

14 June 2024

SUBMISSION TO ASSIST THE AUSTRALIAN LAW REFORM COMMISSION ('ALRC') INQUIRY INTO JUSTICE RESPONSES TO SEXUAL VIOLENCE

Thank you for the opportunity to provide feedback on these issues. Set out below are some observations to address the questions posed in Issues Paper 49, April 2024. As suggested, we have addressed those questions that our organisation is able to provide particular observations or insights in relation to.

We welcome and strongly support the particular interest the ALRC has identified in hearing directly from individuals who have personally encountered the justice system's response to sexual violence. Whilst the work conducted by Women's Legal Service Queensland ('WLSQ') assists a significant number of women who are victim survivors of sexual violence, including in domestic and family violence settings, our submission will be provided from an organisational perspective to ensure the voices of those with lived experience can be directly heard by the ALRC.

Further, WLSQ adopts the submissions made by Women's Legal Services Australia ("WLSA") and supports the recommendations set out therein.

Reporting Sexual Violence

Victim survivors in Queensland have the option to report sexual violence online, together with the ability to participate in an Alternate Reporting Option ("ARO") process when reporting sexual violence to the police. This process enables them to remain anonymous, however still requires the victim survivor to either telephone the QPS or fill out an online form. An ARO also does not constitute making a formal complaint to the QPS of the sexual assault.

WLSQ recommends that victim survivors have access to legal advice before reporting sexual violence to ensure awareness of their rights and access to support prior to becoming involved in the criminal justice process. Independent legal advice would also assist victim survivors to understand the consequences of reporting and ensuing investigation and trial processes.

A multidisciplinary approach and integrated response groups are needed to ensure appropriate support is accessible by victim survivors at the time of reporting. This includes providing a mechanism for victim survivors to report sexual violence when presenting at hospitals or in health settings for medical treatment.

WLSQ has established Health Justice Partnerships with multiple health providers across Southeast Queensland enabling women to seek legal assistance regarding Domestic and Family Violence in a health setting. We submit funding for similar partnerships and processes should be established to enable victim survivors to report sexual violence offences, seek legal advice and commence engaging in the criminal justice process, particularly in circumstances where a health consultation may be their only means to make a safe report or seek assistance without the perpetrator present.

Special Measures – Giving Evidence

In Queensland Courts Children, people with intellectual disabilities and victim survivors of sexual assault may be given special assistance when giving evidence. This includes:-

- Having a support person present in court;
- The ability to have evidence recorded or given via an audiovisual connection from a separate witness room;
- Screens in the courtroom to enable the victim survivor to avoid seeing the perpetrator; and
- Closed court sessions.

A Video Recorded Evidence Pilot was conducted in the Southport and Ipswich Courts throughout 2023 to look at the effectiveness of recorded police evidentiary statements. Whilst the pilot reported increased resolution of criminal matters as a result of pleas, no matters with video recorded evidence statements proceeded to hearing under the pilot. It is submitted that to properly evaluate the benefit of video recorded evidentiary statements, understanding of the impact at trial for victim survivors is crucial, particularly to determine if there is any reduction in the risk or experience of re-traumatisation.

Together with the option for reporting and evidence to be provided via audio-visual means, WLSQ also strongly recommends that the subject records are then made available to victim survivors to assist in all aspects when giving evidence at trial.

Cross Examination and the Law of Evidence

Section 102NA of the *Family Law Act 1975* (Cth) provides access to grants of aid to parties in family law matters to ensure an unrepresented opposing party does not cross examine the other party in circumstances where there has been domestic or family violence. Giving the court in the criminal jurisdiction a similar discretion to make orders to protect victim survivors and restrain self-represented defendants from cross-examining victim survivors, together with funding for legal advice and representation is strongly supported.

WLSQ also supports restrictions on inappropriate, improper, and aggressive questioning during cross-examination of victim survivors of sexual violence. We submit there is a clear need for independent legal representation for complainants during cross-examination to ensure proper compliance with legislative requirements and protection for victim survivors from improper lines of questioning.

Interpreters – availability and access, particularly in regional areas

Availability of interpreters, in particular female interpreters, continues to impact on CALD victim survivors and cause increased procedural delays. This is particularly seen in regional communities where there may also be a further reduced pool of accredited interpreters as some may be conflicted out or known personally to the victim survivor. Pre-trial hearings and recording of evidence continue to be delayed as a result of challenges securing appropriate interpreters to attend court. Further funding for training and accreditation of interpreters across diverse language groups and dialects is strongly supported.

Personal Information – the disclosure and use of a complainant's personal information obtained during counselling or other therapeutic intervention.

Division 2A of the *Evidence Act 1977* (Qld), including the recent amendments, provides protection for victim survivors when applications are made to subpoena records that may contain protected counselling communications (“PCC”).

Currently in Queensland independent legal representation is provided to the complainant for the purposes of the application to access the protected counselling communications only. As a counselled person, a victim survivor is given standing with respect to this pretrial application pursuant to section 14L of the *Evidence Act*. WLSQ have partnered with Legal Aid Queensland to provide legal representation for counselled persons in PCC Applications.

This representation is essential to ensure appropriate submissions can be made to protect the counselling communications where the law allows and ensure advocacy on behalf of the counselled person, particularly with respect to the impact the release of their confidential counselling information would have on their health and willingness to seek out counselling for the harm they have suffered.

Applications to access protected counselling communications in criminal matters are conducted through a two stage pre-trial hearing process. The initial Stage 1 subpoena hearing considers whether leave ought to be provided for the Applicant/Defendant to subpoena the subject records which may contain PCC. Pursuant to Section 14H(1)(a) of the *Evidence Act* the Applicant/Defendant is required to satisfy the Court that the subject protected counselling communications *will* have substantive probative value, before the further two limbs of Section 14H(1) then need to be satisfied in order for leave to be granted.

The Queensland judiciary has observed and provided commentary regarding the intent of the legislation in this regard in numerous cases, in particular the evident intention of the legislation to ensure the circumstances in which access to protected counselling communications may be granted are heavily restricted. This has been noted as being clear in the legislation itself and when considering the extrinsic material, both of which support the contention that Parliament placed greater weight in favouring the protection of counselling communications over the right to a fair trial. The Explanatory Notes also identify the primary public interest factor to be the need to encourage and support victim survivors to access therapeutic treatment freely and without concern those records would be accessed, to aid their recovery.

In cases where the court is satisfied of the criteria in Section 14H has been made out, orders made for the production and inspection of the subject records which may contain PCC ordinarily expressly state that the records produced are only to be provided to the counselled person’s legal representatives and the court for further consideration at the Stage 2 “Use” Hearing. Having this second stage is an imperative step in the Sexual Assault Counselling Privilege process as it provides comfort to victim survivors that there will be proper consideration of the content of their personal counselling records before only those notes that meet the requirements of Section 14H are released to the parties.

Victim survivors who are assisted through WLSQ’s counselling notes protect program frequently express their feelings of reassurance and reduced distress that their legal representatives are able to make submissions regarding the content of their records together with the opportunity to provide a statement of harm for the court’s consideration before any of the subject records are viewed by the parties.

In April 2023 Long DCJ delivered a decision in *R v HJJ* [2023] QDCPR 22 diverging from this approach, directing that the subject PCC material be provided to the prosecution and defendant to enable them to make “*meaningful submissions about the particular relevance of the PCC*”. Such an approach, if left untested, would have impacted upon all victim survivors whose PCC material was sought, as despite

the court making a subsequent order as to the appropriate use of the subject records, the defence and prosecution would still have had access to and seen the private counselling records the SACP legislation specifically sought to protect. These records could not then be “unseen”.

WLSQ advocated for the continued protection of victim survivors’ rights in sexual assault cases and supported the counselled person to seek judicial review of the decision in *R v HJJ*. Cooper J in *MH v HJ* [2023] QSC 176 quashed the decision in *R v HJJ*, and provided commentary at paragraph [54] that the implied power sought to be relied on in *R v HJJ* “*would undermine the purpose of the SACP provisions in seeking to protect the privacy of an individual whose rights are invaded by a sexual assault and to recognise the public interest in encouraging people who have been sexually assaulted to seek therapy to assist in their recovery and to encourage them to report the crime to police*¹”.

The Defendant appealed the judicial review decision. WLSQ again supported the counselled person to defend the appeal and continued advocating for the protection of victim survivor’s counselling records. This approach and advocacy resulted in the amendments to the *Evidence Act* on 19 February 2024, providing further support and agency for victim survivors to be heard with respect to the use of their private counselling records. The appeal was abandoned following the amendments.

Assisting counselled persons to understand the application of the law in this area and ensure they have choice in either waiving consent or being assisted to protect their counselling communications is essential and WLSQ strongly supports the introduction of analogous legislation and processes in the other jurisdictions.

Further, as this representation is limited to protected counselling communications application only, victim survivors do not have standing, nor receive the same assistance, advice, and support with respect to other pre-trial applications, or interlocutory steps and processes. This includes applications to subpoena records and information that do not contain protected counselling communications, even though such records would still be invasive to the counselled person and may in some circumstances not have substantive probative value to the criminal matter. It is submitted that independent legal representation for complainants throughout the disclosure and pre-trial processes would be beneficial to ensure victim survivors are properly informed and their rights protected together with easing the burden on the DPP to provide this advice, particularly as at times they may be the party seeking the subject records.

WLSQ is wholly supportive of independent legal advice and representation for victim survivors throughout the criminal justice process, including where necessary up to and including the trial.

The use of complaint evidence

Preliminary complaint evidence should be taken at a time and in a setting that is safe and accessible for the victim-survivor, with access to adequate support. This includes control being provided to victim survivors to choose the location, the means of providing their evidence and the option to provide their evidence in multiple sittings if required. WLSQ also considers there is an urgent need for independent legal advice and/or representation for victim survivors when providing complaint evidence.

WLSQ support restrictions being placed on the admissibility of further complaint evidence. We submit thresholds as to the admissibility of complaint evidence, particularly asserted inconsistent complaint evidence ought to be established. We have observed frequent attempts to characterise complaint

¹ Explanatory Notes, page 2; *TRKJ v Director of Public Prosecution (Qld)* (2021) 9 QR 472; [2021] QSSC 297 [15] – [16]

evidence as inconsistent without proper examination of the setting, timing and context of the complaint evidence together with a failure to properly consider the specific content of the complaint evidence. For example, where further complaint evidence may make omissions of details included in preliminary complaint evidence, however the context, setting and recipient of the complaint is not considered when determining whether such omissions would amount to an inconsistency.

WLSQ also supports the view that sexual reputation evidence should be inadmissible in all circumstances and only limited circumstances should allow for sexual experience evidence to be admitted.

Specialisation and training of Judges and Counsel

We strongly support the establishment of specialist courts that prioritise the safety and well-being of victim survivors.

WLSQ considers there is a need to provide specialist training to Judges hearing sexual violence matters, add an equal need for appropriate education and/or instructions to be provided to jury members, particularly to assist in addressing misconceptions regarding issues such as consent, the victim survivors appearance or behaviour and the impact of trauma. It is critical that the decision makers in sexual violence offence cases are properly trained and appropriately instructed.

Specialist training for judges, court staff, police and liaison officers, support services, and legal practitioners working in the sector is recommended to ensure cases are run in a trauma informed manner.

Further training for lawyers with a special interest and experience in sexual offence cases could be established similar to the current specialist accreditation process. Such an approach would enhance the skills of these practitioners without reducing the availability for lawyers to appear in sexual violence cases through compulsory accreditation.

Sentencing

WLSQ submits it is imperative for victim survivors to be provided with independent legal representation during sentencing submissions and the sentencing process as a whole. Independent legal representation will ensure victim survivors are fully informed and appropriately supported when providing Victim Impact Statements. Victim survivors should have control and input as to whether they wish to provide a VIS, including in what format and/or setting to minimise re-traumatisation and provide them with choice and agency in the process.

Civil Litigation

Limitation periods have been removed in all states and territories for victim survivors of sexual abuse where the offending occurred when the victim survivor was under the age of 18. In Queensland, an adult victim survivor is still required to commence proceedings within 3 years of the date of incident pursuant to Section 11 of the *Limitations of Actions Act 1974* (Qld). This limitation period does not account for or recognise the impacts of both the trauma the victim survivor is dealing with post the sexual offence, together with the multiple other stressors they may be encountering such as attempting to access treatment or navigating the criminal justice system during this 3 year period. Further, it is widely accepted that it can take a number of years before a victim survivor feels ready to disclose a sexual assault. This has rendered countless adult victim survivors unable to pursue civil

actions against their perpetrators. We would welcome further reform to the Limitation of Actions Act to address the impact on accessibility for adult victim survivors to pursue civil claims.

Further, in civil cases where a victim survivor has been able to commence proceedings during the 3 year period post the sexual offence, those proceedings are often stayed until the completion of the criminal justice process. This restricts the victim survivor from accessing much needed compensation whilst they are participating in the criminal process and required to give evidence, being a time where there is a high risk of re-traumatisation. As the determination in a criminal trial is not binding in the civil jurisdiction, it is submitted there is no basis for delaying or staying civil proceedings.

Compensation Schemes

Apart from Victim's Assist Queensland Applications, the only mechanism for a victim survivor of a sexual offence to seek compensation is through a civil claim.

WLSQ supports consideration of government enforcement of orders to pay damages, including funding to meet payment of damages where an offender is impecunious to ensure victim survivors have access to reparatory damages. In particular, access to damages for medical treatment and to assist in the recovery and healing from the sexual violence they have suffered will provide victim survivors with increased potential to contribute to or re-enter the workforce and reduce the reliance on government benefits.

The National Redress Scheme introduced in 2018 established a statutory compensation scheme accessible by victim survivors of childhood sexual abuse, if the abuse was suffered as a minor and in an institutional setting. Victim survivors of sexual offences perpetrated by individuals are therefore unable to access this statutory compensation. We would support a similar statutory scheme being established for victim survivors of sexual assault who are unable to pursue an action for reparatory damages directly from an individual perpetrator.

Victims' Charters

The Office of the Interim Victim Commissioner in Queensland introduced a Charter of Victims' Rights. WLSQ were pleased to see the efforts to consult with victim survivors and those working in the sector to develop the charter, however many questions remain as to its effectiveness, particularly dependant on its execution and method of enforcement. The OIVC is presently reviewing the approach to be taken regarding the complaints functionality of the Victims' Commissioner which is welcomed. The success and impact of the charter is dependent on awareness, engagement and clear communication of a victim survivor's rights and options for recourse for non-compliance with the charter.

Further information

We would welcome the opportunity to provide further assistance to the ALRC and look forward to following the progress of this inquiry. Please feel free to contact us for further information/engagement.

Yours sincerely,



Nadia Bromley /

CEO

Women's Legal Service Queensland