CJ articulated the crucial role played by judicial officers overseeing a trial in rejecting irrelevant questions and disallowable lines of cross examination in the following terms:⁹⁹

The difficulties encountered by complainants in sexual assault cases in the criminal justice system has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

98. The Law Council acknowledges that in some cases, counsel and judicial officers may not utilise existing safeguards appropriately. If this is the case, then this should be addressed by continuing, trauma-informed, training and education of the legal profession and judiciary. We note the ongoing work of our Constituent Bodies in responding to contemporary standards of acceptable questioning with a renewed focus on trauma-informed advocacy and the basic objectives of cross-examination in their offering of continuing professional development. We recognise the need for specialist accreditation programs, including for family law, children's law and criminal law, to include family violence and trauma-informed lawyering as an expected area of knowledge. We note that in order to maintain accreditation, specialist-accredited practitioners are required to undertake an annual continuing professional development (CPD) program, with an emphasis on CPD related to their area of specialisation in addition to the other mandated CPD fields.

Questioning by an unrepresented litigant disallowed

99. The Law Council reiterates its support for a prohibition on an unrepresented accused person questioning complainants and victim-survivors in sexual violence cases of any type. In the context of criminal trials, we note that NSW and Victoria have established provisions with the effect that the complainant and victim-survivor cannot be examined in chief, cross-examined or re-examined by an unrepresented accused person, but may be so examined instead by a person appointed by the court.¹⁰⁰ The National Domestic and Family Violence Bench Book notes recent changes to state and territory legislation placing similar restrictions on cross-examination of complainants and victim-survivors in domestic and family violence related court proceedings by unrepresented litigants.¹⁰¹ Similar restrictions exist in the *Family Law Act 1975* (Cth) as set out below in paragraph 189.

⁹⁸ See for example, *Criminal Procedure Act 2009* (Vic), ss. 340–344.

⁹⁹ *R v TA* (2003) 57 NSWLR 444, [8].

¹⁰⁰ *Criminal Procedure Act 1986* (NSW), s. 294A; *Criminal Procedure Act 2009* (Vic), s. 357.

¹⁰¹ See further, Attorney-General's Department, Australasian Institute of Judicial Administration, the University of Queensland and University of Melbourne, [National Domestic and Family Violence Bench Book](#) (Online, June 2023), Cross Examination, 7.2.1 citing: *Family Violence Act 2016* (ACT), s. 63; *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s. 41A and *Criminal Procedure Act 1986* (NSW), s. 289VA and 289T; *Domestic and Family Violence Act 2007* (NSW), s. 114; *Domestic and Family Violence Protection Act 2012* (Qld), s. 151; *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s. 29; *Family Violence Act 2004* (Tas), s. 31; *Family Violence Protection Act 2008* (Vic), s. 70; *Restraining Orders Act 1997* (WA), s. 44C and 53D.

Judge-alone trials

100. The Law Council maintains its view that the right of an accused to trial by jury for a criminal offence must be retained for all offences prosecuted on indictment.¹⁰² Where offences prosecuted on indictment may be tried by judge alone, that should only occur with the consent of the accused. In respect of trials on indictment for Commonwealth offences, section 80 of the Australian Constitution requires trial by jury.
101. In our *Principles on Jury Trials in the Context of COVID-19* policy statement, we explained that jury trials are a fundamental part of the criminal justice process and enhance community perceptions of the transparency and legitimacy of the administration of justice.¹⁰³

The jury is a fundamental part of the system of criminal justice in Australia, whereby the community plays an important and direct role in the administration of justice. Jury trials provide a safeguard against the exercise, or the apparent exercise, of arbitrary power by the State. They also allow for impartiality to be observed. Likewise, jury trials help ensure that criminal proceedings are conducted in a manner which is comprehensible to the general public and that the outcomes ultimately achieved are regarded as legitimate and impartial.

102. Australian courts have explained the significance of this right as one that is held by the accused. Trial by Judge alone must be understood as a waiver of the right by the accused.¹⁰⁴
103. Decision making theory would suggest that jurors, who bring a diversity of life experience and make independent decisions, in certain contexts, are more likely to make better decisions than an individual decision maker.¹⁰⁵ While we understand concern that juror decision making may be subject to bias and misconception, we agree with the assessment of the Victorian Law Reform Commission that:¹⁰⁶

Some features of Victoria's criminal justice system, such as the jury system, serve fundamental purposes. Changes require caution and strong evidence that they will achieve their aims ... We are persuaded that it is not clear that replacing the jury, either with a judge or with professional jurors, would deal with juror misconceptions. There are serious risks that would require further study, such as the impacts of this change on a fair trial. We see juries as an important feature of the criminal justice system. They represent the community and contribute to public trust in the system. At this stage, the case for a major change has not been made.

Interpreters

104. The Law Council's Justice Project highlighted an urgent need for high quality, accessible and culturally appropriate interpreter services to ensure participation

¹⁰² Law Council of Australia, [Principles on Jury Trials in the Context of COVID-19](#) (Policy Statement, May 2020).

¹⁰³ Ibid, 1.

¹⁰⁴ *Alqudsi v The Queen* (2016) 258 CLR 203.

¹⁰⁵ James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations* (2004) Doubleday Anchor.

¹⁰⁶ Victorian Law Reform Commission, [Improving Justice System Response to Victims of Sexual Violence](#) (Report, September 2021), [20.15].

across the justice process. This need included highly trained interpreters in numerous Aboriginal and Torres Strait Islander languages, interpreters of Aboriginal English, and interpreters for hearing impaired First Nations people.¹⁰⁷ It recommended a National Justice Interpreter Scheme be implemented, which ensures that professional, appropriate, and skilled interpreters are readily available and free to people who cannot afford them, including First Nations people.

105. We maintain our view that Governments across Australia should implement a National Justice Interpreter Scheme that ensures:¹⁰⁸

- professional, appropriate and skilled interpreters are readily available and free to people from culturally and linguistically diverse backgrounds who cannot afford them, including Aboriginal and Torres Strait Islander peoples, recent arrivals, asylum seekers, and people who are trafficked and exploited, at all levels of the justice system, including legal assistance services;
- interpreter services and courts are funded to enable the full implementation of the Judicial Council on Cultural Diversity's '*Recommended National Standards for Working with Interpreters in Courts and Tribunals*';¹⁰⁹
- the assessment of communication needs is not restricted to physical disability and should include intellectual disability¹¹⁰ and cognitive impairments. This is because communication needs are often an 'invisible disability' arising alongside other disabilities such as conditions including cognitive impairment, cerebral palsy, Foetal Alcohol Spectrum Disorder, Down Syndrome, Autism Spectrum Disorder, stuttering, severe speech sound or language disorders, mental health conditions, traumatic brain injury, neurodegenerative disorders, and ageing processes.¹¹¹ The Senate Legal and Constitutional Affairs Committee, in line with the Law Council's submission, recommended that the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (Cth) be amended to include other persons with intellectual disability or other communication difficulties who may require an interpreter.¹¹²

106. The Law Council's concern in this area has recently been reinforced by the findings of the *Independent Review of the National Legal Assistance Partnership Report*. This review found that access to interpreter services is essential for First Nations persons to have proper access to justice and that current funding is inadequate.¹¹³ We endorse the recommendation in this report calling for Commonwealth, together with state and territory governments and relevant service providers, to determine an adequate level of interpreter funding for legal assistance purposes as soon as practicable.

¹⁰⁷ Law Council of Australia, '[Aboriginal and Torres Strait Islander People](#)', Justice Project (Final Report, Part 1, August 2018), 45 - 46.

¹⁰⁸ Law Council of Australia, '[Critical Support Services](#)', Justice Project (Final Report, Part 2, August 2018), 50 Recommendation 5.3.

¹⁰⁹ Judicial Council on Cultural Diversity, [Recommended National Standards for Working with Interpreters in Courts and Tribunals](#) (March 2022, 2nd edition).

¹¹⁰ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#), (Submission, 3 March 2024) 17 [60].

¹¹¹ Law Council of Australia, Justice Project Final Report Part 2: [Legal Services](#) (Report, August 2018), 51.

¹¹² Senate Legal and Constitutional Affairs Committee Legislation Committee, [Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#) (April 2024), [2.145] Recommendation 2.

¹¹³ Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Final Report, March 2024), Recommendation 13.

Assessment of the credibility and reliability of complainants and victim-survivors

107. The Issues Paper refers to the 'growing body of empirical research' on the neuro-biological impacts of trauma, including sexual violence trauma, on the memory and responsive behaviour of people who experience sexual violence.¹¹⁴ The Law Council agrees that this body of research has important implications for the criminal justice system, particularly for the assessment of the credibility and reliability of the evidence of a complainants and victim-survivors of sexual violence. This is because this research questions the validity of so called 'common sense beliefs which inform the criminal justice process' as premised on 'myths and misconceptions about the impact of trauma on memory and responsive behaviour'.¹¹⁵
108. As the Issues Paper notes, there are two main approaches to addressing these myths and misconceptions in criminal trials: the first is for the prosecution to call expert evidence about memory and responsive behaviour research; the second is for trial judges to give directions to the jury about delayed complaints, consent and other myths and misconceptions to avert flawed reasoning processes that may result in a miscarriage of justice.¹¹⁶ Jurisdictions have established legislative provisions enabling the prosecution to lead expert evidence about memory and responsive behaviour research.¹¹⁷
109. The Law Council agrees that, in general, prosecutors in Victoria are less likely to call expert evidence to explain the response of a complainant and victim-survivor to alleged sexual assaults because of the expansive provisions in the *Jury Directions Act 2015* (Vic). However, the Victorian Bar notes that there are some cases where expert evidence has been called.¹¹⁸ It observes that expert evidence has tended to be utilised in cases where a complainant and victim-survivor has responded in a particular way to an alleged assault, and has had ongoing contact with an adult following the offence allegations. In such cases, the expert evidence is intended to rebut a defence suggestion that the allegations are fanciful given the complainant and victim-survivor's behaviour.¹¹⁹ Expert evidence has also been led by the prosecution to explain the process of memory formation, storage and retrieval after an alleged traumatic event.
110. The Law Council supports the ALRC giving further consideration to whether jury directions which are currently available, across Australian states and territories, adequately address myths and misconceptions in understanding the behaviour of a complainant and victim-survivor (see further below). We note that the desire to dispel myths and misconceptions must be balanced against the risk that expert evidence will bear on a juror's assessment of evidence of the offence elements unfairly. Expert evidence should be clear as to whether the opinions are general propositions, or specific to the case before the court.

Jury directions

111. Jury directions play a powerful educative role by clarifying the law, and the legal standards of behaviour required in the context of sexual relations. They are an

¹¹⁴ Issues Paper, 12 [59].

¹¹⁵ Issues Paper, 13 [60].

¹¹⁶ Issues Paper, 13 [65].

¹¹⁷ See for example, in Victoria, section 79(2) of the *Evidence Act 2008* (Vic) confirms the exception to the opinion evidence rule where expert evidence that is specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse) is called.

¹¹⁸ See for example, *Ma v The Queen* (2013) 40 VR 564.

¹¹⁹ For one recent example: *Lehrmann v Network Ten Pty Ltd* (Trial Judgment) [2024] FCA 369.

important mechanism by which myths and misconceptions about consent can be addressed, including, for example, that physical resistance is required to demonstrate a lack of consent.

112. In our view, it is critical that jury directions are periodically reassessed to ensure they reflect emerging scientific understandings of the neuro-biological impacts of trauma and the need to dispel myths and misconceptions in criminal trials about expected complainant and victim-survivor behaviour. We support consolidating directions in bench books on these topics, as has been done in some jurisdictions.
113. The Law Council considers that flexibility and judicial discretion are essential in ensuring directions are tailored to the facts of the case in an appropriate way. In this regard, we reiterate the position we have expressed in our *Policy Statement on Jury Directions*:¹²⁰

The law in this area is in a constant state of change because it is impossible to predict all the circumstances in which the need for a warning or direction might emerge. Flexibility and judicial discretion are required to ensure that the directions and warnings which are given and the manner in which they are communicated are appropriate in the context of any particular case. For this reason, the legislature should not attempt to codify the law in respect of jury warnings and directions or attempt to reduce the law to one piece of legislation. Unless legislation is essential (for example, to over-ride common law authority) it should be avoided.

114. The Law Council notes that, in Victoria, to reduce the complexity of jury directions in criminal trials, there has been codification of jury directions in the *Jury Directions Act 2015* (Vic). Notably, that Act maintains, as a guiding principle, that it is the responsibility of the trial judge to determine the matters in issue in the trial and the content of the directions that the trial judge should give to the jury.¹²¹ Under this regime, it is the role of counsel to assist in identification of matters in issue and request that particular directions be given or not given.¹²² Then the trial judge must give the jury a requested direction unless there are good reasons for not doing so.¹²³ The Victorian Bar considers that this framework enables directions to be given that clearly articulate myths and misconceptions and enables juries to be directed that research does not support these myths and misconceptions.¹²⁴ It is the experience of Victorian practitioners that these directions have the practical effect of limiting defence counsel's ability to utilise such myths in any challenge to a complainant and victim-survivor's account. However, the Victorian Bar submits that there is a real risk that any further expansion of jury directions would act to overwhelm and expand upon the prosecution case unfairly.

Admissibility of certain evidence

Complaint evidence

115. The Law Council notes that the effect of complaint evidence can be contextualised by tailored directions. In general, it may be probative of a complainant and victim-

¹²⁰Law Council of Australia, [Policy Statement on Jury Directions](#) (Policy Statement).

¹²¹ *Jury Directions Act 2015* (Vic), s. 5.

¹²² *Jury Directions Act 2015* (Vic), ss. 11 and 12.

¹²³ *Jury Directions Act 2015* (Vic), s. 14.

¹²⁴ See for example, in relation to consent (ss. 45–47); in relation to delay in complaint (ss. 51–52); in relation to differences in the complainant's account (s. 54D); in relation to continuation of relationship post-offence (s. 54H).

survivor's credibility where such evidence differs substantially from the version of events given by a complainant and victim-survivor. The absence of complaint evidence is not generally relied upon by defence counsel to undermine credibility of a complainant and victim-survivor. Conversely, the prior consistency between accounts given by a complainant and victim-survivor is often pointed to by a prosecutor as bolstering the credibility of a complainant and victim-survivor.

Prior inconsistent statement

116. The ability to rely on a prior inconsistent statement, within the rules of evidence, is an important means of properly assessing the complainant and victim-survivor's credibility. To disallow such a line of questioning would not permit a jury an accurate and truthful representation of the case that the jury is required to determine. It would place the jury, and the accused, at a significant disadvantage and risk an unfair trial. It may also lead to applications for stays, appeals and re-trials. As explained above, there is a role for tailored jury directions to contextualise inconsistencies in statements that may be attributable to the effects of trauma on memory.

Distress evidence

117. The Law Council does not see the need for legislative intervention to regulate the admission of distress evidence. In appropriate cases, judges may provide a tailored direction to the effect that trauma affects people differently and that some people may show obvious signs of emotion or distress when giving evidence about a sexual offence, while others may not.¹²⁵ This will contextualise the potentially prejudicial effect of that evidence reminding jurors that it is possible to be truthful or untruthful with or without signs of emotion or distress.

Tendency and coincidence evidence

118. The Law Council notes different approaches to the admission of tendency evidence between code and common law jurisdictions. In general, we consider that the current position including the statutory restrictions contained in sections 97, 98 and 101 of the *Evidence Act 1995* (Cth) provide sufficient certainty. Recent legislative amendments and High Court decisions have meant that tendency and evidence will be admitted in many more cases.¹²⁶
119. The Law Council notes concerns in New South Wales that recent amendments¹²⁷ made to the tendency and coincidence evidence provisions in uniform evidence laws are unnecessarily complex, and that rather than improve understanding of the inferential value of other misconduct evidence, the new provisions may result in confusion and inefficiency.¹²⁸ The Law Society of New South Wales has recently commented that these provisions introduce the danger of unfair prejudice to the accused where cases increase in complexity, however, because of COVID-19

¹²⁵ See for example, *Jury Directions Act 2015* (Vic), s. 54K.

¹²⁶ *Hughes v the Queen* (2017) 263 CLR 338; *The Queen v Bauer* (2018) 266 CLR 56. See for example, in NSW, Section 94 was amended by the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) (which affects hearings which commenced from 1 July 2020) to insert new subsections (4) and (5), following recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. Section 94(4) provides that any principle or rule of the common law or equity preventing or restricting the admissibility of tendency or coincidence evidence is not relevant when applying Pt 3.6 of the *Evidence Act 1995* (NSW).

¹²⁷ *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW).

¹²⁸ See further, David Hamer, 'Myths, misconceptions and mixed messages: an early look at the new tendency and coincidence evidence provisions' (2021) 45 *Criminal Law Journal* 232.

further time is required to provide comprehensive evidence-based commentary on the operation of these new provisions.¹²⁹

Sentencing

120. As a general point, the Law Council expresses caution about the desirability of seeking to harmonise sentencing considerations because of the differences in relevant elements, maximum penalties and names of sexual offences across jurisdictions.
121. For the reasons set out below, the Law Council does not support the proposals listed at paragraph 101 of the Issues Paper.

Evidence of good character

122. In general, in the sentencing context, McHugh J explained that it is first necessary to determine whether the offender is of 'otherwise good character'—the weight that must be given to that good character will vary according to context:¹³⁰

... being of otherwise good character may in some circumstances suggest that the prisoner's actions in committing the offence for which he or she is being sentenced were "out of character" and that he or she is unlikely to re-offend. For that purpose, the absence of previous convictions is usually regarded as evidence of good character. On the other hand, many previous convictions suggest that the offence for which sentence is being passed was not an "uncharacteristic aberration".

123. In New South Wales, section 21A(5A) of the *Sentencing Procedure Act 1999* (NSW), states that, in determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence. The Court must be satisfied of a relevant connection (with a practical onus on the Crown to point to evidence of that connection) that the good character made 'some material contribution' to the offender in the commission of the offence.¹³¹
124. The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that all jurisdictions should introduce legislation similar to that applying in New South Wales (and South Australia) noting that 'offenders may use their reputation and good character to facilitate the grooming and sexual abuse of children and to mask their behaviour'.¹³² The Law Council notes divergences in recent legislative provisions: for example, section 5AA of the *Sentencing Act 1991* (Vic), that seek to prevent the offender's good character being taken into account as

¹²⁹ Law Society of New South Wales, [Submission to Statutory review of the Evidence Amendment \(Tendency and Coincidence\) Act 2020](#) (Submission, 14 July 2022).

¹³⁰ *Ryan v The Queen* (2001) 206 CLR 267, [29] (citations omitted).

¹³¹ *Bhatia v R* [2023] NSWCCA 12, [13]–[14] (Beech-Jones CJ at CL); in that case, the New South Wales Court of Appeal found that it was insufficient to point to the fact that the offender was a family friend, there must be evidence to establish that the commission of the offence was materially assisted by the offender's good character or reputation. See also, in *AH v R* [2015] NSWCCA 51, [25] (Hidden J, Beazley P and Fullerton J agreeing at [1] and [34]) the New South Wales Court of Appeal found upheld a ground of appeal that the sentencing judge had wrongly applied s 21A(5A) to the particular facts in question because there was insufficient evidence that the applicant's good character had in fact assisted his commission of the offences.

¹³² Royal Commission into Institutional Responses to Child Sexual Abuse, [Criminal Justice Report: Executive Summary and Parts I to II](#) (2017), 98–99 Recommendation [74].

a mitigating factor if that good character was of assistance to the offender in the commission of a child sexual offence.¹³³

125. It is significant that the Victorian Court of Appeal, in its interpretation of the Victorian provision in the recent case of *Ooms*, highlighted differences in the statutory text and context underlying the distinct approaches to construction of the NSW and Victorian provisions.¹³⁴ Considering the appellate history of these provisions in New South Wales and Victoria, members of the Law Council's National Criminal Law Committee are concerned at the risk that disparate approaches will be taken in relation to similar facts with respect to establishing the requisite causal connection identified in these provisions.
126. With that context in mind, the Law Council submits that the ALRC should examine recent legislative amendments in states and territories intended to regulate mitigatory effect of good character in sentencing including whether these restrictions are effective and just in the way that they apply. We encourage the ALRC to examine whether there are other ways of dealing with this issue. For example, a simpler option, which imposes less onerous restrictions on judicial discretion, would be to prescribe the extent to which an offender takes advantage of their good character as a factor to be taken to account in sentencing. That approach should be contrasted with framing the provision as a blanket rule that prohibits any weight being given to the offender being of otherwise good character where the requisite causal connection between the offence and the offender being of otherwise good character is established. In certain cases, we are concerned that a blanket prohibition may have an unjust effect.

Sentencing standards at the time of sentence

127. Given that the maximum penalty that applies is that which was relevant at the time of the offending, that is the sentencing standard that ought to be applied. In our view, any departure from this approach would be contrary to fundamental rule of law principles and would require strong justification.

Victim impact statements

128. The Law Council supports the use of victim impact statements (which the prosecuting authority plays a role in ensuring are brought to the attention of the Court) to allow the impacts of trauma on victim-survivors to be properly heard and understood in their own words. This enhances the agency and voice of the victim-survivors in the criminal trial process.
129. The Law Council does not consider it appropriate for victim-survivors to have independent legal representation during sentencing submissions. The sentencing process involves an individualised balancing exercise by reference to legislative parameters and sentencing principles. These legislative parameters regarding the purpose of sentencing generally refer to the need to balance conflicting concepts like deterrence, community safety, rehabilitation and the need to denounce wrongful conduct.¹³⁵
130. In the context of offending against Commonwealth offences, in determining a sentence or order in respect of a federal offence, the sentence must be of a severity

¹³³ See for example, *Sentencing Procedure Act 1999* (NSW), s. 21A(5A). In Victoria, following the case of *Wakim v The Queen* [2016] VSCA 301, section 5AA of the *Sentencing Act 1991* (Vic) was adopted.

¹³⁴ *Ooms v Director of Public Prosecutions* [2023] VSCA 207, [58]–[68] (Niall, Kennedy and Macaulay JA)

¹³⁵ See for example, *Sentencing Act 1991* (Vic), s. 5(1).

appropriate in all the circumstances of the offence.¹³⁶ The impact of offending on a victim-survivor is already considered in sentencing offenders.¹³⁷

131. The role of defence submissions on sentencing is to respond to these matters and suggest an appropriate sentence. The role of the sentencing decision maker is to arrive at an appropriate sentence by 'instinctive synthesis' which means taking 'account of all of the relevant factors and to arrive at a single result which takes due account of them all'.¹³⁸

Realising a more trauma-informed, culturally safe and accessible justice system

132. In addition to the matters we have addressed at paragraph 38 regarding holistic legal service delivery, realising a more trauma-informed and accessible justice *system* is a function of two factors. The first factor puts the focus on the skills and capabilities of the people providing services within the justice system. The Law Council's Justice Project Report emphasised the need for the justice system to adopt trauma-informed and recovery-orientated approaches to better address disadvantage and realise therapeutic outcomes.¹³⁹ However, we have said above, realising a more trauma-informed, culturally safe and accessible justice system (that is responsive to the needs of the most vulnerable members of our community) is not only a function of the skills and capabilities of people within the justice system. This requires sustained investment to overcome decades of neglect of core legal funding for the legal assistance sector.
133. In our view, the range of measures addressed in this submission, while intended to improve criminal justice responses to sexual violence and to promote fair outcomes in these matters, impose additional financial burdens on an already over-stretched justice system. The Law Council considers that successful implementation of these measures is only achievable if much needed additional funding for the legal assistance sector is provided. It cannot be achieved with the current resourcing of the sector.
134. The Law Council holds grave concerns that recent funding initiatives have failed to acknowledge or address the sustained reduction and inadequacy in recurrent expenditure on the core services of the justice system. We consider that victim-survivors and complainants are more likely to be re-traumatised and to experience adverse impacts resulting from unmet legal needs in the context of a chronically underfunded justice system.
135. In this regard, the Law Council welcomed the 39 recommendations contained in the *Independent Review of the National Legal Assistance Partnership Report*, especially those targeted towards a greater investment in the legal assistance sector, better justice outcomes for First Nations peoples, increases to rates paid to legal aid practitioners in the private sector, support for the long-term capabilities of those in the legal assistance workforce, and the need for improved data collection to support evidence-based decision making.¹⁴⁰ The Law Council reiterates its position that Commonwealth, states and territories must meaningfully partner with the legal

¹³⁶ *Crimes Act 1914 (Cth)*, s. 16A(1).

¹³⁷ *Crimes Act 1914 (Cth)*, s. 16A(2)(d) (personal circumstances of the victim); (e)(any injury loss or damage resulting from the offence); (ea) any victim impact statement for the victim.

¹³⁸ *Wong v the Queen* [2001] HCA 64, [75].

¹³⁹ Law Council of Australia, Justice Project Final Report Part 2: [Legal Services](#) (Report, August 2018), 50.

¹⁴⁰ Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Final Report, March 2024).

assistance sector to urgently progress the *Independent Review of the National Legal Assistance Partnership Report's* recommendations.¹⁴¹

Mapping the unmet legal and non-legal needs of complainants and victim-survivors

Complainants and victim-survivors of domestic violence

136. As the Issues Paper notes, sexual violence is gendered and, in the family context, it often occurs alongside other forms of physical and psychological violence and abuse carried out by a partner, spouse, or parent.¹⁴² The Law Council strongly supports the National Plan's focus on strengthening prevention, early intervention and delivery of tailored services to support vulnerable groups, including the identified need to improve capacity building within legal assistance services supporting women and children experiencing family violence.¹⁴³
137. A 2019 study of the legal needs of victim-survivors of domestic violence found that their legal needs were more likely to be 'severe' with greater than normal adverse impacts on life circumstances. That study concluded in respect of victim-survivors of domestic violence that:¹⁴⁴

Their legal problems were more likely to lead to stress-related illness, physical ill health, relationship breakdown, loss of income or financial strain, and moving home. They were more likely to require assistance from professionals, particularly lawyers and health and welfare professionals, and to require recourse to formal legal processes to achieve resolution. These findings demonstrating the 'compounding effect' of DFV victimisation on legal and human service needs, together with the relatively disadvantaged profile of people experiencing DFV, reinforce the importance of accessible public legal assistance services for DFV remaining a government policy priority. Holistic, joined-up legal and broader human services are often necessary to address the complex legal and related needs of people experiencing DFV.

138. The Law Council considers that coercive control is often a central or underlying feature of family and domestic violence and is a known predictor of future or escalated family violence. The Law Council continues to support the development of the National Principles to Address Coercive Control to inform measures aimed at addressing coercive control. Effective responses to coercive control will be greatly assisted by nationally consistent policy settings.¹⁴⁵
139. The Law Council has previously emphasised the importance of specialist, joined-up legal services alongside critical support services at an early stage as a key element of an integrated response to family violence. The Law Council reiterates its support for the Law and Justice Foundation's recommendations for the development of more accessible, 'joined-up' legal and non-legal services and bidirectional referrals.¹⁴⁶

¹⁴¹ Law Council of Australia, [Access to justice funding report welcome, implementation plan must be urgently developed](#) (Media Release, 28 May 2024).

¹⁴² Issues Paper, 4 [22].

¹⁴³ Law Council of Australia, [Ending Violence against Women and Children](#) (Media Release, 18 October 2022).

¹⁴⁴ NSW Law and Justice Foundation, ['Quantifying the legal and broader life impacts of domestic and family violence'](#), *Justice Issues* (Report, June 2019) Paper 32. See generally, Law Council of Australia, [The Justice Project Final Report: Part 1 People Who Experience Family Violence](#) (Report, August 2018).

¹⁴⁵ Law Council of Australia, Submission to Attorney-General's Department, [National Principles to Address Coercive Control](#) (Submission, 5 December 2022).

¹⁴⁶ Law Council of Australia, Submission to House of Representatives Standing Committee on Social Policy and Legal Affairs, [Inquiry into family, domestic and sexual violence](#) (Submission, 7 August 2020), 18 [74].

We have previously endorsed the approach taken by New South Wales Legal Aid Domestic Violence Unit, which has set a long-term goal of providing those who are experiencing, or, at risk of, family violence with the legal and other assistance they require to 'build lives safer from' family violence, as a positive example of an integrated response to family violence.¹⁴⁷

140. Accordingly, the Law Council strongly endorses the recommendations made by the *Independent Review of the National Legal Assistance Partnership Report* that funding for women's legal services be separated from the general community legal centre stream and be quarantined under the access to justice partnership (including additional funding to be provided to Women's Legal Services Australia so it can function as the national women's legal assistance peak).¹⁴⁸

First Nations complainants and victim-survivors

141. In a recent submission to a parliamentary inquiry, the Law Council emphasised that the principle of self-determination should underpin responses to violence experienced by First Nations women and children, including by long-term investment in First Nations community-controlled organisations and services empowered to self-design strategies for the safety of their communities.¹⁴⁹ The priority reforms pursuant to the National Agreement on Closing the Gap should be drawn upon as a framework for working with First Nations Controlled Organisations to address the service needs of First Nations people.¹⁵⁰ The Law Council agrees with the recommendation of the *Independent Review of the National Legal Assistance Partnership Report* that the access to justice partnership founding document should be amended to recognise the shared responsibility of Commonwealth, state and territory governments for both achieving those Closing the Gap targets that relate to the legal system and for provision of sufficient legal assistance funding to achieve those objectives.¹⁵¹
142. The Law Council reiterates its support for the guiding principles contained in the 2020 report by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Ms June Oscar AO: the *Wiyi Yani U Thangani Report*.¹⁵² In particular, we agree with the key recommendations directed to:¹⁵³
- urgently investing in prevention and early intervention supports;
 - investing in diversionary pathways away from the criminal justice system and child protection;
 - implementing mechanisms to keep women and children safe and families, together (including increased investment year on year, commensurate with need to Family Violence and Prevention Legal Services and to Aboriginal Legal Services as culturally safe, trauma-informed specialist supports and legal representation); and
 - developing a culturally safe and responsive service system.

¹⁴⁷ Ibid, 19 [75].

¹⁴⁸ Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Final Report, March 2024), Recommendation 7.

¹⁴⁹ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Inquiry into Missing and Murdered First Nations Women and Children](#) (Submission, 11 January 2023) 17 [45].

¹⁵⁰ Australian Government, Department of the Prime Minister and Cabinet, Parties to the National Agreement on Closing the Gap: [Priority Reform Areas for Joint National Action](#) (Online, July 2020).

¹⁵¹ Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Final Report, March 2024), Recommendation 9, 10, 11 and 12.

¹⁵² Australian Human Rights Commission, [Wiyi Yani U Thangani Report](#) (Report, 9 December 2020)

¹⁵³ Ibid, 236–238.

143. We share the concerns identified recently in the *Independent Review of the National Legal Assistance Partnership Report* which highlighted both the chronic underfunding of Aboriginal and Torres Strait Islander Legal Services and Family Violent Prevention Legal Services, but also the inadequate respect for self-determination, which the report author, Dr Mundy expressed as follows:

It is clear to me that Aboriginal and Torres Strait Islander peoples experience greater unmet legal need than any other group in the community. While resourcing of Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS) has been inadequate for well over a decade, and despite the Justice Policy Partnership, NLAP and the approaches adopted by some state officials actively work against self-determination.

144. With that context in mind, the Law Council has previously made recommendations that Federal, State and Territory governments should commit to improvements across the justice system to ensure that First Nations women and children experiencing violence are empowered to access justice and, in turn, realise their rights to safety and to an effective remedy.¹⁵⁴

Culturally and linguistically diverse complainants and victim-survivors

145. In the Law Council's Justice Project Report, the Law Council has set out extensively the specific barriers faced by vulnerable persons from culturally and linguistically diverse communities in accessing courts¹⁵⁵ and legal assistance as well as asylum seekers¹⁵⁶ and recent arrivals to Australia.¹⁵⁷
146. Additionally, the Law Council refers to the following key findings of the Victorian Royal Commission into Family Violence in respect of diverse communities.¹⁵⁸
- The effects of family violence experienced by people from culturally and linguistically diverse communities are compounded by a range of factors associated with their experience of migration and resettlement, as well as systemic barriers to seeking and obtaining help.
 - There are some specific forms of family violence experienced by women in some culturally and linguistically diverse communities, for example: forced marriage, dowry-related violence, and female genital mutilation.
 - Both mainstream universal services, and specialist family violence services, struggle to provide culturally appropriate support for culturally and linguistically diverse complainants and victim-survivors.
 - The availability of professional and independent interpretation and translation services is inadequate.
147. The need for further resourcing with respect to cultural awareness training and interpreters are discussed further below.

¹⁵⁴ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Inquiry into Missing and Murdered First Nations Women and Children](#) (Submission, 11 January 2023),

¹⁵⁵ See further, Law Council of Australia, Justice Project Final Report Part 2: Courts and Tribunals (Report, August 2018), 34–47.

¹⁵⁶ See further, Law Council of Australia, Justice Project Final Report Part 1: [Asylum Seekers](#) (Report, August 2018).

¹⁵⁷ See further, Law Council of Australia, Justice Project Final Report Part 1: [Recent Arrivals to Australia](#) (Report, August 2018);

¹⁵⁸ State of Victoria, Royal Commission into Family Violence: Summary and Recommendations Parl Paper No 132 (2014–16) vol. 1, 34–39.

Regional, rural and remote complainants and victim-survivors

148. We consider it appropriate for the ALRC to examine the impact of resourcing on the capacity for justice agencies to respond effectively to sexual violence, with a particular focus on resourcing in regional, rural and remote areas as a priority area of concern.
149. In this regard, the Law Council emphasises its support for the recommendations of the *Independent Review of the National Legal Assistance Partnership Report* directed to addressing unmet geographic need.¹⁵⁹ That includes the need to undertake a legal need survey to better understand geographic areas of legal need; the nature and cost of the services needed to efficiently fill these gaps and to ensure that services intended to be national in character are adequately funded to service all parts of the country. Additionally, we support its recommendations directed to ensuring complete national geographic coverage for Family Violence Prevention Legal Services.¹⁶⁰ More generally, the Law Council endorses the recommendation of the House Standing Committee on Social Policy and Legal Affairs that the Australian Government should, in consultation with state and territory governments, develop a transparent need-based funding methodology to account for variations in the presentation of family, domestic and sexual violence in different jurisdictions.¹⁶¹ This methodology should be applied to future Australian Government and state and territory governments' funding for family, domestic and sexual violence programs.

Complainants and victim-survivors living with disability and mental health issues

150. People with disability are more likely to experience family, domestic and sexual violence than people without disability.¹⁶² The Law Council has previously considered the additional barriers faced by persons living with disability to seeking help and accessing the justice system including: lack of legal knowledge, lack of legal assistance services, lack of training, poor accessibility including communication, experience with adversarial justice systems and lack of access to critical support services.¹⁶³ It is important to recognise that sexual violence may intersect with specific harms experienced by people with disability, for example:¹⁶⁴ abuse focused on the disability, threats of institutionalisation, abandonment, withdrawal of care and health information disclosure and withdrawal of medication, care and other assistance.
151. In this regard, the Law Council reiterates its view that implementation of the recommendations of the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability will make a vital contribution to ensuring a more inclusive and just Australia which supports people with disability to live independently and in safety.¹⁶⁵ To address these barriers, the Law Council has previously explained its support for strengthening access to legal

¹⁵⁹ Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Final Report, March 2024), Recommendation 2 and Appendix D1 (identifying areas of need).

¹⁶⁰ Ibid, Recommendation 3.

¹⁶¹ House of Representatives Standing Committee on Social Policy and Legal Affairs, [Inquiry into Family, Domestic and Sexual Violence](#) (Report, March 2021), [3.200] Recommendation 19.

¹⁶² Australian Institute of Health and Welfare, [Family, domestic and sexual violence: People with disability](#) (Online, 12 April 2024).

¹⁶³ Law Council of Australia, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [The Criminal Justice System—Issues Paper](#) (Submission, 17 August 2020), 23–32; Law Council of Australia, [The Justice Project: Final Report Part 1—People with Disability](#) (Report, August 2018).

¹⁶⁴ Australian Institute of Health and Welfare, [Family, domestic and sexual violence: People with disability](#) (Online, 12 April 2024).

¹⁶⁵ Law Council of Australia, [‘A more just Australia for people with disability’](#) (Media Release, 6 October 2023).

knowledge and information, specialised legal advice and representation, measures to improve communication, the role of intermediaries and interpreters, flexible procedures and disability support officers.¹⁶⁶ As we have explained at paragraph 38, there is a need for greater resourcing of early identification and multi-disciplinary service responses.¹⁶⁷

Complainants and victim-survivors who experience socio-economic hardship

152. In previous submissions, we have explained that the persistent inadequate level of funding provided under the National Legal Assistance Partnership adversely impacts access to justice for those who experience socio-economic hardship the most.¹⁶⁸ For instance, because of persistent underfunding in relation to core activities the legal aid means tests employed by Legal Aid Commissions are set at levels at which most Australian households—even those experiencing significant disadvantage—will not be eligible.¹⁶⁹ We have also emphasised the importance of ensuring that legal aid rates made available to the private legal profession should have far greater regard to existing scales of costs, and, wherever possible, align with these benchmarks.¹⁷⁰ We consider that this is critical to ensuring sustainable participation by the profession in the delivery of access to justice to Australians experiencing socio-economic hardship.
153. The Law Council's Justice Project extensively considered the cumulative and multifaceted disadvantage experienced by people who are homeless or who are at risk of homelessness.¹⁷¹ We have found that the acute shortage of affordable housing and temporary, crisis accommodation is a structural cause of homelessness and a key underlying factor precipitating, or exacerbating, a person's interaction with the justice system, including as a victim, and perpetrator, of crime. In this regard, we have underlined the need for commitment to reliable, secure and recurrent funding of specialist homelessness legal services and related social, health and wellbeing critical supports. We consider that legal, policy and service frameworks should be improved to prioritise homelessness prevention, through investment in safe, secure and appropriate housing, including inclusive crisis accommodation.
154. Accordingly, the Law Council strongly endorses the recommendation in the *Independent Review of the National Legal Assistance Partnership Report* that the access to justice partnership priority groups should be expanded to include people living below the ACOSS defined poverty line.¹⁷²

Complainants and victim-survivors who identify as LGBTQIA+

155. Discrimination experienced by LGBTQIA+ people may increase their risk of experiencing distinct forms of family, domestic and sexual violence. The 2020 Private Lives 3 Survey (an Australian study of LGBTQIA+ people) found 49 per cent had experienced sexual assault, 61 per cent had experienced violence from an intimate partner and 43 per cent of participants who had experienced intimate

¹⁶⁶ Law Council of Australia, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [The Criminal Justice System—Issues Paper](#) (Submission, 17 August 2020), 33–41.

¹⁶⁷ Ibid, 45–46.

¹⁶⁸ See generally, Law Council of Australia, [Submission to Dr Warren Mundy, Independent Review of the National Legal Assistance Partnership](#) (Submission, 27 October 2023).

¹⁶⁹ Ibid, 12 [30].

¹⁷⁰ Ibid, 16 - 17.

¹⁷¹ See further, Law Council of Australia, [The Justice Project Final Report Part 1: People who are Homeless](#) (Report, August 2018), 4.

¹⁷² Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Final Report, March 2024), Recommendation 8.

partner or family violence reported that they felt they were targeted because of their sexuality, gender or intersex variations.¹⁷³

156. The Law Council notes with concern that patterns of identity-based abuse may coincide with sexual violence-related behaviour for LGBTQIA+ persons. That identity-based abuse may include factors such as:¹⁷⁴ pressuring a person to conform to gender norms or stop them from accessing gender affirming care; corrective rape (a hate crime in which the victim is raped because of their perceived sexual orientation); threatening to 'out' the person's gender, sexuality, HIV status or intersex status; exiling a person from family due to their sexuality or gender; and forcing a family member into conversion therapy.
157. The Law Council agrees with the findings of the *Independent Review of the National Legal Assistance Partnership Report* regarding the need to expand the priority groups identified in the access to justice partnership to include LGBTQIA+ people.¹⁷⁵

Technology facilitated violence

158. The Law Council refers to research findings from the Australian Institute of Criminology examining dating app-facilitated sexual violence (that is, sexual harassment and other violence that occurs online, or facilitates in-person violence). A study in 2022 found, within a sample of almost 10,000 people living in Australia who had used a mobile dating app or website in the last five years, nearly three-quarters (72.3 per cent) had been subjected to online sexual harassment, aggression or violence by someone they had connected with through an online dating platform during this period. That behaviour comprised being continually contacted by someone after they told them they were not interested (47.2 per cent), through to being threatened (18.9 per cent), and having images or videos taken of them without their consent (12.7 per cent) as well as sexual harassment, aggression and violence in the 'real-world' by someone they had met through an online dating platform (34 per cent).¹⁷⁶ These trends are more pronounced for persons who identify as LGBTQIA+, a 2023 study found that respondents were more likely to report in-person than online sexual violence to police (14.7 per cent vs 8.3 per cent).¹⁷⁷

¹⁷³ Adam O. Hill, Adam Bourne, Ruth McNair, Marina Carman and Anthony Lyons, [Private Lives 3: The health and well-being of LGBTIQ people in Australia](#), Monograph Series No. 122, Australian Research Centre in Sex, Health and Society, La Trobe University (Report, 2020).

¹⁷⁴ Australian Government, Department of Social Services, [The National plan to end violence against women and children 2022–2032](#) (Report, 2022), 46.

¹⁷⁵ Warren Mundy, [Independent Review of the National Legal Assistance Partnership](#) (Final Report, March 2024), Recommendation 8.

¹⁷⁶ Heather Wolbers, Hayley Boxall, Cameron Long & Adam Gunnoo, '[Sexual harassment, aggression and violence victimisation among mobile dating app and website users in Australia](#)' Research Report no. 25. Canberra: Australian Institute of Criminology (Report, 2022).

¹⁷⁷ Siobhan Lawler & Hayley Boxall, '[Reporting of dating app facilitated sexual violence to the police: Victim-survivor experiences and outcomes](#)' *Trends & issues in crime and criminal justice* no. 662. Canberra: Australian Institute of Criminology (Report, 2023).

Specialisation and training of judges, solicitors and counsel

159. We recognise the value, in appropriate circumstances, of specialist courts, procedures and personnel employing therapeutic, culturally appropriate and trauma-informed approaches in handling particular matter types.¹⁷⁸ At the same time, we recognise that the process of developing an effective specialist approach is a complex exercise, and, in certain areas, can create significant risks of ‘burnout’ and trauma for staff consistently working in such courts. Additionally, we are concerned that concentration of resources in metropolitan specialist courts may exacerbate existing disparities and ‘postcode justice’ faced by complainants and victim-survivors located in rural, regional and remote areas.
160. Given the volume of sexual violence related matters dealt with in courts across Australian jurisdictions, we do not consider it feasible to establish specialist courts for all sexual violence matters. Instead, we support greater focus on raising standards of trauma-informed and culturally safe practices across all criminal courts.
161. In the Law Council’s Justice Project Report, we found that culturally-aware courts and tribunals are key features of an accessible, responsive and fair justice system. To develop greater cultural awareness, courts and tribunals must be resourced to provide ongoing training and education to justice system personnel.¹⁷⁹ Cultural competency training can ensure that justice system personnel, including the judiciary, court officers, legal profession, corrections staff and police, are able to identify and respond to the cultural needs of different people interacting with the justice system.
162. As the Victorian Bar observes, a major difficulty encountered in sexual offence cases is that they are frequently prosecuted and defended by relatively junior members of the legal profession. Such cases often involve complex factual and legal issues and would benefit from the involvement of more experienced members of the legal profession. We consider there is merit in the Victorian Bar’s recommendation that consideration should be given to a separate fee structure for indictable sexual offences in order to attract more senior members of the legal profession to this area of work. We understand that in certain jurisdictions, including in Victoria, because of resourcing constraints, prosecution agencies have had to abolish specialist teams of sex offence prosecutors. We are concerned that this may represent a loss of needed expertise and specialisation.
163. As we have explained in a previous submission, while the Law Council maintains a leadership and oversight role as to the development of rules relating to CPD, the design and delivery of education for the legal profession is generally undertaken at the state and territory level, including by the Law Council’s Constituent Bodies.¹⁸⁰ The CPD framework allows practitioners to shape their continuing education to their particular, often specialised, needs while mandating compulsory annual development in areas such as legal ethics and professional responsibility.

¹⁷⁸ For example, in NSW, the establishment of the Youth Koori Court, Children’s Court, Drug Court, Child Sexual Offence Evidence Program and Walama List in the District Court.

¹⁷⁹ Law Council of Australia, Justice Project Final Report Part 2: [Courts and Tribunals](#) (Report, August 2018), 52–58.

¹⁸⁰ Law Council of Australia, Letter to Senator Paul Scarr, [Questions on notice: Current and proposed sexual consent laws in Australia](#) (Submission, 30 August 2023), 3.

164. In a recent submission to the Attorney-General's Department regarding continuing professional development for legal practitioners on coercive control, the Law Council indicated its support for measures that will promote an increased understanding within the legal community of coercive control. We consider that this will, in turn, lead to more effective recognition and improved responses to coercive control.¹⁸¹
165. The Law Council has also recently written to the Attorney-General regarding recent consultations undertaken by the Law Council to outline how the legal profession is working to increase the family safety competency of practitioners. We found that those of our Constituent Bodies, who are responsible for development and delivery of CPD to the profession, have made a concerted effort to bolster training modules that are focussed on, or relate to, family violence. There is a significant number of specific family safety-focussed CPD offerings provided by the Law Council's Constituent Bodies.
166. The Law Council strongly supports the need for lawyers to build their family safety competency. Women and children experiencing or escaping family violence are highly likely to come into contact with members of the legal profession, who should be well-placed to respond in a trauma-informed manner. We recognise that it is not just family and criminal lawyers who may be in a position to recognise and respond to instances of family violence experienced by their clients (and even colleagues), but many others throughout the wider profession. Accordingly, the Law Council's position is that, while we are not in favour of a mandatory requirement, we strongly encourage all members of the legal profession to undertake at least one unit of CPD each year in relation to family violence.
167. Additionally, we note that, in relation to specialist accreditation programs, assessments of practitioners seeking specialist accreditation in areas such as family law, children's law and criminal law would typically include family violence as an expected area of knowledge. Moreover, in order to maintain such accreditation, specialist accredited practitioners are required to undertake a larger annual CPD program, with an emphasis on CPD related to their area of specialisation in addition to the other mandated CPD fields.

Delays

168. The Law Council recognises that delays in sexual violence related criminal proceedings have a damaging impact on complainants and victim-survivors of sexual violence, unduly prolonging anguish and distress. Significant delay may also deter other complainants and victim-survivors from reporting their experience of sexual violence. We are of the view that taking meaningful action to reduce delay in criminal matters, including addressing backlogs in state and territory criminal courts, is essential to improving justice responses to sexual violence. We support the ALRC giving consideration to other drivers of delay in each jurisdiction.
169. In this regard, we note the evidence of the Law Society of New South Wales that:

NSW criminal courts are grappling with a substantial backlog of criminal matters pending finalisation, a factor which contributes to significant delays as victim-survivors wait for defendants to be tried. As of June 2023, the median time for a defended case to be finalised in the District Court was just over two years (783 days) from the date of arrest,

¹⁸¹ Law Council of Australia, Submission to Attorney-General's Department, [Continuing Professional Development for Legal Practitioners on Coercive Control](#) (Submission, 21 July 2023).

increased from 729.5 days in 2018/2019.¹⁸² Of the matters heard by the District Court, we note that sexual assault matters tend to take longer to resolve.¹⁸³ Importantly, we note that these statistics do not reflect the totality of delay experienced by a victim-survivor, as the event of sexual violence predates arrest, with many cases involving complaints of historical conduct.

170. A similar point was made by the Victorian Bar, who noted the main cause of delay in criminal trials in Victoria is the backlog of cases in the County Court. In Victoria, the delay is, although now at pre-COVID levels, still around a year or more between committal and trial for most indictable offences. The Victorian Bar consider that the appointment of more judges would help reduce the backlog and thereby the delay. Additionally, there is a scarcity of skilled barristers who prosecute and defend sexual offences. The Victorian Bar observes that there have been occasions when the Office of Public Prosecutor or Victorian Legal Aid have been unable to find appropriate counsel to brief in trials or pleas of sexual offences, necessitating an adjournment. Therefore, more needs to be done to attract senior and experienced barristers to this area of criminal law so that sexual offence trials can run efficiently and effectively. The Law Council emphasises the importance of providing adequate baseline funding for organisations in the legal assistance sector discussed in detail above.
171. The Law Council notes the view expressed by the New South Wales Bar that one significant cause of delays in criminal proceedings is non-compliance with prosecutorial disclosure obligations specifically in relation to committal proceedings. This results in considerable delay in criminal cases in New South Wales, including sexual assault proceedings, in both the Local Court and post-committal, where late service of evidence and late disclosure can lead to adjournment of a trial. This can occur, shortly before, and during a trial. The Law Council notes that the New South Wales Bar has called for the issue of prosecutorial disclosure to be referred to the New South Wales Law Reform Commission. The issue is also of significant concern to the Law Society of New South Wales, which has published a detailed submission on prosecutorial disclosure in criminal cases.¹⁸⁴

Guilty pleas

172. As the ALRC's Issues Paper notes, if an accused person chooses to plead guilty to an offence, this may minimise the victim's anxiety or trauma, which would ordinarily result from the trial process, particularly where the guilty plea occurs at an early stage.¹⁸⁵

Evaluations of the New South Wales Early and Appropriate Guilty Plea Scheme

173. The Law Council suggests that the ALRC give further consideration to the operation, effectiveness and fairness of schemes established in state and territory jurisdictions to incentivise early guilty pleas.

¹⁸² NSW Bureau of Crime Statistics and Research, [Criminal Court Statistics](#), July 2018 – June 2023.

¹⁸³ NSW Bureau of Crime Statistics and Research, Steve Yeong and Sara Rahman, '[The effect of appointing additional judges on District Court finalisations](#)', Crime and Justice Bulletin 241 (2021).

¹⁸⁴ Law Society of New South Wales, Letter to Attorney-General of New South Wales, [Prosecutorial disclosure in criminal cases in New South Wales](#) (Submission, 14 October 2022).

¹⁸⁵ Issues Paper, 20.

174. New South Wales established an Early and Appropriate Guilty Plea Scheme (**EAGP**) in 2018. The EAGP was evaluated by the New South Wales Bureau of Crime Statistics and Research in 2021.¹⁸⁶ That evaluation found that early guilty pleas in District Court matters increased by 6.5 percentage points, rising from 70 per cent to 76.5 per cent (adjusting for other factors).¹⁸⁷ It also found that the reforms increased finalisations in the District Court by at least 7 additional matters each week. Conversely, anticipated improvements in the EAGP reducing court delays were not achieved because, while the scheme succeeded in reducing case processing time later in proceedings (i.e. in the District Court), this was offset by an increase in the time that matters spent in the Local Court.¹⁸⁸ Notably, subsequent evaluations with reference to the experience of key justice system stakeholders (for example, NSW Police Prosecutors, Crown Prosecutors and legal practitioners) have also highlighted delays in briefs of evidence being served and in the charge certification process and continuity of legal representation not always being achieved.¹⁸⁹
175. The Law Council notes the view of the New South Wales Bar that the effectiveness of the EAGP scheme could be improved if certain issues were addressed including:
- **strengthening the role of senior prosecutors in charge certification**—that is, it is important that senior prosecutors are involved in the early stages of cases when they are in the Local Court. This better facilitates appropriate charge certification and the case-conferencing process. The EAGP scheme envisaged a senior and experienced prosecutor taking carriage of a matter, certifying the matter, and attending the mandatory case conference(s). However, charge certificates are often signed ‘on behalf of the Director of Public Prosecutions’, which permits the Crown to have a different prosecutor appear at the case conference. Where the prosecutor who attends the conference is not the prosecutor who will be certifying the charges, it is more difficult to engage in meaningful negotiations and reach a resolution of the matter at an early stage. This undermines the purpose of the EAGP scheme and leads to inefficiencies; and
 - **case conferences and improved prosecutorial disclosure**—that is, there have been circumstances involving the late service of highly incriminating evidence by the prosecution post committal and a late guilty plea has been entered. However, had this material been served pre-committal, the legal representatives of these accused persons would have been able to advise them properly of the true strength of the prosecution case and their extremely poor prospects of success in defending these matters. The pleas of guilty would have been entered in the Local Court and the accused persons would have received a discount for their early pleas of 25 per cent as opposed to 10 or 5 per cent for their late pleas. The New South Wales Bar is of the view that the EAGP scheme should be amended to take account of circumstances where evidence that has a substantial impact on the strength of the prosecution case is served post-committal.

¹⁸⁶ NSW Bureau of Crime Statistics and Research, Ilya Klauzner and Steve Yeong, ‘[The impact of the Early Appropriate Guilty Plea reforms on guilty pleas, time to justice, and District Court finalisations](#),’ *Crime and Justice Bulletin* No 240 (August 2021), 1; NSW Bureau of Crime Statistics and Research, [Court reforms increase early guilty pleas in the NSW District Criminal Court](#) (Media Release, 3 August 2021).

¹⁸⁷ *Ibid*,

¹⁸⁸ *Ibid*, 17.

¹⁸⁹ NSW Bureau of Crime Statistics and Research, Lily Trimboli, ‘[Early Appropriate Guilty Plea reform program - Process evaluation](#),’ *Crime and Justice Bulletin* No 238 (August 2021), 10

Civil and other justice responses to sexual violence

176. The Law Council acknowledges the evidence in the Issues Paper that some complainants and victim-survivors do not want to engage in the criminal justice process because they do not want the person responsible for sexual violence to go to jail, or because the process does not meet their needs.¹⁹⁰ Accordingly, the Law Council underlines the need for the ALRC's review to encompass additional options that may be more tailored to the needs of complainants and victim-survivors, these options include: restorative justice, the intersection of sexual violence in family law proceedings and mechanisms to obtain civil compensation. In suitable cases, these options have the potential to enhance agency and therapeutic outcomes for complainants and victim-survivors.

Restorative justice

177. The Law Council reiterates its view that, in suitable cases, restorative justice options have the potential to promote agency, acknowledgment and healing for some complainants and victim-survivors of sexual violence.¹⁹¹

178. We consider that restorative justice options are a supplement to the criminal justice system and careful consideration should be given to the criteria for selecting appropriate matters for resolution based on restorative justice principles. As a starting point, we suggest consideration be given to the types of circumstances identified by the Victorian Law Reform Commission as suitable for restorative justice options, namely:¹⁹²

- where a person harmed does not wish to report the harm or to pursue a criminal prosecution;
- where a harm is reported but there are insufficient grounds to file charges;
- where charges were filed but the prosecution discontinues the prosecution;
- after a guilty plea or conviction and before sentencing;
- after a guilty plea or conviction and in connection with an application for restitution or compensation orders; and
- at any time after sentencing.

179. Given the intersection of sexual violence with patterns of domestic and gendered violence (often involving a power imbalance), it is critical that the restorative justice options be supported by a comprehensive risk mitigation and governance framework. In this regard, we maintain our support for the guiding principles identified by the Victorian Law Reform Commission to mitigate the risks posed by restorative justice options:¹⁹³

- **voluntary participation**—that is, participation should be contingent on the fully informed prior consent of participants;
- **accountability**—that is, the person responsible should take accountability for their actions;

¹⁹⁰ Issues Paper, 4 [23].

¹⁹¹ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, [Current and Proposed Sexual Consent Laws in Australia](#) (Submission, 5 April 2023), Principle 6, 24–26.

¹⁹² Victorian Law Reform Commission, [Improving Justice System Response to Victims of Sexual Violence](#) (Report, September 2021), 211 Recommendation 31.

¹⁹³ Victorian Law Reform Commission, [Improving Justice System Response to Victims of Sexual Violence](#) (Report, September 2021), Table 11 197.

- **the needs of the person harmed take priority;**
- **safety and respect**—the process is flexible and responsive to diverse needs, including the needs of children and young people, and of First Nations communities;
- **confidentiality;**
- **transparency**—that is, de-identified results are publicised to contribute to continuous program improvement;
- **the process is part of an ‘integrated justice response’**—that is, other criminal and civil justice options are available, as well as therapeutic treatment programs; and
- **clear governance.**

180. We maintain our view that there is a need for detailed consideration of appropriate safeguards to ensure that implementation of restorative justice options does not undermine the fairness of the criminal trial process. For example, the following matters require consideration:

- the legislative protection of any incriminating statements made during restorative justice processes that occur prior to a plea—so that these statements are inadmissible in any proceeding against the accused;
- the legislative guarantee that any matters raised by a complainant and victim-survivor made during restorative justice processes that occur prior to a plea not be admissible in any proceeding against the accused; and
- the legislative recognition of the potential beneficial impact on sentence of participation in restorative justice.

181. In this regard, we support the ALRC giving further consideration to the operation of the safeguards contained in the *Crimes (Restorative Justice) Act 2004* (ACT). For instance, the restriction on the admissibility of statements made during restorative justice conferences, or an agreement, in relation to the offence (subject to restorative justice) or a less serious offence.¹⁹⁴

The Australian Capital Territory model

182. In a previous submission, we considered the evidence supporting the effectiveness of the restorative justice model in the Australian Capital Territory, established by the *Crimes (Restorative Justice) Act 2004* (ACT).¹⁹⁵

183. The ACT scheme has been incrementally expanded over time, reflecting positive results that demonstrate high participant satisfaction and reductions in reoffending.¹⁹⁶ The first phase, which has been in operation since 2005, applied the restorative justice scheme to less serious offences committed by young people, excluding sexual offences and offences of domestic violence (Phase 1). The ACT scheme was expanded in 2016 to accept referrals for adult offenders (Phase 2). From 2018, the scheme was expanded to include domestic violence and sexual offences (Phase 3).

¹⁹⁴ *Crimes (Restorative Justice) Act 2004* (ACT), s. 59.

¹⁹⁵ Law Council of Australia, Letter to Senator Paul Scarr, [Questions on notice: Current and proposed sexual consent laws in Australia](#) (Supplementary Submission, 30 August 2023), 8–9.

¹⁹⁶ See for example, Heather Strang, Lawrence W Sherman, Evan Mayo-Wilson, Daniel Woods & Barak Ariel, ‘[Restorative Justice Conference \(RJC\) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review](#),’ *Campbell Systematic Reviews* (2013) 9 (1) 1–59.

184. We note that the Australian Institute of Criminology, which was commissioned to assess the effectiveness of Phase 3, concluded that 'Phase Three provided an important mechanism for persons harmed to seek redress in the aftermath of [domestic family violence] and sexual violence victimisation, and for persons responsible to address the factors associated with their offending'.¹⁹⁷ The Institute also made certain recommendations to improve the effectiveness of the scheme.¹⁹⁸

Civil pathways

Sexual violence and family law proceedings

185. Sexual violence is a form of family violence as defined in section 4AB(2)(C) of the Family Law Act. Allegations of sexual violence in the family law system will have relevance in areas such as parenting, financial proceedings, injunctions, common law damages. In this regard, evidence of family violence (including sexual violence), is subject to the civil standard of proof. Evidence in chief is conducted by way of affidavits with oral in-court cross examination of witnesses.
186. Division 3 of Part XI of the Family Law Act provides that unrepresented litigants will be unable to cross-examine the other party at an interim or a final hearing if there are allegations of family violence and:
- (a) either party has been charged with or convicted of an offence involving violence or threat of violence involving the other party;
 - (b) a final Family Violence Order applies to both parties;
 - (c) an injunction has been made under section 68B or section 114 of the Family Law Act for the personal protection of one party against another; or
 - (d) the Court makes an order that personal cross-examination should not be permitted.
187. In matters involving alleged family violence that do not fall into the above categories, the Court may permit personal cross-examination by an unrepresented party but must ensure alternative protections, such as cross-examination via video link, are implemented.¹⁹⁹
188. The Federal Circuit and Family Court of Australia has also implemented a range of measures designed to protect vulnerable parties and children in family law proceedings, including triaging of matters with serious family violence,²⁰⁰ and a specialised list for matters considered to be high risk.²⁰¹
189. In terms of the family law system offering a civil response to concerns outlined in the Issues Paper, it is worth noting the ALRC's earlier recommendation of a statutory tort of family violence which would provide remedies consistent with existing

¹⁹⁷ Siobhan Lawler, Hayley Boxall, Christopher Dowling, [Restorative justice conferencing for domestic and family violence and sexual violence: Evaluation of Phase Three of the ACT Restorative Justice Scheme](#) (Final Report, 18 October 2023), 12.

¹⁹⁸ Ibid, 13.

¹⁹⁹ *Family Law Act 1975* (Cth), section 102NB.

²⁰⁰ See, Federal Circuit and Family Court of Australia's 'Lighthouse' program <<https://www.fcfcia.gov.au/fl/fv/lighthouse>>.

²⁰¹ See, Federal Circuit and Family Court of Australia's 'Evatt List', <<https://www.fcfcia.gov.au/fl/lighthouse/evatt>>.

common law remedies.²⁰² In responding to that recommendation, the Australian Government highlighted its view that such a tort may increase conflict and acrimony between parties, with subsequent impact on children, and have limited applicability due to the need to prove loss or damage.

190. Importantly, the proposed reforms contained in the exposure draft of the Family Law Amendment Bill (No. 2) 2023 contained measures to better recognise the economic impacts of family violence in the Family Law Act by prescribing family violence as a factor which should be taken into account in determining a property settlement, where relevant to the circumstances of the case. Detailed consideration will need to be given to the effects of these reform measures, if they are implemented, including whether further adjustments to family law proceedings are required to identify and compensate for sexual violence, as a subset of family violence in this jurisdiction. There is a complex range of issues which inform this consideration, including the extent to which family violence will be asserted in proceedings before the courts (given the very high incidence of reported family violence in matters filed in the court) and the consequent resource impacts.
191. Those working within the family law system, including judicial officers, engage regularly in training about understanding and responding to family violence. This will continue to be an important part of ensuring that the justice system appropriately responds to sexual violence (and other forms of family violence).

Family law procedural issues

192. The Law Council's Family Law Section notes that it is not uncommon for parties to have more than one concurrent intersecting proceeding on foot where allegations of family violence (including sexual violence) are a relevant consideration. The need to present evidence of family violence across multiple proceedings can compound the trauma and difficulties experienced by parties in the proceedings, with the resulting delays in proceedings only adding to this.
193. The Law Council has strongly supported recent reforms to information-sharing arrangements to improve the process for information-sharing between jurisdictions and enhance the capacity of the family law courts to properly assess the risk of family violence, abuse and neglect, and make decisions which prioritise safety. Currently, the Court has power to order an information-sharing agency to disclose information in child-related proceedings where allegations of abuse, neglect or family violence (or risk of these) have been made.²⁰³ However, this excludes protected material as defined in section 67ZBF(3) of the Family Law Act, which includes material that may prejudice legal proceedings.
194. Relatedly, the Law Council has supported the introduction of the *National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems (National Framework)* into the family law system. The National Framework improves the process for information-sharing between jurisdictions and enhances the capacity of the family law courts to properly assess the risk of family violence, abuse and neglect, and make decisions which prioritise safety.

²⁰² Australian Law Reform Commission, *Family Law for the Future—An Inquiry into the Family Law System* (Report 135, 10 April 2019), recommendation 19.

²⁰³ *Family Law Act 1975* (Cth), sections 67ZBD and 67ZBF.

Compensation

195. As a general point, complainants and victim-survivors of sexual violence may be financially compensated in different ways:

- compensation in the civil courts, generally through proceedings between parties with a cause of action alleging that a tort has been committed;
- an order that an offender pay restitution or reparation to the victim, as part of the offender's sentence; and
- statutory compensation schemes in which awards are assessed and paid by the state.

These matters are addressed further below.

Civil actions

196. We do not support any limitation on individuals' existing rights to recover compensation from perpetrators or institutions at common law, where it is possible to do so.

Reparation orders

197. The Law Council supports the ALRC considering the operation of reparation orders across Australian jurisdictions.

Compensation schemes

198. Statutory compensation schemes play an important role in acknowledging and addressing the financial hardship sexual violence can cause. As the ALRC has previously observed, '[c]ompensating victims of crime has been part of a wider social and legislative trend towards greater recognition of the importance of the interests of the victims of crime in the criminal process'.²⁰⁴

199. These measures are also critical in realising Australia's obligations to take measures to realise Articles 5 and 12 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Article 12 requires states to endeavour to provide financial compensation to victim-survivors who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes.

200. The Law Council maintains its view that the overarching issue is that victims of crime compensation schemes vary significantly across jurisdictions, resulting in entrenched inequalities between victims depending on the State or Territory in which the crime has taken place and the application for compensation lodged.²⁰⁵ The maximum compensation amounts payable highlight the arbitrary outcomes involved. Other key issues that are likely to affect victims to a greater or lesser extent, depending on the jurisdiction, include: time limits on bringing a claim; standards of proof; reporting obligations; narrow definitions of harm; and access to psychological records of victims by convicted perpetrators.

²⁰⁴ Australian Law Reform Commission, [Family Violence—A National Legal Response](#), report no. 114 (Report, 2010), [4.108].

²⁰⁵ Law Council of Australia, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, [Victims of Crime Compensation Schemes: Issues Paper 7](#) (Submission, 4 July 2014).

201. While the Law Council welcomed implementation of the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), prior to enactment, the Law Council suggested certain areas for improvement including reducing the reliance on delegated legislation and strengthening review mechanisms.²⁰⁶ Subsequent to its enactment, the Law Council made further submissions highlighting aspects of the national redress scheme that were inconsistent with the recommendations of the Royal Commission, including eligibility for redress, timetables for acceptance of offers, and minimum and maximum payment amounts.²⁰⁷
202. We support the ALRC giving consideration to developing model principles for victims of crime compensation schemes (particularly, in the context of sexual violence) reflecting best practice across Australian jurisdictions.
203. The Law Council has also long argued for establishing a Commonwealth compensation scheme for victims of Commonwealth crime including in particular victim-survivors of human trafficking, slavery, and slavery-like practices.²⁰⁸

Defamation proceedings as a deterrent

204. The Law Council is mindful of the risk that, at least for some complainants and victim-survivors, the threat or fear of being sued for defamation can be a deterrent to bringing complaints (particularly in relation to sexual harassment, sexual assault, and family violence). In a previous submission, we have set out our reasons for opposing proposals for extending the defence of ‘absolute privilege’ to people who make complaints of unlawful conduct, such as sexual harassment, to employers and professional disciplinary bodies.²⁰⁹ The Law Council’s general view is that the qualified privilege defence currently provides the appropriate level of protection to individuals in making genuine, honest complaints to appropriate recipients.²¹⁰

Victims’ Charters

205. The Law Council supports the continued use of Victims’ Charters governing the treatment of victims of crime by public agencies and officials, and in some cases, by non-government agencies and contractors who provide services to victims. We note the evidence in the Issues Paper that all Australian jurisdictions have developed some form of Victims’ Charter.²¹¹

²⁰⁶ Law Council of Australia, [Submission no. 82 to the Senate Community Affairs Legislation Committee on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017](#) (Submission, 12 February 2018); and Law Council of Australia, Submission no. 18 to the Senate Community Affairs Legislation Committee on the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (Submission, 1 June 2018).

²⁰⁷ Law Council of Australia, Submission to Joint Select Committee on the Royal Commission into Institutional Responses to Child Sexual Abuse, [Oversight of redress related recommendations](#) (Submission, 23 August 2018).

²⁰⁸ Law Council of Australia, Submission to the Attorney-General’s Department, [Review of Australia’s Modern Slavery Act 2018](#) (13 December 2022); Law Council of Australia, Anti-Slavery Australia and University of Technology Sydney, [Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime](#) (2016).

²⁰⁹ Law Council of Australia, [Review of Model Defamation Provisions Stage 2 Part B: Exposure Draft Amendments and Consultation Paper](#) (Submission, 12 October 2022).

²¹⁰ *Ibid*, 1 [5].

²¹¹ ALRC’s Issues Paper, 28 [128].

206. As stated above, we consider that Australia’s international human rights obligations should form the foundation of the justice system response to sexual violence. In this regard, we support the ALRC giving further consideration to whether the approaches taken in Australian jurisdictions to Victims’ Charters is compliant with international human rights law requirements, including those set out in documents like the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.
207. The Law Council reiterates its long-standing support for the establishment of a Federal Human Rights Act.²¹² The Law Council supports the recommendation by the Parliamentary Joint Committee on Human Rights that, following the establishment of a Federal Human Rights Act, the first review of that Act should specifically be required to consider whether additional rights for groups such as victim-survivors of crime should be included.²¹³

Evaluation

Data collection and reporting

208. The Law Council considers it significant that multiple independent reviews have called for strengthened collection, reporting and analysis of data pertaining to sexual violence matters.²¹⁴ This is vital to ensuring that reforms in this area are evidence-based. The Victorian Law Reform Commission described the need for strengthened evaluation and reporting in the following terms:²¹⁵

The challenges we faced in building an evidence base for our proposals demonstrate the need for more regularly published data. Without such data, it is difficult to know what is not working and how to deal with any problems. Such data will also improve transparency, enable a richer public debate about the criminal justice system, and provide a firmer foundation for reforms in the future. This could also improve the research base on the policing or prosecution of family, domestic and sexual violence.

209. We support the ALRC considering provision for collecting data and conducting research targeted at measuring the effectiveness of the reforms discussed in this submission (including in particular special measures discussed above).
210. We also support the ALRC considering the need for further collection of data about participants’—particularly complainant and victim-survivors’—subjective experiences of each stage of the justice system, which can be used to guide future legal reform. Such data should be de-identified, taking into account the privacy of participants, and conform to applicable ethical standards governing the collection of sensitive data.

²¹² Law Council of Australia, [Federal Human Rights Charter](#) (Policy Statement, November 2020). Law Council of Australia, Submission to Parliamentary Joint Committee on Human Rights, [Inquiry into Australia’s Human Rights Framework](#) (Submission, 3 July 2023).

²¹³ Parliamentary Joint Committee on Human Rights, [Inquiry into Australia’s Human Rights Framework](#) (Report, May 2024), 310–311 Recommendation 2 [9.42].

²¹⁴ See most recently, Law Reform Commission of Western Australia, [Project 113: Sexual Offences](#) (Final Report, October 2023), 415, Recommendations 133 and 134.

²¹⁵ Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021), [6.71].

211. In this regard, the Committee on the Elimination of Discrimination against Women emphasises the importance of data collection ‘to understand the scope of the problem of gender-based violence against Indigenous Women and Girls’. It recommends that:²¹⁶

States must undertake efforts to collect data disaggregated by a range of factors including sex, age, indigenous origin, status, or identity, and disability, and collaborate with Indigenous Women and their organizations, as well as academic and non-profit institutions, in the achievement of this goal ... Indigenous Peoples must have control over data collection processes in their communities, and how this information is stored, interpreted, used, and shared.

212. To better inform policy responses to under-reporting of sexual violence within the criminal justice system, the Law Council endorses the recommendation of the House Standing Committee on Social Policy and Legal Affairs that the Australian Government direct and appropriately resource the Australian Institute of Health and Welfare to develop a national data collection on service-system contacts with victim-survivors and perpetrators, including data from primary health care, ambulance, emergency department, police, justice, and legal services.²¹⁷ The privacy implications of collecting such data should be carefully considered. There is a need for governments across Australia to support implementation of consistent data collection procedures by service providers to ensure that the data collected can be meaningfully interpreted.

²¹⁶ Committee on the Elimination of Discrimination against Women, General recommendation No.39 (2022) on the rights of Indigenous Women and Girls, CEDAW/C/GC/39 (26 October 2022), [35].

²¹⁷ House of Representatives Standing Committee on Social Policy and Legal Affairs, [Inquiry into Family, Domestic and Sexual Violence](#) (Report, March 2021), [2.219] Recommendation 10.