Australian Government

Australian Law Reform Commission

FINAL REPORT

# SAFE, INFORMED, SUPPORTED: REFORMING JUSTICE RESPONSES TO SEXUAL VIOLENCE

ALRC Report 143
January 2025

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## Note on content

This report relates to sexual violence, which may be confronting or cause distress to some readers. Please be aware that free and confidential support is available through:

- 1800 RESPECT, call 1800 737 732 or visit www.1800Respect.org.au
- Full Stop Australia, call 1800 385 578 or visit www.fullstop.org.au
- Lifeline, call 13 11 14 or visit www.lifeline.org.au
- 13YARN, call 13 92 76 or visit www.13yarn.org.au
- Kids Helpline, call 1800 55 1800 or visit www.kidshelpline.com.au
- Compass, call 1800 353 374 or visit www.compass.info
- Rainbow Sexual, Domestic and Family Violence Helpline, call 1800 497 212 or visit https://fullstop.org.au/get-help/our-services

If you are, or someone else is, in immediate danger, call 000.

If you are deaf and/or find it hard hearing or speaking with people on the phone, the National Relay Service (NRS) can help. Contact via your preferred option or call 1800 555 660.

**Acknowledgement of Country**

The Australian Law Reform Commission acknowledges the Traditional Owners and Custodians of Country throughout Australia and their continuing connection to land, sea, and community. We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders past and present. In particular, we acknowledge the Traditional Custodians of the lands on which our offices are based: the Wurundjeri people of the Kulin Nation for our Melbourne office; and the Jagera people and Turrbal people for our Brisbane office. We acknowledge the contributions made to this Inquiry by First Nations people who have experienced sexual violence, First Nations advocates, and Aboriginal Community Controlled Organisations.

**Acknowledgement of people who have experienced sexual violence**

The Australian Law Reform Commission acknowledges the courage, resilience, and generosity of people who have experienced sexual violence who shared their insights and experiences with us. Their voices, advice, and contributions have been pivotal to the recommendations made to achieve just outcomes and improve the justice system's responses to sexual violence. We are particularly grateful to members of the Expert Advisory Group whose commitment and expertise have been central to this Inquiry.

**Unless otherwise stated, this Report reflects the law as at 1 November 2024.**

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government

Australian Law Reform Commission

The Hon Mark Dreyfus KC MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

22 January 2025

Dear Attorney-General

**Review of Justice Response to Sexual Violence**

On 23 January 2024, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into justice responses to sexual violence in Australia. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the Final Report on this reference (ALRC Report 143, 2025).

Yours sincerely

**The Hon Justice Mordecai Bromberg**

**President**

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# Terms of Reference

I, the Hon Mark Dreyfus KC MP, Attorney-General of Australia, having regard to the Government's commitment to strengthen and harmonise sexual assault and consent laws, refer to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), an inquiry into justice responses to sexual violence. Through this referral, the ALRC should seek to promote and consider just outcomes for people who have experienced sexual violence,[1] including minimising re-traumatisation.

**Scope of the Reference**

1. In undertaking this reference, the ALRC should have regard to:

    a. Laws and frameworks about evidence, court procedures/processes and jury directions

    b. Laws about consent

    c. Policies, practices, decision-making and oversight and accountability mechanisms for police and prosecutors

    d. Training and professional development for judges, police, and legal practitioners to enable trauma-informed and culturally safe justice responses

    e. Support and services available to people who have experienced sexual violence, from prior to reporting, to after the conclusion of formal justice system processes. This should include consideration of:

        i. Current supports such as legal assistance, appropriately trained and accredited interpreters, witness assistance and intermediaries, and the accessibility of those supports

        ii. Innovative supports including independent legal representation

        iii. Information and resources provided to victims and survivors about supports available and justice processes

    f. Alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes, and specialist court approaches.

1 We acknowledge that a range of terms are used to refer to people who have experienced sexual violence, including 'victims and survivors', and that some individuals may not identify with this terminology.

2. In the context of the significant under-reporting of sexual violence and the limited prosecution of reported cases, the ALRC should take a trauma-informed, holistic, whole-of-systems and transformative approach. The ALRC should also consider 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, including:

    a. Women

    b. First Nations people

    c. People from culturally and linguistically diverse (CALD) backgrounds

    d. People with disability

    e. People who are Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, Brotherboy, Sistergirl, or who have other genders and sexualities (LGBTQIA+)

    f. People who have been convicted of criminal offences, and been incarcerated

    g. People who are migrants or newly arrived refugees impacted by an insecure visa status

    h. People living with HIV

    i. People employed in sex work

    j. People in residential care settings

    k. Older people, especially those experiencing cognitive decline

    l. Young people.

3. In undertaking this Inquiry, the ALRC should consider the matters raised for reform and detailed in the **Summary Report of the ministerial-level national roundtable on justice responses to sexual violence.** The ALRC should also identify and consider relevant reports, inquiries and action plans, including but not limited to the list below. Where appropriate, the ALRC should synthesise and build on relevant federal, state and territory reports, with a focus on identifying opportunities to explore new ground and not duplicate existing work.

    a. The **Senate Legal and Constitutional Affairs References Committee report into Consent Laws**, tabled in federal Parliament on 14 September 2023.

    b. Australian Institute of Criminology's **national review of child sexual abuse and sexual assault legislation in Australia (2023)**.

    c. Standing Council of Attorneys-General **Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–2027**.

d. **National Plan to End Violence against Women and Children 2022–2032** and associated Action Plans and **consultation reports**.

e. **Wiyi Yani U Thangani Report (2020)** and **Implementation Framework (2022)**.

f. **Mayi Kuawyu** — National Study into Aboriginal and Torres Strait Islander Wellbeing.

g. ACT Sexual Assault Prevention and Response Program Steering Committee **Listen. Take Action to Prevent, Believe and Heal Report (2021)**, and the **ACT Government Response (2022)**.

h. Queensland Women's Safety and Justice Taskforce (2022) **Hear Her Voice – Report Two (2022)** and the **Queensland Government response (2022)**.

i. New South Wales Law Reform Commission Report: **Consent in relation to sexual offences (2020)**.

j. Victorian Law Reform Commission Report: **Improving the Response of the Justice System to Sexual Offences Report (2021)**.

k. AIC Research Report: **Sexual harassment, aggression and violence victimisation among mobile dating app and website users in Australia (2022)**.

l. Australian Human Rights Commission: **Respect@Work: Sexual Harassment National Inquiry Report (2020)**.

m. House Standing Committee on Social Policy and Legal Affairs report: **Inquiry into family, domestic and sexual violence — Parliament of Australia (aph.gov.au)**.

n. **Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (2017)**.

o. **National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030**.

p. **National Agreement on Closing the Gap 2020**.

q. The forthcoming **Senate Legal and Constitutional Affairs Committee inquiry into missing and murdered First Nations women and children report**.

r. Attorney-General's Department, Australasian Institute of Judicial Administration, and Central Queensland University: **Specialist Approaches to Managing Sexual Assault Proceedings: an Integrative Review (2023)**.

**Consultation**

4. In undertaking this Inquiry, the ALRC should identify and consult with relevant stakeholders across Australia, including but not limited to:

    a. people who have experienced sexual violence

    b. people and organisations representing population cohorts that are overrepresented in sexual violence statistics as listed above

    c. state and territory government and law enforcement agencies

    d. policy and research organisations

    e. community service providers (especially specialist sexual assault service providers and legal assistance service providers)

    f. the broader legal profession (including prosecutors and defence lawyers)

5. Consultation should include the lived-experience Expert Advisory Group, established by the Attorney-General's Department, primarily comprising victims and survivors of sexual violence and their advocates.

**Timeframe**

6. The ALRC should provide its final report to the Attorney-General by 22 January 2025.

# Participants

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# List of Recommendations

## Chapter 3

**Recommendation 1**

In the context of the significant under-reporting of sexual violence, and to ensure people who have experienced sexual violence are able to engage with the justice system in a safe, informed, and supported way, the Australian Government, together with state and territory governments, should fund relevant organisations (including sexual violence services, community legal centres, Aboriginal Community Controlled Organisations, Legal Aid Commissions, and participating legal firms) to provide the following three services (Safe, Informed, and Supported Services, or SIS Services):

a. **Independent Legal Services** — for every person who has experienced sexual violence, the provision of a free and confidential legal advice session that enables informed decision-making about whether or not to engage with the justice system and, if so, which justice pathways best suit their needs, including referral to any chosen pathway. For ongoing legal advice and representation in the criminal justice context, see Recommendation 9.

b. **Justice System Navigators** — for every person who has experienced sexual violence, support to access any chosen justice pathway; and for people who choose to pursue a criminal justice pathway, the provision of a trained support person to advocate and provide support in initial and ongoing interactions with police, prosecutors, the court, and related systems.

c. **Safe Places to Disclose** — for every person who has experienced sexual violence, the ability to disclose the harm to trauma-informed professional staff, receive support and assistance to access relevant health and social services, and be referred to the Independent Legal Services.

To diminish barriers to engagement, increase accessibility and address diverse needs, SIS Services should be provided through a network or other form of coordination, and be available when and where they are needed, including in-person, via telephone, online, and through outreach services.

# Chapter 4

**Recommendation 2**

The Australian Government should commission a national inquiry to address the impact of factors such as:

a. mandatory sentencing provisions;

b. sentencing discount regimes; and

c. consequences following conviction (such as sex offender registration)

on sexual offence matters proceeding to trial rather than resolving via guilty pleas, and measures that may promote early resolution.

The inquiry should have regard to the importance of just outcomes for accused persons, people who have experienced sexual violence, and the broader community.

**Recommendation 3**

The National Judicial College of Australia should be funded to manage and staff an ongoing research team and, in consultation with heads of jurisdiction in each of the trial courts that hear most sexual offence matters (District Courts in New South Wales, Queensland, South Australia and Western Australia; the County Court in Victoria; and the Supreme Courts in the Australian Capital Territory, Northern Territory and Tasmania), locate a member of the research team in each of the trial courts to coordinate the building of a shared evidence base by supporting the evaluation of reform measures implemented in trial courts to improve responses to sexual violence, including:

a. research and evaluation projects regarding reform measures implemented in trial courts to improve responses to sexual violence, including:

    i. jury directions to address myths and misconceptions (including the implementation of the Model Jury Directions Bill) (Chapter 8, Recommendation 21);

    ii. the calling of expert evidence to address myths and misconceptions (Chapter 8, Recommendations 23–25);

    iii. recorded police statements (Chapter 9, Recommendation 29);

    iv. pre-recorded evidence hearings (Chapter 9, Recommendations 28–30);

    v. intermediaries (Chapter 10, Recommendation 31);

    vi. ground rules hearings (Chapter 10, Recommendation 32);

    vii. specialist lists (discussed in Chapter 4);

    viii. measures to reduce delays (such as case management programs) (discussed in Chapter 4); and

    ix. measures to support the delivery of victim impact statements (Chapter 10, Recommendation 34);

b. research and evaluation projects regarding the practical operation of relevant legislative provisions, including provisions that address:

   i. access to a complainant's personal, sensitive, or confidential information (including access to a complainant's sexual assault counselling communications) (Chapter 12, Recommendation 43) and the involvement of an independent legal representative to represent complainants in applications for access to that information (Chapter 6, Recommendation 9);

   ii. the cross-examination of complainants by unrepresented accused persons (Chapter 12, Recommendation 42);

   iii. the admissibility and use of complaint evidence and distress evidence (discussed in Chapter 19);

   iv. the admissibility and use of tendency and coincidence evidence (discussed in Chapter 19);

   v. the availability and use of interpreters (Chapter 10, Recommendation 33);

   vi. the admissibility and use of sexual history and sexual reputation evidence (Chapter 12, Recommendation 44–45); and

   vii. elections for juryless trials in sexual assault trials (discussed in Chapter 19);

c. research and evaluation projects regarding:

   i. the impact of vicarious trauma upon trial judges who preside over sexual assault matters, including measures to address that trauma (discussed in Chapter 4);

   ii. affirmative models of consent (to be conducted by the Australian Institute of Criminology) (Chapter 11, Recommendations 35–37);

   iii. section 41 of the *Evidence Act 1995* (Cth) and whether it is reducing improper questioning and increasing appropriate judicial intervention (as commissioned by the Standing Council of Attorneys-General) (Chapter 12, Recommendation 41); and

   iv. the practical operation of confidential communication and sexual assault counselling privilege provisions (including the adequacy of current subpoena processes) and identification of areas of improvement (as commissioned by the Standing Council of Attorneys-General);

d. nationally standardised and ongoing data collection and statistical analysis on sexual violence matters in the courts (Chapter 5, Recommendation 5);

e. the involvement of the courts in consultations to formulate a Model Jury Directions Bill addressing myths and misconceptions in sexual violence trials (Chapter 8, Recommendation 21);

f. the analysis of annual reports tabled in parliament regarding feedback made by complainants of sexual violence about their experiences of the criminal justice process for the information of judicial officers (Chapter 5, Recommendation 6);

g. court responses to requests from Attorneys-General for feedback on proposed legislative amendments relating to sexual violence laws and court processes; and

h. court responses to requests from law reform bodies about sexual violence.

The National Judicial College of Australia should convene national meetings of the research officers, nominated judicial officers from each of the trial courts, and representatives of the Judicial Commission of New South Wales and the Judicial College of Victoria, to ensure effective research planning, judicial education delivery, information sharing, and best practice identification.

Note: The National Judicial College of Australia and its research team may conduct some of the research and evaluation projects listed above, but will primarily support other research organisations or individuals to conduct those projects, including by being their principal point of contact with the courts and, for example, facilitating requests to the court for access to information (including access to data, transcripts, and hearings).

# Chapter 5

**Recommendation 4**

State and territory governments should each establish and fund an independent taskforce within 12 months of this Report to:

a. undertake an initial review of all reports of sexual violence made to police within the prior 12 to 18 months that did not progress to charge and publish a report of its findings and recommendations (modelled largely on the Sexual Assault (Police) Review in the Australian Capital Territory);

b. develop a model for an independent, ongoing review mechanism for all reports of sexual violence that the police do not progress to charge that publishes reports at appropriate intervals (and the model to be implemented within 24 months of the report published by the initial taskforce); and

c. develop a model for an independent, ongoing, and complainant-initiated review mechanism to enable complainants of sexual violence to seek a review of the police decision not to progress to charge in their case (and the model to be implemented within 24 months of the report published by the initial taskforce).

The taskforce and models should include specialist and diverse sector expertise (including sexual violence services, representatives from Aboriginal Controlled Community Organisations, and researchers with a mixed set of disciplinary skills and expertise) as part of its membership.

The initial review will, among other things: identify systemic reasons for attrition and make recommendations to address those reasons; identify and recommend any individual cases to be further investigated; and accept self-referrals from complainants whose matters did not proceed to charge at any time up to the commencement of the review.

The ongoing review mechanism, for all reports of sexual violence that the police do not progress to charge, will operate as a rolling review of all reports of sexual violence which the police do not progress to charge; monitor attrition levels, systemic reasons for attrition and compliance with recommendations; make ongoing recommendations to address systemic issues; and recommend any specific cases be re-investigated.

Governments should ensure information-sharing frameworks are in place to enable the reviews and respond to the initial review report and ongoing reports released by that review mechanism.

**Recommendation 5**

The Standing Council of Attorneys-General should commission the Australian Bureau of Statistics, or other appropriate body, to devise a nationally consistent data collection framework for reports of sexual violence as they progress through the criminal justice system, and provide appropriate funding and support to police agencies, Offices of the Directors of Public Prosecutions, and courts to implement that framework to obtain nationally consistent data regarding sexual violence cases that:

a. are reported to the police;

b. do not proceed to charge;

c. are charged but otherwise discontinued by police before referral to Offices of the Directors of Public Prosecutions;

d. are discontinued by Offices of the Directors of Public Prosecutions;

e. are resolved by guilty plea;

f. are the subject of convictions following trial;

g. are the subject of acquittals following trial; and

h. are the subject of an appeal against conviction, including the outcomes of those appeals.

The data should:

i. identify the reasons for reports not proceeding to charge or discontinuance of proceedings;

j. capture timeframes on the progression of the reports through the system;

k. include demographic information about groups who are disproportionately reflected in sexual violence statistics; and

l. be published online annually.

**Recommendation 6**

Each state and territory government should establish and fund an independent centralised feedback mechanism for complainants of sexual violence to report their experience of the criminal justice system.

The methods and formats (such as questionnaire development) for obtaining feedback should be considered in consultation with relevant stakeholders including Victims of Crime Commissioners, sexual violence service providers (including from Aboriginal Controlled Community Organisations), and people who have experienced sexual violence.

The mechanism should be managed by Victims of Crime Commissioners, or an equivalent independent body.

Victims of Crime Commissioners (or an equivalent independent body) should collate feedback with a view to identifying systemic issues in the criminal justice system and making recommendations to be published in an annual report which must be tabled in parliament.

Each state or territory government should be required to respond to the annual report in their jurisdiction within a prescribed period.

# Chapter 6

**Recommendation 7**

The Commonwealth, and those states and territories that do not currently have a legislated victims' charter, should enact such a charter.

**Recommendation 8**

The Standing Council of Attorneys-General should commission an appropriately funded national review of victims' charters to identify and consolidate a key set of rights for victims of sexual violence which should then be legislated in victims' charters in the Commonwealth and all states and territories. Subject to the review, the key set of rights should include:

a. Where police decide not to investigate or lay charges:

    i. the right to be informed by police about the right to seek reasons, and a review, of the decision;

    ii. the right to reasons for the decision; and

    iii. the right to a review of the decision.

b. Where prosecutors decide to withdraw or otherwise discontinue all charges in relation to a prosecution:

    i. the right to be informed by prosecutors about the right to seek reasons, and a review, of the decision;

ii. the right to reasons for the decision; and

iii. the right to review of the decision.

c. The right to request that the person interviewing them is of a particular gender, and to have that request accommodated where possible.

d. The right to be informed of, and make use of, available flexible evidence measures and flexible arrangements for giving a police statement, evidence, and a victim impact statement.

e. The right to be informed of alternative justice options (including civil justice, restorative justice, conciliation, and victims of crime schemes).

f. The right to interpretation and translation, including for First Nations people who speak a language other than English.

Victims' charters should also require justice agencies to take into account, refrain from discriminating on the basis of, and be responsive to, the particular needs of groups who are disproportionately reflected in sexual violence statistics.

**Recommendation 9**

As a component of the Independent Legal Services recommended in Recommendation 1, the Australian Government, together with state and territory governments, should fund and support independent legal advisers who will be available to:

a. provide complainants of sexual violence with legal advice as required during the criminal justice process; and

b. represent complainants in court when applications are made to subpoena or inspect materials which may contain a complainant's personal, sensitive, or confidential information (including sexual assault counselling communications).

**Recommendation 10**

The Commonwealth, states, and territories should amend relevant legislation to provide that independent legal advisers have standing to appear in court on behalf of complainants of sexual violence in applications to subpoena or inspect materials directed to third parties which may contain a complainant's personal, sensitive, or confidential information, including sexual assault counselling communications. The legislative changes should include a mechanism which ensures the complainant is notified that a subpoena has been sent to a third party to produce personal, sensitive, or confidential information, including sexual assault counselling communications, relating to the complainant.

# Chapter 7

**Recommendation 11**

People who work in the criminal justice system and have relevant involvement in sexual violence matters, including judicial officers (magistrates, trial judges, and appellate judges); court staff; prosecutors and in-house witness assistance officers; defence lawyers; and police officers, should receive:

a. education about myths and misconceptions that utilises research on:

   i. trauma, memory, and responsive behaviour of complainants of sexual offences; and

   ii. sexual offending, grooming behaviour, and coercive control;

and

b. training about trauma-informed and culturally safe practices, including:

   i. best practice communication and engagement with complainants (including working with intermediaries and interpreters);

   ii. supporting the informed choices of complainants, including in relation to giving statements, flexible evidence measures, and giving evidence;

   iii. minimising retraumatisation in the justice system, including during questioning by police, prosecutors in witness conferences, and parties in court;

   iv. victims' rights, including their rights to privacy and laws and processes about sexual assault counselling communications;

   v. responding with an understanding of the intersection between family violence and sexual violence; and

   vi. practices which address the experiences and needs of groups who are disproportionately reflected in sexual violence statistics.

The education and training should:

c. be evidence-based;

d. inform and address the relevant organisation's guidelines about myths and misconceptions and trauma-informed and culturally safe practices; and

e. be developed with input from experts on trauma; memory and responsive behaviour of complainants of sexual offences; people who have experienced sexual violence; sexual assault services; and representatives of groups who are disproportionately reflected in sexual violence statistics.

**Recommendation 12**

Police agencies should mandate and be funded to ensure all police officers receive the education and training described in Recommendation 11, but tailored to reflect the tasks performed by specialist police officers and general duty police officers.

**Recommendation 13**

Commonwealth, state, and territory Offices of the Directors of Public Prosecutions should mandate and be funded to ensure that all employed solicitors, prosecutors, and witness assistance officers who work on sexual violence matters receive the education and training described in Recommendation 11 (tailored to reflect the tasks performed).

**Recommendation 14**

All courts should strongly encourage the education and training described in Recommendation 11 for court staff who work on sexual violence matters (tailored to reflect the tasks they perform).

**Recommendation 15**

State and territory bar associations and law societies should:

a. strongly encourage barristers and solicitors who work on sexual violence matters to complete the education and training described in Recommendation 11 as part of ongoing professional development and training requirements;

b. be funded to enable the provision of this education and training to barristers and solicitors for free or at a discounted rate; and

c. collect and publish data on the number of participants who undertake this education and training.

**Recommendation 16**

Each court, through its head of jurisdiction, should strongly encourage all judicial officers (magistrates, trial judges, and appellate judges) who sit on sexual violence matters to undertake the education and training described in Recommendation 11.

The National Judicial College of Australia, the Judicial Commission of NSW, and the Judicial College of Victoria should be funded to provide that education and training and keep records of attendances.

Levels of attendance of judicial officers at education and training programs described in Recommendation 11 should be included in court annual reports.

**Recommendation 17**

The Law Admissions Consultative Committee (LACC) should ensure that education about myths and misconceptions research and trauma-informed and culturally safe responses to sexual violence (as described in Recommendation 11) are part of the current discussions between the six peak bodies (the Council of Australian Law Deans, LACC, Legal Services Council, Australian Law Students' Association, Law

Council of Australia and the Australasian Professional Legal Education Community Ltd) around reforming legal education with a view to embedding that education within the curriculum of all law schools and practical legal education providers.

**Recommendation 18**

Federal, state, and territory police agencies should prepare or review and update their guidelines on responding to complainants of sexual violence to ensure that their guidelines address, at a minimum, the following matters:

a. a requirement to log all complaints of sexual violence;

b. processes for responding to complainants of sexual violence, including complainants who are within groups that are disproportionately reflected in sexual violence statistics;

c. advising complainants prior to a formal interview of their right to seek independent legal advice and the availability of supports, including referrals to the Independent Legal Services, a Justice System Navigator, and support services;

d. criteria for making decisions regarding investigations or laying charges;

e. processes for interviewing complainants, including processes for taking a written statement or making an audiovisual recording;

f. communicating with complainants, including keeping complainants informed and updated;

g. timeframes;

h. the use of communication assistance, including interpreters and intermediaries;

i. the intersection between family violence and sexual violence; and

j. review and complaint processes.

The police guidelines (which are not operationally sensitive) should be made publicly available, published online and subject to ongoing review.

**Recommendation 19**

Offices of the Directors of Public Prosecutions should review and update their guidelines on responding to complainants of sexual violence to ensure their guidelines address, at a minimum, the following matters:

a. the decision to prosecute or not prosecute;

b. communicating with complainants, including keeping complainants informed and updated;

c. processes for responding to complainants of sexual offences, including complainants who are within groups that are disproportionately reflected in sexual violence statistics;

d. advising complainants of their right to seek independent legal advice and the availability of supports, including referrals to (where applicable) Independent Legal Services, a Justice System Navigator, witness assistance services, and support services;

e. meeting with complainants before trial;

f. preparation for trial, including the process of proofing complainants and court familiarisation;

g. the trial process generally;

h. the option of a pre-recorded evidence hearing;

i. the availability of flexible evidence measures;

j. the use of communication assistance, including interpreters and intermediaries;

k. applications for access to a complainant's personal, sensitive or confidential information, including sexual assault counselling communications;

l. sentencing and victim impact statements;

m. appeals;

n. timeframes;

o. resolving charges before trial;

p. decisions to discontinue the prosecution; and

q. review and complaint processes.

The prosecution guidelines should be made publicly available, published online, and subject to ongoing review.

**Recommendation 20**

Federal, state, and territory police agencies, the Offices of the Directors of Public Prosecutions, and state and territory courts should ensure their online information on processes about sexual offence matters:

a. is easy to find;

b. explains to complainants what they can expect from the process;

c. provides information about all trauma-informed and culturally-informed processes, including the availability of flexible evidence measures;

d. is accessible to screen readers;

e. is available in an accessible format, including in easy read and audio or video format with captioning;

f. is available in multiple languages; and

g. is kept up to date.

# Chapter 8

**Recommendation 21**

The Standing Council of Attorneys-General should establish an appropriately funded expert multi-disciplinary working group to produce a model bill containing judicial directions to address myths and misconceptions in sexual offence trials, to be enacted by each state and territory (the Model Jury Directions Bill).

The multi-disciplinary working group should include experienced criminal trial judges and consult nationally with criminal trial judges, researchers, and stakeholders about the Model Jury Directions Bill.

Once adopted by states and territories, the effectiveness of the directions in the Model Jury Directions Bill should be subject to ongoing evaluation, including a review within five years after enactment.

**Recommendation 22**

The National Judicial College of Australia, the Australasian Institute of Judicial Administration, the Judicial College of Victoria, and the Judicial Commission of New South Wales, in collaboration with relevant experts, should be funded to publish a National Judicial Bench Book, to support and complement the Model Jury Directions Bill (Recommendation 21).

**Recommendation 23**

Relevant Commonwealth, state, and territory legislation should be amended, where necessary, to make admissible expert evidence about the impact of sexual violence on child and adult complainants.

**Recommendation 24**

The Standing Council of Attorneys-General should commission the establishment of an appropriately funded governing body of expert witnesses in sexual violence matters to:

a. compile and maintain a panel of expert witnesses as an accessible resource for prosecution and defence who are seeking opinions, reports, and evidence from qualified experts about myths and misconceptions, including the impact of trauma on memory, responsive behaviour of complainants, and related topics;

b. prepare materials for a flexible approach to expert evidence, including audiovisual recordings of experts giving evidence in the form of modules which address research on the impact of trauma on memory and responsive behaviour of complainants with a view to those recordings being admissible as part of the prosecution case;

c. prepare summaries of those modules which may be used as the basis for agreed facts between prosecution and defence in sexual assault trials; and

d. be a resource for the education of people who work in the criminal justice system, including by producing training videos for police, prosecutors, and defence counsel on myths and misconceptions and trauma-informed practice (discussed in Recommendation 11) and contributing to programs organised by the National Judicial College of Australia, Australasian Institute of Judicial Administration, judicial colleges, Offices of the Directors of Public Prosecutions, Legal Aid Commissions, Aboriginal and Torres Strait Islander legal services, bar associations, law societies, and police.

Membership of the governing body should include experts and academics specialising in: memory, including the impacts of trauma on memory; responsive behaviour of people who have experienced sexual violence; sexual offences; and jury research.

Members of the governing body should undertake this work in consultation with experienced trial judges; academics who specialise in jury research; counsel experienced in conducting sexual violence trials; and other relevant stakeholders.

**Recommendation 25**

The Commonwealth, and each state and territory, should enact legislation to provide that the evidence of an expert on sexual violence (see Recommendation 24) may be admissible in the form of an audiovisual recording, but the expert (or another expert who adopts the video) must be available for cross-examination if required.

# Chapter 9

**Recommendation 26**

The Standing Council of Attorneys-General should establish an appropriately funded national taskforce to develop a national quality assurance framework for police interviewing of complainants of sexual violence.

a. The national taskforce should, in relation to the police agency in each jurisdiction:

   i. use the quality assurance framework to review agency interviewing guidelines and work with the agency to ensure they are founded upon generally accepted evidence-based practices for interviewing complainants;

   ii. evaluate agency implementation of those guidelines, including by objectively evaluating interviewer and organisational performance;

   iii. provide feedback to the police agency, which would include communicating key elements of the research and identifying areas for improvement; and

   iv. receive reports back from the police agency in response to the feedback and areas identified for improvement.

b. The taskforce should include:

   i. members with extensive high-level police governance experience; and

   ii. experts in the field of investigative interviewing of complainants of sexual violence and in the evaluation of interviewer training.

c. As required, the taskforce should consult with relevant stakeholders, including:

   i. experts on the impact of trauma;

   ii. people who have experienced sexual violence;

   iii. representatives from groups who are disproportionately reflected in sexual violence statistics and other experts who can advise on cultural sensitivity with respect to police investigations;

   iv. experienced prosecution and defence counsel; and

   v. trial judges experienced in conducting sexual assault trials.

**Recommendation 27**

Federal, state, and territory police agencies should ensure that trauma-informed environments are available for interviewing complainants of sexual violence, including the provision of:

a. a comfortable space;

b. privacy;

c. the ability to accommodate a support person or victim advocate; and

d. disability access.

Arrangements should be put in place to allow for statements to be taken from outside police premises, including at culturally appropriate locations.

**Recommendation 28**

The Commonwealth, states, and territories should enact or amend legislation, where necessary, to provide all adult complainants of sexual offence proceedings in County, District, or Supreme Courts with the option of giving their evidence (evidence-in-chief, cross-examination, and any re-examination) at a pre-recorded evidence hearing (recorded in the absence of a jury).

Offices of the Directors of Public Prosecutions in each jurisdiction should adopt guidelines which ensure:

a. an adult complainant is:

   i. given a choice to give evidence either at a pre-recorded evidence hearing or at the time of trial;

   ii. given information relevant to making that choice; and

iii. advised that to help make the choice, they may speak with a Justice System Navigator or obtain advice from the Independent Legal Services (see Recommendations 1 and 9); and

b. the prosecution will not make an application for a pre-recorded evidence hearing unless the complainant has been consulted and made an informed choice to proceed in that way.

**Recommendation 29**

The Australian, state, and territory governments should ensure that the use of recorded police statements and pre-recorded evidence hearings is monitored and reviewed, by collaborating to commission and fund relevant empirical research projects.

**Recommendation 30**

The Australian, state and territory governments should ensure that adequate technology, suitable for recording and playing evidence, is available to police agencies and courts, including in regional and remote areas.

# Chapter 10

**Recommendation 31**

The Commonwealth, states, and territories should each legislate, establish, maintain and fund an intermediary scheme which ensures an intermediary is available in sexual violence matters for child complainants and complainants with communication needs at the police interview, pre-recorded evidence hearing, and trial stages.

The Standing Council of Attorneys-General should establish an appropriately funded peak body to support the recruitment, professional development, and provision of intermediaries across Australia by:

a. developing national accreditation standards for intermediaries (in consultation with Aboriginal Community Controlled Organisations) which respects and includes competency in working with First Nations complainants;

b. creating an inter-jurisdictional register of intermediaries; and

c. providing national professional development opportunities and access to vicarious trauma support.

**Recommendation 32**

Trial courts should extend ‘ground rules’ hearings about the evidence of complainants of sexual violence as an available option in all sexual offence trials, to be held on application by prosecution or defence or on the court’s own motion prior to the complainant giving evidence.

Where necessary, the Commonwealth, states, and territories should enact legislation to facilitate this.

**Recommendation 33**

The Standing Council of Attorneys-General should:

a. develop a strategy to address the national shortage of interpreters to assist complainants of sexual violence in the criminal justice system; and

b. coordinate the Australian, state and territory governments to:

   i. ensure interpreters are consistently, efficiently, and appropriately engaged by justice agencies for complainants of sexual violence, from the point of police reporting to finalisation of the criminal process (including considering the mechanisms for engagement of interpreters by courts and tribunals as identified by the Judicial Council on Cultural Diversity in the 'Recommended National Standards for Working with Interpreters in Courts and Tribunals');

   ii. develop national standards for working with interpreters on sexual violence matters at the police and prosecution stage (in consultation with relevant stakeholders, including police agencies, interpreting agencies and services, people who have experienced sexual violence, and Aboriginal Community Controlled Organisations); and

   iii. provide for vicarious trauma support and training in trauma-informed principles for interpreters who work with complainants of sexual violence.

**Recommendation 34**

The Commonwealth, states, and territories should review and where necessary amend legislation, and courts should amend court rules, to implement flexible measures for victims of sexual offences to make and deliver their victim impact statements:

a. in a flexible format, including written, pre-recorded audio, or pre-recorded audio-visual statements;

b. utilising illustrative formats, such as drawings and photographs;

c. for written statements:

   i. read aloud by the victim in an open or closed court (with or without a screen) or via remote witness facilities and with a support person; or

   ii. read aloud by someone nominated by the victim; or

   iii. tendered without being read aloud; and

d. for pre-recorded audio or pre-recorded audio-visual statements:

   i. played in an open court; or

   ii. played in a closed court; or

   iii. tendered without being played in court.

# Chapter 11

**Recommendation 35**

1. Jurisdictions that have recently adopted affirmative models of consent, or that are proposing to do so, should evaluate these reforms within five years of the reforms commencing. Tasmania (which has had an affirmative model of consent since 2004) should also conduct a review, within a reasonable timeframe.
2. The purpose of the evaluation is to ensure that a best practice affirmative model of consent is identified for the purposes of national harmonisation.
3. The Standing Council of Attorneys-General should commission, and ensure appropriate funding for, the Australian Institute of Criminology to prepare the evaluation criteria and conduct the evaluation. The evaluation should assess whether the reforms are:
    a. operating in a trauma-informed manner for complainants and consistently with the accused person's right to a fair trial; and
    b. having any impact on:
        i. jury directions;
        ii. the presentation of prosecution and defence cases at trial;
        iii. cross-examination of complainants and accused persons; and
        iv. community understandings of consent.
4. The Australian Institute of Criminology should liaise with court researchers (see Recommendation 3) to obtain data for the evaluation process.
5. People who have experienced sexual violence, police, prosecutors, defence lawyers, and judicial officers should be consulted as part of the evaluation process.
6. The Australian Institute of Criminology should provide the results of the evaluation to the Standing Council of Attorneys-General to consider the adoption of a nationally harmonised affirmative model of consent.

**Recommendation 36**

The Commonwealth, states, and territories, with the assistance and oversight of the Standing Council of Attorneys-General, should review their legislation to ensure there is broad national consistency in the list of matters that do not, on their own, constitute consent (negative indicators of consent). Examples (based on existing legislation across the jurisdictions) include:

a. previous consent to a sexual act, of that kind or any other kind, either with the accused person or someone else; and

b. absence of resistance to sexual activity.

Note: These are expressed as general terms. The ALRC seeks to achieve broad consistency nationally, rather than being prescriptive about how such negative indicators should be expressed in legislation.

**Recommendation 37**

1. The Commonwealth, states, and territories, with the assistance and oversight of the Standing Council of Attorneys-General, should review relevant legislation, and amend that legislation where necessary, to ensure there is broad national consistency in the list of circumstances where there is no consent.

2. The circumstances where there is no consent should be considered and agreed upon, in respect of each of the following categories:

    a. where the person does not do or say anything to communicate consent;

    b. where the person has no capacity to consent, for example because they were: asleep, unconscious, or incapable of understanding the nature of the act; or because the person was incapacitated by drugs or alcohol;

    c. where the person participates because of:

        i. threats or use of force or harm (including economic or financial harm) to themselves, another person, an animal, or property;

        ii. intimidation or coercion, including in the context of domestic or family violence;

        iii. unlawful detainment; or

        iv. an abuse of a position of authority, trust, or dependency;

    d. where the person has a mistaken belief as to the identity of the other person or as to the nature or the purpose of the act;

    e. where the person participates because of a fraudulent inducement or deception; or

    f. where, contrary to an agreement that a condom would be used, there was intentional non-use, removal of, or tampering with, a condom.

Note: The ALRC seeks to achieve broad consistency nationally. The ALRC emphasises that the descriptions given in (2)(a)–(f) are descriptions of categories (which are based on existing legislation across the jurisdictions). It is for the states and territories, through the Standing Council of Attorneys-General, to try to ensure consistency of categories.

**Recommendation 38**

The Australian Government should resource and support ongoing public education about consent. The Australian Government should build upon existing initiatives, with an emphasis on identifying gaps and meeting the needs of different communities.

a. Education programs should seek to explain:

   i. the importance of consent;

   ii. who can consent;

   iii. that consent requires free and voluntary agreement;

   iv. that not doing or saying anything to communicate consent is not consent (and include examples of ways that consent can be communicated);

   v. that steps should be taken by each participant to see if other participants are consenting (and include examples of steps that could be taken);

   vi. that consent is required every time for every type of sexual activity (see Recommendation 36);

   vii. that there are circumstances in which there is no consent (see Recommendation 37); and

   viii. that sexual activity with a person who does not consent is a criminal offence.

b. Education programs should be:

   i. informed by international technical guidance on sexuality education;

   ii. informed by evidence-based research on primary prevention of gender-based violence (consistent with the *National Plan to End Violence Against Women and Children 2022–2032)* and on how best to generate lasting social change;

   iii. accessible and up to date; and

   iv. specific to their context and audience (rather than general).

c. Education programs should be tailored to reach all groups in the community, with a focus on:

   i. boys and young men;

   ii. specific age groups including children at different developmental stages, young people, and older people;

   iii. neurodiverse people;

   iv. people with communication difficulties (who may have difficulties communicating consent);

   v. people with impaired capacity to consent;

   vi. people with impaired capacity to understand whether or not other participants are consenting;

   vii. First Nations people;

viii. people in remote, rural, and regional communities; and

ix. people working in institutional settings with children, people with disabilities, and people in aged care.

d. Education programs should be developed through a process of participatory design, which includes children and young people, older people, First Nations communities, LGBTQIA+ communities, neurodiverse people, people with disabilities, and culturally and linguistically diverse communities.

# Chapter 12

**Recommendation 39**

Each state and territory should amend relevant legislation, where necessary, and enact a provision that fully adopts section 41 of the *Evidence Act 1995* (Cth).

**Recommendation 40**

Judicial education should cover the duty to intervene imposed by section 41 of the *Evidence Act 1995* (Cth), to ensure its requirements are well understood and consistently applied.

**Recommendation 41**

The Standing Council of Attorneys-General should commission and ensure appropriate funding for research, within five years of all jurisdictions adopting section 41 of the *Evidence Act 1995* (Cth), to evaluate whether the provision, combined with judicial education, is reducing improper questioning and increasing appropriate judicial intervention.

**Recommendation 42**

The Commonwealth, states, and territories should amend relevant legislation, where necessary, to adopt a consistent approach to cross-examination by unrepresented accused persons in criminal proceedings by:

a. prohibiting unrepresented accused persons from personally cross-examining any complainant or family member of the complainant (a protected witness), in all sexual offence proceedings, in all courts;

b. providing that unrepresented accused persons are only permitted to cross-examine a protected witness through a person appointed by the court to ask questions on their behalf;

c. providing that if unrepresented accused persons wish to cross-examine a protected witness, the court must order that a person be appointed to ask questions on behalf of the accused person for the purposes of cross-examination only;

d. providing that any person appointed by the court for this purpose:

i. must be a legal practitioner; and

ii. is indemnified when providing such a service, provided they act in 'good faith';

e. providing that Legal Aid Commissions are funded and required in each jurisdiction to provide this service, irrespective of the accused person's capacity to pay for representation;

f. providing that appointed persons must not put improper questions to the protected witness on behalf of the accused person;

g. providing that judicial officers must advise accused persons of:

i. their right to a court-appointed legal practitioner; and

ii. the consequences (in terms of being able to lead evidence which contradicts, challenges, or discredits a witness) if they decline and decide not to cross-examine a witness;

h. providing that judicial officers must inform juries that:

i. it is normal process for protected witnesses not to be questioned by an accused person directly and for legal practitioners to be appointed for that purpose; and

ii. no inference (against or in favour of the accused person or protected witness) may be drawn from this process.

**Recommendation 43**

The Standing Council of Attorneys-General should commission and ensure appropriate funding for the Australian Institute of Criminology to conduct research:

a. on how confidential communication and sexual assault counselling privilege provisions are operating in practice (including the adequacy of current subpoena processes); and

b. to identify areas for improvement, consistent with the underlying public interest rationale for the provisions.

The Standing Council of Attorneys-General should, on the basis of that evaluation, consider whether sexual assault counselling communications should be absolutely privileged or admissible with the leave of the court (and if so, what the criteria for granting leave should be).

**Recommendation 44**

Section 4(1) of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT), dealing with sexual reputation, should be amended to provide that evidence of a complainant's sexual reputation is not admissible in a sexual offence proceeding. This absolute prohibition should extend to all sexual offence complainants. The availability of leave (in respect of section 4(1)(a)) and the term 'chastity' should be removed.

**Recommendation 45**

New South Wales should introduce a discretionary leave model for the admission of sexual history evidence, consistent with the approach adopted in all other jurisdictions.

# Chapter 13

**Recommendation 46**

1. Commonwealth, state, and territory laws relating to civil proceedings, as well as court and tribunal processes (including processes relating to their conciliation, mediation, and hearing functions) should be amended, where reasonably practicable, so that the following measures, mechanisms, and evidentiary rules are available in any civil proceeding in which an allegation of sexual violence is raised:

***Delay***

a. Prioritise for hearing (and for any pre-recorded evidence hearing) matters involving children, or people with a cognitive impairment, who allege they have experienced sexual violence.

***Flexible evidence measures***

b. Establish 'ground rules' for appropriate questioning of witnesses, and appropriate flexible evidence measures, as part of case management hearings.

c. Record evidence given at trial by witnesses who allege having experienced sexual violence to avoid the need for that evidence to be given again on any re-trial.

d. Any person who alleges they have experienced sexual violence should have access to the following flexible evidence measures:

   i. giving evidence with a one-way screen or other device to avoid visual contact with the person alleged to have used sexual violence;

   ii. giving evidence from a remote location within the court precinct via video link;

   iii. giving evidence from a remote location outside the court precinct via video link;

   iv. having a support person present while giving evidence; and

   v. having a canine companion present while giving evidence.

e. A court should have explicit discretion to close the court when a person who alleges having experienced sexual violence gives evidence, and

the court should give significant weight to the potential for the person to experience trauma if they were to give evidence in open court.

f. Make available Indigenous Liaison Officers to assist courts to operate in culturally safer ways, and to assist First Nations people to engage with court proceedings, whether as a party, witness, or otherwise, in relation to matters in which sexual violence is a relevant issue.

***Interpreters***

g. Where necessary, make available an appropriately qualified interpreter trained in trauma-informed principles (see Recommendation 33) to interpret for a person who alleges sexual violence.

***Intermediaries***

h. Make available an intermediary for witnesses who are a child or have a communication difficulty and allege having experienced sexual violence.

***Improper questioning***

i. Relevant evidence legislation should be amended to introduce a provision equivalent to section 41 of the *Evidence Act 1995* (Cth) (where not already enacted in the particular jurisdiction), requiring a court to intervene when an improper question is put to a witness.

***Cross-examination***

j. Prohibit personal cross-examination by an unrepresented person of a witness when there is an allegation of sexual violence between the unrepresented person and the witness (or an allegation of violence against a family member of the witness) and provide for any cross-examination to be conducted by a legal practitioner who is made available without cost to the unrepresented person.

***Admissibility of evidence***

k. Require that the leave of the court or tribunal be obtained to compel the production of, or to produce, or to adduce, evidence of confidential sexual assault counselling communications made by a party or witness who alleges having experienced sexual violence, unless the party or witness has waived confidentiality. In considering whether leave should be granted, the court or tribunal should take into account the probative value of the evidence and the prejudice or harm that would be caused by the loss of confidentiality.

l. Exclude evidence of the sexual reputation of a witness who alleges having experienced sexual violence and require that the leave of the court be obtained for the admission of evidence about that person's sexual history.

m. Provide for admissibility of expert evidence regarding the nature and effects of sexual violence upon a person alleging having experienced sexual violence (including effects on memory, the nature and effects of trauma, and the nature of sexual violence), to be used for the purpose of assessing the credibility and reliability of the person's evidence.

The measures or mechanisms outlined above should, unless the court or tribunal otherwise determines, be made available only when the alleged sexual violence is capable of constituting a criminal offence.

2. Training and education should be made available to judges, tribunal members, court and tribunal staff, and lawyers involved in civil proceedings involving allegations of sexual violence in relation to:

   a. Trauma-informed practice, including cultural competence and cultural safety.

   b. Working with interpreters in sexual violence matters.

   c. Working with intermediaries in sexual violence matters.

   d. The duty to intervene to prevent improper questioning, to ensure that the requirements of a provision equivalent to section 41 of the *Evidence Act 1995* (Cth) are well understood and consistently applied.

3. Courts and tribunals should, where appropriate, publish a bench book relating to civil matters involving allegations of sexual violence.

**Recommendation 47**

Commonwealth, state, and territory complaint bodies and regulators (such as the Commonwealth Ombudsman, Australian Human Rights Commission and Fair Work Ombudsman), non-tribunal government services, and private mediators and arbitrators should review their processes to:

a. enhance trauma-informed practice;

b. avoid perpetuating or giving effect to myths and misconceptions about sexual violence;

c. train staff in trauma-informed practice (including cultural competence and cultural safety) and common myths and misconceptions about sexual violence; and

d. facilitate the communication needs of people who have experienced sexual violence.

# Chapter 14

**Recommendation 48**

The *Sex Discrimination Act 1984* (Cth) should be amended so that the prohibitions on sexual harassment (as defined in s 28A of the Act) apply beyond those areas of activity specified by ss 28B–28L of the Act to all areas of public activity.

**Recommendation 49**

The Australian Government should consider within 24 months of this Report whether, and how best, to amend the *Sex Discrimination Act 1984* (Cth) so that the prohibitions on sexual harassment apply universally.

**Recommendation 50**

The remedies available under the *Australian Human Rights Commission Act 1986* (Cth) for addressing a contravention of the prohibition on sexual harassment in the *Sex Discrimination Act 1984* (Cth) should be clarified or extended to include the capacity for the court to make orders where appropriate:

a. restraining a respondent from engaging in particular conduct (such as approaching the applicant, or attending a particular place);

b. requiring a respondent to take part in a program of counselling, training, mediation, rehabilitation, or assessment;

c. requiring a respondent, conducting the business or undertaking in which the sexual harassment has occurred, to take corrective action to prevent further sexual harassment in the business or undertaking; and

d. requiring a respondent to pay a civil penalty in relation to a breach of a prohibition on sexual harassment in the *Sex Discrimination Act 1984* (Cth).

**Recommendation 51**

The *Australian Human Rights Commission Act 1986* (Cth) should be amended such that a person found to have contravened the positive duty in s 47C of the *Sex Discrimination Act 1984* (Cth) may be ordered to pay a civil penalty.

# Chapter 15

**Recommendation 52**

Section 570 of the *Fair Work Act 2009* (Cth) should be amended for sexual harassment proceedings, such that it is equivalent to s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth), which is the provision that applies to the recovery of legal costs in sexual harassment proceedings under the *Sex Discrimination Act 1984* (Cth).

**Recommendation 53**

The *Fair Work Act 2009* (Cth) should be amended to include a provision (equivalent to that contained in the *Sex Discrimination Act 1984* (Cth)) imposing a positive duty on an employer, or a person conducting a business or undertaking, to take reasonable and proportionate measures to eliminate, as far as possible, the sexual harassment of workers. A person who breaches the positive duty should be liable for payment of a civil penalty.

**Recommendation 54**

The remedies available under the *Fair Work Act 2009* (Cth) for a breach of the prohibition on sexual harassment should be clarified or extended to include capacity for a court or the Fair Work Commission (in arbitration or when making a stop sexual harassment order) to make orders, where appropriate:

a. restraining a respondent from engaging in particular conduct (such as approaching the applicant, or attending a particular place);

b. requiring a respondent to take part in a program of counselling, training, mediation, rehabilitation, or assessment; and

c. requiring a respondent, conducting the business or undertaking in which the sexual harassment has occurred, to take corrective action to prevent further sexual harassment in the business or undertaking.

**Recommendation 55**

The Australian Government should, within 24 months of this Report, conduct a review of the operation of the regime in the *Fair Work Act 2009* (Cth) addressing sexual harassment.

Subject to the outcome of that review, a regime incorporating tribunal, court, and regulatory processes like those provided for in the *Fair Work Act 2009* (Cth) should be made available in other sectors (for example, in the higher education sector) or across all areas of activity in which sexual harassment is prohibited in the *Sex Discrimination Act 1984* (Cth).

## Chapter 16

**Recommendation 56**

Each state and territory victims of crime scheme should, where necessary, be amended in relation to sexual violence matters to:

a. extend time limits for applications to be at least 10 years from the date of the most recent act of violence for which assistance is sought, and provide a discretion to accept applications made outside the time limit based on a low threshold;

b. remove any requirement for an applicant to have disclosed the violence to another person, or to have formally reported or cooperated with authorities, as

a condition of receiving financial assistance or as a basis for any reduction in the financial assistance provided, and not use non-reporting as determinative of, or necessarily essential to, the assessment of whether the violence occurred;

c. remove requirements to prove injury as a condition of making a recognition payment, and provide access to a recognition payment as an alternative to proving injury in order to obtain a compensation payment. Injury should be presumed in relation to medical, counselling, and related expenses;

d. not notify the person alleged to have used sexual violence that an application has been made, or that a financial assistance payment has been made, where the applicant has a genuine belief of a risk of harm to the applicant or to a person associated with the applicant;

e. not reduce any payment on the basis that the person alleged to have used sexual violence may benefit, and instead use other measures to safeguard payments made to an applicant; and

f. introduce recognition statements and recognition meetings.

**Recommendation 57**

Each state and territory government should conduct a review of its victims of crime scheme to consider the following (where applicable) in relation to all applications (including, but not limited to, sexual violence matters):

a. ensuring that the process is victim-centred and trauma-informed, including by:

   i. ensuring that decision-makers are appropriately trained;

   ii. reducing complexity of the application process; and

   iii. reducing the time taken to process applications;

b. setting out guiding principles for the operation of the scheme;

c. with the assistance and oversight of the Standing Council of Attorneys-General, providing equality of access across all victims of crime schemes and providing for more equitable and consistent awards of compensation or financial assistance across all jurisdictions;

d. applying the standard of proof that ‘on the balance of probabilities’ the wrongdoing occurred, rather than any higher standard;

e. prohibiting any criminal activity by the applicant being used as a ground for refusal or reduction of an award, and ensuring that any discretion to refuse or reduce an award by reason of any contributory conduct is not misused;

f. on request, requiring decision-makers to provide written reasons for decisions; and

g. recognition payments.

# Chapter 18

**Recommendation 58**

The Commonwealth, states, and territories should, where necessary, adopt, or review and amend, legislation to make restorative justice for sexual violence widely available.

**Recommendation 59**

Restorative justice legislation should provide clarity about:

a. its aims, which should include:

   i. empowering people who have been harmed and responding flexibly to their needs;

   ii. respecting all participants and ensuring their safety; and

   iii. repairing harm;

b. the voluntary nature of restorative justice — no one is under any obligation to participate;

c. the confidentiality of the restorative justice process and limits on confidentiality;

d. its availability in cases involving children and young people, and the additional screening and supports that must be provided in these cases;

e. the relationship between restorative justice and other justice processes, including:

   i. when and how matters that are the subject of criminal charges can be referred for restorative justice, and how restorative justice outcomes may influence criminal justice outcomes in these cases (Recommendation 60);

   ii. recognition that restorative justice can happen independently of other justice processes;

f. the obligation on providers of restorative justice for sexual violence to work within national guidelines (Recommendation 61); and

g. the bodies responsible for oversight of restorative justice (Recommendation 62).

**Recommendation 60**

Restorative justice legislation should specify that restorative justice is available:

a. where a person who has experienced sexual violence has not reported the violence to the police**;**

b. where a person who has experienced sexual violence has reported to police, but there were insufficient grounds to file charges or the prosecution was

discontinued, subject to safeguards to ensure the charging and prosecution process is fair and transparent;

c. during criminal proceedings as part of the accused person being referred to a diversionary program that provides for a restorative justice process;

d. after a guilty plea or conviction and before sentencing; and

e. at any time after sentencing, including as part of parole proceedings.

**Recommendation 61**

The Australian Government, together with state and territory governments, should develop national guidelines for the safe delivery of restorative justice for sexual violence, drawing on the guidelines used in the Australian Capital Territory, New Zealand; and in Victoria for family violence.

The national guidelines should be developed with input from people who have experienced sexual violence, sexual violence services, Aboriginal Community Controlled Organisations, community organisations (including those representing groups who are disproportionately reflected in sexual violence statistics), and restorative justice researchers and providers.

**Recommendation 62**

The Commonwealth, states, and territories should ensure designated bodies are responsible in each jurisdiction for providing oversight of restorative justice, including consistent implementation of the national guidelines (Recommendation 61). The oversight bodies should include First Nations representatives and representatives from groups who are disproportionately reflected in sexual violence statistics.

The Commonwealth oversight body should:

a. establish and publish national training standards;

b. establish and publish national accreditation criteria; and

c. provide national coordination and support national information sharing, knowledge building networks, and communities of practice.

The Commonwealth, state, and territory oversight bodies should:

d. establish and manage complaints processes in their jurisdiction;

e. ensure transparency and accountability in relation to the funding of restorative justice; and

f. evaluate programs and collect and publish data to provide transparency and inform program and policy development. How programs are evaluated, and data is collected and published, should be consistent with principles of Indigenous data sovereignty.

**Recommendation 63**

The Australian, state, and territory governments should jointly provide funding to support First Nations communities to design, build, and deliver accredited restorative justice programs for First Nations people.

First Nations people should be free to access restorative justice at any restorative justice service.

**Recommendation 64**

The Australian, state, and territory governments should make sure restorative justice is well resourced and supported by 'wrap around' services, including therapeutic treatment programs for people responsible for sexual violence.

# Glossary

The definitions from *The National Plan to End Violence against Women and Children 2022–2032* (*see* National Plan) have been adopted where relevant to ensure that nationally consistent definitions of gender-based violence are used.

The criminal law contains many words and phrases that have a technical or specialised meaning. For definitions of words such as 'summary', 'indictable', and 'plea', see: Commonly Used Terms | Commonwealth Director of Public Prosecutions.

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| **Aboriginal and Torres Strait Islander Action Plan** | *The Aboriginal and Torres Strait Islander Action Plan 2023–2025* under the National Plan is the first dedicated Action Plan to provide targeted action to address the disproportionate rates of violence experienced by First Nations women and children |
| **ABS** | Australian Bureau of Statistics |
| **Access to justice** | essential to ensuring the rule of law, access to justice requires providing access to dispute resolution through law and justice institutions such as lawyers and courts, or broader legal and social avenues |
| **ACCO** | Aboriginal Community Controlled Organisation |
| **Accountability, justice system** | accountability on the part of people involved in the justice system, such as police, prosecutors, lawyers, and judges |
| **Accountability, those who use sexual violence** | a key justice need of those who have experienced sexual violence and a fundamental feature of the rule of law. Accountability remains a widely accepted tool in the community's efforts to denounce and reduce the prevalence of sexual violence |
| **Accused person** | a person who has been charged with a criminal offence. *See also* defendant |
| **ACT Sexual Assault Prevention and Response Program Steering Committee Report** | *Listen. Take Action to Prevent, Believe and Heal* is a report presented to the ACT Government in 2021 with recommendations on key priorities to improve the ACT's response to sexual assault. The government provided a response in 2022 |
| **AHRC** | Australian Human Rights Commission |
| **AIC** | Australian Institute of Criminology |

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| **AIC Sexual Harassment on Mobile Dating Apps Report** | The Australian Institute of Criminology published *Sexual harassment, aggression and violence victimisation among mobile dating app and website users in Australia* in 2022 to explore the prevalence and nature of dating app facilitated sexual violence |
| **AIJA** | Australasian Institute of Judicial Administration |
| **AIJA Specialist Approaches Report** | The Attorney-General's Department, Australasian Institute of Judicial Administration and Central Queensland University published *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* in 2023 |
| **ALRC** | Australian Law Reform Commission |
| **ANROWS** | Australia's National Research Organisation for Women's Safety, established by the Commonwealth and all state and territory governments of Australia under the National Plan to build the evidence base that supports ending violence against women and children in Australia |
| **Applicant** | is used in a civil context in this Report to indicate someone who has applied for victims of crime compensation or made a complaint of sexual harassment in court |
| **Attrition, of sexual violence matters** | the decrease in sexual violence cases from reporting through to different stages in the justice system |
| **Australian Human Rights Commission Act** | *Australian Human Rights Commission Act 1986* (Cth) |
| **CEDAW** | The United Nations *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), ratified by Australia in 1983, defines internationally what constitutes discrimination against women and sets up an agenda for national action to end gender discrimination, including gender-based violence. A number of Australian laws give effect to CEDAW relating to sexual violence, including the *Sex Discrimination Act* |
| **CEDAW Committee** | The Committee of independent experts that monitors implementation of the United Nations *Convention on the Elimination of All Forms of Discrimination against Women*, including issuing General Comments interpreting the Convention |

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| **CERD** | The United Nations *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), ratified by Australia in 1975, defines internationally what constitutes racial discrimination, and prohibits racial discrimination in all sectors of private and public life |
| **Child** | a person who is not an adult for legal purposes. Generally, a person under the age of 18, however particular legislation specify different age ranges |
| **Child Sexual Abuse Royal Commission** | The Royal Commission into Institutional Responses to Child Sexual Abuse considered, in relation to child sexual abuse and related matters in institutional contexts: what institutions and governments should do to better protect children, and to encourage reporting and better responses; what should be done to eliminate or reduce impediments that currently exist for reporting and responding appropriately; and what institutions and governments should do to ensure justice for victims |
| **Child sexual abuse** | any act that exposes a person under the age of 18 to, or involves them in, sexual activities that: they do not understand; they do not or cannot consent to; are not accepted by the community; are unlawful |
| **CIJ** | Centre for Innovative Justice |
| **Civil justice system** | the system of law used to resolve disputes or to seek a remedy or order for some form of harm or wrongdoing |
| **Civil proceeding** | court action in which one person or entity sues another for a breach of their rights, seeking damages or some other court order (as opposed to a court action brought by the state for a breach of the criminal law, seeking imposition of a penalty or sanction) |
| **CLC** | Community Legal Centre |
| **Closing the Gap National Agreement** | *The National Agreement on Closing the Gap 2020–2030* was developed in formal partnership between all Australian governments and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations to work together to overcome the inequality experienced by First Nations people. There are four Priority Reforms and 17 socioeconomic targets. Target 13 of the agreement requires that by 2031 there be at least a 50% reduction in all forms of family violence and abuse against First Nations women and children, as progress towards zero |

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| **Cognitive impairment, person with** | an umbrella term encompassing actual or perceived differences in cognition, including concentration, processing, remembering, or communicating information, learning, awareness, and/or decision-making. *See also* Person with disability |
| **Compensation** | payment of money for harm or loss, or damage of property. A court may order that a person found guilty of a criminal offence pay compensation for the loss or damage caused by the offence. Some victims of crime schemes can reimburse actual expenses already incurred, sometimes cover anticipated future expenses, and provide compensation for injuries suffered (non-economic loss such as bodily injury and pain and suffering) |
| **Complainant** | is used in a criminal context in this Report to mean a person who alleges to have been the victim of a sexual offence. *See* Person/people who has experienced sexual violence |
| **Consent** | is defined as 'free' and/or 'voluntary' in all Australian jurisdictions. However, jurisdictions differ in defining consent as something which is 'given' or the result of 'agreement' |
| **Criminal justice system** | the people, processes, institutions, and laws that define, identify, and sanction breaches of the criminal law, i.e. crimes |
| **Criminal proceeding** | a court action initiated on behalf of the Commonwealth, State, or Territory (eg by the police or Offices of the Directors of Public Prosecutions) for an alleged breach of the criminal law |
| **CRC** | The United Nations *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), ratified by Australia in 1990, defines internationally what constitutes the specific civil, political, economic, and cultural rights of children |
| **CRPD** | The United Nations *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), ratified by Australia in 2008, defines internationally what constitutes the fundamental human rights of people with disability, and promotes, protects, and ensures the full enjoyment of all human rights by all persons with disabilities |

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| **Cultural safety** | is about overcoming the power imbalances of places, people, and policies that occur between the majority non-Indigenous position and the minority First Nations person so that there is no assault, challenge, or denial of the First Nations person's identity, of who they are, and what they need. Cultural safety is met through actions from the majority position which recognise, respect, and nurture the unique cultural identity of First Nations people. Only the First Nations person who is recipient of a service or interaction can determine whether it is culturally safe |
| **Culturally and linguistically diverse** | people in Australia from a range of countries and ethnic, religious, and cultural groups |
| **Defence** | in the criminal context, defence means:<br>1. the accused person's formal response to the prosecution's case against them;<br>2. a legally recognised reason for conduct that would otherwise constitute an offence; or<br>3. a collective term for the defendant and their legal team.<br>in the civil context, defence means:<br>1. the defendant's formal response to the plaintiff's claim against them;<br>2. a legally recognised justification or excuse for conduct the subject of the claim; or<br>3. a collective term for the defendant and their legal team |
| **Defendant** | in the criminal context means a person against whom a formal allegation of criminal offence has been made. *See also* accused person. In the civil context, a defendant is a person against whom a formal claim has been brought |
| **Disclosing sexual violence** | women who have experienced sexual violence are more likely to seek support from an informal source (friend or family member, work colleague, or boss) than a formal source (a general practitioner, other health professional, counsellor or support worker, telephone helpline, refuge or shelter, police, legal service, government housing or community services, and financial services) |
| **Diversity of experiences** | a reform principle of this Inquiry, which considers the diverse needs and experiences of people who have experienced sexual violence |
| **Domestic, Family and Sexual Violence Commission** | a Commonwealth agency established in 2022 to promote and support the achievement of the objectives of the National Plan and to hold governments accountable to it |

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| **Expert advisory group** | an Expert Advisory Group, comprised of 20 advocates for people who have experienced sexual violence, most of whom have lived experience of sexual violence themselves, was established by the Attorney-General's Department (Cth) to inform this Inquiry and advise the government on implementing the ALRC's recommendations |
| ***Fair Work Act*** | *Fair Work Act 2009* (Cth) |
| **Family and domestic violence** | any behaviour within an intimate relationship (including current or past marriages, domestic partnerships, or dates), or perpetrated by parents (and guardians) against children, or between other family members and in family-like settings that causes physical, sexual, or psychological harm. The term 'family violence' is used in some Australian jurisdictions and 'domestic violence' in others |
| **FCA** | Federal Court of Australia |
| **FCFCA** | Full Court of the Federal Court of Australia |
| **FCFOA** | Federal Circuit and Family Court of Australia |
| **First Action Plan** | *The First Action Plan 2023–2027* under the National Plan, in parallel with the Aboriginal and Torres Strait Islander Action Plan, sets out the scope of activities, areas for action, and responsibility with respect to outcomes under the first 5 years of the National Plan |
| **First Nations people** | Aboriginal and Torres Strait Islander peoples who are the first sovereign Nations of the Australian continent and its adjacent islands and possessed it under First Nations laws and customs |
| **Flexible evidence measures** | commonly known as special measures, are used across the civil and criminal justice system to help reduce some of the stress and distress a plaintiff or complainant can experience when giving evidence, which can help them give clearer evidence. This may include, for example, giving evidence in the court room using a screen or one-way screen or from a remote location via audio-visual link or closed-circuit television |

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| **Gender-based violence** | any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. This includes sexual violence, sexual harassment, online abuse, and trafficking of women and children. The term 'violence against women' is preferred to 'gender-based violence' to reflect the international human rights context, and recognises that women make up the overwhelming majority of victims of gender-based violence, including sexual violence |
| **Harmonisation** | a reform principle of this Inquiry, which acknowledges the benefits of having consistent laws while taking local circumstances into account |
| **HIV, people living with** | a person who has acquired HIV, regardless of whether they have been given a formal diagnosis |
| **ICCPR** | The United Nations *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by Australia in 1980, defines internationally what constitutes the civil and political rights of all peoples, including life, liberty, fair trial, freedom of expression, and participation |
| **ICESCR** | The United Nations *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), ratified by Australia in 1975, defines internationally what constitutes the economic, social, and cultural rights of all peoples, including rights to education, fair conditions of work, standard of living, health, and social security |
| **Image-based abuse** | when an intimate image or video is shared, or threatened to be shared, without the consent of the person shown. This includes images or videos that have been digitally altered |
| **Inquiry into family, domestic and sexual violence** | The House Standing Committee on Social Policy and Legal Affairs' *Inquiry into Family, Domestic and Sexual Violence* report (March 2021) considered the successes and shortcomings of the previous *National Plan to Reduce Violence against Women and their Children 2010–2022*. Sexual violence beyond family and domestic was not examined in detail |

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| **Intersectional approach** | in the context of addressing violence against women and children, an intersectional approach recognises that the way women experience gender and inequality can be different based on a range of other cultural, individual, historical, environmental, or structural factors including (but not limited to) race, age, geographic location, sexual orientation, ability, or class. This approach also recognises that the drivers, dynamics, and impacts of violence women experience can be compounded and magnified by their experience of other forms of oppression and inequality, resulting in some groups of women experiencing higher rates and/or more severe forms of violence, or facing barriers to support and safety that other women do not experience |
| **JACET** | Joint Anti Child Exploitation Team, is a joint dedicated team comprising members of Victoria Police and the Australian Federal Police, which targets the perpetrators and victims of online child abuse material |
| **Jury directions** | directions that a judge gives to a jury about how they should approach the task of reaching a verdict. For example, a judge may give directions about the onus and standard of proof; the elements of an offence that must be proved for them to reach a particular verdict; and how certain evidence should be understood and used by the jury |
| **Justice needs** | are what people who have experienced sexual violence hope for and need from the justice system. These often include participation, voice, validation, vindication, and accountability |
| **Justice responses to sexual violence** | a justice mechanism, process, activity, measure, or practice used to respond to the harm of sexual violence including civil, criminal, restorative, and transformative processes. This Report uses 'justice responses' because it is used in the Terms of Reference |
| **Justice system** | the system that responds to criminal offences, civil unlawfulness, and other harms. It can include the courts, tribunals, regulators, police, solicitors, counsel, prosecutors, and defence. In this Report the term is used broadly to include justice pathways such as restorative justice and victims of crime schemes. When referring to the system that responds to criminal offences, the report generally uses the term 'criminal justice system'. The ALRC acknowledges the justice system does not always feel just or bring about just outcomes |

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| **LGBTQIA+** | an acronym used to describe members of the lesbian, gay, bisexual, transgender, queer, intersex, and asexual community. Other acronyms used to describe this community include LGBTIQ, or LGBTIQ+ |
| **Mayi Kuawyu** | currently the largest national study into First Nations culture, health, and wellbeing. A longitudinal study, it is intended to provide a strong source of information for the First Nations community, service providers, and policy makers |
| **Migrants, or newly arrived refugees, or people impacted by insecure visa status** | people who are not Australian citizens and have not been granted permanent residency in Australia; they may be on a bridging visa awaiting the outcome of an application for a permanent visa or they may have been granted a temporary protection visa (allowing them to remain in Australia for 3 years) |
| **Ministerial-level roundtable on justice responses to sexual violence** | The National Roundtable on Justice Responses to Sexual Violence was convened by the Attorney-General (Cth) in August 2023 ahead of the ALRC inquiry into Justice Responses to Sexual Violence. The roundtable brought together people who have experienced sexual violence, representatives from the service and advocacy sectors, other experts, and relevant Commonwealth, state, and territory ministers |
| **Missing and murdered First Nations women and children inquiry** | The Senate Standing Committee on Legal and Constitutional Affairs handed down the report in 2024 from its inquiry into Missing and murdered First Nations women and children |
| **Myths and misconceptions** | beliefs about sexual violence and how people involved in sexual violence behave, often based on harmful gender and racial stereotypes. Recent developments indicate a shift in terminology to 'false assumptions and stereotypes'. This Report will refer to myths and misconceptions as it is currently still the most commonly and recognisable term |
| **NJCA** | National Judicial College of Australia |
| **National Plan** | The *National Plan to End Violence against Women and Children 2022–2032* is the overarching national policy framework, agreed to by all Commonwealth and states and territories governments, that guides action towards ending gender-based violence in Australia in a generation. Sexual violence and harassment is identified as one of the six key areas of focus for addressing gender-based violence under the National Plan |

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| **National review of child sexual abuse and sexual assault legislation in Australia** | The Australian Institute of Criminology conducted a national review of child sexual abuse and sexual assault legislation (2024) for the Attorney-General's Department (Cth) |
| **New South Wales Law Reform Commission Consent Report** | The New South Wales Law Reform Commission's final report, *Consent in Relation to Sexual Offences* (2020) |
| **Older people** | people aged 65 years and older |
| **PCBU** | 'Person Conducting a Business or Undertaking' is used in this Report in the context of sexual harassment |
| **Person/people harassed** | is used in this Report in the context of sexual harassment under the *Sex Discrimination Act* and *Fair Work Act* to mean the person or people who have experienced sexual harassment. *See* Person/people who experience sexual harassment |
| **Person/people harmed** | is used in this Report in the context of restorative justice to mean the person or people who have experienced sexual violence |
| **Person/people who experience sexual harassment** | is used in this Report in the context of sexual harassment under the *Sex Discrimination Act* and *Fair Work Act* to mean the person or people who have experienced sexual harassment. *See* Person/people harassed |
| **Person/people who experience sexual violence** | includes a person who has identified that they have experienced sexual violence. The ALRC uses this term more than 'victim survivor' as it helps indicate that sexual violence is just one part of a person's experience, which does not have to define them. The ALRC notes that 'victim survivor' may resonate more with some people who have experienced sexual violence |
| **Person/people who has committed a sexual offence** | is used in this Report in a criminal context to indicate someone who has been found guilty of an offence involving sexual violence |
| **Person/people with disability** | is used in this Report as an instance of person-first language based upon the social model of disability |
| **PROMIS** | Police Realtime Online Management Information System |
| **Prosecution** | 1. legal proceedings for a criminal offence; or<br>2. the party bringing criminal proceedings against a person accused of committing an offence |
| **PTSD** | Post-Traumatic Stress Disorder |
| **QHRC** | Queensland Human Rights Commission |

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| **Queensland Women's Safety and Justice Taskforce Hear Her Voice Report Two** | The Women's Safety and Justice Taskforce published its second report into women and girls' experiences across the criminal justice system in Queensland in 2022. The Queensland Government published its response in the same year |
| **RANZCP** | Royal Australian and New Zealand College of Psychiatrists |
| **Recording** | a recording by any technological means to capture moving images and soundtrack. In criminal or civil proceedings involving sexual violence, a recording can be used to capture pre-recorded evidence |
| **Reporting sexual violence to police** | is the key step in initiating a criminal justice response to sexual violence |
| **Residential care settings** | facilities which provide assistance and care to residents, including aged care facilities for persons aged over 65, out-of-home care for children and teens in the child protection system, specialist disability accommodation, residential mental health care, and health rehabilitation unit care |
| **Respect@Work Report** | The Australian Human Rights Commission in *Respect@Work: Sexual Harassment National Inquiry Report* (2020) made 55 recommendations for policy and legislative reforms to prevent and address workplace sexual harassment |
| **Restorative justice** | brings together people affected by violence so they can discuss the harm that has been done and try to repair it |
| **Rule of law** | a reform principle of this Inquiry, which includes, in relation to sexual violence, the right to a fair trial, access to justice, and holding people who commit sexual offences to account |
| **Senate Legal and Constitutional Affairs References Committee Report into Consent Laws** | The Senate Legal and Constitutional Affairs References Committee handed down its report, *Current and proposed sexual consent laws in Australia* in September 2023 |
| ***Sex Discrimination Act*** | *Sex Discrimination Act 1984* (Cth) |
| **Sex worker/people employed in sex work** | a person who provides consensual sexual services to another person in return for payment or reward |
| **Sexual activity** | an act of sexual penetration, an act of non-penetrative sexual touching, or a non-touching sexual act (regardless of whether there was an attempt or threat to touch) |

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| **Sexual assault** | an act of a sexual nature carried out against a person's will through the use of physical force, intimidation, or coercion, including any attempts to do this. This includes rape, attempted rape, aggravated sexual assault (assault with a weapon), indecent assault, penetration by objects, forced sexual activity that did not end in penetration, and attempts to force a person into sexual activity |
| **Sexual harassment** | in keeping with its legislative meaning, 'sexual harassment' is used in its broad sense to mean any unwelcome conduct of a sexual nature including verbal, physical, or technology-facilitated sexualised conduct. Sexual harassment includes all forms sexual violence. Chapter 13 includes a further discussion about the meaning of sexual harassment and issues related to a lack of understanding about this term |
| **Sexual offence** | a criminal offence involving acts of a sexual nature or conduct enabling such acts |
| **Sexual violence** | The National Plan broadly defines violence 'as sexual activity that happens where consent is not freely given or obtained, is withdrawn or the person is unable to consent due to their age or other factors. It occurs any time a person is forced, coerced or manipulated into any sexual activity. Such activity can be sexualised touching, sexual abuse, sexual assault, rape, sexual harassment and intimidation and forced or coerced watching or engaging in pornography. Sexual violence can be non-physical and include unwanted sexualised comments, intrusive sexualised questions or harassment of a sexual nature. Forms of modern slavery, such as forced marriage, servitude or trafficking in persons may involve sexual violence' |
| **SIS Services** | Safe, Informed, and Supported Services |
| **Sistergirl/brotherboy** | sistergirl is a term used by First Nation peoples to describe gender diverse people who have a female spirit and take on female roles within the community<br><br>brotherboy is a term used by First Nation peoples to describe gender diverse people who have a male spirit and take on male roles within the community |
| **Special measures** | *see* flexible evidence measures |
| **Specialist court** | a court with a specific focus or limited jurisdiction, which can be set up with specialist or generalist judges, with the whole court specialising or through specialist divisions, lists or just specialist procedures. There are many specialist sexual offence courts worldwide |

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| **Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault** | in 2022, the Standing Council of Attorneys-General endorsed the *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–2027* to take collective and individual action to improve the experiences of people who have experienced sexual assault in the criminal justice system |
| **Stealthing** | intentional removal, non-use, or tampering with a condom without consent during sexual activity |
| **Strategy to Prevent and Respond to Child Sexual Abuse** | The *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030* was recommended by the Child Abuse Royal Commission. It is the nationwide, cross-government framework for increasing understanding of, improving responses to, and preventing of child sexual abuse |
| **Technology-facilitated abuse** | encompasses many subtypes of interpersonal violence and abuse using mobile, online, and other digital technologies. These include harassing behaviours, sexual violence, and image-based sexual abuse, monitoring and controlling behaviours, and emotional abuse and threat. Technology-facilitated abuse is one of six key areas of focus for addressing gender-based violence in the National Plan. The most common forms of technology-facilitated sexual violence are technology facilitated sexual assault, image-based sexual abuse, and online sexual harassment |
| **Trauma-informed** | a trauma-informed approach integrates an understanding of trauma throughout a program, organisation, or system to improve the services provided. In the context of responding to sexual violence, taking a trauma-informed approach means understanding the impact trauma has had on the person who has experienced sexual violence, and ensuring that the response addresses the barriers to engagement they face and reduces the risk of retraumatisation. This approach is detailed in Chapter 1 |
| **Trial** | formal examination of evidence by a judge, before a jury or by judge alone, in order to decide accountability in a case of criminal or civil proceedings |
| **UNDRIP** | The United Nations *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), endorsed by Australia in 2009, establishes international standards for the survival, dignity and well-being of Indigenous peoples of the world, and denotes how existing human rights and freedoms apply to Indigenous peoples |

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| **Uniform Evidence Acts** | The collective name for the uniform evidence legislation adopted in many Australian jurisdictions, including *Evidence Act 2011* (ACT), *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), *Evidence Act 2004* (NT), *Evidence Act 2001* (Tas), and *Evidence Act 2008* (Vic). The Evidence Bill 2024 (WA) is currently before the Western Australian parliament. If passed, Western Australia will also adopt the Uniform Evidence Act. There is some variation between Acts in each jurisdiction |
| **Victim impact statement** | a statement to the court made by a person affected by a crime explaining their experience of injury, loss, suffering, or damage resulting from the crime |
| **Victim/victim-survivor** | *see* person/people who experience sexual violence |
| **VCAT** | Victorian Civil and Administrative Tribunal |
| **VOCAT** | Victims of Crime Assistance Tribunal |
| **Victims of crime schemes** | government-funded schemes that may provide recognition, money, and other support to help with recovery after a crime |
| **Victorian Law Reform Commission sexual offences report** | The Victorian Law Reform Commission final report, *Improving the Response of the Justice System to Sexual Offences Report* (2021) |
| **Violence against women** | *see* gender-based violence |
| **VLRC** | Victorian Law Reform Commission |
| **Vulnerable witness** | a person giving evidence in court proceedings to whom special arrangements are available by reason of that person's young age, cognitive impairment, or the nature of the alleged offence |
| **Wiyi Yani U Thangani Report** | The Australian Human Rights Commission released the *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* in 2020 which highlighted First Nations women and girls' views on their key strengths and concerns, what principles they think ought to be enshrined in the design of policies, programs, and services, and what measures they recommend ought to be taken to effectively promote the enjoyment of their human rights into the future. The report is accompanied by an *Implementation Framework* (2022) to provide guidance for translating the substantial findings of the Report into meaningful action |
| **Woman/women** | includes both cisgender and transgender women. We also recognise that women are not a homogenous group |
| **Young person** | a person under a certain age but older than the statutory definition of a child and entitled to different treatment to an adult under legislation. *See* Child |

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# 1. Introduction and Overview of Recommendations

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## About this Inquiry

1.1 Sexual violence is one of the most common and serious harms confronting Australia today. One in five women and one in 16 men over the age of 15 have experienced sexual violence.[1] About one in three girls and one in seven boys experience child sexual abuse.[2] Some groups, such as First Nations women, women with disability, and migrant women, experience sexual violence at much higher rates.[3] The trauma caused by sexual violence casts a dark shadow over many lives.[4] The harm caused by sexual violence to individuals, families, and society, is significant.[5]

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1 Australian Bureau of Statistics, 'Personal Safety, Australia: 2021–22 Financial Year' <www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>.

2 Divna Haslam et al, *The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study* (Australian Child Maltreatment Study, Queensland University of Technology, 2023) 17, 19.

3 See **Chapter 2**.

4 See **Chapter 2**.

5 See **Chapter 2**.

1.2 Ending sexual violence requires substantial action from almost every government system. This Inquiry focuses on the justice system and the critical role it can play in responding to sexual violence. The justice system is the system that responds to criminal offences, civil unlawfulness, and other harms.[6] The justice system is often the only pathway for people who experience sexual violence to have access to just outcomes. It is the means through which people who have experienced sexual violence can have the harm remedied, the people responsible held to account, and where society sends a message that it recognises and condemns this serious harm.

1.3 For individuals and society to benefit from the justice system, people who have experienced sexual violence need to have access to it. But 9 out of 10 women who have experienced sexual violence do not report to the police.[7] Where there is engagement with the justice system, that engagement is usually short-lived. Those who do engage too often experience the justice system as retraumatising.[8]

1.4 The ALRC considers under-engagement with the justice system to be the most significant problem with the justice system's response to sexual violence. Low trust and underuse of the justice system by those who have experienced sexual violence is understandable because:

- significant barriers to engagement with the justice system persist;
- people who have experienced sexual violence are not given the opportunity to engage with the justice system in a safe, informed, and supported way;
- when people who have experienced sexual violence do engage with the justice system, they often encounter myths and misconceptions about sexual violence, and experience ill-treatment and retraumatisation; and
- there are too few justice options realistically available to meet the diverse justice needs of people who have experienced sexual violence.

1.5 There have been many efforts over decades to improve the justice system's response to sexual violence. Reforms that began in the 1980s and 1990s focused on improving how people who experienced sexual violence were treated in the criminal justice system.[9] These reforms focused on areas such as improving police responses, rules, or flexible evidence measures around giving evidence and

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6 It can include the courts, tribunals, regulators, police, solicitors, prosecutors, and counsel. In this Report, the term is used broadly to include justice pathways such as restorative justice and victims of crime schemes. When referring to the system that responds to criminal offences, the report generally uses the term 'criminal justice system'. The ALRC acknowledges that the justice system does not always feel just, or bring about just outcomes.

7 Australian Bureau of Statistics, 'Sexual Violence: 2021–2022 Financial Year' <www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/2021-22>. The various barriers to reporting are discussed further in **Chapter 3**.

8 See, eg, Name withheld, *Submission 14*; S Filmer, *Submission 30*; Not published, *Submission 36*; Not published, *Submission 68*; C Oddie, *Submission 145*; K Seear, G Grant, S Mulcahy and A Farrugia, *Submission 177*.

9 See generally Victorian Law Reform Commission, *Sexual Offences* (Interim Report, 2003) 145 [4.4].

cross-examination, specialised management of sexual violence matters, and substantive law.[10]

1.6 Another wave of reform is taking place across Australia, supported by renewed commitments from governments and justice system institutions.[11] The broader national reform effort is being shaped by the National Plan to End Violence Against Women and Children 2022–32, which 'commits to 10 years of sustained action, effort and partnership across sectors and levels of government' to end violence against women and children in one generation.[12] These reforms have also focused on areas such as restorative justice responses and support systems.[13] The reform efforts have increasingly included the voices and expertise of people who have experienced sexual violence. Against this background, on 23 January 2024, the Attorney-General of Australia asked the ALRC to conduct an inquiry into justice responses to sexual violence.

1.7 The Inquiry's Terms of Reference require the ALRC to 'promote and consider just outcomes for people who have experienced sexual violence, including minimising retraumatisation'.[14] The Terms of Reference outline a range of topics for the ALRC to look at, including:

- evidence laws, court processes, and jury directions;
- consent laws;
- police and prosecutor mechanisms;
- training and professional development for people who work in the justice system;
- support and services for people who have experienced sexual violence;
- alternatives to or transformative approaches to the criminal process, including civil and restorative processes; and
- the impacts of laws and legal frameworks on groups that are disproportionately reflected in sexual violence statistics.

1.8 The Inquiry's scope was framed by the Terms of Reference and the limited time the ALRC had to conduct the Inquiry. In **Chapter 19**, the ALRC highlights the issues that could not be covered in this Report due to time constraints, in the hope that these issues are addressed in the future.

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10 See, eg, Victorian Law Reform Commission, *Sexual Offences* (Final Report, 2004).

11 See, eg, Attorney-General's Department (Cth), *National Roundtable on Justice Responses to Sexual Violence* (Summary Report, 2023).

12 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 18.

13 See, eg, Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021); Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021); Department of Justice and Attorney-General (Qld), *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences across the Criminal Justice System* (2022).

14 See **Terms of Reference**.

## This Report's recommendations — an overview

1.9 Despite many reform efforts, there is still a long way to go in responding effectively to sexual violence. About 9 in 10 women do not report their most recent experience of sexual violence to the police.[15] In at least some Australian jurisdictions, between 75 to 85 per cent of reports to police do not proceed to charge.[16] The statistics are a striking illustration that this serious harm can frequently occur without leaving a trace on the justice system. People who have experienced sexual violence often shoulder the harm's impacts without having the opportunity for a just outcome. People who commit it face no consequence for their actions. In society it remains invisible — it is not recorded, recognised, or renounced. Community safety is not enhanced.

1.10 This problem demands the justice system do better, and respond in a way that promotes a fairer, more respectful, and safer society. The key to achieving this is increasing access to justice for sexual violence. If more people can access the justice system, meaningfully engage with it, and reach a just outcome, the justice system's critical role in responding to this harm can be better realised, bringing benefits to people who have experienced sexual violence and the community, and moving us closer to ending sexual violence.

1.11 In this Report, the ALRC makes 64 recommendations to increase access to justice. In doing so, we apply key reform principles, discussed below, to centre the rights, diverse needs, and choices of people who have experienced sexual violence. The ALRC has also been careful to consider the rights of people accused of sexual violence. The recommendations do not change the right of the accused person in a criminal trial to a fair trial — this includes the 'beyond reasonable doubt' standard of proof, the presumption of innocence, and the right to silence.

1.12 The recommendations in this Report fall into three categories:

- addressing barriers to access and engagement with the justice system;
- improving the criminal justice system's accountability and justice system processes; and
- expanding justice pathways and the remedies available.

1.13 In each of these categories, the Report makes recommendations that consider the experiences and needs of people who have experienced sexual violence including those who are disproportionately reflected in sexual violence statistics.

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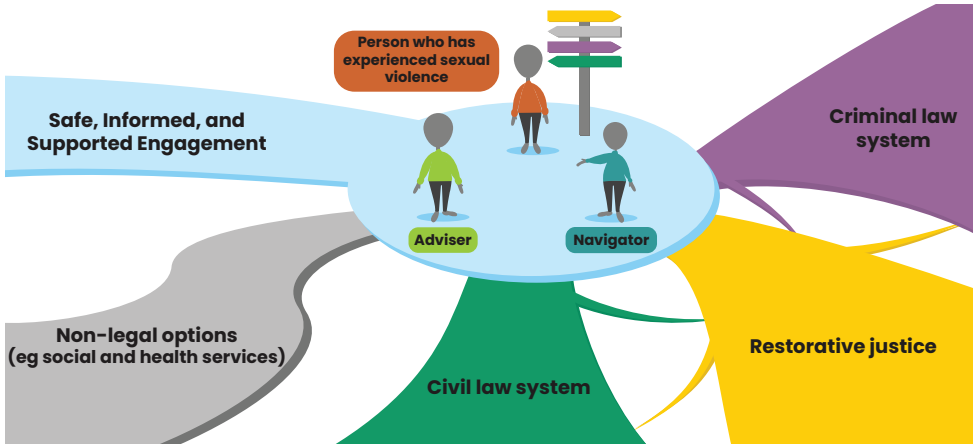
15 Australian Bureau of Statistics (n 7).

16 Sarah Bright et al, *Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update* (Crime Statistics Agency, 2021); Brigitte Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System* (Bureau Brief No 170, NSW Bureau of Crime Statistics and Research, May 2024) 4.

## Addressing barriers to access and engagement with the justice system

1.14 An important step in increasing access to justice for people who have experienced sexual violence is removing the barriers they face to accessing and engaging with the justice system. For many reasons, people who experience sexual violence may not want to take the first step to engage with the justice system. They may not trust the justice system, or they may find it too daunting. They may expect to be treated poorly. They may think that the justice system has nothing to offer them. They may not have access to the basic information and support most people need to make an informed decision as to how to engage with the justice system. From their standpoint, there might be little to gain, and much to lose. By addressing these barriers — by making sure there is meaningful opportunity to engage with the justice system, more support, better treatment if someone chooses to engage with it, and more pathways for seeking a just outcome — engagement with the justice system, and access to justice, could be significantly increased.

***Figure 1.1: Pathways that could respond to sexual violence***




1.15 Barriers to accessing and engaging with the justice system are discussed in more detail in **Chapter 3**. A key barrier to access is feeling concerned about engaging with police or other authorities. People who have experienced sexual violence may stop engaging or 'withdraw' from the justice system after disclosing their experience because of a lack of support.[17] The ALRC addresses a number of these access and engagement barriers, including through recommendations to:

- Support people who have experienced sexual violence taking the first step to engage with the justice system — Safe, Informed, and Supported engagement

17 KPMG and Centre for Innovative Justice, RMIT, *'This Is My Story. It's Your Case, But It's My Story': Interview Study* (NSW Bureau of Crime Statistics and Research, July 2023); Jodie Murphy-Oikonen et al, 'Unfounded Sexual Assault: Women's Experiences of Not Being Believed by the Police' (2022) 37(11–12) *Journal of Interpersonal Violence* NP8916, NP8935.

(**Recommendation 1**) would support accessible entry points for people who have experienced sexual violence to engage, and gain access to information, advice, and support.

- Make legal advice available to every person who has experienced sexual violence — Independent Legal Services would give people who have experienced sexual violence advice about criminal and other justice pathways that centres their rights, needs, and interests, so that they can make informed choices about engaging with the justice system (**Recommendation 1**). This advice would continue to be available in the criminal justice process if a person chooses to report sexual violence to police (**Recommendations 9–10**).
- Make support available throughout the criminal justice process — A major barrier the ALRC heard about in this Inquiry is the fragmented responses to sexual violence across different legal and non-legal processes. Justice System Navigators would walk alongside and guide complainants through the criminal justice and related justice processes and service systems (**Recommendation 1**).
- Increase publicly available information about sexual violence and the justice system — Public education about consent (**Recommendation 38**) and clearer, more accessible information from police, prosecution services, and courts about what to expect from the criminal justice system (**Recommendation 20**) would help address information barriers that people who have experienced sexual violence face when accessing the justice system.

1.16 Another barrier to engaging with the justice system is how people who have experienced sexual violence are treated when they do engage with it. Reasons people who have experienced sexual violence 'withdraw' from a criminal case after reporting include 'defeatist' police attitudes,[18] having little or no say in policing decisions,[19] and a fear of how they would be treated in the trial.[20] To address this barrier, the ALRC makes recommendations to improve how people who have experienced sexual violence are treated by police, prosecutors, and courts. This includes recommendations to:

- improve education and training for those who work in the justice system (**Recommendations 11–16** and **46**);
- strengthen police and prosecution guidelines (**Recommendations 18–19**);
- ensure that laws which require judges to disallow improper questioning during cross-examination are properly applied (**Recommendations 40–41**); and
- encourage the use of ground rules hearings to set ground rules to assist complainants to give their best evidence (**Recommendation 32**).

1.17 Making other justice pathways more accessible could also reduce barriers to accessing and engaging with the justice system or justice responses more broadly.

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18 Rachael Burgin and Jacqui Tassone, *Beyond Reasonable Doubt? Understanding Police Attrition of Reported Sexual Offences in the ACT* (Swinburne University of Technology, 2024) 90.

19 Ibid 89.

20 KPMG and Centre for Innovative Justice, RMIT (n 7) 62.

As discussed in **Chapter 2**, people who have experienced sexual violence have diverse justice needs. They may view access to 'justice' as something different from access to the criminal justice pathway. Some may want different outcomes to what the criminal justice pathway can deliver. For example, while some would like to see the person responsible for sexual violence made accountable by going to prison, others might prefer them to understand and apologise for the harm they caused.[21] Having a range of justice pathways that can meet these different needs provides greater opportunity for people who have experienced sexual violence to access justice. The ALRC makes recommendations to expand the justice pathways available to people who have experienced sexual violence, including to:

- make sexual harassment justice pathways (which cover all forms of unwelcome conduct of a sexual nature) more accessible — by prohibiting sexual harassment in any area of public activity (or universally), and not just in contexts like education or employment (**Recommendations 48** and **49**); by reducing financial barriers to bringing legal proceedings about sexual harassment and giving expanded access to cheaper and quicker tribunal processes (**Recommendations 52** and **55**); and by shifting the burden of, and responsibility for, addressing sexual harassment from individuals to organisations and regulatory bodies, including by expanding the contexts in which a duty to eliminate sexual harassment applies, and by enhancing compliance with both that duty and the prohibition on sexual harassment (**Recommendations 48**, **51**, **53**, and **55**);
- make the restorative justice pathway more accessible — by legislating for restorative justice in sexual violence matters so this pathway is widely available (**Recommendations 58–60**); and
- make the victims of crime financial assistance scheme pathway more accessible — by removing aspects of victims of crime schemes that disadvantage people who have experienced sexual violence, such as time limits and a requirement to report to police (**Recommendations 56–57**).

## Strengthening justice pathways and the remedies available

1.18 To increase access to justice, the recommendations in this Report strengthen the justice pathways and the remedies available by strengthening the processes in other justice pathways. The ALRC recommends:

- improvements to process and evidentiary rules in civil justice proceedings (**Recommendation 46**); and
- developing guidelines for the safe delivery of restorative justice (**Recommendation 61**).

1.19 The recommendations in this Report also increase the range of remedies available in other justice pathways, to support recovery and healing. The ALRC recommends:

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21 See, eg, A McIntosh, *Submission 131*; Centre for Innovative Justice, *Submission 216*.

- expanding the range of orders that can be made when a court finds that someone has been sexually harassed, beyond awarding compensation (**Recommendations 50** and **54**);
- ensuring therapeutic treatment programs are available for people responsible for sexual violence, in restorative justice processes (**Recommendation 64**); and
- consideration of recognition statements and meetings in victims of crime financial assistance schemes (**Recommendation 56**).

1.20 The aim of these recommendations is to increase access to justice by giving people who have experienced sexual violence options to assess and address their justice needs. The recommendations are made in the context of strong oversight and transparency applying to these pathways. They are also made to recognise the solid evidence that some people who experience sexual violence do not want a criminal justice system pathway, and this choice should be respected.

## Strengthening the justice system's accountability and outcomes

1.21 While there has been progress in some areas, the criminal justice process too often fails to achieve just outcomes in sexual violence matters, damaging the trust people have in the criminal justice system. The ALRC heard from many people with experience of sexual violence who felt that they could not trust that the system would be fair or protect them from further harm. As discussed further in **Chapter 5**, the rate at which matters 'drop out' of the criminal justice system is very high and indicates that the system needs to do better to deliver just outcomes.

1.22 The recommendations in this Report aim to increase access to justice by strengthening the criminal justice system's accountability to rebuild trust in the system and improve its outcomes. The recommendations aim to:

- increase understanding of the systemic reasons sexual violence matters drop out of the criminal justice system (**Recommendation 4**);
- improve data about how sexual violence matters are progressing through the criminal justice system (**Recommendation 5**); and
- provide complainants of sexual violence with legal knowledge, support, and advocacy through independent advice and legal representation in the criminal justice process (**Recommendation 9**).

1.23 The recommendations also aim to improve evidence in criminal and civil proceedings to support just outcomes. Currently, the interpretation of evidence presented in sexual violence matters may be affected by myths and misconceptions that continue to influence the criminal (**Chapter 4)** and civil justice systems. The recommendations aim to challenge these myths and misconceptions by correcting problematic beliefs that juries might hold about sexual violence, through the directions that judges give to juries (**Recommendations 21** and **22**), and expert evidence (**Recommendations 23–25** and **46**). The recommendations also aim to support the best possible evidence being used in criminal proceedings — for example, by

improving recorded police interviews through a taskforce to establish a national quality assurance framework for interviewing complainants (**Recommendation 26**).

## Addressing the experiences and needs of groups disproportionately reflected in sexual violence statistics

1.24 The Terms of Reference ask the ALRC to consider the impact of laws and legal frameworks on groups that are disproportionately reflected in sexual violence statistics. As discussed in **Chapter 3**, these groups often face unique and compounding barriers to accessing justice. We understand that in reality, people very often belong to, and have the experiences of, more than one group.

1.25 The ALRC makes a range of recommendations to address the access and engagement barriers faced by these groups. In making these recommendations, the ALRC was informed by the input of those who both belong to and represent these groups, provided in consultations and submissions. The ALRC also asked some groups for written feedback on relevant draft proposals. The recommendations aim to ensure that:

- everyone who discloses sexual violence, will receive Safe, Informed, and Supported engagement, including through connections with specialist or culturally appropriate services and outreach to closed institutions (**Recommendation 1**);
- information about the criminal justice process from police, the Offices of the Directors of Public Prosecutions, and courts is accessible to people with different communication needs and in different languages (**Recommendation 20**);
- public education on consent reaches all groups in the community (**Recommendation 38**);
- police and prosecution guidelines include processes for responding to complainants who are from groups disproportionately reflected in sexual violence statistics (**Recommendations 18** and **19**);
- data published on attrition includes demographic information about groups which are disproportionately reflected in sexual violence statistics (**Recommendation 5**);
- Victims' rights charters require justice agencies to be responsive to the specific needs of groups disproportionately reflected in sexual violence statistics (**Recommendation 8**);
- people who work in the justice system are educated about practices which address the experiences and needs of groups disproportionately reflected in sexual violence statistics (**Recommendation 11**);
- intermediaries are available to help children and people with communication needs to give their best evidence (**Recommendations 31** and **46**);
- there are more and better trained interpreters available across Australia, including First Nations interpreters (**Recommendation 33**);

- First Nations communities are supported to design and implement a restorative justice model that works for their communities (**Recommendation 63**).

1.26 The recommendations reflect specific issues the ALRC was able to address within the timeframe provided for this Inquiry. However, there are other promising approaches to reform that were also suggested. In Further Reform (**Chapter 19**), the ALRC discusses other ideas to address the access and engagement barriers to just outcomes faced by these groups.

1.27 It is important to note, however, that the unique and compounding barriers faced by these groups demands a response that the ALRC could not develop within this Inquiry's scope and timeframe. Building trust and confidence in and engagement with the justice system is central to improving justice responses to sexual violence. The ALRC formed the view that meaningfully addressing barriers to engagement and just outcomes requires a broader and more lengthy examination of the issues, and a focus on the whole justice system, rather than only focusing on sexual violence. This is because for many of the groups listed in our Terms of Reference, distrust in and disengagement with the justice system arise from long standing and whole-of-justice system problems. In addition, there is already a significant body of research, expertise, and advocacy examining the barriers experienced by groups that are disproportionately reflected in sexual violence statistics, and developing tailored solutions.[22]

1.28 To demonstrate this point, the following section focuses on First Nations peoples who have experienced sexual violence. The discussion seeks to explain why a singular focus on sexual violence risks ignoring substantial and enduring impediments to increasing access to the justice system and by extension, just outcomes. A similar analysis could be undertaken in relation to all of the groups included in our Terms of Reference.

### *First Nations people who have experienced sexual violence*

1.29 Improving justice responses to sexual violence for First Nations people requires significant and self-determined changes so that the justice system can be trusted by First Nations people, families, and communities. This necessarily involves grappling with the historic and ongoing impacts of colonisation, and how systemic barriers, discrimination, marginalisation and racism are perpetuated and experienced at different stages in the justice process.

1.30 The Yoorrook Justice Commission, Victoria's formal truth-telling inquiry, recently inquired into systemic injustice experienced by First Nations peoples in the

22 See, eg, Heather Wolbers and Hayley Boxall, *Online Dating App Facilitated Sexual Violence Victimisation among People with Disability* (Australian Institute of Criminology, 2024); Donna Chung et al, *Preventing Sexual Violence against Young Women from African Backgrounds* (Australian Institute of Criminology, 2018); Marie Segrave et al, *Migrant and Refugee Women in Australia: A Study of Sexual Harassment in the Workplace* (Research Report Issue 6, ANROWS, August 2023).

child protection and criminal justice systems.[23] It is instructive to look to this inquiry as it is the first formal inquiry in Australia to be First Nations-initiated and led, to have the powers of a Royal Commission, and to be focused on genuine truth-telling.

1.31 Former Attorney-General of Victoria, the Hon Jaclyn Symes, provided a witness statement to the Yoorrook Justice Commission, stating that

> I acknowledge the fact that the justice system has both recently and historically been a site of exclusion and oppression, whether through laws that were specifically targeted at Aboriginal peoples, laws that were unequally applied to them, or through the refusal to enact specific laws for the advancement of Aboriginal peoples or engage Aboriginal peoples in the design of laws that affect them. I acknowledge that this has resulted in entrenched systemic and structural racism within the justice system and broader institutions of government.[24]

1.32 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability similarly commented that when

> speaking with First Nations people with disability, their families and people who supported them, researchers sensed there is still an assimilation approach perceived as pervasive among many people working within criminal justice and human service agencies, with little recognition of the ongoing impact of colonisation, intergenerational trauma and grief and loss for First Nations people.[25]

1.33 The First Peoples' Assembly of Victoria, Victoria's democratically elected representative body for First Peoples, submitted to the Yoorrook Justice Commission that

> issue-specific law reform in the criminal justice and child protection systems alone is not enough to address the systemic injustices faced by First Peoples. A 'whole of system' approach that gives effect to genuine self-determination is required.[26]

1.34 Accordingly, in addition to recommending urgent reforms, the Yoorrook Justice Commission found that 'the most meaningful, transformative change needed is to embed genuine self-determination'.[27]

1.35 This finding is consistent with recommendations made over 30 years ago by the Royal Commission into Aboriginal Deaths in Custody that governments let 'go

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23 Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems* (Interim Report 2, 2023).

24 Jaclyn Symes, Witness Statement to the Yoorrook Justice Commission (31 March 2023).

25 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 8* (2017) 41. See also Eileen Baldry et al, '"It's Just a Big Vicious Cycle That Swallows Them Up": Indigenous People with Mental and Cognitive Disabilities in the Criminal Justice System' (2016) 8(22) *Indigenous Law Bulletin* 10, 11.

26 First Peoples' Assembly of Victoria, Submission to the Yoorrook Justice Commission (5 December 2022).

27 Yoorrook Justice Commission (n 23) 5.

of the controls',[28] and by the ALRC's Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, which notes that

> a recurring observation made during consultations and in submissions to this Inquiry was that solutions should be developed and led by Aboriginal and Torres Strait Islander people.[29]

1.36 Given what has been found by both past and recent inquiries, and based on the ALRC's own understanding, consultations, and research, it is the ALRC's view that for disproportionately reflected groups, and in particular First Nations peoples, significantly improving the justice system's response to sexual violence requires addressing related historic and enduring systemic injustices — injustices that deter engagement with and reinforce distrust in the justice system. These include bias and discrimination at various stages of the justice system, the criminalisation of disability, overpolicing, and overimprisonment.

1.37 Analysing and addressing these underlying issues is beyond what the ALRC could deliver in the timeframe provided. It will also only be meaningful and effective if affected people and organisations are given the opportunity and resources to initiate and lead these efforts.

1.38 To this end, we note the important recommendations made by the Yoorrook Justice Commission, and the significant work being undertaken to reduce rates of violence against First Nations women and children through the National Aboriginal and Torres Strait Islander Family Safety Plan (which is influenced by First Nations voices).[30] We further note the recommendation made by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability for governments to develop a five year Action Plan for Women and Children with Disability to accompany the National Plan to End Violence against Women and Children 2022–23.[31] The ALRC would also be pleased to support any future inquiries focused on building trust and confidence in the justice system.

## The ALRC's approach to reform

1.39 In addition to the Terms of Reference and the evidence base outlined above, the ALRC has been guided by the unique characteristics of sexual violence, a number of reform principles, and what we heard from people who have experienced sexual violence.

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28 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (vol 4, 1991) [27.9.2]; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (vol 5, 1991) rec 188.

29 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, 2017) 22.

30 SNAICC – National Voice for our Children, 'Our Ways – Strong Ways – Our Voices: National Aboriginal and Torres Strait Islander Family Safety Plan Engagement Phase'.

31 Commonwealth of Australia, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary: Our Vision for an Inclusive Australia and Recommendations* (Final Report, 2023) rec 8.23.

## Sexual violence as a unique harm

1.40 The ALRC's recommendations address sexual violence as a unique harm. Unlike other crimes, sexual violence is linked to persistent myths and stereotypes.[32] These incorrect beliefs affect how people understand what sexual violence is, as well as how people who experience it respond. The Australian Institute of Family Studies notes that such beliefs can cause society to 'default' to 'mistrusting women and excusing men' when sexual violence is alleged.[33] The impact of this includes causing:

- people who have experienced sexual violence to experience, or anticipate, 'blame, shame, and stigma'; and
- these incorrect beliefs to become the criteria against which sexual violence matters are understood or assessed.[34]

1.41 These impacts can create barriers for people who have experienced sexual violence to disclose sexual violence and seek help.[35] They can also affect outcomes in sexual violence matters by influencing how police, prosecutors, and jurors deal with sexual violence cases, as well as affect the experiences of complainants in the criminal justice system.[36] For example, people who have experienced sexual violence respond differently after being harmed. While some behave in 'more stereotypically "distressed" ways', others might be calm and controlled as a coping mechanism.[37] It is also normal for people who have experienced sexual violence to have 'disjointed recollections' about the sexual violence.[38]

1.42 The experience of complainants in the criminal justice system is also affected by the unique nature of sexual violence from an evidentiary perspective. Often the only evidence in a sexual violence matter is the evidence given by the complainant and the accused person.[39] Discrediting a witness is common in criminal trials, but

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32 See, eg, Denise Leivore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Australian Institute of Criminology, 2003).

33 Nina Hudson et al, *Understanding Adult Sexual Assault Matters: Insights from Research and Practice: An Educational Resource for the Justice Sector* (Australian Institute of Family Studies, Attorney-General's Department (Cth), 2024) 9.

34 Ibid.

35 Ibid; Leivore (n 32) 29–30.

36 Hudson et al (n 33) 10. See also **Chapter 4**.

37 Ibid 31; Kate Minter, Erin Carlisle and Christine Coumarelos, '"Chuck Her on a Lie Detector": Investigating Australians' Mistrust in Women's Reports of Sexual Assault' (Research Report Issue No 4, ANROWS, November 2021) 17.

38 Hudson et al (n 33) 33; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (2017) 8. See also Jane Goodman-Delahunty, Mark Andrew Nolan and Evianne L van Gijn, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2017).

39 Hudson et al (n 33) 42; Julia Quilter and Luke McNamara, *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis* (Crime and Justice Bulletin No 259, NSW Bureau of Crime Statistics and Research, 2023) 16–17. Discussed further in **Chapter 4**.

'sexual assault complainants endure a level of scrutiny and personal attack unknown in other cases',[40] which can be more distressing, especially given the highly intimate nature of the harm. A study has shown that they may be at a higher risk than other victims of crime of being re-traumatised by the criminal justice system.[41]

1.43 As discussed in **Chapter 2**, sexual violence is also a distinct harm because people who experience it are often harmed by someone they know. For example, 85 percent of women over 18 knew the person who perpetrated their most recent sexual assault.[42] Sexual violence is also perpetrated in a range of contexts. People experience sexual violence at university, at work, in recreational settings such as pubs or sporting venues, and in institutions such as out-of-home-care, disability care and aged care facilities, and prisons and detention centres.[43]

1.44 The ALRC engages with the unique nature of sexual violence summarised above, through recommendations that aim to make sure that:

- people who experience sexual violence have enough information, and feel believed and supported when they disclose or report sexual violence;
- decision making, processes, and practices in the criminal justice system are informed by research about myths and misconceptions relating to sexual violence;
- processes and practices in the criminal justice system that could perpetuate myths and misconceptions about sexual violence are limited;
- there are multiple pathways for seeking a response to sexual violence that can apply to the various contexts in which it occurs; and
- there are a range of flexible remedies to address the diverse justice needs of people who have experienced sexual violence, some of which would be shaped by sexual violence being a relationship-based crime.

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40 With You We Can, *Submission 132* citing Erin Gardner Schenk and David L Shakes, 'Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military' (2016) 6(1) *University of Denver Criminal Law Review* 9.

41 Kerstin Braun, 'Legal Representation for Sexual Assault Victims - Possibilities for Law Reform?' (2014) 25(3) *Current Issues in Criminal Justice* 819, 821.

42 Australian Bureau of Statistics (n 7).

43 Wendy Heywood et al, *National Student Safety Survey: Report on the Prevalence of Sexual Harassment and Sexual Assault among University Students in 2021* (Social Research Centre, 2022) 1–2; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 95–8; Australian Bureau of Statistics (n 7); Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 2* (2017) 86; Commonwealth of Australia, Royal Commission into Aged Care Quality and Safety, *Final Report: Volume 2: The Current System* (2021) 96–7; Australian Institute of Health and Welfare, 'The Health of People in Australia's Prisons 2022: Physical and Sexual Assaults' <www.aihw.gov.au/reports/prisoners/the-health-of-people-in-australias-prisons-2022/contents/physical-health-status/physical-and-sexual-assaults>; Tom Sullivan et al, *Sexual Offending in Australia 2021–22* (Statistical Report No 47, Australian Institute of Criminology, 2024) 15.

## Reform principles and understandings that informed the Inquiry

1.45 The ALRC has been guided by four overarching principles and understandings in developing its recommendations. We have been guided by rule of law principles, and by an acceptance that it is important when considering reform to take into account diversity of experiences, the need for a trauma-informed approach, and the usefulness of harmonising laws about sexual violence across Australia. The ALRC has also considered the fundamental principles of international law and human rights relevant to this Inquiry.

### *Rule of law principles*

1.46 The rule of law is a core precept in systems of law such as Australia's. The components of the rule of law have been variously identified.[44] The ALRC considers that the rule of law includes the right to a fair trial, equality before the law and access to justice, and accountability before the law.

#### *Right to a fair trial*

1.47 The right to a fair trial is a central pillar of the common law adversarial justice system. In Australia, the right to a fair trial is reflected in both legislation and common law. Relevant statutes include those on human rights,[45] evidence,[46] and criminal law.[47] It is also part of the rule of law:

> It is important to bear in mind the status of the right to a fair trial. It is a universal norm. It requires that we do not allow any individual to be condemned unless he has been fairly tried in accordance with the law and the rule of law.[48]

1.48 At common law, the right is described as an accused person's right 'not to be tried unfairly'.[49] The principles underpinning the right to a fair trial for accused people include:

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44 See generally Tom Bingham, *The Rule of Law* (Penguin UK, 2011); Tom Bingham, 'The Rule of Law' (2007) 66(1) *The Cambridge Law Journal* 67. See also Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press, 2021); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001); Ronald Dworkin, *Law's Empire* (Fontana, 1986); Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009); AV Dicey, *The Law of the Constitution* (Macmillan, 10th ed, 1959); *R v A (No 2)* [2001] UKHL 25.

45 In jurisdictions which have enacted human rights legislation: *Human Rights Act 2004* (ACT) ss 21, 22, 24; *Human Rights Act 2019* (Qld) ss 31, 32, 34; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24, 25, 26.

46 For example, the privilege against self-incrimination in other proceedings: *Evidence Act 1995* (Cth) s 128; *Evidence Act 2011* (ACT) s 128; *Evidence Act 1995* (NSW) s 128; *Evidence (National Uniform Legislation) Act 2011* (NT) s 128; *Evidence Act 1977* (Qld) s 10; *Evidence Act 2001* (Tas) s 128; *Evidence Act 2008* (Vic) s 128; *Evidence Act 1906* (WA) s 11.

47 For example, the obligation on the prosecution to disclose all evidence to the defence: *Criminal Code 1899* (Qld) ss 590AB, 590AH, 590AI, 590AJ, 590AK, 590AL; *Criminal Procedure Act 1986* (NSW) ss 61–3; *Criminal Procedure Act 2009* (Vic) pt 3.2 div 2, pt 5.5 div 2; *Criminal Procedure Act 2004* (WA) ss 42–7.

48 *R v Special Adjudicator; Ex parte Ullah* [2004] UKHL 26 [44].

49 *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 56–7.

- the presumption of innocence;[50]
- the privilege against self-incrimination;[51]
- the right to be tried without unreasonable delay;[52]
- the right to examine witnesses;[53] and
- the right to legal representation.[54]

1.49 The ALRC's recommendations do not question or interfere with any of these rights.

1.50 However, the recommendations also acknowledge that part of the right to a fair trial is for the criminal justice system to support complainants as much as possible without limiting the accused person's fair trial rights.[55] More recent case law and commentary recognise that a fair trial must consider the interests of those who have been wronged, and the public generally.[56] The ALRC's recommendations take into account these different interests to support just outcomes in sexual violence matters.

### *Access to justice*

1.51 Another rule of law principle guiding the recommendations is access to justice. As discussed in the ALRC's previous report on the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,[57] access to justice refers to the 'affirmative steps' necessary to 'give practical content to the law's guarantee of formal equality before the law'.[58] It refers to the need to address or remove barriers to access,[59] and 'must be defined in terms of ensuring that legal and judicial outcomes are just and equitable'.[60] It is enshrined in article 14 of the International Covenant on Civil and Political Rights (ICCPR).

1.52 Ensuring equality before the law means that all people are entitled to be treated equally before the law,[61] and to have the law's equal protection. They are entitled to be treated fairly and to not be discriminated against.

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50 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).
51 Including the right to silence: *Sorby v Commonwealth* (1983) 152 CLR 281, 288.
52 *R v Mills* (2011) 252 FLR 295.
53 *Lee v The Queen* (1998) 195 CLR 594, [32].
54 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3)(d).
55 Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 247.
56 Jeremy Gans, *Criminal Process and Human Rights* (Federation Press, 1st ed, 2011) 509–10; Doak (n 55) 28.
57 Australian Law Reform Commission (n 29) 319.
58 The Hon Justice Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' (Paper, Access to Justice Roundtable, Law and Justice Foundation of NSW, 10 July 2002).
59 Ibid.
60 United Nations Development Programme, *Access to Justice Practice Note*, (2004).
61 Equality before the law originates from the Magna Carta which, in 1215, introduced the principle that all citizens, including those in power, should be equally and fairly ruled by the law.

> Equality before the law and access to justice are fundamental to the rule of law in Australia. People who experience significant disadvantage should not 'fall through the cracks' of the system. Beyond formal institutions or abstract notions, access to justice is commonplace, concrete and embedded in everyday lives. Everyday problems often have critical legal dimensions which need resolving but can go unrecognised.[62]

1.53 Access to justice, and access to the courts in particular, enables established norms of conduct to be identified, applied, and enforced. Without it, arbitrary power will persist, and not everyone will be equally subject to the law.[63]

1.54 All people whose 'rights are infringed or liberties are threatened' are entitled to access to justice.[64] People who have experienced sexual violence are therefore entitled to access to justice. In practice, this principle involves providing access to justice through law and legal institutions such as lawyers and courts, or broader legal and social pathways.[65]

1.55 Access to justice is especially important in law reform. A fundamental tenet of law reform involves improving access to justice by:

- enhancing access to legal knowledge;
- attempting to make legal systems easier to understand;
- improving the delivery of legal services;
- removing barriers to equality before the law; and
- strengthening social justice.[66]

1.56 For people who have experienced sexual violence, the lack of access to justice is highlighted by an overwhelming lack of engagement with the justice system. To promote access to justice, the ALRC's recommendations aim to address this, as well as other barriers in accessing and engaging with the justice system, such as a lack of support, or financial or language barriers.

1.57 To support access to justice, the processes leading to justice and their outcomes can be viewed broadly. This can include:

- multiple pathways to facilitate access to justice, including civil proceedings, restorative justice, and victims of crime schemes;
- processes that are fair and that respect the rights, interests, and needs of those harmed;

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62 Law Council of Australia, *The Justice Project: Overarching Themes* (Final Report, 2018) 2.

63 The Hon Justice Michelle Gordon, 'The Rule of Law – What We Share and Must Defend' (Speech, Australian High Commission, Malaysia, 8 March 2018).

64 Ibid.

65 Bronwyn Naylor, 'Equality Before the Law: Mission Impossible? A Review of the Australian Law Reform Commission's Report Equality Before the Law' (1997) 23 *Monash University Law Review* 423.

66 Roderick A Macdonald, 'Access to Justice and Law Reform' (1990) 10 *Windsor Yearbook of Access to Justice* 287; The Hon Justice Michelle Gordon, 'The Rule of Law – What We Share and Must Defend' (Speech, Australian High Commission, Malaysia, 8 March 2018).

- processes that are timely or not unnecessarily delayed; and
- access to a range of outcomes and remedies, beyond punishment or financial compensation.

1.58 The ALRC's recommendations aim to expand and strengthen available pathways and remedies to increase access to justice.

### *Accountability before the law*

1.59 Accountability is a key rule of law principle. Traditionally, accountability has four key features: (1) a relationship between an actor and a forum; (2) the actor must explain and justify their conduct; (3) the forum can question and pass judgment on the conduct; and (4) the actor may face consequences.[67]

1.60 In relation to sexual violence, the prevalence of this harm and the challenges complainants face in giving evidence at trial support a rule of law argument to bring a person accused of sexual violence to trial,[68] and to hold them accountable for the harm, if warranted.

1.61 More broadly, the National Plan to End Violence against Women and Children 2022–2023 states that, 'holding people who choose to use violence accountable means the responsibility to stop using violence belongs to the person using it.'[69] It sets out different forms accountability can take. This includes:

- listening to, and believing, people who have experienced sexual violence;
- ensuring that people who use sexual violence take personal responsibility for the violence, and change their behaviour; and
- imposing appropriate legal or other consequences on people who use sexual violence.[70]

1.62 As discussed in **Chapter 2**, accountability is a key justice need of people who have experienced sexual violence. People who have experienced sexual violence can view accountability in different ways, with some wanting the person who used sexual violence to be punished,[71] and others preferring that they are held accountable in other ways.[72]

1.63 A system that effectively holds people who use violence to account is crucial for upholding the rule of law. Without it, sexual violence can occur with no consequence, leaving people who have used sexual violence undeterred. While deterrence cannot on its own end sexual violence, it is an important tool to reduce its occurrence and denounce sexual violence.

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67 Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 450.
68 *Regina v A (No 2)* (2002) 1 AC 45.
69 Department of Social Services (Cth) (n 12) 73.
70 Ibid 75.
71 See, eg, Name withheld, *Submission 77*; C Oddie, *Submission 145*.
72 See, eg, A McIntosh, *Submission 131*; Not published, *Submission 171*; Centre for Innovative Justice, *Submission 216*.

1.64 The broad aims of the ALRC's recommendations — to address barriers to access and engagement with the justice system, to strengthen the criminal justice system's accountability and processes, and to expand justice pathways and the remedies available — all make it more likely that people who use sexual violence will be held accountable. Importantly, the recommendations take a broad approach to accountability, with processes such as restorative justice (**Recommendations 58–64**) providing opportunities for people who have experienced sexual violence to be heard and believed, and for people who have used sexual violence to take personal responsibility for their violence and make amends.

### *Diversity of experiences*

1.65 The Terms of Reference ask the ALRC to consider the impacts of laws and legal frameworks on groups that are disproportionately reflected in sexual violence statistics, and those with identities 'intersecting' across these groups. As observed by the National Plan to End Violence against Women and Children 2022–2023, women and children (and people more generally) 'are not a homogenous group. They have many and varied personal identities, backgrounds, experiences and social positions'.[73]

1.66 To bring about just outcomes for people experiencing sexual violence, their 'diversity of experiences', or different backgrounds, experiences and needs, must be considered. Considering the diversity of experiences helps identify barriers to just outcomes, accessing support, and enables meaningful engagement with justice responses.

1.67 This is consistent with the approach in several victim charters in Australia, which consider victim's individual needs in order to provide respectful and dignified treatment.[74] It has also been acknowledged internationally that when providing services and assistance to victims, 'attention should be given to those who have special needs because of the nature of the harm inflicted', or because of their diversity of experiences.[75]

1.68 The following principles have guided the ALRC's approach in this Inquiry to understand the diversity of experiences and promote just outcomes for everyone who has experienced sexual violence:

- People have diverse experiences of sexual violence, the justice system, and supports.
- People have diverse experiences because their identities, such as gender, race, disability, or socioeconomic status, can overlap to influence how the justice system responds — for example, a First Nations woman might face

73 Department of Social Services (Cth) (n 12) 72.

74 See, eg, *Victims of Crime Act 1994* (ACT) s 14C; *Victims Rights and Support Act 2013* (NSW) s 6; Northern Territory Government, *Northern Territory Charter of Victims' Rights*; *Victims of Crime Assistance Act 2009* (Qld) s 8; *Victims of Crime Act 2001* (SA) s 6; *Victims' Charter Act 2006* (Vic) s 6; *Victims of Crime Act 1994* (WA) sch 1.

75 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN Doc A/RES/40/34 (adopted 29 November 1985) art 17.

both racial discrimination and gender inequality, which means she may face a unique set of challenges.

- Other factors such as structural, historical, and cultural factors also shape and compound the challenges a person might face — for example, cultural stigma may affect whether people from newly arrived communities disclose sexual violence, and historical and ongoing harms caused by colonisation may affect whether First Nations people disclose sexual violence.
- These identities and factors combined can result in some people who have experienced sexual violence facing 'barriers to support and safety that other women [and people more generally] do not experience'.[76]
- Understanding this context can help with understanding how the justice system responds to sexual violence and the diverse barriers to just outcomes that people experience.

1.69 The ALRC's recommendations specifically consider the diversity of experiences in the principles listed above.

### *A trauma-informed approach to delivering justice*

1.70 The Terms of Reference ask the ALRC to take a trauma-informed approach to this Inquiry.

1.71 'Trauma' is an overarching term used to refer to an event, or series of events or circumstances, experienced by individuals or groups that increases their risk of physical or psychological harm.[77] Trauma can impact a person in a range of ways, including through a loss of feelings, sense of self, and control.[78] It is formally acknowledged as causing various acute or chronic psychiatric disorders, such as post-traumatic stress disorder (PTSD) and acute stress disorder (ASD).[79]

1.72 Interest and research in trauma-informed approaches has grown over the past decade in areas such as public health, education, social work, and criminal justice. These approaches usually involve integrating an understanding of trauma throughout a program, organisation, or system to improve the services provided.[80] A program, organisation, or system is trauma-informed if it:

- demonstrates a realisation of the widespread impacts of trauma and potential pathways toward recovery;
- recognises the signs and symptoms of trauma in individuals and groups;

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76 Department of Social Services (Cth) (n 12) 129.

77 Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma Informed Approach* (Substance Abuse and Mental Health Services Administration, 2014).

78 Alice Miller, *For Your Own Good: Hidden Cruelty in Child-Rearing and the Roots of Violence* (Noonday, 3rd ed, 1993).

79 American Psychiatric Association (ed), *Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR* (American Psychiatric Association Publishing, 5th ed, text revision, 2022).

80 Robey B Champine et al, 'Systems Measures of a Trauma-Informed Approach: A Systematic Review' (2019) 64(3–4) *American Journal of Community Psychology* 418.

- responds in a way that fully integrates knowledge about trauma into practices and policies; and
- makes efforts to prevent retraumatisation of individuals and groups.[81]

1.73 In 2014, the Substance Abuse and Mental Health Services Administration (SAMHSA) developed a framework which is now regarded as essential to trauma-informed care. This framework is based on six key principles, which provide a starting point for developing a trauma-informed approach.[82]

***Table 1.1: Key principles for developing a trauma-informed approach***

| | |
|---|---|
| 1. Safety | How practices and settings support physical and emotional safety, including the feeling of safety. |
| 2. Trustworthiness and transparency | Maintaining clear and appropriate boundaries, honouring confidentiality, and communicating clearly and consistently. |
| 3. Peer support | Support to be provided by other people who experienced trauma. |
| 4. Collaboration and mutuality | Allowing people with a trauma history to play an active role in their engagement, and having providers acknowledge the expertise that those people bring to the process. |
| 5. Empowerment, voice, and choice | People who have experienced trauma being involved in their recovery and having independence over their preferences regarding support services. Building consumer skills and allowing people who have experienced trauma to be involved in the planning, operating, and evaluating of services. |
| 6. Culture, historical, and gender issues | Recognising stereotypes and biases, historical trauma, and a commitment to practice that works to address inequities and responds to the diverse needs of people who have experienced trauma. |

1.74 In the sexual violence context, taking a trauma-informed approach means recognising and addressing the barriers that may face people who have been through traumatic events. Trauma-informed responses to sexual violence are informed by an understanding of the impact of trauma and being a victim of trauma, how this

81 Substance Abuse and Mental Health Services Administration (n 77) 9.
82 Ibid 10–11.

may affect a person's ability to engage, and what is needed to reduce and prevent retraumatisation.[83]

1.75 Ensuring that reforms to justice responses are trauma-informed can support access and engagement with the justice system. On the other hand, if justice responses are not trauma-informed, they may cause further harm.

1.76 Specific principles have been used to guide trauma-informed practice for people who have experienced sexual violence. These include:

- identifying recovery from trauma as a main goal;
- aiming to maximise the choices and control people who have experienced sexual violence have over their recovery;
- creating an atmosphere that is respectful of the need for safety, respect, and acceptance;
- minimising the risk of retraumatisation; and
- striving to be culturally competent and to understand people who have experienced sexual violence in the context of their life experiences and cultural background.[84]

1.77 The principles above underpin many of the ALRC's recommendations, such as recommendations to:

- provide more legal and practical support to people who have experienced sexual violence (**Recommendations 1** and **9**);
- improve police and prosecution practices (**Recommendations 11–13** and **18–19**);
- ensure that there are avenues to question and provide feedback to the justice system (**Recommendations 4** and **6**); and
- to strengthen justice pathways so that they provide more avenues for recovery (**Recommendations 56** and **58–60**).

### *Harmonisation*

1.78 The Terms of Reference request that the ALRC have regard to the Australian Government's commitment to strengthen and harmonise sexual assault and consent laws.

1.79 Harmonisation can be defined as the process of making individual state or territory laws more uniform or complementary.[85] While uniformity can be an outcome

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83 Victims of Crime Commissioner (Vic), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (2023) 14. See also Sarah Kendall, 'The Trauma-Informed Trial: A Conceptual Framework to Guide Practice' (2024) 43(3) *University of Queensland Law Journal* 319.

84 Denise E Elliott et al, 'Trauma-informed or Trauma-denied: Principles and Implementation of Trauma-informed Services for Women' (2005) 33(4) *Journal of Community Psychology* 461.

85 Brian Opeskin, 'The Architecture of Public Health Law Reform: Harmonisation of Law in a Federal System' (1998) 22(2) *Melbourne Univeristy Law Review* 337, 338–9.

of harmonisation, it is also a different concept — uniformity can be defined as either pursuing identical substantive, and sometimes procedural, law;[86] or administering justice in a uniform way.[87]

1.80 In a federation like Australia, harmonisation can be achieved through Commonwealth legislation if there are constitutional underpinnings that allow this.[88] Where the constitution does not enable this, laws can still be harmonised if states and territories mirror their legislation.[89]

1.81 Currently, responses to sexual violence vary depending on where someone lives in Australia. Laws and practices can differ across states and territories — some states may have stronger legal protections on some issues, for example. This is a predictable situation, given sexual violence laws are largely state and territory laws, and each jurisdiction has developed these laws and practices independently of each other.

1.82 Harmonisation is a helpful aim of reform because there are benefits to greater harmonisation in responding to sexual violence. A major benefit is supporting equality before the law and equal access to justice around Australia. For example, especially in substantive law, harmonised consent laws set a consistent standard for Australian society (see **Chapter 11**).[90] The laws that protect against sexual offences, and hold people accountable for committing these offences, would apply to all people in the same way, and not just to some of them.[91] Further, harmonisation can set a minimum or best practice standard in approaches towards responding to sexual violence. Harmonisation might also help support the interoperability of laws, where legal processes apply across jurisdictions, which could help support cross-jurisdictional cases and cooperation between criminal justice agencies.

1.83 However, efforts to harmonise must be considered against its challenges and risks. These include that:

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86 Ibid 338. Uniformity is sometimes used as a synonym of harmonisation, especially in the field of private international law: Dongwook Chun, 'Patent Law Harmonization in the Age of Globalization: The Necessity and Strategy for a Pragmatic Outcome' (2011) 93(2) *Journal of Patent Trademark Office Society* 127, 137. As a result, the conceptual divide between uniformity, harmonisation, and consistency are sometimes ambiguous: Guzyal Hill, *National Uniform Legislation* (Springer Nature Singapore, 2022) 23–8.

87 Arthur Taylor von Mehren, 'Choice of Law and the Problem of Justice' [1977] (Spring) *Law and Contemporary Problems* 27, 28.

88 For an example of how Commonwealth legislation can be enacted in Australia, see discussion in Opeskin (n 85) 341–7, 352.

89 Some methods include co-operative legislation, template legislation, mutual recognition legislation, and alternative consistent legislation: Guzyal Hill, 'Referred, Applied and Mirror Legislation as Primary Structures of National Uniform Legislation' (2019) 31(1) *Bond Law Review* 91; Opeskin (n 85) 347–52.

90 Guzyal Hill and Jonathan Crowe, 'Harmonising Sexual Consent Law in Australia: Goals, Risks and Challenges' (2023) 49(3) *Monash University Law Review* 1, 4–5.

91 Ibid 6.

- Strict harmonisation can ignore the local contexts of jurisdictions. For example, slightly different laws may be needed in jurisdictions with fewer people and lower resources.[92]
- Substantive equality before the law may require some diversity in laws, based on local circumstances, to facilitate access to justice for people with diverse experiences and needs.
- The process of harmonisation, if implemented without thorough research, can run the risk of 'levelling down' the law to a 'less progressive' standard, where more advanced jurisdictions are expected to adopt laws favoured by less advanced jurisdictions, to reach agreement.[93]
- Harmonisation can take a long time and be costly, especially as it can require agreement among nine jurisdictions.[94]
- Harmonisation may discourage jurisdictions from trialling new laws, and stifle innovation,[95] undermining the useful role that 'competitive federalism' has in law reform.[96]

1.84 Further, even if black letter law is harmonised, complete harmonisation is likely an impossible aim. The law is likely to develop differently when it is interpreted locally. This is an important part of the law developing, so that it is applied in a way that is fit for purpose for the local community.

1.85 The ALRC views harmonisation, to achieve broad consistency, as a helpful aim. This is especially so where best practice can be identified and replicated across jurisdictions. However, the degree of harmonisation should be balanced against the need to account for local circumstances, as well as the challenges and risks of harmonisation highlighted above (see **Chapters 11** and **12**). More consistent justice outcomes across Australian jurisdictions may not require the costs associated with strict harmonisation or uniformity — even if states and territory laws have some legislative differences, they could achieve the same goal.

### *International law and human rights*

1.86 In performing its functions, the ALRC must aim to ensure that its recommendations are consistent with Australia's international obligations as far as practicable.[97] In this Inquiry, the ALRC considered various international obligations relating to justice responses to sexual violence. Relevant treaties considered in this Report include the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); *Convention on the Rights of the Child* (CRC); *Convention on the Rights of Persons with Disabilities* (CRPD); the *International Covenant on Civil and Political Rights* (ICCPR); and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).

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92 Opeskin (n 85) 358.
93 Hill and Crowe (n 90) 8, 10–11.
94 Opeskin (n 85) 358.
95 Ibid 357–8.
96 Hill (n 86) 68; Hill and Crowe (n 90) 11.
97 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

1.87 Other relevant international materials include the Declaration on the Elimination of Violence against Women; the Beijing Declaration and Platform for Action; the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and interpretive guidance from United Nations treaty bodies, and concluding observations made by treaty bodies.

1.88 The ALRC's recommendations were especially influenced by how the Committee on the Elimination of Discrimination against Women has interpreted CEDAW to require that effective legal measures, including criminal, civil, employment, or administrative sanctions be implemented in domestic laws to punish sexual violence, and to redress the wrongs caused to women who are subject to sexual violence.[98]

### What the ALRC heard from people who have experienced sexual violence

1.89 The ALRC was also guided by what people who have experienced sexual violence told us they wanted or needed from the justice system ('justice needs'). Drawing on the 220 submissions the ALRC received from people who experienced sexual violence, **Chapter 2** sets out the importance of:

- having information and communication;
- being able to participate, make choices, and have a voice;
- feeling validated and recognised;
- having the person responsible for sexual violence be accountable, and for the criminal justice system to be accountable as well; and
- feeling or being safe.

## Ongoing reform to the response to sexual violence

1.90 As stated in the National Plan to End Violence against Women and Children 2022–2023, to achieve the aim of ending violence against women and children, jurisdictions must all be 'pulling in the same direction'.[99] Throughout this Report, we have ensured our recommendations align with the objectives of the National Plan to End Violence against Women and Children 2022–2023, particularly in relation to the 'response' domain, which focuses on 'efforts and programs used to address existing violence'. This includes improving 'justice responses to all forms of gender-based violence'.[100]

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98 Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child (2019) on Harmful Practices*, CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 (8 May 2019).

99 Department of Social Services (Cth) (n 12) 16.

100 Ibid 21.

1.91 These reform efforts sometimes overlap with the areas in the Terms of Reference, such as strengthening consent laws and improving support for people who have experienced sexual violence. As required by the Terms of Reference, the ALRC builds on the work of many reports, inquiries, and plans that have recently considered improving justice responses to sexual violence. The ALRC has also carefully considered how the Report's recommendations will fit with how the justice system already works, and reforms which are already underway.

1.92 For example, the recommendation on Safe, Informed and Supported engagement builds on and complements the work sexual assault services have been doing for decades (**Recommendation 1**), as well as work underway in some jurisdictions,[101] and federally funded efforts to improve responses to sexual violence disclosures.[102] The recommendations on Independent Legal Services consider federally funded services that are being piloted in the Australian Capital Territory, Victoria and Western Australia (**Recommendations 1** and **9**).[103] The recommendations on restorative justice legislation reflects that some states already have or are developing restorative justice legislation (**Recommendations 58–60**).[104] The ALRC does not make recommendations on technology-facilitated violence or intervention orders, as these areas are the subject of current reform efforts.[105]

1.93 The ALRC's recommendations also complement reform efforts to address family violence, given the overlap between family and sexual violence (see **Chapter 2**). For example, the early-stage Independent Legal Services and Justice System Navigators (**Recommendation 1**) would support people who have experienced both sexual and family violence in relation to the range of systems they might be dealing with, such as intervention orders, family law, and child protection systems. Recommendations to improve police guidelines include a consideration of how family and sexual violence intersect (**Recommendation 18**). Recommendations on consent include a category that acknowledges the dynamics of family violence in the list of circumstances where there is no consent (**Recommendation 37**).

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101 For example, the 2024–25 Queensland budget provided for the development of integrated inter-agency responses to support people who have experienced sexual violence.

102 This includes funding in the 2024–25 Australian Government budget to fund accredited training on sexual violence responses for doctors, nurses and frontline workers, and $253.4 million in funding over five years from 2023–24 for 1800RESPECT, a national service for people affected by domestic, family, and sexual violence, which provides counselling, information, and referrals. There is also a national information and referral service to support people who have experienced sexual child sexual abuse being developed.

103 The Australian Government provided funding over three years from 2023–24 to pilot a new service model in these jurisdictions to provide people who have experienced sexual violence with greater access to legal support.

104 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT); *Dispute Resolution Centres Act 1990* (Qld).

105 The Australian Government is introducing reforms to address gender-based violence committed online and funding a national review of family and domestic violence order frameworks: Commonwealth of Australia, *Budget 2024–25 (Women's Budget Statement)* (2024) 21.

## Implementing the recommendations: funding, data, and evaluation

1.94 In implementing these recommendations, the ALRC stresses the need for enough funding and resources to ensure that the justice system can deliver timely and effective outcomes. Further, there would be a need for new funding, rather than using existing funding for a different purpose and at the expense of existing systems and services. Underfunded or resourced courts, police, Offices of the Directors of Public Prosecutions, sexual assault services, community legal centres, Legal Aid Commissions, Aboriginal and Torres Strait Islander legal services, and regulatory bodies create delays and overburden staff — this already leads to poor outcomes for people who have experienced sexual violence. Without proper investment in these services, the reforms the ALRC proposes will struggle to make a real difference. In fact, the recommendations could put pressure on an already burdened system.[106]

1.95 The ALRC found a particular gap in data in relation to the extent to which various justice pathways are used. Data was often not publicly or easily available, or not disaggregated enough to indicate which matters involved sexual violence. It was also difficult to make comparisons between states and territories, as well as between sexual violence and non-sexual violence matters. In implementing the recommendations, it is also important to establish data collection practices which enable the reforms to be monitored and reviewed, to ensure they are working, to refine them, or to find other ways to solve the problem if they are not.

1.96 Where evaluation is especially important, we have also highlighted this in the recommendation itself. As suggested by the Domestic, Family and Sexual Violence Commission, data collection should align with Indigenous Data Sovereignty principles.[107]

## Broader and further reform

1.97 Our recommendations, which focus on supporting engagement with the justice system and increasing the criminal justice system's accountability, aim to achieve transformative change. But while reforming the law and justice system is essential, it will not be enough on its own to address sexual violence. Real, transformative change needs more than just legal reforms — it requires a shift in attitudes and practices beyond the justice system.[108] The National Plan works towards bringing about this broader cultural change through a range of social, political, and economic measures.[109]

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106 Law Council of Australia, *Submission 215*.

107 Correspondence from the Domestic, Family and Sexual Violence Commissioner to the Australian Law Reform Commission, 25 October 2024.

108 Rachel Marcus et al, *Gender-Transformative Programming* (Background Paper Series, UNICEF Gender Policy and Action Plan 2022–2025).

109 Department of Social Services (Cth) (n 12).

# The Inquiry's process

## The Expert Advisory Group

1.98 The Inquiry was expertly informed by a group of 20 advocates for people who have experienced sexual violence, most of whom have lived experience of sexual violence themselves (the Expert Advisory Group). The Expert Advisory Group comprised people from different backgrounds, most of whom belonged to one or more of the groups disproportionately reflected in sexual violence statistics. The Australian Government Attorney-General's Department convened the Expert Advisory Group.

1.99 Through the Expert Advisory Group, the ALRC could hear directly from people who had firsthand experience of the justice response to sexual violence. Members gave their own views about the issues in the Inquiry, rather than agreeing on a single view. The ALRC heard both common and different views across group members.

1.100 The ALRC formally met with the Expert Advisory Group four times. The ALRC also met with members in smaller meetings, one-on-one, or as part of consultations with other stakeholders. The ALRC received written input from some Expert Advisory Group members, including submissions.

1.101 The ALRC sincerely thanks the Expert Advisory Group for their expertise, commitment, and the significant effort they put into the Inquiry. This Report has been much enhanced by their thoughtful guidance and input.

## Submissions and consultations

1.102 On 17 April 2024, the ALRC released an Issues Paper to invite submissions to inform the ALRC's recommendations. The ALRC received 220 submissions in response to the Issues Paper (see **Appendix B**). While the ALRC usually publishes its draft proposals, this was not possible because of the Inquiry's tight timeframes. The ALRC instead conducted targeted consultation on the draft proposals (discussed below).

1.103 The ALRC ran two major consultation phases with community organisations, support services, academics and experts, courts, lawyers, judges, police, prosecutors, government, and people with experience of sexual violence. The people the ALRC consulted with were from all Australian states and territories, the United Kingdom and Canada. Consultations were mostly held online.

1.104 The first consultation phase focused on understanding how justice responses to sexual violence currently work in practice, the problems related to that, and how those problems could be solved. The ALRC conducted 89 consultations in this phase (see **Appendix A**).

1.105 The second phase of consultation focused on testing the ALRC's draft proposals. Consultations were targeted to fit the Inquiry's short timeframe. The ALRC sent selected draft proposals to specific individuals and groups based on their area of expertise. This approach was taken to avoid overwhelming them with too much material in a short timeframe, and to help encourage more meaningful engagement. Some draft proposals were shared through email rather than discussed in consultations. The ALRC conducted 37 consultations (see **Appendix A**) and received 124 written responses in this phase.

1.106 Some consultations were conducted as roundtables to explore specific themes. The ALRC held roundtables about independent legal services, evidence laws, and sexual harassment, for example. Some roundtables focused on the experiences of the groups listed in the Terms of Reference as being disproportionately reflected in sexual violence statistics. These roundtables involved and were about the experiences of First Nations people; people from culturally and linguistically diverse backgrounds; people with disability; people who have been incarcerated; people who are migrants or impacted by insecure visa status; and people engaged in sex work.

1.107 The submission and consultation process, as well as the ALRC's broader engagement with the community, was informed by a 'Trauma-informed Practice Framework'. The ALRC developed this framework at the start of the Inquiry to help ensure that the ALRC took an approach that aimed not to cause more trauma for anyone who engaged with the Inquiry, including stakeholders and staff.

## Research and expert review

1.108 This Report builds on the information collected through the processes above, research about Australian laws and practice, as well as laws and practice overseas. This includes legislation, case law, academic research, evaluations, and reports of previous inquiries or reviews. Taking a comparative approach was especially helpful in this Inquiry for identifying promising reform models. The ALRC also considered publicly available quantitative data, and data provided by some organisations.

1.109 Some chapters of this Report were read by expert reviewers, who provided feedback based on their experience and expertise (see Acknowledgements).

# 2. The Problem of Sexual Violence and What We Heard

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## Introduction

2.1 To improve justice responses to sexual violence, the nature of sexual violence and the contexts in which it occurs must be clearly understood. This chapter sets out key statistics about sexual violence and the justice response to it. It describes what research indicates and what people who have experienced sexual violence have said about justice system responses. This informs the ALRC's recommendations, which seek to acknowledge and respond to the scale of the problem of sexual violence and those most affected by it, including what people who have experienced sexual violence want from a justice response.

2.2 This chapter:

- describes the widespread 'problem' of sexual violence;
- highlights that sexual violence often does not receive a justice response; and
- explains what we heard about people's experiences of the justice system and their 'justice needs'.

## What is sexual violence?

2.3 Sexual violence has been defined in many ways.[1] In this Inquiry, the ALRC adopts the nationally consistent definition set out in the *National Plan to End Violence against Women and Children 2022–2032*, which defines sexual violence as

> sexual activity that happens where consent is not freely given or obtained, is withdrawn or the person is unable to consent due to their age or other factors. It occurs any time a person is forced, coerced or manipulated into any sexual activity. Such activity can be sexualised touching, sexual abuse, sexual assault, rape, sexual harassment and intimidation and forced or coerced watching or engaging in pornography. Sexual violence can be non-physical and include unwanted sexualised comments, intrusive sexualised questions or harassment of a sexual nature. Forms of modern slavery, such as forced marriage, servitude or trafficking in persons may involve sexual violence.[2]

2.4 It is generally acknowledged that sexual violence is 'a way one person exerts power and control over another'.[3]

## Sexual violence is common and affects many people

2.5 Sexual violence is widespread. It is experienced by many people in Australia across different age-groups. Sexual violence is gendered. Most people who experience it are women and girls. Men are more likely to use it.[4]

2.6 About 1 in 3 girls experience child sexual abuse.[5] About one in five women have experienced sexual violence since the age of 15.[6] In 2021–22, 13% of women

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1 Natalie Townsend et al, *A Life Course Approach to Determining the Prevalence and Impact of Sexual Violence in Australia: Findings from the Australian Longitudinal Study on Women's Health* (Research Report Issue 14, ANROWS, August 2022) 12.

2 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 37.

3 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 20 [2.10].

4 Australian Bureau of Statistics, 'Personal Safety, Australia: 2021–22 Financial Year' <www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>; Divna Haslam et al, *The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study* (Australian Child Maltreatment Study, Queensland University of Technology, 2023) 17; Laura Doherty and Christopher Dowling, *Perpetration of Sexual Violence in a Community Sample of Adult Australians* (Australian Institute of Criminology, 2024) 15.

5 Haslam et al (n 4) 17.

6 Australian Bureau of Statistics, *Personal Safety, Australia: 2021–22 Financial Year* (n 4). The Australian Bureau of Statistics defines sexual violence as 'the occurrence, attempt or threat of sexual assault experienced since the age of 15': Australian Bureau of Statistics, 'Sexual Violence: 2021–2022 Financial Year' <www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/2021-22>.

had experienced sexual harassment in the last 12 months.[7] These figures may underestimate the true extent of sexual violence because of limitations on data collection (see below).

2.7 Men and boys also experience sexual violence. About one in seven boys experience child sexual abuse.[8] About 1 in 16 men have experienced sexual violence since the age of 15.[9] In 2021–22, 4.5% of men had experience sexual harassment in the last 12 months.[10] Data for men who have experienced sexual violence is limited.[11]

## Sexual violence is used in a range of situations

2.8 Sexual violence is used by different people across a range of relationships, most often against someone they know — 85% of women over 18 knew the person who carried out their most recent sexual assault.[12] The relationship with that person can depend on factors like age. For women over 18, sexual violence was most often used by an intimate partner, such as a partner they lived with, a boyfriend, or a date.[13] For children, sexual violence was most often carried out by adolescents they knew, parents, or their caregivers.[14] Sexual violence can also be used by other family members, neighbours, friends, housemates, co-workers, and acquaintances.[15]

2.9 Sexual violence can occur in many settings. For most women, their most recent experience of sexual assault was at their own home or the home of the person who sexually assaulted them.[16] People also experience sexual violence at university, at work, in recreational settings such as pubs or sporting venues, and in

7 Australian Bureau of Statistics, 'Sexual Harassment 2021–22 Financial Year' (23 August 2023) <www.abs.gov.au/statistics/people/crime-and-justice/sexual-harassment/latest-release>. The Australian Bureau of Statistics provides that 'sexual harassment is considered to have occurred when a person has experienced or been subjected to one or more selected behaviours which they found improper or unwanted, which made them feel uncomfortable, or were offensive due to their sexual nature': ibid.

8 Haslam et al (n 4) 19.

9 Australian Bureau of Statistics, *Personal Safety, Australia: 2021–22 Financial Year* (n 4).

10 Australian Bureau of Statistics, *Sexual Harassment 2021–22 Financial Year* (n 7).

11 Australian Institute of Health and Welfare, 'Sexual Assault Reported to Police', *Family, domestic and sexual violence* <www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/police/sexual-assault-reported-to-police>; Australian Bureau of Statistics, 'Personal Safety, Australia Methodology: 2021–22 Financial Year' <www.abs.gov.au/methodologies/personal-safety-australia-methodology/2021-22>.

12 Australian Bureau of Statistics, *Sexual Violence: 2021–2022 Financial Year* (n 6).

13 Ibid.

14 Haslam et al (n 4) 17.

15 Australian Bureau of Statistics, *Sexual Violence: 2021–2022 Financial Year* (n 6). See also Tom Sullivan et al, *Sexual Offending in Australia 2021–22* (Statistical Report No 47, Australian Institute of Criminology, 2024) 11–12.

16 Australian Bureau of Statistics, *Sexual Violence: 2021–2022 Financial Year* (n 6).

institutions such as out-of-home-care, disability care, aged care, and prisons and detention centres.[17]

2.10 Sexual violence can also occur online. Technology can enable both online and in-person sexual violence, such as image-based sexual abuse and online sexual harassment.[18] One in two Australians aged 18 and over have experienced technology-facilitated abuse such as online sexual and image-based abuse.[19] Technology-facilitated sexual violence is a serious, and growing, area of concern.[20]

2.11 Sexual violence can occur at the same time as other types of violence, such as family and domestic violence.[21] About 39% of sexual assaults which were recorded in 2023 and reported to police occurred in a family and domestic violence context.[22] Victims of these incidents were most commonly women. Stigma around sexual violence in intimate partner relationships can contribute to feelings of shame and isolation.[23]

2.12 A person can experience sexual violence more than once. Recent data indicates that '60% of women and 51% of men who experienced sexual assault experienced it more than once'.[24] Similarly, the Australian Child Maltreatment Study

17 Wendy Heywood et al, *National Student Safety Survey: Report on the Prevalence of Sexual Harassment and Sexual Assault among University Students in 2021* (Social Research Centre, 2022) 1–2; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 95–8; Australian Bureau of Statistics, *Sexual Violence: 2021–2022 Financial Year* (n 6); Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 2* (2017) 86; Commonwealth of Australia, Royal Commission into Aged Care Quality and Safety, *Final Report: Volume 2: The Current System* (2021) 96–7; Australian Institute of Health and Welfare, 'The Health of People in Australia's Prisons 2022: Physical and Sexual Assaults' <www.aihw.gov.au/reports/prisoners/the-health-of-people-in-australias-prisons-2022/contents/physical-health-status/physical-and-sexual-assaults>; Tom Sullivan et al (n 15) 15.

18 eSafety Commissioner, *Technology-Facilitated Abuse: Family, Domestic and Sexual Violence* (October 2023) 3; Heather Wolbers et al, *Sexual Harassment, Aggression and Violence Victimisation among Mobile Dating App and Website Users in Australia* (No Research Report 25, Australian Institute of Criminology, 2022) xi; Nicola Henry and Anastasia Powell, 'Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research' (2016) 19(2) *Trauma, Violence, & Abuse* 195, 195–7.

19 Anastasia Powell, Asher Flynn and Sophie Hindes, *Technology-Facilitated Abuse: National Survey of Australian Adults' Experiences* (Research Report Issue No 12, ANROWS, July 2022) 23.

20 Asher Flynn, Anastasia Powell and Sophie Hindes, *Technology-Facilitated Abuse: A Survey of Support Services Stakeholders* (Research Report Issue No 2, ANROWS, July 2021) 5.

21 Gemma Hamilton and Patrick Tidmarsh, *The Intersections of Family Violence and Sexual Offending* (Routledge, 2023) 1; Anastasia Powell et al, *Family Violence and Sexual Harm: Research Report 2023* (RMIT University, 2023) 9; Australian Bureau of Statistics, 'Recorded Crime – Victims: 2023' <www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>.

22 Australian Bureau of Statistics, *Recorded Crime – Victims: 2023* (n 21).

23 Cherie Toivonen and Corina Backhouse, *National Risk Assessment Principles for Domestic and Family Violence* (ANROWS Insights, 2018) 10.

24 Australian Bureau of Statistics, 'Sexual Violence: Victimisation' <www.abs.gov.au/articles/sexual-violence-victimisation>.

found that child sexual abuse rarely happened on just one occasion.[25] A person can experience sexual violence perpetrated by different people.[26]

## Some groups experience sexual violence at higher rates

2.13 Some groups experience sexual violence at a much higher rate than other groups. This includes First Nations women; women with a disability; LGBTQIA+ people; people who have been incarcerated; and sex workers. For example:

- Aboriginal and Torres Strait Islander women are estimated to be three times more likely to experience sexual violence than non-Aboriginal and Torres Strait Islander women.[27]
- About 21% of people with disability experienced sexual violence, compared to 10% of people without disability, since the age of 15.[28] Women with disability were found to be twice as likely to report sexual violence over their lifetime than women without disability.[29]
- A recent national study found that 48.6% of LGBTIQ participants reported having been coerced or forced into sexual acts; 8.9% had experienced sexual assault in the past 12 months.[30]
- About 70–90% of women in custody are estimated to have a history of emotional, sexual, or physical abuse.[31]

2.14 Data on the prevalence of sexual violence for other groups, such as older people, [32] women who are migrants, refugees, or impacted by insecure visa status,

25 Haslam et al (n 4) 19.
26 Tom Sullivan et al (n 15) 19; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 17) 39.
27 Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women* (Landscapes Issue 1, ANROWS, December 2016) 20; Department of Social Services (Cth) (n 2) 42.
28 Centre of Research and Excellent in Disability and Health, *Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia* (Research Report for Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2021) 9.
29 Ibid 10.
30 Adam O Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* (Monograph Series No 122, Australian Research Centre in Sex, Health and Society, La Trobe University, August 2020) 75.
31 *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (ANROWS Insights, March 2020) 5.
32 Lixia Qu et al, *National Elder Abuse Prevalence Study: Final Report* (Australian Institute of Family Studies, July 2021) 11–13, 39–40.

and women from culturally and linguistically diverse backgrounds,[33] is limited. However, research suggests that these groups have an increased risk of experiencing sexual violence or face unique barriers to having their experiences recognised and addressed.[34]

2.15 For people from these groups the combination of different aspects of their identity — like being a woman or having a disability — can heighten their risk of experiencing sexual violence and facing barriers to getting support.[35]

2.16 The ALRC recognises that the data on sexual violence is both limited and has limitations, especially for the groups discussed above.[36] Different definitions in datasets,[37] underreporting of sexual violence,[38] limited data on some groups,[39] and how often the data is collected, all contribute to these limitations.

2.17 The ALRC makes recommendations to improve access to justice for these groups in **Chapter 3**.

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33 Data on the prevalence of sexual violence for women who are migrants, refugees, or impacted by insecure visa status, and women from culturally and linguistically diverse backgrounds is limited and conflicting: Mitra-Kahn, Newbigin and Hardefeldt (n 27) 22–3; Marie Segrave et al, *Migrant and Refugee Women in Australia: A Study of Sexual Harassment in the Workplace* (Research Report Issue 6, ANROWS, August 2023) 13–14; Australian Institute of Health and Welfare, 'People from Culturally and Linguistically Diverse Backgrounds', *Family, domestic and sexual violence* <www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/cald>; Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence: National Data Landscape 2022* (In Focus, August 2022) 12.

34 See, eg, Mitra-Kahn, Newbigin and Hardefeldt (n 27) 22–4; Segrave et al (n 33) 13; *Crossing the Line: Lived Experience of Sexual Violence among Trans Women of Colour from Culturally and Linguistically Diverse (CALD) Backgrounds in Australia – Key Findings and Future Directions* (Research to Policy and Practice Issue 14, ANROWS, June 2020) 1; Australian Institute of Health and Welfare, *People from Culturally and Linguistically Diverse Backgrounds* (n 33); Qu et al (n 32) 12–15. See also **Chapter 3**.

35 *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women in Australia* (Our Watch, 2nd ed, 2021) 46–7; Office of the Commissioner for Victims of Crime (WA), *Improving Experiences for Victim-survivors: Review of Criminal Justice System Responses to Sexual Offending*, (Discussion Paper 1, 2024) 10–11; Sex Discrimination Commissioner (Cth), *Submission 168*.

36 See generally Australian Institute of Health and Welfare, 'Family, Domestic and Sexual Violence: Key Information Gaps and Development Activities' <www.aihw.gov.au/family-domestic-and-sexual-violence/resources/key-information-gaps-and-development-activities>; Australian Institute of Health and Welfare, 'Family, Domestic and Sexual Violence: National Data Landscape 2022' (n 33) 6–8.

37 Townsend et al (n 1) 12; Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) 101.

38 Australian Institute of Health and Welfare, *Sexual Assault Reported to Police* (n 11); Denise Leivore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Australian Institute of Criminology, 2003) 10.

39 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence: Key Information Gaps and Development Activities* (n 36); Australian Institute of Health and Welfare, 'Family, Domestic and Sexual Violence: National Data Landscape 2022' (n 33) 8. See also Australian Institute of Health and Welfare, *Sexual Assault in Australia* (In Focus, August 2020) 3; Mitra-Kahn, Newbigin and Hardefeldt (n 27).

## The impact of sexual violence

2.18 Sexual violence can have serious and long-lasting impacts. Sexual violence can affect a person's physical and psychological health and wellbeing.[40] It can hurt their relationships and limit their ability to learn, work, and be a part of the community.[41]

2.19 These impacts can affect people throughout their lives.[42] The ALRC heard from people who have experienced sexual violence that they continue to be affected by flashbacks, physical effects, post-traumatic stress disorder, severe depression, suicidal ideation, anxiety, fear, and complex trauma.[43]

> Not surprisingly, since the abuse and rapes, I began to suffer from PTSD, depression and anxiety … The physical pain and emotional anguish I have experienced over the years as result of the crimes perpetrated against me has at times been so debilitating that I have wanted to end my own life.[44]

2.20 Experiences and impacts of sexual violence are unique to each person. People may experience many, some, or no impacts.[45] The impacts can be compounded when combined with other factors, like having a disability or being subjected to racism.[46] As discussed in **Chapter 1**, these factors can combine and result in some people who have experienced sexual violence facing greater barriers to accessing support.

## Sexual violence often does not receive a justice response

2.21 Even though sexual violence is common in Australia, there are low reporting rates, low prosecution rates, and low conviction rates.[47]

2.22 Most people who experience sexual violence do not formally report it. The Personal Safety Survey found that 92% of women did not report their most recent experience of sexual assault to police.[48] Women were more likely to seek

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40 Townsend et al (n 1) 8–9; Cameron Boyd, *The Impacts of Sexual Assault on Women* (Resource Sheet, Australian Centre for the Study of Sexual Assault, 2011) 2–8; Australian Institute of Health and Welfare, 'Sexual Assault in Australia' (n 39) 6–7; Australian Bureau of Statistics, *Sexual Violence: 2021–2022 Financial Year* (n 6).

41 Boyd (n 40) 5–6; Australian Institute of Health and Welfare, 'Sexual Assault in Australia' (n 39) 7; Australian Bureau of Statistics, *Sexual Violence: 2021–2022 Financial Year* (n 6).

42 Department of Social Services (Cth) (n 2) 41.

43 See, eg, Not published, *Submission 1*; Not published, *Submission 44*; A McIntosh, *Submission 131*; J Crous, *Submission 141*; C Oddie, *Submission 145*; B Colbourne, *Submission 174*. See also Boyd (n 40).

44 C Oddie, *Submission 145*.

45 Boyd (n 40) 1.

46 Department of Social Services (Cth) (n 2) 41–4.

47 Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crimes against Adult Victims: Barriers to Justice* (Research Paper No 611, Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice, November 2020) 3.

48 Australian Bureau of Statistics, *Sexual Violence: 2021–2022 Financial Year* (n 6).

informal support from a friend or family member rather than formal support from an organisation.[49] Barriers to disclosure and reporting are discussed in **Chapter 3**.

2.23 Those that do report to police, despite these challenges, often have similar reasons for doing so. Many are concerned for their own safety and wellbeing, want to stop the violence or be protected against future incidents, or want to protect others from experiencing what happened to them or prevent the person who harmed them from offending again.[50]

2.24 When sexual violence is reported to police, the matter may not continue through the justice system because of high attrition.[51] Attrition is when reports do not progress through to different stages in the criminal justice system, for example to a charge after a report, or where the matter is discontinued before trial.[52] In Australia, research indicates that police will only file or lay charges in a smaller number of cases than are reported.[53] Even fewer cases will be prosecuted, and fewer again result in a finding of guilt.[54] Studies have found that less than 20% of offences reported to police result in a finding of guilt.[55] Conviction rates for sexual offences have decreased over time.[56] Other countries also have high attrition and low conviction rates in sexual violence matters.[57] Attrition is discussed in more detail in **Chapter 5**.

2.25 High attrition may be due to a range of reasons, including myths and misconceptions about sexual violence and about how a person who has experienced sexual violence behaves.[58] For example, myths and misconceptions can influence how people who work in the justice system (such as police, lawyers, and judges) make decisions.[59] They can also influence the views of juries and how they assess the

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49 Ibid.
50 Ibid.
51 See generally Rachael Burgin and Jacqui Tassone, *Beyond Reasonable Doubt? Understanding Police Attrition of Reported Sexual Offences in the ACT* (Swinburne University of Technology, 2024); Sarah Bright et al, *Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update* (Crime Statistics Agency, 2021); New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, 2020) 13–24 [2.1]–[2.43].
52 For a more detailed discussion of attrition, see **Chapter 5**.
53 Burgin and Tassone (n 51) 108; Bright et al (n 51) 1.
54 New South Wales Law Reform Commission (n 51) 16–17 [2.14]–[2.17]; Bright et al (n 51) 1; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (2017) 3.
55 Bright et al (n 51) 6.
56 Australian Institute of Family Studies and Victoria Police (n 54) 3.
57 Ibid; Melanie Millsteed and Cleave McDonald, *Attrition of Sexual Offence Incidents across the Victorian Criminal Justice System* (Crime Statistics Agency, 2017) 2; Bright et al (n 51) 6–7. See also Ministry of Justice (NZ), *Attrition and Progression: Reported Sexual Violence Victimisations in the Criminal Justice System* (2019).
58 Tidmarsh and Hamilton (n 47) 2; Australian Institute of Family Studies and Victoria Police (n 54) 3; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 50; New South Wales Law Reform Commission (n 51) 19–24 [2.26]–[2.31].
59 Christopher Dowling et al, *National Review of Child Sexual Abuse and Sexual Assault Legislation in Australia* (Consultancy Report, Australian Institute of Criminology, 2024) 11; Hamilton and Tidmarsh (n 21) 9.

credibility of the complainant of sexual violence.[60] For example, research has found that complainants of sexual violence who display emotions or distress are viewed as more believable or credible than complainants who do not display emotions, even though people respond differently when recounting sexual violence.[61] Myths and misconceptions, and their impact, are discussed in further detail in **Chapter 4**.

2.26 One prevalent misconception is that false reporting rates are high.[62] Research suggests that most sexual violence reports are genuine and that rates of false reporting are low.[63] Some estimates suggest that only 5% of reports are false,[64] but it is difficult to confirm the exact rate.[65]

## What we heard from people who have experienced sexual violence

2.27 The ALRC heard from people who have experienced sexual violence about their experiences of the justice system and what they want or need from it.

### Experiences of the justice system

2.28 Some people had good experiences with individuals in the justice system. They highlighted positive experiences with, for example, support services,[66] police,[67] prosecutors,[68] and court officials:

> The Magistrate spoke directly to me, telling me that she believed I had been a victim of crime and expressed her regret for the sexual and domestic violence my ex-husband had perpetrated against me. I found this to be the most affirming and healing aspect of the disclosure process.[69]

2.29 However, the submissions mostly highlighted negative experiences with the justice system, especially the criminal justice system. The ALRC heard that:

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60 Australia's Nationa Research Organisation for Women's Safety (ANROWS), *Submission 149*.
61 Australian Institute of Family Studies and Victoria Police (n 54) 13; Kate Minter, Erin Carlisle and Christine Coumarelos, '"Chuck Her on a Lie Detector": Investigating Australians' Mistrust in Women's Reports of Sexual Assault' (Research Report Issue No 4, ANROWS, November 2021) 17.
62 Christine Coumarelos et al, *Attitudes Matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia* (Research Report Issue No 2, ANROWS, 2023) 138.
63 Minter, Carlisle and Coumarelos (n 61) 4.
64 Australian Institute of Family Studies and Victoria Police (n 54) 9; Minter, Carlisle and Coumarelos (n 61) 4.
65 Minter, Carlisle and Coumarelos (n 61) 4. Cf J Papadimitriou and T Nankivell, *Submission 158*.
66 See, eg, A McIntosh, *Submission 131*.
67 See, eg, O Camera, *Submission 71*; J Crous, *Submission 141*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.
68 See, eg, H Robbins, *Submission 139*; P Brennan, *Submission 87*.
69 Name withheld, *Submission 136*.

- People did not receive enough information about their options or how their matter was progressing.[70]
- They felt that they did not have agency, choice, or voice.[71]
- People thought that they were not treated with enough care and empathy. They did not have enough support.[72]
- People also reported not being believed or being made to feel at fault.[73]

2.30 Many people found the justice system traumatising.[74]

> In many ways, my experience with the police and legal system was far worse, and far more traumatic, than the violence I was subjected to.[75]

2.31 Some people who made submissions were disappointed with the outcome they received from the justice system. They felt that it failed to reflect the serious impact of the sexual violence, or failed to bring them closure.[76] The Queensland Sexual Assault Network noted that disappointment with the outcome, especially sentencing, can cause people to go backwards in their healing.[77] However, some were satisfied, for example, with aspects of the sentence imposed or financial assistance they received.[78]

2.32 Fragmented systems can make things worse for people who have experienced sexual violence, by forcing them to deal with many complex systems or processes.[79] This can be confusing. It can be hard to know where to get help and people may receive conflicting advice. It can also be retraumatising as the person who has

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70 See, eg, D Erlich and N Meyer, *Submission 115*; A McIntosh, *Submission 131*; J Crous, *Submission 141*; Not published, *Submission 151*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

71 See, eg, Name withheld, *Submission 14*; A McIntosh, *Submission 131*; Name withheld, *Submission 135*; Not published, *Submission 171*.

72 See, eg, Name withheld, *Submission 77*; Brisbane Rape and Incest Survivor Support Centre, *Submission 107*; Name withheld, *Submission 136*; J Crous, *Submission 141*; C Oddie, *Submission 145*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

73 See, eg, Name withheld, *Submission 162*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

74 See, eg, Name withheld, *Submission 14*; Name withheld, *Submission 135*; H Robbins, *Submission 139*; Name withheld, *Submission 152*; Not published, *Submission 171*; D Villafaña, *Submission 182*.

75 D Villafaña, *Submission 182*.

76 See, eg, Not published, *Submission 5*; Not published, *Submission 36*; Not published, *Submission 44*; Name withheld, *Submission 160*.

77 Queensland Sexual Assault Network, *Submission 70*.

78 See, eg, Not published, *Submission 31*; P Brennan, *Submission 87*.

79 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 9* (2017) 11; Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 46. See also Julie Stubbs and Jane Wangmann, 'Competing Conceptions of Victims of Domestic Violence within Legal Processes' in Sean Wilson and Ross Stuart (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan UK, 2015) 107, 113–15.

experienced sexual violence may need to repeat what happened to them several times to different people.[80]

## What people who have experienced sexual violence want from the justice system

2.33 Submissions also highlighted what people who have experienced sexual violence need from the justice system. The justice needs that were highlighted echoed the needs identified by research: 'participation, voice, validation, vindication and offender accountability-taking responsibility'.[81] Submissions also highlighted a need for safety. Each justice need is discussed below.

### To have information and communication

2.34 Submissions from people who have experienced sexual violence and from other stakeholders often identified a need for better information and communication. The ALRC heard how important it is to receive information about how the justice system works was, as well as information about supports people could use straight away, such as medical and psychological support.[82] People who have experienced sexual violence said that without enough information they did not know or understand their options.[83] People's experiences with information and communication are discussed in more detail in **Chapter 3**.

2.35 The ALRC also heard that police and prosecutors often did not explain the process or how the prosecution was progressing.[84] Several members of the Expert Advisory Group noted that poor communication and conflicting information can leave people who have experienced sexual violence 'unaware of their rights, confused about police procedure and frustrated with decisions being made about them, without them'.[85]

> I had to ask all the questions about the process and no one ever followed up with me at any point ... This was incredibly frustrating as it felt like nothing was happening even though it was. I also got the impression that I was the least important person in the situation and they did not care whether I got closure for this event. I didn't matter in the process.[86]

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80 See, eg, Not published, *Submission 176*; Women's Legal Service Victoria, *Submission 207*; Full Stop Australia, *Submission 214*.

81 Kathleen Daly, 'Sexual Violence and Victims' Justice Interests' in Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge, 2017) 108, 115. See also Haley Clark, '"What Is the Justice System Willing to Offer?": Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85(September) *Family Matters: Australian Institute of Family Studies* 28.

82 See, eg, Name withheld, *Submission 6*; Name withheld, *Submission 77*; Name withheld, *Submission 95*. See also Daly (n 81) 115–121.

83 See, eg, Name withheld, *Submission 6*; Name withheld, *Submission 136*.

84 See, eg, Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

85 Ibid.

86 Name withheld, *Submission 12*.

> Whenever I had a conference with the lawyers (I think there were 2 before the trial went ahead), it was very serious and I was limited in what I could ask and what information I could be given by the lawyers. I was told that it wasn't really about me, and that I was a "passenger in the plane that they were flying", so to just sit back and try and relax. … I find it bizarre that the defence can "build" a case with the defendant and form a relationship with them, whereas I couldn't really communicate with my prosecutor.[87]

2.36 In this Report the ALRC makes recommendations to improve information and communication with people who have experienced sexual violence. See **Chapter 3**, **6**, **7**, and **10**.

## To participate, and have choice and voice

2.37 The need for information and communication is closely related to the need for people who have experienced sexual violence to participate in decision making as much as possible, to be able to make informed choices about engaging with the justice system, and to have a voice.[88] This can include being informed about options, being able to ask questions, and having a say in what happens.[89] Those who felt that they could not participate or have input into the process said that they felt 'disconnected', 'excluded', and 'alienated'.[90]

2.38 Submissions also noted it was important that people who have experienced sexual violence have a voice, and can explain their evidence in their own words, such as by giving evidence in a narrative style.[91]

> It was vital for me that the perpetrator be held accountable for his crime and that my voice be heard in the process.[92]

2.39 In this Report the ALRC makes recommendations to improve the ability of people who have experienced sexual violence to participate in, make informed choices about, and have a voice in the justice system. See **Chapters 3**, **6**, **7**, **9**, and **10**.

## To feel validated and recognised

2.40 For people who have experienced sexual violence, feeling validated may come from being believed or from a particular outcome, such as police filing or laying charges or a finding of guilt after a court process.[93] Recognition and acknowledgment of a person's experience, and its impacts, can be validating.[94]

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87 Name withheld, *Submission 6*.
88 Daly (n 81) 115–16.
89 Ibid; Clark (n 81) 34–5.
90 See, eg, A McIntosh, *Submission 131*; Name withheld, *Submission 135*.
91 See, eg, A McIntosh, *Submission 131*; J Crous, *Submission 141*. See also G Hamilton and D Gerryts, *Submission 55*; Clark (n 81) 34; Daly (n 81) 116.
92 A McIntosh, *Submission 131*.
93 Victorian Law Reform Commission (n 3) 31 [2.41]–[2.44]; Daly (n 81) 116–18.
94 Daly (n 81) 116–17; Clark (n 81) 32–33.

2.41 Validation is related to choice, because validation or closure may come in different forms for different people. For example, some people have identified that some ways to validate a person's experience include being believed, the imposition of a strong sentence, or online reporting.[95]

> The process of remembering the abuse triggered by telling the story and gathering evidence was difficult and disruptive to my day to day life. But, the act of speaking out about the assault and taking legal action was an act of self validation. It was fulfilling in my need to stand up and take action to receive some acknowledgement from the state of the suffering and be counted as a victim-survivor.[96]

2.42 In this Report the ALRC makes recommendations to better recognise and acknowledge the experiences of people who have experienced sexual violence. See **Chapters 10**, **13**, **16**, and **18**.

## For the system and the person responsible to be held accountable

2.43 In submissions, people who have experienced sexual violence discussed accountability in two ways. Some submissions referred to accountability on the part of people involved in the justice system, such as police, prosecutors, lawyers, and judges.[97] It was suggested this could be achieved through reforms such as training,[98] and disciplinary processes.[99]

> In my experience, there needs to be accountability of the police and magistrate's systems. I've never even heard a response back from my official complaint lodged about how the prosecuting police dealt with my case and the deal with the defence lawyer for [the convicted person].[100]

2.44 Others spoke of accountability on the part of those who use sexual violence.[101] This looks different for different people. Some people would like to see the person responsible for the sexual violence be made accountable by, for example, going to prison, or through rehabilitative measures such as 'education', or 'therapy'.[102] Others would prefer the person who is responsible to take responsibility for their actions,[103] for example, through an apology.[104]

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95 See, eg, Name withheld, *Submission 43*; P Brennan, *Submission 87*; Full Stop Australia, *Submission 214*.
96 Name withheld, *Submission 43*.
97 See, eg, Name withheld, *Submission 57*; Name withheld, *Submission 77*; Not published, *Submission 155*.
98 See, eg, A Williams, *Submission 19*; Name withheld, *Submission 136*.
99 See, eg, C Oddie, *Submission 145*; J Crous, *Submission 141*.
100 Name withheld, *Submission 77*.
101 See, eg, Not published, *Submission 36*; K Maher, *Submission 74*; Name withheld, *Submission 77*; J Crous, *Submission 141*; Not published, *Submission 176*. See also Clark (n 81) 30.
102 See, eg, J Crous, *Submission 141*; C Oddie, *Submission 145*; Not published, *Submission 171*.
103 See, eg, A McIntosh, *Submission 131*; Not published, *Submission 171*; Centre for Innovative Justice, *Submission 216*.
104 J Crous, *Submission 141*.

> I, like many other victims, really wanted to avoid the criminal justice system because it is well-known that going through a sexual offence trial is extremely difficult and re-traumatising, and it is also statistically extremely unlikely to result in a conviction. … Unfortunately, I felt that I had no choice but to involve the criminal justice system as he had failed on multiple occasions to take adequate accountability for what he had done. I really felt that the perpetrator posed an unacceptable risk to other women as he had not taken responsibility for his actions despite me giving him multiple opportunities and many months to do so.[105]

2.45 Throughout this Report the ALRC makes recommendations to support a more accountable system and to hold people who use sexual violence accountable.

## To feel and be safe

2.46 Many submissions emphasised the need to feel and be safe in the following contexts:

- when reporting sexual violence;
- in the community and in the workplace, irrespective of immigration status;
- within justice processes, such as during a trial; and
- after justice system processes conclude.[106]

2.47 Trauma-informed practices were widely recognised as an important way to keep people who have experienced sexual violence safe and avoid retraumatisation.[107]

> I told the police I did not want to go to court or press charges but wanted this man to leave me alone (as he had continued to follow and intimidate me). The police told me that by disclosing what had happened, they would have to charge the man. … I was very scared of going to court and did not want to go, but I have very supportive detectives and Witness Assistance Officers who worked with me.[108]

2.48 In this Report the ALRC makes recommendations to support the safety of people who have experienced sexual violence. See **Chapters 3**, **6**, **10**, and **13**.

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105 Ibid.

106 See, eg, O Camera, *Submission 71*; Name withheld, *Submission 77*; Name withheld, *Submission 83*; H Robbins, *Submission 139*; Not published, *Submission 151*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Not published, *Submission 171*.

107 See, eg, A Brownlie, *Submission 39*; Name withheld, *Submission 57*; O Camera, *Submission 71*; S Lockwood, *Submission 78*; Name withheld, *Submission 136*; J Crous, *Submission 141*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Not published, *Submission 173*.

108 H Robbins, *Submission 139*.

# 3. Safe, Informed, and Supported Engagement with the Justice System

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# Introduction

3.1 Sexual violence occurs in almost all areas of life, both private and public. The personal, social, and economic harm caused by sexual violence is immense. Yet few people who experience sexual violence engage with the justice system.

3.2 The ALRC considers this under-engagement with the justice system to be the most significant problem with the justice system's response to sexual violence. The justice system is failing to meet the twin goals of access to justice and accountability: it is not supporting those who have experienced sexual violence to engage with the justice system, or holding those who use sexual violence to account.

3.3 Low trust and underuse of the justice system by those who have experienced sexual violence is to be expected. This is because significant barriers to engagement persist (discussed below), and because people who have experienced sexual violence are not currently given the opportunity to engage in a safe, informed, and supported way.

3.4 The ALRC heard that when sexual violence occurs, people who experience it need information, support, advice, and advocacy.

3.5 This chapter deals with one of the key recommendations made by the ALRC — that Commonwealth, state, and territory governments fund the following three services ('Safe, Informed, and Supported Services', or 'SIS Services'):

- **Independent Legal Services** ('ILS') — where people who have experienced sexual violence can receive information about their justice options and advice that centres their bespoke rights and interests;
- **Justice System Navigators** — where people who have experienced sexual violence can be supported to engage with their chosen justice pathway and be guided through the criminal justice system and related systems; and
- **Safe Places to Disclose** — where people who have experienced sexual violence can safely disclose and receive support, including from a Justice System Navigator, and receive referrals to the ILS.

3.6 SIS Services should be delivered nation-wide and through existing (and where necessary, new) services, including sexual violence services, community legal centres, Aboriginal Community Controlled Organisations (ACCOs), Legal Aid Commissions, and participating legal firms.

3.7 People who have experienced sexual violence should be given a well-informed opportunity to decide if they want to engage with the justice system.

3.8 **Recommendation 1** is intended to work in tandem with the other recommendations in this Report and is focused on the point at which a decision on whether or not to engage with the justice system is made by a person who has experienced sexual violence.

3.9 Currently, the main way people who have experienced sexual violence engage with the justice system is through reporting to police. SIS Services are intended to supplement and increase reporting, as well as increase engagement with other justice pathways, by offering a best practice point of early engagement with the justice system.

3.10 Unless much improved services are put in place to assist people who have experienced sexual violence to engage with the justice system, the commitment made by all Australian governments under the National Plan to end gender-based violence within a generation will not be realised.

3.11 **Recommendation 1** is responsive to the Terms of Reference which require the ALRC to have regard to the services and supports available to people who have experienced sexual violence and to take a 'trauma-informed, holistic, whole-of-systems and transformative approach'.

3.12 As is discussed below, the ALRC proposes that SIS Services should be provided through a network or in another coordinated way. The ALRC also proposes that 'gateway' referral services should receive training in trauma and on how to refer people into SIS Services. The ALRC also provides other suggestions for design components. As the ALRC does not have expertise in service design, we strongly encourage the involvement of existing service providers, as well as people who have experienced sexual violence, in the ultimate design and delivery of SIS Services.

## Under-engagement with the justice system: a costly, longstanding issue

### The National Plan to End Violence against Women and Children 2022–2023 and Australian data demonstrate the extent of under-engagement

3.13 Under-reporting and under-engagement with the justice system is a longstanding issue. Under the National Plan, all levels of Australian government have committed to enhancing access to equitable justice outcomes for all victim-survivors, and identifying and removing barriers to reporting violence and engaging with the criminal justice process.[1]

1 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 62.

3.14 The First Action Plan under the National Plan states that 'more needs to be done to ensure justice systems are safe, accessible, and easy for victim-survivors to navigate'.[2]

3.15 The extent of non-engagement with the justice system is reflected in data. The 2021–22 Personal Safety Survey conducted by the Australian Bureau of Statistics (ABS) found that approximately 92% of women who had experienced sexual assault by a male in the last 10 years (from the release date of the data) did not report the most recent incident to police (see **Chapter 2**).[3] The ABS also recently reported that in a 12-month period about 1.7 million people experienced sexual harassment.[4] In the same period, the Australian Human Rights Commission (AHRC) only received 298 complaints of sexual harassment.[5]

3.16 The 2021–22 Personal Safety Survey collected detailed data from women about the most recent incident of sexual assault by a male that occurred in the 'last 10 years' (being from the release date of the data).[6] This included data on support-seeking and police contact.[7] Of the estimated 737,200 women who had experienced sexual assault by a male in that last 10 years ('the women in the study'):

- An estimated 8.3% said that the police were contacted about the most recent incident, including an estimated 7.7% who contacted the police themselves.
- Approximately 57% sought some form of advice or support after the most recent incident.
- Approximately 27% sought formal support (for example, from health professionals, police, legal services, counsellors, support workers, helplines, or other service providers).
- Approximately 46% sought informal support (including from friends, family members, colleagues, bosses, a priest, minister, rabbi, or other spiritual adviser).[8]

3.17 The most common sources of formal advice or support (that is, not from someone like a friend or family member) included, as an approximate percentage of women in the study:

- counsellor or support worker (15%);

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2 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032: First Action Plan 2023–2027* (2023) 55.

3 Australian Bureau of Statistics, 'Sexual Violence: 2021–2022 Financial Year' <www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/2021-22>.

4 Australian Bureau of Statistics, 'Sexual Harassment 2021–22 Financial Year' (23 August 2023) <www.abs.gov.au/statistics/people/crime-and-justice/sexual-harassment/latest-release>.

5 Australian Human Rights Commission, *2021–22 Complaint Statistics* (2022) 19.

6 Australian Bureau of Statistics (n 3).

7 It is not clear from the reporting of this data whether these statistics refer only to the first disclosure by people who have experienced sexual violence. The ABS data is limited to persons who have experienced sexual assault rather than those that have experienced all forms of sexual violence, including sexual harassment. Some of the data also has a relative standard error of 25 to 50%, and therefore should be used with caution. It is nevertheless generally informative.

8 Ibid.

- other health professional (not a general practitioner) (14%);
- general practitioner (GP) (8.5%);
- telephone helpline (5.3%);
- police (5.2%);
- legal service (3.5%);
- refuge or shelter (1.8%); and
- government housing and community services (1.2%).[9]

3.18 The ABS also reported on the prevalence of reasons for why the police were not contacted following the most recent occurrence of sexual assault experienced by women in the study. **Table 3.1** below provides a detailed overview.

***Table 3.1: Women's reasons for not contacting police following the most recent experience of sexual assault***

| Reasons why women in the study did not contact the police | Prevalence of reasons cited by women, as a percentage of total women in the study who did not contact the police |
|---|---|
| Felt they could deal with it themselves | 33.5 |
| Did not regard the incident as a serious offence | 32.8 |
| Felt ashamed or embarrassed | 31.2 |
| Did not think there was anything the police could do | 28.6 |
| Did not think the police would be able to do anything | 28.5 |
| Did not know or think the incident was a crime | 27.3 |
| Felt they would not be believed | 25.7 |
| Fear of the person responsible | 21 |
| Did not want person responsible arrested | 16 |
| Did not trust the police | 14.2 |
| Fear of legal processes | 13.1 |
| Did not want to ask for help | 10.8 |
| Cultural/language reasons | 4.7 |

9 Ibid (noting that support or advice may have been sought from more than one source).

3.19 Barriers to engagement, discussed in detail below, are also a critical part of understanding and contextualising non-engagement with the justice system.

## Understanding the consequences of non-engagement

3.20 Non-engagement with the justice system has two related dimensions. First, from the perspective of people who have experienced sexual violence, non-engagement involves a denial of access to justice. In a democratic society governed by the rule of law, access to justice is a fundamental right and its denial is a serious impediment to a just society.

3.21 As outlined in **Chapter 2**, there are a wide range of justice needs and entitlements that people who have experienced sexual violence should have access to. These include to:

- feel acknowledged or validated;
- heal;
- be compensated or receive financial assistance;
- have the person who used sexual violence held accountable;
- feel safer, through prevention of the reoccurrence of violence; and
- feel that they have contributed to keeping their families, communities, and the broader community safe.

3.22 When it performs well, the justice system can assist people who have experienced sexual violence to meet these justice needs. The ALRC recognises that sexual violence is a crime and many of this Report's recommendations go to improving the criminal justice system, so that more people who experience sexual violence are likely to engage with it. However, the ALRC also recognises that people who have experienced sexual violence have myriad justice needs and entitlements, and should be given the opportunity to make an informed choice over which justice pathway, if any, they prefer.

3.23 From the perspective of the public interest, holding people who use sexual violence to account under the law is a fundamental requirement of a society governed by the rule of law.

3.24 The justice system can help prevent sexual violence by holding a person who has used sexual violence to account through a wide range of justice outcomes. Many of those outcomes have the capacity to send a specific deterrent message to the person who used sexual violence, and a general deterrent message to the broader community, that sexual violence is not acceptable and that there will be consequences for those who use violence. Those outcomes are not confined to removing a person who has used sexual violence from the community. Accountability may also be achieved through the person who used sexual violence:

- being exposed as a wrongdoer;
- acknowledging the harm they have done;
- apologising, either publicly or privately;
- providing compensation for the harm done;
- undertaking rehabilitative or behaviour change programs; and
- being subject to a range of other remedies available through the justice system.[10]

3.25 As discussed in **Chapter 2**, sexual violence can cause long-term trauma and mental health challenges, physical injuries, and other health impacts. It can impact day-to-day activities such as eating, sleeping, working, and maintaining healthy relationships. The National Plan puts the annual economic cost of violence, including sexual violence, against women and children at $26 billion.[11] Barriers to engaging with the justice system may contribute to these costs.

3.26 The resource investment required to expand the net of the justice system — to give more people who experience sexual violence the opportunity to access just outcomes; to hold more people who use sexual violence to account through criminal, civil, and restorative justice remedies; and to prevent sexual violence from occurring — is justified. It far outstrips the cost of sexual violence remaining widespread, under-reported, and in the words of the National Plan, in the shadows.[12]

10 See **Chapter 2**.
11 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 15.
12 Ibid 9, 22.

## Safe, Informed, and Supported Services

**Recommendation 1**

In the context of the significant under-reporting of sexual violence, and to ensure people who have experienced sexual violence are able to engage with the justice system in a safe, informed, and supported way, the Australian Government, together with state and territory governments, should fund relevant organisations (including sexual violence services, community legal centres, Aboriginal Community Controlled Organisations, Legal Aid Commissions, and participating legal firms) to provide the following three services (Safe, Informed, and Supported Services, or SIS Services):

**a.** **Independent Legal Services** — for every person who has experienced sexual violence, the provision of a free and confidential legal advice session that enables informed decision-making about whether or not to engage with the justice system and, if so, which justice pathways best suit their needs, including referral to any chosen pathway. For ongoing legal advice and representation in the criminal justice context, see **Recommendation 9**.

**b.** **Justice System Navigators** — for every person who has experienced sexual violence, support to access any chosen justice pathway; and for people who choose to pursue a criminal justice pathway, the provision of a trained support person to advocate and provide support in initial and ongoing interactions with police, prosecutors, the court, and related systems.

**c.** **Safe Places to Disclose** — for every person who has experienced sexual violence, the ability to disclose the harm to trauma-informed professional staff, receive support and assistance to access relevant health and social services, and be referred to the Independent Legal Services.

To diminish barriers to engagement, increase accessibility and address diverse needs, SIS Services should be provided through a network or other form of coordination, and be available when and where they are needed, including in-person, via telephone, online, and through outreach services.

## What we heard about the barriers to engagement with the justice system

3.27 Each of the SIS Services has been identified with the aim of providing a best practice mechanism for first engagement with the justice system by people who have experienced sexual violence. That has been done with an eye to the limitations of existing mechanisms and the barriers to engagement which explain them.

3.28 The reasons people who experience sexual violence do not engage with the justice system are complex and contextual. This part outlines the main barriers that people who experience sexual violence often face. The ALRC has identified four overarching barriers that limit engagement:

- **Lack of awareness and information** means that many people who experience sexual violence do not know who to turn to or where to go to get help and information. This barrier correlates with the ABS data referred to above, whereby women in the study did not report to police because they did not know or think the incident was a crime (27.3%) and for cultural or language reasons (4.7%).
- **Persistent legal and institutional barriers** limit a person's willingness to engage with legal and other service systems. This barrier correlates with the ABS data referred to above, whereby women in the study did not report to police because they did not think the police would be able to do anything (28.5%); did not trust the police (14.2%); and feared legal processes (13.1%).
- **Disclosure of sexual violence can be retraumatising, stigmatising, and shaming**, which means it can take a long time, if ever, for people who have experienced sexual violence to be ready to talk about what happened. This barrier correlates with the ABS data referred to above, whereby women in the study did not report to police because they felt ashamed or embarrassed (31.2%); felt they would not be believed (25.7%); feared the person who used sexual violence (21%); and did not want to ask for help (10.8%).
- **Unique and compounding barriers created by intersecting identities and experiences ('intersectional barriers')** mean that not everybody experiences the same barriers in accessing justice. It is likely that these intersectional barriers are reflected in all of the categories identified by the ABS data.

## Lack of awareness and information

3.29 A lack of awareness of, and information about, available remedies and how they could be accessed is a barrier to access to justice across the civil and criminal justice systems. Lack of awareness that some conduct is unlawful is also a significant barrier, particularly in the context of some forms of sexual harassment.

3.30 The ALRC heard from many people who have experienced sexual violence that they wanted more information about the full range of legal options,[13] legal definitions of sexual violence,[14] different ways to report sexual violence,[15] and what to expect when going through different civil and criminal legal processes at the Commonwealth, or state or territory level.[16] Some members of the Expert Advisory Group spoke about the importance of giving people who have experienced sexual violence 'legal literacy' so that they are empowered to navigate the justice system.[17]

3.31 The ALRC heard that legal information and advice about justice system options was hard to come by and understand following a traumatic experience of sexual violence.[18] Early legal advice may be needed to understand the legal meaning of sexual violence.[19]

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13 See, eg, Name withheld, *Submission 6*; A Brownlie, *Submission 39*; Name withheld, *Submission 135*; Name withheld, *Submission 136*; J Crous, *Submission 141*.

14 See, eg, Not published, *Submission 31*; Not published, *Submission 142*; Not published, *Submission 173*.

15 See, eg, Name withheld, *Submission 6*; Not published, *Submission 23*; A Brownlie, *Submission 39*; P Brennan, *Submission 87*; Name withheld, *Submission 135*; H Robbins, *Submission 139*; J Crous, *Submission 141*.

16 See, eg, Name withheld, *Submission 34*; A McIntosh, *Submission 131*; Name withheld, *Submission 136*; D Erlich and N Meyer, *Submission 115*; J Crous, *Submission 141*; Name withheld, *Submission 162*.

17 Australian research has indicated awareness of certain policies, like the ability to have forensic evidence collected without notifying police, are not widely known throughout the community: see Emma J McQueen and Sally F Kelty, 'Reporting Sexual Assault: Can Knowledge of How to Protect Forensic Evidence Influence Intentions to Report?' (2021) 36(21–22) *Journal of Interpersonal Violence* NP11367, NP11367, NP113183; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

18 See, eg, Not published, *Submission 5*; Name withheld, *Submission 6*; Not published, *Submission 18*; Name withheld, *Submission 34*; A Brownlie, *Submission 39*; Not published, *Submission 44*; Name withheld, *Submission 57*; D Erlich and N Meyer, *Submission 115*; Name withheld, *Submission 135*; Name withheld, *Submission 136*; H Robbins, *Submission 139*; J Crous, *Submission 141*; Not published, *Submission 148*; Not published, *Submission 151*; Name withheld, *Submission 162*.

19 South-East Monash Legal Service Inc, *Submission 210*.

3.32 Several people noted that they struggled to identify what they had experienced as 'sexual violence'.[20] Some communities might not be willing to talk about sexual violence, and not all languages have direct translations of key terms like 'sexual violence' or 'sexual assault', which can form additional barriers.[21] Changes to the law around sexual violence may not be well understood in the community.[22] Those who did not report sexual violence sometimes indicated that they thought that it was 'not serious enough' or 'important enough' for law enforcement.[23]

3.33 In relation to the criminal justice system, the ALRC heard that those who have experienced sexual violence often needed and expected legal advice when engaging with police, but only discovered the realities of the trial process and cross-examination when they went to court.[24] The availability of alternative reporting mechanisms, victims of crime schemes, redress schemes, civil justice, and restorative justice options are often not communicated to people who have experienced sexual violence.[25]

## Persistent legal and institutional barriers

3.34 We heard that negative experiences with, and perceptions of, police and other government authorities discourage reporting.[26] For many people who have experienced sexual violence, this was a result of police or authorities discriminating

20 Inbal Peleg-Koriat and Carmit Klar-Chalamish, 'Sexual Offence Victims' Responses to the Question #WhyIDidntReport? Examining Restorative Justice as an Alternative Dispute Resolution Mechanism' (2023) 40 *Conflict Resolution Quarterly* 295, 300–1; Elizabeth N Wright et al, 'Help-Seeking and Barriers to Care in Intimate Partner Sexual Violence: A Systematic Review' (2022) 23(5) *Trauma, Violence, & Abuse* 1510, 1522 ('Help-Seeking and Barriers to Care in Intimate Partner Sexual Violence'); Martina Delle Donne et al, 'Barriers to and Facilitators of Help-Seeking Behavior Among Men Who Experience Sexual Violence' (2018) 12(2) *American Journal of Men's Health* 189, 194–5; Karen G Weiss, '"You Just Don't Report That Kind of Stuff": Investigating Teens' Ambivalence Toward Peer-Perpetrated, Unwanted Sexual Incidents' (2013) 28(2) *Violence and Victims* 288, 295–7. See also Not published, *Submission 31*; Not published, *Submission 142*; Not published, *Submission 173*.

21 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 133.

22 Traci Keys, *Workplace Sexual Harassment and Harm: 2019 Churchill Fellowship to Increase Effective and Supportive Options for Women Experiencing Sexual Harassment in the Workplace* (Winston Churchill Memorial Trust, 2024).

23 Weiss (n 20) 288–93.

24 See, eg, Name withheld, *Submission 34*; A Brownlie, *Submission 39*; Name withheld, *Submission 135*.

25 See, eg, Name withheld, *Submission 6*; Name withheld, *Submission 135* 135; Name withheld, *Submission 136*.

26 See, eg, Not published, *Submission 1*; Name withheld, *Submission 14*; Not published, *Submission 31*; D Erlich and N Meyer, *Submission 115*; Name withheld, *Submission 135*; J Crous, *Submission 141*; C Oddie, *Submission 145*; B Colbourne, *Submission 174*.

against or dismissing them or members of their community in the past.[27] This is particularly the case for communities with histories of police harm, including First Nations people,[28] sex workers,[29] people who use drugs,[30] LGBTIQA+ people,[31] and some culturally and linguistically diverse communities.[32]

3.35 The ALRC heard some positive accounts of police reporting, including people who have experienced sexual violence receiving empathetic responses and being believed.[33] But we also heard many distressing accounts about reporting sexual violence to police, including that the reporting process was dehumanising and degrading, disempowering, disbelieving, too public, lacking in empathy, and culturally insensitive.[34]

> I found it hard to go to the SOCIT office. I was emotionally fragile and the office felt very formal. I felt under pressure to remember everything. My memory

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27 See, eg, Not published, *Submission 13*; Name withheld, *Submission 14*; D Erlich and N Meyer, *Submission 115*; Name withheld, *Submission 135*; B Colbourne, *Submission 174*. Name withheld, *Submission 178*. See also B Kennath Widanaralalage et al, 'Prevalence, Disclosure, and Help Seeking in Black and Asian Male Survivors of Sexual Violence in the United Kingdom: A Rapid Review' (2024) 25(4) *Trauma, Violence, & Abuse* 3299, 3301, 3306–8; Kristin Carbone-Lopez, Lee Ann Slocum and Candace Kruttschnitt, '"Police Wouldn't Give You No Help": Female Offenders on Reporting Sexual Assault to Police' (2016) 22(3) *Violence Against Women* 366, 369; Sexual Assault Prevention and Response Steering Committee (ACT) (n 21) 40.

28 See, eg, National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*; Victorian Aboriginal Legal Service, *Submission 198*; Centre for Innovative Justice, *Submission 216*. See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Missing and Murdered First Nations Women and Children* (2024) 173; Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (2020) 166; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Family, Domestic and Sexual Violence* (2021) 177; Megan Beatrice, 'The Incarceration of First Nations Women: Theories of Violence' [2024] *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique* 1, [3.1.2].

29 Carbone-Lopez, Slocum and Kruttschnitt (n 27) 369.

30 Ibid 377, 381, 390.

31 Donne et al (n 20) 198; Annelise Mennicke et al, 'Who Do They Tell? College Students' Formal and Informal Disclosure of Sexual Violence, Sexual Harassment, Stalking, and Dating Violence by Gender, Sexual Identity, and Race' (2022) 37(21–22) *Journal of Interpersonal Violence* NP20092, NP20096 ('Who Do They Tell?'); Jodie Murphy-Oikonen and Rachel Egan, 'Sexual and Gender Minorities: Reporting Sexual Assault to the Police' (2022) 69(5) *Journal of Homosexuality* 773 ('Sexual and Gender Minorities').

32 See, eg, Brisbane Rape and Incest Survivor Support Centre, *Submission 107*; Victim Support ACT, *Submission 112*; Project Respect, *Submission 129*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Scarlet Alliance, *Submission 186*; Asylum Seeker Resource Centre, *Submission 194*; Legal Aid NSW, *Submission 201*; inTouch Women's Legal Centre, *Submission 204*; Women's Legal Service Victoria, *Submission 207*.

33 See, eg, Name withheld, *Submission 10*; A Williams, *Submission 19*; A McIntosh, *Submission 131*; H Robbins, *Submission 139*.

34 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 14*; Not published, *Submission 23*; Name withheld, *Submission 26*; Name withheld, *Submission 34*; Name withheld, *Submission 43*; Name withheld, *Submission 66*; P Brennan, *Submission 87*; Sisters Inside Inc, *Submission 100*; A McIntosh, *Submission 131*; Name withheld, *Submission 135*; Name withheld, *Submission 136*; H Robbins, *Submission 139*; J Crous, *Submission 141*; C Oddie, *Submission 145*; Name withheld, *Submission 178*.

> was triggered with a flashback whilst giving my evidence which was extremely emotional, painful and stressful. I was not encouraged to bring a support person with me.[35]

> Growing up in a closed community, we were unaware that disclosing abuse was an option, and we feared the police. We were told the authorities would pull us away from our community. It took someone from secular society to inform us that what we experienced was abuse and should be reported.[36]

3.36 We also heard from people who did not engage, or would not want to engage, with the justice system again.[37] Reasons included fear of being retraumatised if they were required to re-tell their story multiple times,[38] and fear of their private lives and personal information being made public and examined in a trial.[39] Some people did not want a criminal justice outcome, including because they wanted the person who used violence to get help to change their behaviour, rather than be punished (particularly where the violence occurs within a family-type relationship).[40]

3.37 We heard that secondary victimisation, or the harm someone experiences when interacting with the justice system through the civil and criminal legal processes, was experienced often,[41] to the point that even anticipating this harm discourages a person from engaging with the justice system.[42] One submission recounted that

> the prospect of going to the police and possible criminal justice proceedings scared me profoundly at that time, and even back then I was acutely aware that the criminal justice system frequently fails to provide justice for sexual offences. I was also unsure about what the process would be like, having heard time and time again that going through the criminal justice system is often traumatising and degrading for victims.[43]

3.38 Anticipation of a poor experience and outcome from the criminal justice system has a deterrent effect. Research shows that common myths about sexual violence can act as a deterrent for people who have experienced sexual violence because

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35 Name withheld, *Submission 43*.

36 D Erlich and N Meyer, *Submission 115*.

37 See, eg, Name withheld, *Submission 6*; Name withheld, *Submission 10*; Not published, *Submission 64*; H Robbins, *Submission 139*; J Crous, *Submission 141*; B Colbourne, *Submission 174*; Name withheld, *Submission 178*; D Villafaña, *Submission 182*.

38 See, eg, Name withheld, *Submission 10*; B Colbourne, *Submission 174*; Name withheld, *Submission 178*. See generally Sexual Assault Prevention and Response Steering Committee (ACT) (n 21) 31; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (2023) 37.

39 See, eg, Name withheld, *Submission 10*; Name withheld, *Submission 12*; Not published, *Submission 64*; With You We Can, *Submission 132*; H Robbins, *Submission 139*. See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 38) 37.

40 See, eg, J Crous, *Submission 141*; Not published, *Submission 171*. See also Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 28.

41 See, eg, Name withheld, *Submission 135*; H Robbins, *Submission 139*.

42 See, eg, Name withheld, *Submission 10*; Not published, *Submission 15*; Not published, *Submission 31*; Not published, *Submission 64*; H Robbins, *Submission 139*; J Crous, *Submission 141*; Not published, *Submission 155*; Not published, *Submission 173*; B Colbourne, *Submission 174*.

43 J Crous, *Submission 141*.

people are aware that if their experience does not align with these myths, or they do not have evidence of a physical injury, they will likely be subject to greater scrutiny.[44] Reporting rates tend to be lower when the person who used sexual violence was well-known, where there was prior consensual sexual activity, and where the person who experienced the sexual violence has an impaired memory of the incident.[45] Similarly, incidents that occur after alcohol or drugs are consumed are less likely to be reported.[46] Myths and misconceptions about sexual violence are discussed further in **Chapter 4**.

## Disclosure of sexual violence can be retraumatising, stigmatising, and dangerous

3.39 People who experience sexual violence can feel ashamed, humiliated, or embarrassed.[47] Guilt or self-blame are also common feelings.[48] Other feelings such as anger, grief, betrayal,[49] and feeling powerless and unworthy,[50] can stop people who experience sexual violence from talking about what happened.

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44 Widanaralalage et al (n 27) 3301; Sofie Stokbæk, Cecilie LS Kristensen and Birgitte Schmidt Astrup, 'Police Reporting in Cases of Sexual Assault: A 10-Year Study of Reported Cases, Unreported Cases, and Cases with Delayed Reporting' (2021) 17(3) *Forensic Science, Medicine and Pathology* 395, 400; McQueen and Kelty (n 17) 11370–1; Manon Ceelen et al, 'Characteristics and Post-Decision Attitudes of Non-Reporting Sexual Violence Victims' (2019) 34(9) *Journal of Interpersonal Violence* 1961, 1971–2; Carbone-Lopez, Slocum and Kruttschnitt (n 27) 368–9, 383, 388.

45 Stokbæk, Kristensen and Astrup (n 44) 401–2.

46 Briana M Moore and Thomas Baker, 'An Exploratory Examination of College Students' Likelihood of Reporting Sexual Assault to Police and University Officials: Results of a Self-Report Survey' (2018) 33(22) *Journal of Interpersonal Violence* 3419, 3422–3 ('An Exploratory Examination of College Students' Likelihood of Reporting Sexual Assault to Police and University Officials'); Ceelen et al (n 44) 1972.

47 See, eg, Name withheld, *Submission 10*; Not published, *Submission 5*; Name withheld, *Submission 57*; Not published, *Submission 64*; Not published, *Submission 68*; Name withheld, *Submission 135*; Name withheld, *Submission 136*; H Robbins, *Submission 139*; Not published, *Submission 171*; Not published, *Submission 173*; Name withheld, *Submission 178*; A Williams, *Submission 19*; Carbone-Lopez, Slocum and Kruttschnitt (n 27) 388; Julian Molina and Sarah Poppleton, *Rape Survivors and the Criminal Justice System* (Victims Commissioner (UK), 2020) 11; Victorian Law Reform Commission (n 40).

48 See eg, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 38) 37; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 4* (2017) 97–8; Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (The Australasian Institute of Judicial Administration, Attorney-General's Department (Cth), CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, August 2023) 24, 111–2; Victorian Law Reform Commission (n 40) 26; Peleg-Koriat and Klar-Chalamish (n 20) 301–2; Marie Segrave et al, *Migrant and Refugee Women in Australia: A Study of Sexual Harassment in the Workplace* (Research Report Issue 6, ANROWS, August 2023) 26.

49 See eg, Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 3* (2017) 174–6; Sexual Assault Prevention and Response Steering Committee (ACT) (n 21) 21, 175; Victorian Law Reform Commission (n 40) 241 [12.4].

50 See, eg, Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 3* (n 49) 40; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 4* (n 48) 83.

3.40 People told us about these profound negative emotional responses to sexual violence, and their fear of them worsening if they disclosed the violence.[51]

> … I didn't know what to do after and was in shock, terrified, embarrassed etc, so did I not report it.[52]

> The experience with my father I knew was wrong and felt too ashamed and embarrassed to ever talk about it to anyone in my family or anyone authoritative. So I carried the shame and the burden all on my own with no release for years to come.[53]

> I also experienced an element of being unable to accept what had happened — there was a fear that going to the police would make what had happened to me very real and I wasn't ready to accept that immediately.[54]

3.41 We consistently heard from people who have experienced sexual violence who were afraid of being dismissed, blamed, not believed; or told they were 'making it up' or exaggerating how serious their experience was.[55] The fear of not being believed comes from stigma around sexual abuse, victim-blaming cultures, and the lived experience of people and communities who have been discriminated against and had their experiences of violence minimised or trivialised.[56]

3.42 Some people told us they felt ashamed or partly responsible,[57] because they did not fight back or resist enough.[58]

3.43 We heard from several people who were afraid of the consequences of reporting,[59] including family and cultural dislocation,[60] risking employment or education,[61] losing their visa status, being criminalised, and suffering negative financial impacts. Other reporting consequences that people who experienced sexual violence feared included that they would be punished by the person who they

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51 Not published, *Submission 5*; Name withheld, *Submission 10*; Not published, *Submission 68*; Not published, *Submission 171*; Stokbæk, Kristensen and Astrup (n 44); Ceelen et al (n 44).
52 Name withheld, *Submission 57*.
53 Name withheld, *Submission 178*.
54 J Crous, *Submission 141*.
55 See, eg, Not published, *Submission 31*; C Oddie, *Submission 145*; B Colbourne, *Submission 174.* See also Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 11* (2017) 116; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 4* (n 48) 91.
56 See, eg, Not published, *Submission 31*; Not published, *Submission 68*; B Colbourne, *Submission 174.* See also Widanaralalage et al (n 27); Carbone-Lopez, Slocum and Kruttschnitt (n 27).
57 See, eg, Not published, *Submission 68*; Not published, *Submission 171*.
58 Not published, *Submission 31*.
59 See, eg, Ibid; J Crous, *Submission 141*; Not published, *Submission 142*. See also Peleg-Koriat and Klar-Chalamish (n 20) 302–3.
60 Widanaralalage et al (n 27) 3301, 3306–9; Wright et al (n 20) 1520–2.
61 See, eg, D Villafaña, *Submission 182*; J Crous, *Submission 141*; C Oddie, *Submission 145*.

reported to,[62] or that they would experience retaliation from the person who harmed them, or others.[63]

## Unique and compounding barriers created by intersecting identities and experiences

3.44 The National Plan noted that the 'greatest deterrent' preventing First Nations women from reporting violence is fear of child removal, given the historical removal of First Nations children and current over-representation of First Nations children in out-of-home care.[64] Many First Nations people are also reluctant to report sexual violence because of fear and distrust of police and the criminal justice system, due to current and historic mistreatment, criminalisation, harm, and failure to deliver justice by those within the system.[65]

3.45 First Nations peoples also experience greater unmet legal need than any other group.[66] Legal assistance providers and interpreter services are not adequately funded to provide culturally safe legal services for First Nations peoples who experience sexual violence.[67] There are large parts of Australia where Aboriginal Family Violence and Prevention Legal Services are not available,[68] and such services face difficulties hiring legal and non-legal staff in rural and remote services.[69]

3.46 The National Plan noted unique barriers for people from diverse cultural, ethnic, religious, and linguistic backgrounds; and people who are migrants or seeking asylum.[70] The ALRC heard that this can include a distrust of authorities, language barriers, including lack of prompt access to appropriate interpreters, and the cultural inappropriateness of services.[71] As discussed above, the risk of negative impact

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62 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 15* (2017) 105–6; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 16, Book 1* (2017) 447.

63 For example, the Women's Safety and Justice Taskforce heard from First Nations communities that 'women and girls were fearful of violent retaliation and retribution against themselves and their families if they report sexual violence to police. Descriptions of this violence included physical fights and families being intimidated and ostracised. The Taskforce heard an example of a courageous young girl and her family forced to leave their home and community after making such a report': Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 97.

64 Department of Social Services (Cth) (n 11) 42.

65 Centre for Innovative Justice, *Submission 216*.

66 Warren Mundy, *Independent Review of the National Legal Assistance Partnership* (Final Report, Attorney General's Department (Cth), March 2024) iii.

67 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 28) 176 [7.39]; National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*.

68 Warren Mundy (n 66) xiii.

69 National Family Violence Prevention and Legal Service Forum, *Submission 104*.

70 Department of Social Services (Cth) (n 11) 41–6.

71 Brisbane Rape and Incest Survivor Support Centre, *Submission 107*; Project Respect, *Submission 129*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Scarlet Alliance, *Submission 186*; Asylum Seeker Resource Centre, *Submission 194*; Legal Aid NSW, *Submission 201*; inTouch Women's Legal Centre, *Submission 204*; Women's Legal Service Victoria, *Submission 207*.

upon a person's visa status (for example, becoming ineligible for a partner visa after leaving an abusive relationship) is a significant barrier for some people.[72] People seeking asylum or on temporary visas might not be eligible for government support services and have restricted working rights that can make engaging with police and support services extremely difficult. The absence of trusted social networks or families in Australia are also barriers to engagement.[73]

3.47 Violence against people living with disability often goes unreported.[74] People face additional barriers when reporting sexual violence by a carer because they may rely upon that person.[75] Police may hold beliefs that women with cognitive disabilities 'cannot' report and are not 'reliable witnesses'.[76]

3.48 The ministerial-level roundtable on justice responses to sexual violence in August 2023 heard that systemic and cultural factors within police agencies deter LGBTQIA+ people from reporting sexual violence.[77] Traditional ideas of domestic, sexual, and family violence may fail to capture abusive behaviours in LGBTQIA+ intimate relationships such as threatening to 'out' a person's sexual orientation, gender identity or intersex status, or using transphobic abuse.[78]

3.49 The National Plan noted a strong correlation between women who are incarcerated and their also having experienced gender-based violence. It also noted that their support needs often go unrecognised.[79] The ministerial-level roundtable on justice responses to sexual violence in August 2023 noted that women who are incarcerated face particular barriers to reporting sexual violence[80] — this is particularly so if the violence occurs in prison and is carried out by those in authority.

3.50 The National Plan noted that sex workers face violence in their work settings, and found that due to 'the stigma associated with sex work, victim-survivors in this industry face significant barriers in reporting, accessing services and getting justice

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72 Anna K Boucher, 'Migrant Sexual Precarity through the Lens of Workplace Litigation' (2024) 32(1) *Gender, Work & Organization* 458, 10–11; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; George et al (n 48) 183–5; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 183; Department of Social Services (Cth) (n 11) 43–4.

73 Department of Social Services (Cth) (n 11) 43–4.

74 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 28) 191; Commonwealth of Australia, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) 238.

75 Attorney-General's Department (Cth), *National Roundtable on Justice Responses to Sexual Violence* (Summary Report, 2023) 7.

76 Ibid 8.

77 Ibid 8–9. See also ACON, *Submission 191*; Donne et al (n 20); Murphy-Oikonen and Egan (n 31).

78 Murphy-Oikonen and Egan (n 31) 782, 786; Jeffrey L Todahl et al, 'Sexual Assault Support Services and Community Systems: Understanding Critical Issues and Needs in the LGBTQ Community' (2009) 15(8) *Violence Against Women* 952, 955–6 ('Sexual Assault Support Services and Community Systems'); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 28) 187–8.

79 Department of Social Services (Cth) (n 11) 47.

80 Attorney-General's Department (Cth) (n 75) 4, 13. See also *Women's Imprisonment and Domestic, Family and Sexual Violence: Research Synthesis* (ANROWS Insights, March 2020).

if they experience violence'.[81] The ALRC heard that the criminalisation of sex work prevents sex workers from reporting sexual violence.[82] Negative experiences with police discourages future engagement, both for the sex worker and their wider peer community.[83]

3.51 People living in closed environments, such as disability, mental health and aged care facilities, in child protection residential care, youth detention, prisons or in custody, and similar environments, struggle to report sexual violence.[84] Barriers include not having access to a trusted person they can tell; disclosures being minimised or not believed by staff or carers; staff or carers not knowing how to respond to disclosures; and limited access to specialist services and information.[85]

# The rationale underpinning features of the SIS Services

## Disclosure: the need for a safe place

3.52 The ABS data, as well as what the ALRC heard, supports the conclusion that formal disclosure of sexual violence is far more likely to occur when some form of support and advice from a source other than police is being sought by a person who has experienced sexual violence. The advice or support of police was only sought by approximately 5.2% of the women in the study. In contrast, nearly 50% of women in the study sought support and advice from service providers such as those providing counselling and support services, health professionals, GPs, helplines, legal services, and housing related services.

3.53 Particularly in the light of the distrust and lack of confidence in police being able to provide support, which the ABS data reveals and which the ALRC was told about, it is likely that a person who has experienced sexual violence is far more likely to formally disclose to a trusted organisation or person in the context of receiving services such as counselling, health, housing, and related services which address the non-legal needs of the person who has experienced sexual violence.[86]

3.54 That very strongly suggests that a first-engagement mechanism that is trauma-informed and which is aligned with those service providers (counsellors,

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81 Department of Social Services (Cth) (n 11) 47.

82 Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Scarlet Alliance, *Submission 186*; Attorney-General's Department (Cth) (n 75) 4.

83 Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Scarlet Alliance, *Submission 186*; Carbone-Lopez, Slocum and Kruttschnitt (n 27).

84 See generally Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 4* (n 48); Commonwealth of Australia, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (n 74); Commonwealth of Australia, Royal Commission into Aged Care Quality and Safety, *Final Report: Volume 2: The Current System* (2021).

85 Victorian Law Reform Commission (n 40) 159; Not published, *Submission 1*.

86 See above.

support workers, health professionals, GPs, helplines, and legal and housing services) to whom people who have experienced sexual violence go to for support or advice, will be more effective.

3.55 Further, what is also apparent is that disclosure is far more likely to occur in an environment in which the person who has experienced sexual violence feels safe — safe in the sense of being believed rather than being investigated and retraumatised, and safe in the sense that disclosure will not lead to further harm either from the person who used sexual violence, or by some other negative consequence, such as losing employment or impacts upon other family members. A first-engagement mechanism that brings relief, or at least does not compound trauma, can provide that environment, as well as advice about how negative consequences may be avoided.

3.56 This can be a more effective first-engagement mechanism than reporting to police — although the ALRC understands police reporting will remain a critical point of first engagement for many people who have experienced sexual violence, and we make recommendations for improving police practices in **Chapter 7**. A safe first-engagement mechanism such as the one we are recommending will, however, likely result in increased engagement with police given people who have experienced sexual violence will be able to engage with police, if they choose, in a supported way assisted by the Justice System Navigator and the advice of the ILS (discussed below).

3.57 We heard about barriers to engagement for many groups disproportionately reflected in sexual violence statistics, including First Nations people; people in closed environments such as disability, mental health and aged care facilities; and also people in migrant communities and those who are impacted by insecure visa status. In the main, the barrier to engagement for such people involves an inability to access a person or service they can trust who can provide them the assistance they need. To diminish those barriers an effective first-engagement mechanism needs to be culturally safe, proactive, and provide outreach services to help connect these groups with the justice outcomes they require. That function cannot be provided by police but, if funded, could be provided by sexual violence services.

## Independent Legal Services and the Justice System Navigator: the need for advice and support

3.58 We were also told by people who had experienced sexual violence that they did not know where to go for support in the aftermath of sexual violence, and that existing support and engagement options were unsuitable or unavailable.[87] This suggests that an effective first-engagement mechanism should be highly visible and recognisable as capable of providing advice and support and should provide multiple points and methods of access, including remote access.

87 See, eg, Name withheld, *Submission 6*; Name withheld, *Submission 34*; A Brownlie, *Submission 39*; Name withheld, *Submission 135*; Name withheld, *Submission 136*; J Crous, *Submission 141*; D Villafaña, *Submission 182*; Full Stop Australia, *Submission 214*.

3.59 Formal disclosure leading to engagement with the justice system is also more likely to occur where, rather than relying upon perceptions or fears about the justice system, the person who has experienced sexual violence is able to access good, up-to-date, legal advice about how the processes of the justice system actually work, and the extent to which those processes may in fact have an impact upon the person.

3.60 Further, a first-engagement mechanism which supports engagement with the criminal justice system — through providing legal advice about the rights of a complainant and legal representation to avoid those rights being infringed, as well as navigational and emotional support and assistance with interactions with police and prosecutors — will also likely be more effective.

3.61 Lastly, reporting to police can generally only facilitate engagement with the criminal justice system. An effective first-engagement mechanism should facilitate engagement with each and every justice pathway; and in particular with the justice pathway that best meets the bespoke needs and choices of the person who has experienced sexual violence. As we heard, many people do not want a criminal justice outcome, and there is a substantial lack of appreciation and understanding about other justice pathways and the opportunities that those pathways may provide for a just outcome.

3.62 Critical to an effective first-engagement mechanism will be the capacity to provide access to legal advice and information about the rights and entitlements of a person who has experienced sexual violence, and the advantages and disadvantages of the various justice pathways that are available (including civil and restorative justice pathways).

3.63 In summary, the ALRC considers that:

- the justice system should and can, particularly if it is improved in the manner contemplated in the recommendations made by this Inquiry, provide worthwhile justice outcomes to people who have experienced sexual violence;
- access to those justice outcomes necessarily requires that people who have experienced sexual violence engage with the justice system;
- as more of those people engage, more people who use sexual violence will be brought to account before the law, and the societal problem of sexual violence will be better addressed;
- there are major barriers which preclude people who have experienced sexual violence from engaging with the justice system, including barriers which the justice system itself imposes;
- many of those barriers can be diminished if a more effective mechanism was available for first engaging persons who have experienced sexual violence with the justice system;
- critical to an effective first-engagement mechanism is the provision of legal advice and support, as well as the provision of navigational support;

- to connect people who have experienced sexual violence with critical services, those people need to be provided with a safe place to disclose;
- sexual violence and other trusted services where people who have experienced sexual violence go to for support are best placed to provide a safe place to disclose; and
- the provision of the SIS Services will be most effective as a first-engagement mechanism when provided in tandem through an integrated network of service provision.

3.64 On the basis of those considerations, the ALRC has crafted the core components of the SIS Services, which are detailed below.

## Independent Legal Services

3.65 The key component of **Recommendation 1** is the provision of the ILS. The ALRC recommends the ILS have two functions:

- **an early advice stage** — to support early engagement with the justice system through the provision of legal information and advice, for all people who have experienced sexual violence, about their justice options; and
- **the criminal justice stage** — to support sustained engagement with the justice system through the provision of targeted legal advice and representation for complainants of sexual offences in the criminal justice process.

3.66 **Recommendation 1** only deals with the early advice stage of the ILS. The criminal justice stage of the ILS is discussed in **Chapter 6** because it is not dealing with first engagement, but rather deals with supporting ongoing engagement with the criminal justice system. However, both components of the ILS deal with key recommendations made in this Report, and underscore the importance of legal information, advice (both initial and ongoing), and representation for people who have experienced sexual violence.

3.67 The ILS early advice stage will help to address the following barriers to engagement (outlined above):

- lack of awareness and information;
- persistent legal and institutional barriers; and
- intersectional barriers.

3.68 Under the ILS early advice stage, it is proposed that every person who has experienced sexual violence be provided with:

- a free and confidential consultation with an independent legal adviser, sufficient to enable that person to make an informed choice as to whether or not to engage with the justice system;
- advice, particular to the person's circumstances, about the benefits and challenges of each of the various justice pathways (criminal, civil, victims

of crime schemes, alternative dispute resolution processes, and restorative justice), including which justice pathway might best suit their needs; and

- assistance to connect the person with the relevant pathway.

3.69 Importantly, the ALRC does not recommend funding the ILS as a means of compelling or pressing people who have experienced sexual violence to engage with the justice system. To the contrary, the ALRC considers that it would be counter-productive to do so. The premise of the ALRC's approach is that if more people who have experienced sexual violence are enabled to make a well-informed choice about whether to engage with the justice system — and, if so, which justice pathway to take — many more people who have experienced sexual violence will be able to reach a just outcome.

3.70 Where the justice system treats a person who has experienced sexual violence as nothing other than a potential witness in a criminal trial, engagement with the justice system can be expected to be low and will remain low. However, if a person who has experienced sexual violence is given access to a service that:

- explains and provides advice about the valuable rights and entitlements available to them through the justice system;
- enables informed choice about which justice pathway best serves their bespoke needs; and
- facilitates access to those justice pathways by providing referrals (whereas the Justice System Navigator can provide more intensive support to access justice options, if required);

the ALRC considers that the level of engagement with the justice system (including the criminal justice system) will be substantially improved.

## The critical importance of independent legal advice

3.71 Early and comprehensive legal advice is of critical importance. It enables people to understand their rights, obligations and options; it safeguards peoples' interests; it allows people to navigate complex legal processes; and it ensures informed decision making. Legal advice is critical to achieving just outcomes for people who have experienced sexual violence.

3.72 The Law Council of Australia notes that legal advice is often necessary for an individual to sufficiently navigate the 'formidable barriers' of the justice system.[88] In its Respect@Work Report, the AHRC recommended increased funding for legal services to assist vulnerable workers who experience sexual harassment, noting the 'important role' lawyers play in advising, advocating, and supporting people who have experienced sexual harassment to, among other things, 'redress power imbalances and avoid further trauma'.[89]

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88 Law Council of Australia, *The Justice Project: Introduction and Overview* (Final Report, 2018) 38.

89 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 72) 770.

3.73 In the context of sexual violence, the provision of legal advice addresses many of the informational, legal, and institutional barriers that prevent engagement with the justice system.

3.74 The ALRC heard about the importance of legal information and advice for people who have experienced sexual violence:

> I think speaking to someone independent of the police first, or in place of, would be beneficial. Someone who provides support and information in a confidential setting to help make an informed decision … I didn't have any idea what my legal options were … Throughout the several months prior to the case going to trial I felt like I was a small piece of a puzzle the police were rushing to complete. I wasn't aware of my other legal options and I didn't know where to access further information. . . I wish someone could have sat down with me, not in a police station, and gone through all my options, before I provided a statement. I wish someone would have explained how horrible the experience was going to be so I wouldn't have to be another failed statistic. It wasn't about providing the best solution for me, it was about trying to get a conviction.[90]

3.75 For those who wanted to consider other options for redress following sexual violence, we heard that legal information and advice was hard to come by. For example, one submission recounted:

> Police … did not provide adequate information about pathways for me to receive the support and compensation I was entitled to as a victim of crime. I learned about the Victims Assistance Program from a lawyer from a Community Legal Centre and was then referred to a private lawyer for support with an application for compensation from VOCAT. I don't think a lot of victims of sexual violence, particularly within the context of an intimate relationship, are aware of their entitlement to compensation.[91]

3.76 The ALRC also heard in consultations that when it comes to sexual harassment, a significant barrier to engaging with the justice system is that people are not aware of their justice options, or the process through which they can pursue them.

3.77 People who experience sexual violence also often have multiple and entangled legal problems.[92] Contextual and specific legal advice — as opposed to just legal information — is critical so that a person who has experienced sexual violence can have the fullness of their circumstances considered. Without specialised legal advice, it is difficult for someone to navigate intersecting legal processes and make an informed decision about justice pathways that best serve their interests:

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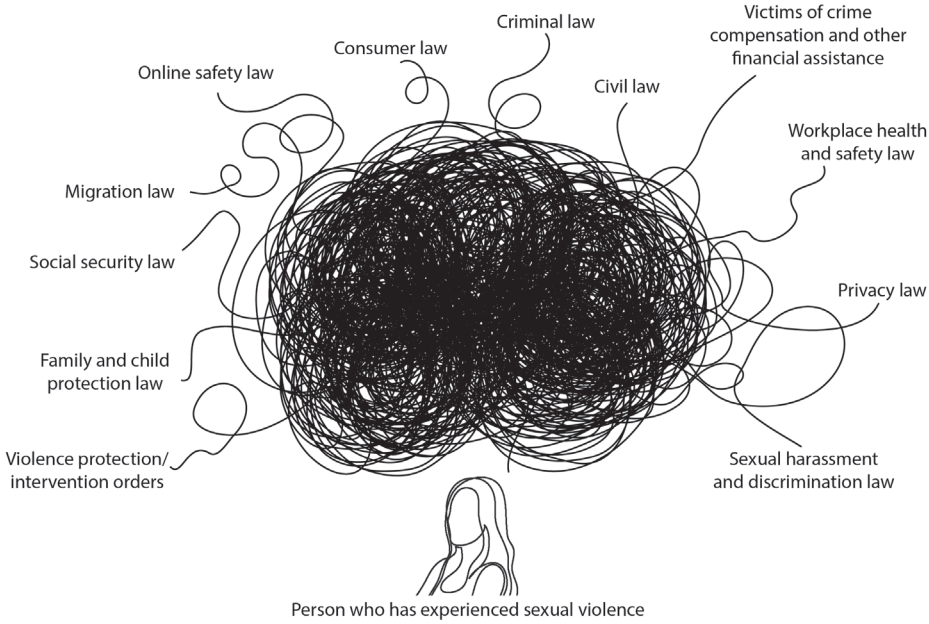
90 Name withheld, *Submission 135*.

91 Name withheld, *Submission 136*.

92 Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Access to Justice and Legal Needs Vol 7, Law and Justice Foundation of New South Wales, 2012) 219–20. See also Catherine Hastings, *Sector Perspectives: Legal Need in Australia* (Macquarie University, 2024) 30–1.

***Figure 3.1: The justice system 'maze' for a person who has experienced sexual violence***




3.78 For Aboriginal and Torres Strait Islander women in particular, the National Aboriginal and Torres Strait Islander Women's Alliance also told us that there is an acute need for legal services which work across and understand the intersection of sexual violence with family violence.

3.79 Many stakeholders also told the ALRC that independent legal advice services would improve access to justice for those who have experienced sexual violence.[93] By having someone to provide clearer information about the legal system and advocate for their interests, people who have experienced sexual violence may be able to make informed choices in relation to the justice system and meaningful participation in the justice process could be facilitated.[94]

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93 Name withheld, *Submission 12*; Name withheld, *Submission 14*; Not published, *Submission 31*; Victim Support ACT, *Submission 112*; BPW Australia, *Submission 127*; S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*; With You We Can, *Submission 132*; Not published, *Submission 137*; Not published, *Submission 151*; Name withheld, *Submission 162*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Not published, *Submission 171*; National Women's Safety Alliance, *Submission 184*; Centre for Women's Safety and Wellbeing, *Submission 193*; Law Council of Australia, *Submission 215*.

94 See, eg, Name withheld, *Submission 6*; Not published, *Submission 15*; S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*; With You We Can, *Submission 132*; Name withheld, *Submission 135*; Not published, *Submission 171*; National Women's Safety Alliance, *Submission 184*; Centre for Women's Safety and Wellbeing, *Submission 193*.

## Independent legal services should be widely available

3.80 The provision of independent legal services for people who have experienced sexual violence is not novel.[95] Reviews overseas and in Australia have recognised the challenges people who have experienced sexual violence face in the justice process, and the value of independent legal services.[96]

3.81 The Australian Government has recently identified free or low-cost legal advice as key to removing barriers in accessing the justice system in cases of domestic, family, and sexual violence.[97] The National Plan noted that 'capacity building for legal services, including Women's Legal Services and Aboriginal and Torres Strait Islander Women's Legal Services … is also a priority.'[98] Following a recommendation for a significant funding uplift for legal services to respond to domestic, family, and sexual violence,[99] in September 2024 the National Cabinet committed to an '$800 million increase in funding to the legal assistance sector over 5 years, with a focus on uplifting legal services responding to gender-based violence'.[100]

3.82 In December 2023, the Australian Government provided $7.65 million to three pilot programs in the Australian Capital Territory, Victoria, and Western Australia.[101] The pilots 'explore new ways to provide legal services for sexual violence victims and survivors that do not add to their trauma'.[102] Although these programs are in their early stages, there is strong demand for their services.[103] The programs are 'making meaningful strides to address … key causes of secondary victimisation of victim survivors of sexual assault by the justice system'.[104]

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95 See, eg, Mary Iliadis, 'Victim Representation for Sexual History Evidence in Ireland: A Step towards or Away from Meting Victims' Procedural Justice Needs?' (2020) 20(4) *Criminology and Criminal Justice* 416.

96 Victorian Law Reform Commission (n 40) 263–9; Victims of Crime Commissioner (Vic), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (2023) ch 15; Government Equalities Office (UK) and Home Office (UK), *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (2010) 97–9, 102–6; John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) ch 5 ('*Gillen Review*'); Law Commission of England and Wales, *Evidence in Sexual Offences Prosecutions* (Consultation Paper No 259, 2023) ch 8.

97 Such as 'cost, location, and legal complexity': Department of Social Services (Cth) (n 2) 55.

98 Ibid 56.

99 Rapid Review Expert Panel, *Unlocking the Prevention Potential: Accelerating Action to End Domestic, Family and Sexual Violence* (Department of Prime Minister and Cabinet, 2024) rec 9.

100 The Hon Anthony Albanese MP, 'Meeting of National Cabinet: Media Statement' (6 September 2024).

101 Department of Treasury (Cth), 'Federal Financial Relations: Pilot Funding for Specialised and Trauma-Informed Legal Services for Victims and Survivors of Sexual Violence', *Federal Financial Relations* <www.federalfinancialrelations.gov.au/agreements/pilot-funding-specialised-and-trauma-informed-legal-services-victims-and-survivors>.

102 The Hon Amanda Rishworth MP and The Hon Mark Dreyfus KC MP, 'Supporting Victims and Survivors of Sexual Violence: Piloting New Legal Services Models' (Media Release, Attorney-General's Department (Cth), 20 November 2023).

103 Women's Legal Service Victoria, *Submission 207*.

104 Aboriginal Family Legal Services (WA), *Submission 40*.

3.83 While the Australian Government pilots are proving successful, they are only available to a very limited number of people who have experienced sexual violence. Equally, the ALRC heard from several community legal centres and ACCOs that legal advice of the nature contemplated by **Recommendation 1** is already being provided. However, there is currently a critical lack of resources, and the need is exponentially greater than the resourcing. **Recommendation 1** envisages every single person who has experienced sexual violence having access to legal information and advice.

## Key aspects of the early-stage independent legal advice

3.84 Provision of the recommended ILS at the early advice stage should expand upon promising aspects of the current pilots. This includes:

- **Resourcing existing, trusted services**, such as women's legal services, community legal centres, ACCOs, and Legal Aid Commissions to fulfil the independent legal advice service role.
- **Providing the service in partnership with non-legal support services** (such as financial assistance, counselling, and other specialist support) so that service provision is holistic and coordinated.[105]
- **Ensuring the service is trauma-informed, safe, and independent** of any other interested parties, and exclusively focused on the needs of the person who has experienced sexual violence accessing the service.

3.85 Other important features of the ILS early advice stage include that it be:

- **Accessible to all people who have experienced sexual violence** — the service should not be means tested (because all people who have experienced sexual violence should have access to justice); and should be available remotely and include provision of interpreter services.
- **Confidential** — as with any lawyer-client relationship, legal professional privilege will apply 'where … communications were made for the dominant purpose of giving or obtaining legal advice or services'.[106]
- **Formal legal advice delivered by trained, specialist staff** — lawyers must be trained about responding to people who have experienced trauma and have knowledge of the multiple justice pathways available for people who have experienced sexual violence, and be able to provide bespoke advice on each of the pathways. They should also be able to identify intersecting

105 Currently available in the Australian Capital Territory: Women's Legal Centre (ACT), 'Sexual Violence Legal Service' <https://wlc.org.au/get-help/our-services-and-programs/sexual-violence/>. The Victorian pilot links clients to broader health justice partnerships through 'warm referrals'.

106 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) 337 [12.1].

legal issues and refer clients to appropriate specialist legal and non-legal services.[107]

## Justice System Navigators

3.86 The second component of SIS Services is for the provision of a Justice System Navigator to provide people who have experienced sexual violence with navigational support to access their chosen justice pathway; and for people who choose the criminal justice pathway: ongoing support, engagement, and advocacy with police, prosecutors, the court, and the broader service system.

3.87 Justice System Navigators will help to address the following barriers to engagement (outlined above):

- persistent legal and institutional barriers;
- disclosure of sexual violence can be retraumatising, stigmatising, and risky; and
- intersectional barriers.

3.88 Justice System Navigators support early engagement with all justice pathways, and ongoing engagement with the criminal justice system by ensuring complainants are supported throughout the process, and 'do not feel like they are left to pick up the pieces alone'.[108] Justice System Navigators have been shown to reduce the likelihood of complainants dropping out of the criminal justice process.[109]

3.89 The Justice System Navigator role provides support that includes:

- **Assistance connecting to legal pathways:** For example, if someone has received advice from the ILS and chosen to proceed with a civil claim or a restorative justice conference, the Justice System Navigator would help connect the person to their chosen pathway.
- **Assistance with navigation of criminal legal processes:** For example, explaining the various stages of the criminal justice process and what each entails.
- **Advocacy with criminal legal actors, such as police and prosecutors:** For example, promoting a trauma-informed approach to complainant interviews or liaising with the prosecution about case decisions and timing.
- **Emotional support during the criminal process:** For example, being present with the complainant at the police interview and trial.
- **Addressing practical support needs during the criminal process:** For example, referrals to other social services, such as financial counselling and housing.

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107 Name withheld, *Submission 6*; Not published, *Submission 18*; Name withheld, *Submission 135*; Name withheld, *Submission 136*; Not published, *Submission 148*; Not published, *Submission 151*.

108 Sexual Assault Services Victoria, *Submission 203*.

109 Molina and Poppleton (n 47) 42, cited in Victorian Law Reform Commission (n 40) 254–5 [12.62].

3.90 Justice System Navigators should be available to all people who have experienced sexual violence, and ideally be located within existing and trusted sexual violence services, including ACCOs, to ensure continuity of training, expertise, and a less disjointed process.

## Justice System Navigators are necessary and already exist in some places

3.91 The ALRC heard that the justice system can be a 'confusing, inconsistent and re-traumatising legal maze' for people who have experienced sexual violence.[110] We heard on multiple occasions that legal options and processes can be unfamiliar and complex.

> The system is very disempowering for victims as there are many facets and processes of the justice system that victims are unfamiliar with, and therefore do not know how to navigate. I assumed that the professionals in the justice system would guide me and provide adequate education throughout the processes, however this was not my experience.[111]

3.92 The ALRC also heard that people who have experienced sexual violence need professional, empathetic, consistent, and ongoing support within the systems that respond to sexual violence,[112] and 'a huge amount of personal support and inner strength to survive' a justice process.[113] We also heard that people who have experienced sexual violence 'want and need their own support person'.[114] Justice System Navigators fulfil this important need.

3.93 The ALRC heard the following benefits of justice system navigators, including from people who have experienced sexual violence. They can:

- minimise trauma for people who have experienced sexual violence and help them to recover from trauma;
- reduce confusion and disempowerment for people who have experienced sexual violence;[115]
- reduce the feeling of a power imbalance between the person who has experienced sexual violence and the justice system professionals; and
- take the pressure off other justice system professionals — for example, by providing information about the progress of the case.[116]

3.94 Roles similar to Justice System Navigators (such as Independent Advisers) have been successfully implemented internationally for the past 20 years. While

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110 Family and Sexual Violence Alliance Steering Committee (Tas), *Submission 202*.
111 J Crous, *Submission 141*.
112 Family and Sexual Violence Alliance Steering Committee (Tas), *Submission 202*.
113 Centre for Women's Safety and Wellbeing, *Submission 193*.
114 Name withheld, *Submission 12*; Name withheld, *Submission 136*; Not published, *Submission 137*; Sexual Assault Services Victoria, *Submission 203*.
115 Full Stop Australia, *Submission 214*.
116 George et al (n 48) 224.

the programs are not identical, Independent Advisers generally act as a single point of contact throughout criminal proceedings. Other implementations of independent advisers are intentionally broad and contextual; with assistance extending to non-legal matters such as housing,[117] financial assistance, and family dispute mediation services.[118] The ALRC is recommending that Justice System Navigators do not need to be a 'jack-of-all-trades', instead, they would be equipped to refer and assist people who have experienced sexual violence to the expert supports they need.

3.95 There is evidence from overseas that navigators reduce the likelihood of complainants withdrawing their support in formal investigations and prosecutions of sexual offences — and therefore support ongoing engagement with the justice system.[119] Navigators have also been found to be cost-effective and successful in holistically supporting people who have experienced sexual violence.[120]

3.96 For example, Independent Sexual Violence Advisers are generally considered a success in England and Wales.[121] In Scotland, Rape Crisis Advocacy Workers were found to help people who have experienced sexual violence stay engaged with the criminal justice process.[122]

3.97 A collaborative submission from some members of the Expert Advisory Group also noted similar supports in New Zealand through Sexual Violence Victim Advocates,[123] which were said to demonstrate the 'intuitive link between victim-survivor support and lower attrition'.[124]

3.98 In Australia there has been increasing recognition of the importance of Justice System Navigators (under various names) and their positive impact on the experiences of complainants, as well as in the justice system itself. Recent

117 Miranda Horvath et al, *Independent Sexual Violence Advisers (ISVAs) in England, Wales and Northern Ireland: A Study of Impacts, Effects, Coping Mechanisms and Effective Support Systems for People Working as ISVAs and ISVA Managers* (Middlesex University London, Canterbury Christ Church University, 2021) 1211159 Bytes, 10 <https://mdx.figshare.com/articles/online_resource/ISVA_Survey_Report_May_2021_cc-by-nc_pdf/14566638>.

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

119 Molina and Poppleton (n 47), cited in Victorian Law Reform Commission (n 40) 254–5 [12.62].

120 Horvath et al (n 117) 11.

121 Horvath et al (n 117).

122 Oona Brooks-Hay et al, *Evaluation of the Rape Crisis Scotland National Advocacy Project Summary Report* (Scottish Centre for Crime & Justice Research, 2018) 4.

123 See commentary on the positive effect of Sexual Violence Victim Advocates in Gravitas Research and Strategy Limited, *Evaluation of the Sexual Violence Court Pilot* (Ministry of Justice (NZ), 2019) 44.

124 Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

commissions of inquiry in Victoria,[125] Queensland,[126] and the Australian Capital Territory[127] have recommended some form of justice system navigation for people who have experienced sexual violence. In response, pilot programs in Queensland and Victoria have recently been announced.[128]

## Safe Places to Disclose

3.99 The third major component of **Recommendation 1** is ensuring appropriate services, such as sexual violence services, receive adequate funding to function as Safe Places to Disclose for all people who have experienced sexual violence. This includes provision of non-legal services including counselling, and referrals to health and other social services. A critical part of their function as part of SIS Services will be to connect, through skilled referral, people who disclose sexual violence with the ILS.

3.100 Safe Places to Disclose will help to address the following barriers to engagement (outlined above):

- persistent legal and institutional barriers;
- disclosure of sexual violence can be retraumatising, stigmatising, and risky; and
- intersectional barriers.

3.101 ABS data above demonstrates that the majority of people who disclose sexual violence to formal supports also disclose to counselling and related services. This is logical given sexual violence services are expert in providing trauma-informed support to people who have experienced sexual violence, and are therefore well placed to facilitate engagement with the justice system, including through referral to legal advice and assistance.

3.102 Further critical functions of sexual violence services under **Recommendation 1** will be to provide the Justice System Navigator services discussed above, and to provide outreach services of the kind discussed below.

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125 In 2021, the Victorian Law Reform Commission found 'widespread support' for 'victim advocates' and recommended the design of 'a model of victim support that uses single advocates to provide continuous support for people who have experienced sexual violence across services and legal systems': Victorian Law Reform Commission (n 40) 256 [12.66] 262 rec 45.

126 In 2022, the Women's Safety and Justice Taskforce in Queensland recommended a similar model: Department of Justice and Attorney-General (Qld), *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences across the Criminal Justice System* (2022) 11–2, rec 9.

127 In 2024, the Sexual Assault (Police) Review Report recommended the establishment of a 'sexual assault advocate', as part of a suite of 'victim-survivor centred responses' in the Australian Capital Territory; Christine Nixon and Karen Fryar, *Responding to Recommendation 15 of the Listen. Take Action to Prevent, Believe and Heal Report (2021): Sexual Assault (Police) Review Report* (2024) 34, rec 2.

128 Queensland Government, *Prevent. Support. Believe: Queensland's Framework to Address Sexual Violence (Second Action Plan, 2023–24 to 2027–28)* 12; Jacinta Allan MP, 'Changing Laws and Culture to Save Women's Lives' (Media Release, 30 May 2024).

## The importance of having a safe place to disclose

3.103 The need for providers of sexual violence services to be readily available to people who have experienced sexual violence is obvious and well-recognised. Those services provide essential healing and recovery to people who have experienced sexual violence. That they should be properly funded to provide extensive and comprehensive services across Australia for all people who have experienced sexual violence, including groups which are disproportionately reflected in sexual violence statistics, is well-accepted.

3.104 The Safe Places to Disclose aspect of SIS Services provided by specialised sexual violence services adds to existing recommendations for deep investment in those services for adults and children[129] and is supported by a submission to the ALRC.[130]

3.105 The recent Rapid Review of Prevention Approaches to gender-based violence recommended a significant funding uplift in frontline crisis service areas to enhance the violence prevention potential of sexual violence support services.[131] In response, National Cabinet agreed in September 2024 to negotiate a National Partnership Agreement on Family, Domestic and Sexual Violence Responses, starting July 2025.[132]

3.106 The need for those services to be properly resourced is justified by considerations independent of **Recommendation 1**. However, if not properly resourced, their effectiveness as a critical element of the SIS Services will be impeded.

3.107 As discussed above, people who have experienced sexual violence often encounter a fragmented, inconsistent, and under-resourced system. This compounds the trauma of sexual violence and can disincentivise both first and ongoing engagement. One submission to the ALRC stated:

> [My state sexual assault service] provided me a one-off appointment in the interim, but the wait list to be allocated a counsellor was 8-11 weeks at the time from memory. I felt very disconcerted that the waiting time for some intensive support was so long and time operated in a different universe in those coming weeks. My nights became days, my days became nights and time was a mere construct and concept that became irrelevant to me.[133]

3.108 For people who have experienced sexual violence who chose to disclose to professional services, we heard that lack of funding is the key limiting factor behind effective support service delivery.[134] There are also significant geographical

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129 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 9* (2017) rec 9.6; Rapid Review Expert Panel (n 99) 69.
130 National Association of Services Against Sexual Violence, *Submission 209*.
131 Rapid Review Expert Panel (n 99) 69.
132 The Hon Anthony Albanese MP (n 100).
133 A Williams, *Submission 19*.
134 See, eg, P Brennan, *Submission 87*; BPW Australia, *Submission 127*.

gaps in service provision, especially in rural and remote areas. We heard that long waitlists for essential support services, as well as organisations referring between each other while at full capacity, is both fatiguing and retraumatising.[135] Mainstream support services are not always inclusive, responsive, or accessible for First Nations people,[136] people with disability,[137] and people from culturally and linguistically diverse backgrounds, resulting in some populations that are disproportionately reflected in sexual violence statistics not using these services.[138]

3.109 Increasing funding to sexual violence services will mean that more people who have experienced sexual violence have a safe place to disclose, engage with safe and trauma-informed services, and receive multidisciplinary support, including referral to the ILS. The response a person who has experienced sexual violence receives when they first seek help can be pivotal to their willingness to engage further with support services or a justice pathway. When people who experience sexual violence receive timely and appropriate support, their chances of recovery, healing, and ongoing engagement are increased.[139]

3.110 We heard that in some instances, services in some jurisdictions are already funded to provide this high level of service provision. However, we also heard that this is not a uniform service offering across Australia. To build engagement, services should be appropriately funded; be available remotely and in urban, regional, rural, and remote communities; and incorporate provision of interpreter services.

## Other features of the SIS Services

### Gateway referral services

3.111 'Gateway' referral services could operate adjacent to SIS Services. As discussed above, an effective first-engagement mechanism should be well-aligned with those services to which people who have experienced sexual violence go to for support and advice. Beyond specialised sexual violence service providers (who are a core component), people who experience sexual violence commonly seek assistance from health services, GPs, and providers of refuge and housing services. What is envisaged is that those services refer people who have experienced sexual violence to SIS Services — preferably the specialist sexual violence service provision component but possibly, and where appropriate, directly to the ILS.

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135 See, eg, A Williams, *Submission 19*; Name withheld, *Submission 26*; Not published, *Submission 35*; Name withheld, *Submission 69*; Not published, *Submission 173*; Not published, *Submission 176*.

136 National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*.

137 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 72) 182; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 28) 190–3 [5.83]–[5.93].

138 National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Todahl et al (n 78).

139 National Association of Services Against Sexual Violence, *Submission 209*.

3.112 The ALRC heard from people who first disclosed to a professional outside of specialist organisations, including doctors,[140] psychologists,[141] teachers,[142] or lawyers,[143] who are generally not specifically resourced or trained to respond to sexual violence disclosures. We heard from some people who felt the professional they disclosed to did not understand how to respond to, or help, someone who has experienced sexual violence.[144]

3.113 Gateway referral services would benefit from trauma-informed training so that they can safely refer people to appropriate services.

3.114 Gateway referral services might also be pharmacies, community and advocacy organisations, courts, and other accessible facilities. Involving services of that kind will improve engagement, even where their sole function will be to facilitate the distribution of pamphlets or other information to guide people to core SIS Services.

3.115 Supporting these services to refer people who have experienced sexual violence to SIS Services would align with Action 2 of the First Action Plan under the National Plan, which commits all levels of Australian government to 'increase the capability of mainstream services to identify, respond to and refer people who have experienced gender-based violence'.[145] A gateway-type model was established by Hestia in the United Kingdom during the pandemic.[146]

## Multiple points and methods of access and outreach services

3.116 We heard that some people who experience sexual violence found existing support and engagement options unsuitable or unavailable in their unique circumstances.[147] To maximise reach and accessibility, SIS Services should be available through multiple points of access, including in-person, via telephone, and online.[148] Some people who experience sexual violence will prefer the discreet nature of online or telephone services, while some will require in-person assistance.

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140 See, eg, Name withheld, *Submission 14*; A Williams, *Submission 19*.

141 See, eg, Name withheld, *Submission 136*; J Crous, *Submission 141*; Not published, *Submission 73*.

142 See, eg, Name withheld, *Submission 14*; D Villafaña, *Submission 182*.

143 Name withheld, *Submission 135*.

144 Academic literature has also noted the need for lay individuals (including friends and family members) to be able to access resources to improve responses to disclosures of sexual violence: Mennicke et al (n 31). See also Name withheld, *Submission 14*; H Robbins, *Submission 139*; Name withheld, *Submission 140* ; Not published, *Submission 173*; B Colbourne, *Submission 174*; Not published, *Submission 176*.

145 Department of Social Services (Cth) (n 2) 32.

146 Christine Magill, *Safe Spaces Survey: Initial Impact Report* (UK Says No More, Hestia, February 2020).

147 Not published, *Submission 31*; C Bulbeck, *Submission 73*; Victim Support ACT, *Submission 112*.

148 See, eg, Relationships Australia, *Submission 21*; Not published, *Submission 171*; D Villafaña, *Submission 182*.

3.117 Support and engagement options are especially lacking in closed environments.[149] SIS Services should also be funded to provide information about disclosing sexual violence and engaging with SIS Services in closed environments (such as prisons, immigration detention facilities, mental health facilities, child protection residential care, and aged care facilities). SIS Services could provide this information through outreach programs, which would also enable access for people in closed environments to an independent service that is able to respond to disclosures of sexual violence. This will ensure that particularly hard to reach groups, such as people who have been convicted of an offence, people with disability, young people, and older people have access to support and engagement.

## High visibility

3.118 Some people told us they did not know where to go in the aftermath of sexual violence. People who experience sexual violence should know where to go — and be able to access services wherever and whenever they need them.

3.119 To this end, the ALRC suggests that all SIS Services be nationally recognisable (through, for example, common and highly visible branding) so that people who experience sexual violence know where to go — whether in person or online — to engage. Highly visible services with consistent and identifiable branding would be easier to find. Some people may not want to be seen going to a 'branded service', so this may not be appropriate in all areas of service delivery.

3.120 Organisations delivering SIS Services could retain their existing name and branding, but could also include the common branding (as occurs, for example, with Family Relationship Centres).[150] This would make the services more recognisable, and the entry points clearer.

## Trauma-informed, culturally safe, and inclusive service delivery

3.121 The First Action Plan under the National Plan commits Australian governments to 'work to make victims of sexual violence feel safe to report their experiences by embedding trauma-informed and culturally safe response models that treat victim-survivors with sensitivity and empathy, and, most importantly, believe victim-survivors' reports of violence'.[151] SIS Services should place the agency, rights, and interests of the person who has experienced sexual violence at the centre of their work. Training in trauma-informed practice and cultural safety will be critical, in addition to ensuring

149 Sheryl P Kubiak et al, 'Sexual Misconduct in Prison: What Factors Affect Whether Incarcerated Women Will Report Abuses Committed by Prison Staff?' (2017) 41(4) *Law and Human Behavior* 361, 2, 19; Commission for Children and Young People, *In Our Own Words: Systemic Inquiry into the Lived Experience of Children and Young People in the Victorian out-of-Home Care System* (November 2019).

150 Andrew Metcalfe, *Support for Separating Families: Review of the Family Relationships Services Program* (Attorney-General's Department, June 2024).

151 Department of Social Services (Cth) (n 2) 44.

SIS Services are located within community-based organisations trusted by groups who are disproportionately reflected in sexual violence statistics.[152]

## Integrated services

3.122 The First Action Plan under the National Plan states that better 'coordination and integration of systems that assist and support women and children experiencing, or at risk of experiencing, violence is integral to creating a person-centred service system where victim-survivors do not have to tell their stories repeatedly at multiple contact points'.[153]

3.123 People accessing SIS Services should experience seamless transitions between services. People who have experienced sexual violence are best served by a 'no wrong door' policy,[154] which takes the burden off them to identify and approach relevant services. For this to be achieved, SIS Services should collaborate and coordinate. They should be trained and resourced to establish and maintain connections and information sharing protocols,[155] to allow for smooth referrals and service provision, and so that people who have experienced sexual violence are not required to retell their story. There are existing multidisciplinary social service collaborations that model this high level of integration.[156]

## Deidentified data collection and participatory design

3.124 There is a dearth of data about the gaps people experience when deciding to disclose and access support services outside of the justice system in the aftermath of sexual violence.[157] Consensual, ethical, deidentified data collection is important to inform better policy development and delivery.[158] Importantly, any data collected

152 Tamara Mackean et al, 'A Framework to Assess Cultural Safety in Australian Public Policy' (2020) 35(2) *Health Promotion International* 340; Elaine J Alpert, 'A Just Outcome, or "Just" an Outcome? Towards Trauma-Informed and Survivor-Focused Emergency Responses to Sexual Assault' (2018) 35(12) *Emergency Medicine Journal* 753. See also D Erlich and N Meyer, *Submission 115*; National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*.

153 Department of Social Services (Cth) (n 2) 35.

154 Department of Social Services (Cth) (n 11) 56.

155 Veronica Ades et al, 'An Integrated, Trauma-Informed Care Model for Female Survivors of Sexual Violence: The Engage, Motivate, Protect, Organize, Self-Worth, Educate, Respect (EMPOWER) Clinic' (2019) 133(4) *Obstetrics & Gynecology* 803, 807.

156 Metcalfe (n 150) 83, 147; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) (Vol 1) 80–2; State of Victoria, *The Orange Door Annual Service Delivery Report 2022–23* (Family Safety Victoria, April 2024) <www.vic.gov.au/orange-door-annual-service-delivery-report-2022-23>.

157 See, eg, A Williams, *Submission 19*; Name withheld, *Submission 26*; S Cuevas, *Submission 33*; Name withheld, *Submission 69*; P Brennan, *Submission 87*; National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*; BPW Australia, *Submission 127*; Name withheld, *Submission 136*; Not published, *Submission 173*; Not published, *Submission 176*.

158 Law Council of Australia, *Submission 215*.

in relation to First Nations people should comply with Indigenous Data Sovereignty Principles.[159]

3.125 Similarly, designing SIS Services with input from existing service providers[160] and people who have experienced sexual violence[161] will ensure end users' perspectives are incorporated from the earliest stages of development through to service delivery.

159 National Indigenous Australians Agency, *Framework for Governance of Indigenous Data: Practical Guidance for the Australian Public Service* (Commonwealth of Australia, May 2024) 7.

160 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 28) 177–8; Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (n 28) 163.

161 Margaret Hagan, 'Participatory Design for Innovation in Access to Justice' (2019) 148(1) *Daedalus* 120, 122; Emma Blomkamp, 'The Promise of Co-Design for Public Policy' (2018) 77(4) *Australian Journal of Public Administration* 729, 732–3.

# 4. Introduction to the Criminal Justice System

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## The criminal 'justice' system

> But I also feel incredibly disheartened that our system is so unequipped and designed to support, yet also designed in such a fashion that it is complicit in rape and sexual assault. The system itself is not broken. It is working as designed, and that is to protect perpetrators.[1]

> I hope my experience helps you change this process — it is horrific, degrading, traumatizing and I would never report to the police again after this experience.[2]

4.1 In our first meeting with the Expert Advisory Group, we were asked not to refer to the system as the criminal 'justice' system because there is no 'justice' in the system for people who have experienced sexual violence. The same sentiment has been heard in prior inquiries,[3] and was reflected in submissions we received.

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1 Name withheld, *Submission 83*.

2 H Robbins, *Submission 139*.

3 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II* (2017) 8–12, 158, 181–2; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2016) 250–2; Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 13, 40; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 4.

4.2 Many people who have experienced sexual violence do not report the crime to the police. For those who do report, many do not proceed further, and even if they do, the process leaves them feeling retraumatised.[4]

4.3 For centuries, the primary justice pathway for people who have experienced sexual violence has been the criminal justice system. Since the 1980s, this pathway has been the focus of many reforms because of increasing recognition and consensus that it fails to deliver justice for people who have experienced sexual violence.[5] As discussed in **Chapter 1**, a broader reform agenda is taking place across Australia that includes a focus on other justice pathways. Increasing access to justice and adopting a trauma-informed approach is about recognising that people who have experienced sexual violence have different justice needs, some of which may not align with the criminal justice pathway. In **Chapter 3**, we recommend funding for Safe, Informed, and Supported Services (SIS Services) that incorporate safe places to disclose, the early provision of information and legal advice about different justice pathways, and the need for support. In **Chapters 13** to **18**, we make recommendations to improve other justice pathways.

4.4 The broader reform agenda looks through a wider lens but it maintains a strong focus on the criminal justice pathway. It does not detract from the importance of reforming that pathway to make it a viable 'justice' pathway for people who experience sexual violence. On 12 August 2022, the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault was endorsed, under which 'jurisdictions will seek to take collective and individual action to improve the experiences of victim-survivors of sexual assault in the criminal justice system'.[6] That is our focus in this chapter and **Chapters 5** to **12**.

## Why it is important to fix the criminal justice pathway

4.5 There is no quick fix for the criminal justice pathway for people who have experienced sexual violence, but it is important that work continues to improve it.

4.6 The criminal justice pathway has the potential to meet justice needs for people who have experienced sexual violence. As discussed in **Chapter 2**, those needs include protecting themselves and others from the person responsible, feeling validated and recognised, and holding the person responsible accountable (including via imprisonment, treatment, intervention orders, a plea of guilty, or an apology). The criminal justice system will not be the most appropriate, suitable, or chosen pathway for every person who has experienced sexual violence. For example, as discussed in **Chapter 3**, it may not meet justice needs for people who do not want an outcome

4 For a discussion of the issue of under engagement with the justice system, see **Chapter 3**.

5 **Chapter 2** outlines the justice needs of people who have experienced sexual violence and the ways in which these are not being met.

6 Attorney-General's Department (Cth), *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–27* (Meeting of Attorneys-General, August 2022) 4.

that involves punishment. Nevertheless, it is a pathway that should be open and available, and a choice that does not cause significant retraumatisation.

4.7 Additionally, a central pillar of our community is that every member should be safe and protected from sexual violence.[7] Sexual violence is a serious crime. The criminal law has a protective purpose and signifies that the community takes responsibility for keeping its members safe from sexual violence. People who use sexual violence commit a crime against the person who has experienced sexual violence which is condemned and punishable by the community.

> Criminal justice involves the interests of the entire community in the detection and punishment of crime in general, in addition to the personal interests of the victim or survivor of the particular crime.[8]

4.8 A breach of the criminal law is 'public' in the sense that the state has a clear role to play in the investigation and prosecution of any breach.[9] The police and prosecution take on that role on behalf of the state. People who use sexual violence must be held to account in the criminal courts to the people who have experienced sexual violence, and to the community in general.

4.9 The state has a responsibility to ensure that the criminal justice system is achieving that protective purpose. The participation of victims of crime in the system is fundamental to its operation and effectiveness. The state should respond accordingly.

4.10 As discussed in **Chapter 3**, there are many barriers to engagement with the criminal justice system, including a lack of confidence in the criminal justice system. The state needs to fully investigate, understand, account for, and address the persistently low participation rates of people who have experienced sexual violence in the criminal justice system. The continuing work on this pathway must include a focus on restoring faith in the criminal *justice* system to make it a system for people who have experienced sexual violence, accused persons, and the community in general. The participation of people who have experienced sexual violence in the criminal justice system is critical not only for their empowerment but also for the legitimacy of the system as a whole.[10]

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7 See, eg, the Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 14, which refers to a 'commitment to a country … where all people live free from fear and violence'.

8 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 3) 8.

9 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, 2010) 174–5 [4.73]–[4.76].

10 Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Routledge, 2020) 131.

## Positive changes

4.11 Decades of advocacy about the failure of the criminal justice system response to sexual violence has led to multiple national, state, and territory-based commissions of inquiry that

> have shed light on the gravity, nature and impacts of sexual violence, and the need to improve prevention, intervention and responses within and beyond the criminal justice system.[11]

4.12 These developments were brought about by various factors including growing community awareness about sexual violence, the growth and activism of the women's movement, and growing awareness about the problems faced by child sexual assault complainants in the legal system.[12] It is important to acknowledge the strength of the advocacy, including from people who have experienced sexual violence. Reform efforts have 'achieved incremental advances, along with some significant improvements, in the criminal justice experience' for people who have experienced sexual violence.[13]

4.13 Positive changes to the criminal justice system response to sexual violence include

- training programs for police, lawyers, and judicial officers about justice responses to sexual violence;
- specialist police officers to respond to sexual violence;
- the use of intermediaries to assist particular complainants, such as children and adults with cognitive impairment, during the police interview and trial stages;
- recorded police statements for child complainants and adult complainants with cognitive impairment that may be used in court as their evidence-in-chief;
- specialist child witness services in Victoria (Child and Youth Witness Service), Queensland (Protect All Children Today) and Western Australia (Child Witness Service);
- Victims of Crime Commissioners;
- witness assistance services located in Offices of the Directors of Public Prosecutions;
- evidence measures such as one-way screens in court (to enable complainants to give evidence in the courtroom without seeing the accused person), audio-visual or closed-circuit television links (to enable complainants to give

11 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*.

12 Australian Law Reform Commission and New South Wales Law Reform Commission (n 9) 1111 [24.53].

13 Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (The Australasian Institute of Judicial Administration, Attorney-General's Department (Cth), CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, August 2023) i.

evidence to the court from a remote location), court companions (for emotional support), and canine companions (therapy dogs to assist complainants with stress and anxiety);

- pre-recorded evidence hearings to record the evidence of complainants before trial so that the recordings may be used in court as their evidence;
- specialist lists in trial courts to case-manage or prioritise sexual violence matters;
- criminalising different types of sexual offending (such as course of conduct offences against children and predatory internet offences);
- legislation to change the common law about complaint evidence, sexual history evidence, and sexual reputation evidence;
- legislation to abolish common law warnings and directions to juries about the unreliability of complainants of sexual violence generally, and to require new directions about the nature of sexual violence, including consent;
- legislation to prohibit an unrepresented accused person from directly cross-examining a complainant;
- legislation to protect the privacy of counselling communications; and
- the use of victim impact statements.

4.14 Consistent with recent studies and inquiries,[14] the ALRC heard some encouraging accounts of criminal justice processes from people who have experienced sexual violence.[15]

4.15 During this Inquiry, it became clear that there are people working in and around the criminal justice system, including people who have experienced sexual violence, who are dedicated to making a difference with limited funding and resources. This includes sexual assault service providers, which have provided long-standing and crucial support to people who have experienced sexual violence. There are also justice system professionals (including police, social workers, lawyers, and judicial officers) who are committed to improving the system's response to people who have experienced sexual violence.

## A national approach

4.16 Positive changes have been made but there is still a long way to go.

4.17 The changes outlined above have not been uniformly adopted or implemented across Australia. Some jurisdictions have adopted all, or many, of the changes;

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14 See, eg, Christine Nixon and Karen Fryar, *Responding to Recommendation 15 of the Listen. Take Action to Prevent, Believe and Heal Report (2021): Sexual Assault (Police) Review Report* (2024); KPMG and Centre for Innovative Justice, RMIT, *'This Is My Story. It's Your Case, But It's My Story': Interview Study* (NSW Bureau of Crime Statistics and Research, July 2023).

15 See, eg, Name withheld, *Submission 6*; Name withheld, *Submission 10*; Not published, *Submission 15*; Not published, *Submission 24*; Not published, *Submission 31*; A Brownlie, *Submission 39*; O Camera, *Submission 71*; Not published, *Submission 75*; H Robbins, *Submission 139*.

others have adopted some. Some of the changes adopted by multiple jurisdictions have been differently implemented. Within a jurisdiction, the availability of the changes might not extend to regional or remote areas.

4.18 Sexual violence continues to be underreported to police, and attrition rates[16] for people who decide to report remain high.[17] Most people who experience sexual violence are not participating in the criminal justice system and

> there is a discernible and growing recognition globally that further change is required to address the urgent need to present the criminal justice system as a realistic rather than re-traumatising option for victim-survivors.[18]

4.19 In 2022, the governments in Australia determined that 'the scale and severity of sexual violence across Australia makes this a nationally significant issue, requiring a nationally coordinated response'.[19] On 12 August 2022, the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault was endorsed, because

> effective law and policy reforms need to be supported by coordinated national action to drive cultural change and build capability to improve experiences for all victim-survivors of sexual assault.[20]

4.20 One of the major challenges to reforming the criminal justice system response to sexual violence in Australia is the existence of nine criminal justice systems, comprising eight state and territory systems, and one federal system. States and territories are primarily responsible for the criminal laws and processes in their own jurisdictions. Jurisdictional differences in sexual assault laws, processes, and supports contribute to the complexity of barriers faced by people who have experienced sexual violence to engaging, and remaining engaged, in the criminal justice system. They also contribute to the complexity of national reform of criminal justice systems.

4.21 The timeframe and resources allocated to this Inquiry have not enabled the ALRC to conduct a detailed investigation into the sexual assault laws, processes, and issues in each jurisdiction in order to construct a comprehensive catalogue for comparison and reform purposes. Our initial consultations with different stakeholders in each jurisdiction indicated that would be an enormous task.

4.22 We have focused attention on addressing the problem that is consistent across all criminal justice systems in Australia — the underreporting and under-engagement of people who have experienced sexual violence.

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16 See definition of attrition in **Chapter 5**.

17 See **Chapter 5** for a discussion of the problem of attrition of sexual violence matters in the criminal justice system, including key statistics.

18 George et al (n 13) i.

19 Attorney-General's Department (Cth), 'Sexual Violence' <www.ag.gov.au/crime/sexualviolence>.

20 Attorney-General's Department (Cth) (n 6) 6.

# Improving engagement in the criminal justice process

4.23 One of the most significant reasons why people who have experienced sexual violence do not engage in the criminal justice system is the system's response to their reports of sexual violence.[21] That response is steeped in a culture that developed from beliefs about rape and women in the 1700s and became entrenched in law and the criminal justice process.

## Suspicion blame and disbelief

4.24 In 1736, Sir Matthew Hale (a barrister, judge, and jurist) published the oft-quoted assertion that '[rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent',[22] which gave rise to a need to

> be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.[23]

4.25 Since then, the criminal justice response to complainants of sexual violence and what they have to say has been one of suspicion, blame, and disbelief. The courts developed legal principles (the 'common law') that labelled complainants of sexual violence to be an inherently unreliable class of witness,[24] and required trial judges to warn and direct juries that it was dangerous to convict on a complainant's word alone, particularly if the complainant 'delayed' in making a complaint.[25]

4.26 Because this label was developed on the authority of appellate courts at the top of a hierarchical criminal justice system, it was binding upon everyone else in the system: the trial courts, committal courts, prosecution, defence lawyers, and police. It was the standard fixed for the whole process. From the moment complainants of sexual violence reported to the police, they were regarded as an inherently unreliable class of witness.

4.27 It is no wonder that many people who have experienced sexual violence have remained silent and stayed away from the criminal justice system for such a long time. Nor is it any wonder that many people who report sexual violence to the police feel retraumatised by their experience of the system's response.

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21 See **Chapter 3** for further details of the reasons behind the under-engagement of people who have experienced sexual violence with the justice system.
22 Sir Matthew Hale, *The History of Pleas of the Crown* (1736) 635.
23 Ibid 636.
24 *Kelleher v The Queen* (1974) 131 CLR 534.
25 *Longman v The Queen* (1989) 168 CLR 79; *Crofts v The Queen* (1996) 186 CLR 427.

4.28 The label persisted for over two centuries. As recently as 2017, the Child Sexual Abuse Royal Commission recommended that each state and territory government review and pass legislation necessary to abolish the jury warnings and directions which grew out of the common law classification of people who have experienced sexual violence as an inherently unreliable class of witness.[26]

## Myths and misconceptions about sexual violence

4.29 The abolition of warnings and directions to juries is one step in addressing the criminal justice system's inherent suspicion, blame, and disbelief of people who have experienced sexual violence. The next challenge is to address the belief system that underlies the law, to enable the engagement of people who have experienced sexual violence in the criminal justice system.

4.30 The belief system underlying the law that people who experienced sexual violence were an inherently unreliable class of witnesses is reflected in the parameters that were developed for assessing their credibility and reliability. Those parameters were said by appellate courts to reflect 'human experience'.[27] For example, that a 'credible and reliable' victim of sexual violence remembers what happened with clear linear detail (like replaying a movie in their mind), resists the accused person, tells someone what happened at the first reasonable opportunity, and does not have any further contact with the accused person. Inconsistencies, inaccuracies, gaps in memory, compliance or acquiescence with the alleged conduct, delayed complaint, and subsequent contact with the accused person are said to be indicators for suspicion and disbelief.[28]

4.31 The community shares these expectations for how people who have experienced sexual violence should behave and what they should remember.[29]

4.32 There is now a significant body of empirical research that contradicts this belief system and shows it does not reflect human experience at all.[30] Broadly, this

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26 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (2017) 109–11 [31.1], rec 65.

27 *Crofts v The Queen* (1996) 186 CLR 427, 451.

28 See, eg, Nina Hudson et al, *Understanding Adult Sexual Assault Matters: Insights from Research and Practice: An Educational Resource for the Justice Sector* (Australian Institute of Family Studies, Attorney-General's Department (Cth), 2024); Jane Goodman-Delahunty and Mark Nolan, 'Autobiographical Memories of Sexual Assault' in Greg Byrne and Jacqui Horan (eds), *Sexual Assault Trials: Challenges and Innovations* (Lexis Nexis, forthcoming); Yvette Tinsley, Warren Young and Claire Baylis, 'Jurors' Use of Rape Myths in Aotearoa New Zealand' in Greg Byrne and Jacqui Horan (eds), *Sexual Assault Trials: Challenges and Innovations* (Lexis Nexis, forthcoming); Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (2017).

29 Hudson et al (n 28) 9–10.

30 See, eg, Australian Institute of Family Studies and Victoria Police (n 28); Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crimes against Adult Victims: Barriers to Justice* (Research Paper No 611, Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice, November 2020) 1.

research explores the effect that trauma and post-traumatic stress disorder has on memory and responsive behaviour. The Royal Australian and New Zealand College of Psychiatrists told the ALRC that this research is well established and spans multiple disciplines.[31]

4.33 Past inquiries have outlined common myths and misconceptions about sexual violence, their impact on the criminal justice system, and the research negating them.[32] The research has also been recognised by Australian courts.[33]

4.34 The Australian Institute of Family Studies (AIFS) has recently published an educational resource for the justice sector that focusses on sexual offending against adults.[34] The 'myths and misconceptions' are referred to as 'false assumptions'. The research evidence is presented as 'insights'. **Table 4.1** below lists in brief some of the false assumptions addressed by the AIFS with the corresponding insights.

***Table 4.1: False assumptions about sexual violence***

| What is the false assumption? | What does the evidence say? |
|---|---|
| **Some forms of sexual assault are more harmful than others** | There are multiple forms of sexual assault, which all have the potential to be profoundly harmful |
| **A victim of sexual assault would sustain physical injuries because the perpetrator would need to use physical force to commit the assault. A victim would resist and fight.** | Sexual assault does not necessarily involve the use of force or involve resistance. Physical injury does not feature in most reported cases. It is more common for victims to 'fawn' or 'freeze' rather than to 'flight' or 'fight'. That is particularly likely if the victim knows the perpetrator because of complex interpersonal dynamics. |
| **Most people are sexually assaulted by strangers.** | Sexual assault is most often perpetrated by people who victims know, like intimate partners and known peers |
| **People who have experienced sexual violence would not continue a relationship with the perpetrator following an incident** | Perpetrators often have an ongoing relationship with the people they use sexual violence against. There are many reasons why people may not cut ties with the perpetrator, such as coercive control, grooming, fear for their safety, and fear of not being believed. |

31 Royal Australian and New Zealand College of Psychiatrists, *Submission 154*.

32 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 26) ch 31; Law Commission of England and Wales, *Evidence in Sexual Offences Prosecutions* (Consultation Paper No 259, 2023) ch 2; New Zealand Law Commission (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, 2015).

33 *BQ v The King* (2024) 419 ALR 153; *AWK v Tasmania* [2024] TASCCA 5.

34 Hudson et al (n 28).

| What is the false assumption? | What does the evidence say? |
|---|---|
| **If someone alleges they have been sexually assaulted when intoxicated, they are probably lying about it because they regretted it once sober. Or they might have misremembered the consensual act. Or it was their fault.**<br><br>**If someone sexually assaults a person when they were intoxicated, they are not responsible.** | Consumption of alcohol does not imply consent to future sexual activity. Perpetrators of sexual violence often use alcohol to intentionally incapacitate the victim prior to the assault or they take advantage of a person who is intoxicated. |
| **People who have experienced sexual violence would be emotionally distressed when recounting violence to police or in court** | There is no 'normal' way for a person to behaviour following sexual assault. Neurobiological brain and bodily responses to sexual assault can vary significantly. |
| **Memories of sexual assault are clear, coherent and detailed and can always be consistently recalled.** | It is common for victims to have disjointed recollections of their experience of sexual assault. It is normal for memory recollections to vary and for people to struggle with linear memory recollection when affected by trauma. |
| **People who have experienced sexual violence would report the incident at the first available opportunity** | Delayed reporting is an extremely common normal reaction and is due to many different reasons. |

4.35 The false assumptions about sexual violence continue to permeate the criminal justice system which means that responses to complainants and decisions about what they say happened are not evidence-based; nor are they trauma-informed. For example, Nixon and Fryar found in their 2024 review of ACT Policing attrition data, the Australian Capital Territory Sexual Assault (Police) Review (the ACT Review), that rape myths and stereotypes influenced the way police assessed a complainant, and the decisions they made about the case.[35] Studies have shown that cross-examination of complainants often focuses on why their behaviour did not align with incorrect commonly held beliefs.[36]

4.36 In 2010, the ALRC noted that false assumptions have underpinned sexual assault proceedings, been the subject of extensive commentary in the literature, and been the focus of considerable law reform to try and counter their influence.[37]

35 Nixon and Fryar (n 14) 36–7.

36 Julia Quilter and Luke McNamara, *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis* (Crime and Justice Bulletin No 259, NSW Bureau of Crime Statistics and Research, 2023) 1–2.

37 Australian Law Reform Commission and New South Wales Law Reform Commission (n 9) 1111 [24.55].

## Changing the common law narrative

4.37 Appellate courts have a key role in countering the resilience of false assumptions by developing the common law to change the narrative for the system's response to complainants of sexual violence. There have been two recent and significant developments.

4.38 In *BQ v The King*,[38] the High Court of Australia was asked to consider expert evidence given at trial about the empirical research on people who have experienced sexual violence. The prosecution led expert evidence about how children respond to intra-familial sexual abuse. The High Court decided that the evidence was relevant for the jury to hear and apply when they decided whether the child complainants (AA and BB) were credible and reliable:

> The very purpose for which her evidence was led was to avoid the jury's assessment of the honesty and reliability of AA and BB's evidence being affected by common misapprehensions, such as there being typical responses of a child to being sexually assaulted and that, commonly, children who are sexually assaulted in an intra-familial context will not acquiesce but instead protect.[39]

The High Court noted that the substance of the expert evidence at trial was not disputed and 'it is difficult to see how it could have been disputed'.[40]

4.39 In *AWK v Tasmania*,[41] the Court of Criminal Appeal recognised the empirical research about memory and the counter-intuitive nature of responses of children to sexual abuse. In the leading judgment, Justice Helen Wood warned counsel on appeal to expect the Court to be cautious about submissions based on myths and misconceptions:

> Counsel should expect the Court to be conscious that memory is a field of expertise and specialised knowledge, to be alert to the risk or reality of counsel propounding erroneous beliefs about memory, and to be aware that there was no expert opinion before the jury to support defence contentions made about memory.[42]

4.40 Acting Justice Brian Martin added the following general observations:

> This appeal, and many of the submissions advanced by the appellant, reflect and seek to perpetuate outdated concepts and myths surround the conduct to be 'expected' of child complainants in sexual assault cases … I agree with the observations of Wood J concerning submissions amounting to speculation as to memories and behaviours 'expected' of child complainants. As her Honour has noted, there exists extensive research in this area. In addition to research,

38 *BQ v The King* (2024) 419 ALR 153.
39 Ibid [49].
40 Ibid [58].
41 *AWK v Tasmania* [2024] TASCCA 5.
42 Ibid [280].

> there is a wealth of experience in the criminal courts demonstrating the fallacy underlying the outdated concepts to which I have referred.[43]

## Addressing low participation rates

4.41 Available data shows that up to 85% of people who report sexual violence to police 'drop out' of the system without charges being laid.[44] The recent ACT Review identified rape myths and stereotypes as one of the reasons underlying unreasonable attrition at the police investigation stage. The ACT Review found they influenced the way police officers responded to people who have experienced sexual violence and made decisions about whether the matter should be progressed.[45]

4.42 In **Chapter 5**, we recommend that each jurisdiction establish an independent taskforce to conduct a deep-dive review of attrition levels at the police investigation stage to identify reasons for unreasonable attrition and develop strategies to address systemic failures. The taskforce should also develop a model for an ongoing independent system-driven review mechanism for all reports of sexual violence that do not progress to charge, and a model for a complainant-driven review mechanism to enable a complainant to seek a review of their case that did not progress to charge.

4.43 In **Chapter 6**, we develop the second function of the Independent Legal Services recommended in **Chapter 3**, by recommending that people who have experienced sexual violence, who decide to report to the police, have access to independent legal advice throughout the criminal justice process and targeted legal representation in court. We consider this initiative has the potential to make a real difference to sustaining the engagement of complainants of sexual violence in the criminal justice process.

4.44 In **Chapters 7** and **8**, we make recommendations to educate people who work in the criminal justice system and juries about myths and misconceptions to reduce attrition levels and promote evidence-based decision-making. In **Chapter 11**, we consider the laws about consent and the need for community education.

4.45 In **Chapters 9**, **10**, and **12**, we focus on measures to enhance the effective participation of people who have experienced sexual violence in the criminal justice system, including the use of recorded evidence, intermediaries and ground rules hearings, and the fairness of cross-examination.

# The importance of future resourcing

4.46 If reforms achieve their aim of increasing the participation of people who have experienced sexual violence in the criminal justice system, pressure will increase

43 Ibid [318]–[319].
44 For an in-depth discussion of attrition rates for sexual offences, see **Chapter 5**.
45 Nixon and Fryar (n 14) 36.

on what the ALRC heard is an already critically under-funded and under-resourced system.

4.47 Some of the risks associated with a failure to ensure capability and capacity of criminal justice agencies to respond to increased demand were recognised by the ACT Review:

> Inadequate agency resourcing is likely to result in breaches of victim rights to dignity, support, advocacy, information, choice and safety, along with risks of further re-traumatisation in justice. For example, insufficient funding can contribute to unreasonable delays and poor-quality investigations. Such investigations compromise community trust in the criminal justice system and fail to hold perpetrators of sexual violence to account. It is therefore critical, at both an individual and community level, for the response system to be designed with victim-survivors centrally in mind including with sufficiently resourced actors.[46]

4.48 An integrative review of literature on trauma-informed care recently identified a conceptual classification of four general justice system needs for people who have experienced sexual violence that 'embody the fundamental requirements for a trauma-informed approach, to reduce systemic barriers and victim-survivor re-traumatisation'.[47] They are specialist, trauma-informed professionals; provision of information and communication; victim-survivor needs and safety; and reduced delays in the time to finalise proceedings.[48] We discuss the importance of future resourcing in the context of two of these general justice system needs.

## Specialisation and resources

4.49 A comprehensive integrative literature review focusing on specialised approaches to sexual assault court proceedings recently found that

> a lack of specialisation in justice system stakeholders is a fundamental systemic barrier that deters report of sexual violence and engagement with the criminal justice process.[49]

4.50 When people who have experienced sexual violence do engage, 'a lack of specialisation can lead to dissatisfaction and attrition' such that

> specialist training is the critical foundation upon which to build a better justice system response to victim-survivors, reduce risks of re-traumatisation, and dismantle systemic barriers.[50]

4.51 The ALRC heard strong support for the specialisation of people who work on sexual violence matters in the criminal justice system — specialist police officers,

46 Ibid 26.
47 George et al (n 13) 45.
48 Ibid.
49 Ibid 220.
50 Ibid.

prosecutors, defence lawyers, judges, court lists, and courts.[51] There is significant merit in specialisation, and it was widely supported in principle. It is gold standard. However, the literature also indicates that

> the provision of adequate, reliable, ongoing resourcing of any potential specialist approach is essential for the successful implementation of specialist measures.[52]

4.52 For people who work in the criminal justice system on sexual assault matters, the impact of vicarious trauma and the importance of personal wellbeing has become well-recognised. Judicial stress and wellbeing were once an 'unmentionable topic' but are now the subject of open discussion and empirical research.[53] High rates of stress in the legal profession have seen a global lawyer wellbeing movement.[54] Police Care Australia is a joint initiative of the National Police Memorial and the National Police Federation of Australia to refer, support, and educate police, both serving and former, along with their families and friends, on all aspects of mental health and wellbeing.[55]

4.53 Vicarious trauma, or secondary traumatic stress, (STS), broadly refers to the psychological distress a person can experience as a result of exposure to information about the primary trauma suffered by another.[56] The daily work of many judicial officers, lawyers, and police officers involves listening to or reading accounts of sexual violence given by people who have experienced that sexual violence. They are exposed to accounts about sexual violence perpetrated upon infants, children, and adults. Police and lawyers must process those accounts to investigate, assess, prosecute, or defend them. Judicial officers must process the accounts to case-manage, preside over a trial, reach a verdict,[57] sentence, or hear an appeal about them.

4.54 The scourge of child exploitation material on the internet requires police officers in the Joint Anti Child Exploitation Teams (JACET) to join online chats to catch sexual predators, view child exploitation material (images/videos/chats) on the internet or located in the physical possession of accused persons, and then describe in written court witness statements what they see depicted in that material. Prosecutors and defence counsel read those descriptions; some are required to view the material. Sentencing judges read those descriptions and, based on decisions of

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51 See, eg, Name withheld, *Submission 6*; Not published, *Submission 31*; Not published, *Submission 44*; D Erlich and N Meyer, *Submission 115*; Project Respect, *Submission 129*; Not Published, *Submission 134*; Northern Territory Director of Public Prosecutions, *Submission 143*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Full Stop Australia, *Submission 214*; Centre for Innovative Justice, *Submission 216*.

52 George et al (n 13) 234.

53 Carly Schrever, 'Judicial Wellbeing: Out in the Open' (2018) 92(12) *Law Institute Journal* 28, 29.

54 Ibid.

55 Police Care Australia, 'About: Police Care Australia' <https://policecareaustralia.org.au>.

56 Carly Schrever, Carol Hulbert and Tania Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28(3) *Journal of Judicial Administration* 141, 151–2.

57 Where the accused has elected for trial by judge alone.

courts of appeal, some feel compelled to view a representative sample for sentencing purposes unless they are provided with a written description of it that descends to particulars well beyond the classification of the material.[58]

4.55 Recently, Australia's first empirical research measuring judicial stress and wellbeing produced results for STS that showed

> the overwhelming majority of judicial officers in this study (83.6%) endorsed at least one STS symptom, with almost a third (30.4%) obtaining total STSS scores in the moderate to severe ranges.[59]

4.56 The literature indicates that further research is warranted in the context of the important pursuit of specialisation because of 'a deeply concerning risk of burnout and vicarious trauma for justice system personnel who regularly engage empathetically with victim-survivors' that the literature does not discuss 'in detail except to identify them as challenges that needed to be better understood'.[60]

4.57 The interdependence of workforce specialisation in sexual offence matters, vicarious trauma, employer duty of care, and resourcing features in the High Court decision of *Kozarov v Victoria*.[61] Ms Kozarov was a solicitor employed at the Office of Public Prosecutions in Victoria, in the Specialist Sexual Offences Unit (SSOU). The risk of serious psychiatric injury in her work from exposure to vicarious trauma was recognised by the Office of Public Prosecutions in its vicarious trauma policy.[62]

4.58 The Office of Public Prosecutions owed a duty of care to provide Ms Kozarov with a safe system of work that included

> an active OH&S framework; more intensive training for management and staff regarding the risks to staff posed by vicarious trauma and PTSD; welfare checks and the offer of referral for a work-related or occupational screening, in response to staff showing heightened risk; and, a flexible approach to work allocation, especially where required in response to screening, including the option of temporary or permanent rotation from the SSOU where appropriate.[63]

4.59 The Office of Public Prosecutions breached its duty of care by failing to take reasonable steps in response to the risk that included failing to offer Ms Kozarov a rotation to a position outside the SSOU which she would have accepted to prevent her further exposure to sexual offence cases.

4.60 The implementation of a specialist approach as one of the necessary criminal justice responses to people who have experienced sexual violence requires a commitment to the future resourcing of a sufficiently large pool of specialist workers

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58 *Kenworthy v The Queen (No 2)* [2016] WASCA 207, [138]–[139]; *R v Turvey* (2017) 127 SASR 425, [141].
59 Schrever, Hulbert and Sourdin (n 56) 164.
60 George et al (n 13) 234–5 [5.8].
61 *Kozarov v Victoria* (2022) 273 CLR 115.
62 Ibid [27].
63 Ibid [82], quoting the decision in the first instance: see *Kozarov v State of Victoria* [2020] VSC 78, [702].

that enables a flexible approach to work allocation, including the option of temporary or permanent rotation out of work on sexual violence matters where necessary.

4.61 As a practical example, the rotation of a specialist judicial officer out of sexual assault trials for a temporary period would require a sufficient pool of specialist judicial officers from which to rotate a judicial officer back in, to avoid increasing trial delays because of insufficient specialists to hear the sexual assault trials. The alternative would be for a non-specialist judicial officer to rotate in to preside over the trials. Without increased resources, the practical reality of an increasing workload of sexual assault trials, particularly in smaller jurisdictions, effectively means that every judicial officer becomes a 'specialist' with little or no possibility of a flexible approach or rotation out of the work. The same principles apply to police, prosecutors, and defence lawyers working on sexual violence matters.

## Unreasonable delay and resourcing

4.62 Without adequate future resourcing of criminal justice agencies, there is a risk of increasing unreasonable delays in the system's response to people who have experienced sexual violence. However, the importance of future resourcing in this context is more significant than avoiding the risk of *increasing* unreasonable delays. The future resourcing of criminal justice agencies should be focused on meeting one of the four identified fundamental needs for a trauma-informed approach: *reducing* delays in the time to finalise proceedings.[64]

4.63 Many prior reports have documented delays in the criminal justice system and the impact upon complainants of sexual violence.[65] The literature 'overwhelmingly supports' unreasonable delay in the trial process as a major factor in increasing trauma and driving attrition.[66] Long delays are well recognised as a source of secondary victimisation for complainants who are often required to 'stay in that traumatic space' for years in preparation for a criminal trial.[67]

4.64 The ALRC heard delay was one of the most significant causes of retraumatisation:

> It felt like the experience was "dragged out", and I could not "move on." As court dates approached, it caused extreme distress and panic, triggering PTSD symptoms.[68]
>
> A delay of over 2 years from my initial report to the police to the trial – this significantly impacted my life, and particularly my mental health … It placed a

64 George et al (n 13) 45.
65 Ibid 30–1 [2.5.2.1]; Women's Safety and Justice Taskforce (n 3) ch 2.10; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) ch 19; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 26) ch 32.
66 George et al (n 13) 73, 225–6.
67 Sexual Assault Services Victoria, *Submission 203*.
68 A McIntosh, *Submission 131*.

> significant strain on all of my relationships as I was struggling so much during this time. My work was impacted as I was carrying the weight and anxiety of the impending trial on my shoulders constantly whilst also trying to maintain full-time work as a doctor. I became severely burnt out and struggled on a daily basis to function at work.[69]

> The delays in the judicial process surrounding my case have had profound and devastating impacts on my life and well-being … The delays significantly affected my communication with loved ones. The persistent anxiety and stress made it difficult to engage openly and honestly, as the unresolved case loomed over every interaction. This strain extended to my mental and physical health, manifesting in ways that compromised my overall well-being.[70]

4.65 People from groups which are disproportionately reflected in sexual violence statistics, such as First Nations people, and those living in regional or remote areas, may experience the impacts of delay more significantly because of complex intersectional factors and needs. Children and complainants with cognitive impairment are also significantly impacted by delay.[71] The impact of delay extends to a complainant's family, friends, and support networks. Delay is also unsatisfactory for an accused person, particularly those who are remanded in custody awaiting trial. Trying to keep up with expected time frames in the context of ever-increasing backlogs is a major cause of stress for people working in the criminal justice system.

4.66 It is important to distinguish between unreasonable delay and the time that must elapse for a report of sexual violence to be properly investigated, prosecuted, and tried. Submissions to this Inquiry described significant delays in sexual offence matters, ranging from two to five years from report to resolution.[72] The ALRC heard in consultations with judicial officers and legal professionals working across jurisdictions that it commonly takes years for a matter to progress from initial report to finalisation. Stakeholders told the ALRC about the compounding effect of unreasonable delay at every stage of the process, including delay:

- during police investigations, with examples that included backlogs for examination of electronic devices (such as mobile phones) and reporting, backlogs for forensic testing and reporting, and difficulties accessing trained interpreters (particular in rural and remote areas);[73]
- by police in providing disclosure of briefs to prosecution;[74]
- during the committal process in busy Local or Magistrates' courts, including delays relating to ongoing disclosure by police and prosecution;

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69 J Crous, *Submission 141*.

70 Name withheld, *Submission 95*.

71 Victorian Law Reform Commission (n 65) 19.26; Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2020) 16; George et al (n 13) 30, 112.

72 See, eg, A McIntosh, *Submission 131*; J Crous, *Submission 141*; A Williams, *Submission 19*; S Filmer, *Submission 30*.

73 See, eg, Not Published, *Submission 134*; Northern Territory Director of Public Prosecutions, *Submission 143*; Legal Aid NSW, *Submission 201*.

74 Northern Territory Director of Public Prosecutions, *Submission 143*.

- due to difficulties experienced by defence solicitors securing prison visits to take instructions from their clients;[75]
- due to allocation of matters to relatively inexperienced prosecution solicitors during the pre-trial process who may not have authority to negotiate pleas,[76] or make decisions about the presentation of the prosecution case at trial;
- due to a 'scarcity of skilled barristers who prosecute and defend sexual offences';[77]
- when materials are subpoenaed by the defence just before the trial date;
- when police and the prosecution make further disclosure just before the trial date, particularly when it is voluminous;[78]
- in the listing of trial dates because of trial court backlogs;[79]
- in the listing of sentencing hearings because of the high workloads of forensic psychologists and psychiatrists to conduct assessments and provide reports about accused persons;[80] and
- in the listing of appeals and waiting for the appellate judgment to be delivered.[81]

4.67 There was mixed support among stakeholders for a proposed recommendation to establish a multi-disciplinary working group or similar body in each jurisdiction to collaboratively identify and address the causes of delay in sexual assault matters. Some stakeholders indicated a co-ordinated approach to reducing unreasonable delay was much needed and should be highly effective. Others indicated their jurisdictions have working groups or pilot programs to address delays,[82] and were either supportive of another group in principle or did not consider a further working group would be of assistance.

4.68 A consensus from submissions, consultations, and feedback was that unreasonable delay is currently a national problem that is largely due to chronic underfunding and under-resourcing.[83] The ALRC supports measures taken in each jurisdiction to identify and reduce unreasonable delay.

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75 Ibid.
76 Legal Aid NSW, *Submission 201*.
77 Law Council of Australia, *Submission 215*.
78 Ibid.
79 Ibid.
80 Northern Territory Director of Public Prosecutions, *Submission 143*.
81 With You We Can, *Submission 132*.
82 Examples include: in New South Wales, there are Early Appropriate Guilty Plea governance groups and the Consent Monitoring and Advisory Group; in Queensland, a multi-agency working group was established following recommendations from the Women's Safety and Justice Taskforce (n 3) to inform the development of a new case management protocol sexual violence matters in the Brisbane and Ipswich District Courts and led to the rollout of a case management model commencing September 2024; and in South Australia, a pilot case management program to prioritise the listing of child sexual assault trials rolled out in January 2024.
83 With You We Can, *Submission 132*; Northern Territory Director of Public Prosecutions, *Submission 143*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Law Council of Australia, *Submission 215*.

## Guilty plea inquiry

**Recommendation 2**

The Australian Government should commission a national inquiry to address the impact of factors such as:

a. mandatory sentencing provisions;

b. sentencing discount regimes; and

c. consequences following conviction (such as sex offender registration)

on sexual offence matters proceeding to trial rather than resolving via guilty pleas, and measures that may promote early resolution.

The inquiry should have regard to the importance of just outcomes for accused persons, people who have experienced sexual violence, and the broader community.

4.69 Case finalisation by guilty plea is a desirable outcome in sexual violence cases for multiple reasons.

4.70 For people who have experienced sexual violence, 'the key to making the trial process meaningful … is the early acknowledgement of guilt by defendants who are in fact guilty'.[84] An accused person may plead as charged or may plead following negotiations with the prosecution. Complainants report retraumatisation when pleas are negotiated between the prosecution and defence without their involvement, including an absence of notification, discussion, or explanation.[85] The ALRC considers that the availability of independent legal advice and advocacy to complainants should help change that practice and culture.

4.71 For complainants, the benefits of a case finalising by guilty plea include

- reducing the trauma associated with delays to trial (particularly if the plea is entered early);
- removing the trauma of giving evidence at trial, including cross-examination;
- fulfilling justice needs by the accused person accepting responsibility;
- removing the prospect of further delay associated with an appeal against conviction following trial and a possible re-trial; and
- enabling focus on a victim impact statement and the sentencing process.

84 Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33(3) *UNSW Law Journal* 662, 663.

85 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*; With You We Can, *Submission 132*; Sexual Assault Services Victoria, *Submission 203*.

4.72 For the criminal justice system, the benefits include:

- saving police resources of further investigation and trial involvement (particularly if the guilty plea is entered early);
- saving the time and resources of courts, prosecutors, and defence lawyers (including legal aid and jury funding) that would have been dedicated to the trial;
- saving court time and resources associated with a trial judge writing a judgment if the trial was judge alone;
- reducing trial backlogs in trial courts (particularly if the guilty plea is entered early in the process);
- saving the time and resources of courts, prosecutors, and defence counsel that that might have been dedicated to any appeal against conviction had the matter proceeded to trial and resulted in a conviction;
- saving the time and resources that might have been dedicated to any re-trial if there was a successful appeal against conviction;
- saving the time and resources of appellate courts in dealing with appeals against conviction; and
- enabling the case to be finalised, subject to sentence.

4.73 Many stakeholders told the ALRC that a range of factors now operate as disincentives for people accused of sexual offences to plead guilty in cases where it would be appropriate for them to do so. There is little, if any, sentencing benefit for an accused person to plead guilty rather than proceed to trial that has the possibility of an acquittal.

4.74 Consultations with and feedback from judicial officers, bar associations, law societies, legal aid organisations, and First Nations legal services informed the ALRC that people who are charged with sexual offences are discouraged from pleading guilty by mandatory sentencing regimes. It was reported to the Queensland Sentencing Council that if the accused person comes within the mandatory sentencing regime, the case is likely to go to trial as there is no incentive or benefit to pleading guilty.[86]

4.75 Parliaments legislate mandatory sentencing regimes to remove sentencing options that might otherwise be available (such as suspended sentences or home detention orders) and require judges to deliver minimum or fixed penalties (such as mandatory minimum non parole periods). These regimes are a departure from the standard approach to sentencing because they remove or constrain judicial discretion to tailor a sentence according to the circumstances of the offending and the person who has been convicted. It is a 'one size fits all' approach to sentencing.[87]

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86 Queensland Sentencing Advisory Council, *The '80 per Cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Final Report, 2022) ch 14.

87 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) ch 21; Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, 2017) ch 8.

4.76 Mandatory sentencing schemes are said to be a response by parliament to address community dissatisfaction with sentencing by judicial officers and reflect community calls for a 'tough on crime' approach.[88] There is a view that community dissatisfaction with sentences can be exacerbated by media reporting and a lack of critical analysis in public debate.[89]

4.77 Researchers have investigated the accuracy of public opinion polls on sentencing by giving members of the community access to all the facts of a case, asking them to sentence specific people who have been convicted, and then comparing the sentences with the sentences imposed by judges. The studies consistently found that the sentences of the fully informed members of the community were slightly more lenient than judges.[90]

4.78 Research also indicates that certainty of punishment has much more deterrent impact than the severity[91] and that increasing the severity of punishment does little to deter crime.[92]

4.79 In 2006, the ALRC reported that reasons for opposition to mandatory sentencing regimes included its inflexibility, discrimination against people convicted of crimes who are disadvantaged, and the increased necessity for jury trials.[93] In 2018, the ALRC reported that stakeholders noted the impact of these regimes included reduced incentives to enter a guilty plea, causing increased workloads for the courts.[94]

4.80 Examples of mandatory sentencing regimes that impact the sentencing of persons convicted of sexual offences include:

- In Queensland, under the serious violent offences scheme, if a person who has been convicted is sentenced to 10 years imprisonment or more, the court must impose a non-parole period of at least 80% of the sentence, whether the person has pleaded guilty or not, and regardless of the circumstances of the crime or the person.[95] Also, if a person who has been convicted has committed an offence of a sexual nature against a child under 16 years or a child exploitation material offence, the person must serve an actual term of

88 Greg McIntyre, 'You Know What Creates Unsafe Communities? Mandatory Sentencing', *Law Council of Australia* <https://lawcouncil.au/media/news/you-know-what-creates-unsafe-communities-mandatory-sentencing>.

89 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) 8 [7].

90 Sentencing Advisory Council (Vic), *Public Opinion About Sentencing: A Research Overview* (2018) 1.

91 Sentencing Advisory Council (Vic), *Does Imprisonment Deter? A Review of the Evidence* (2011) 2.

92 National Institute of Justice (US), *Five Things About Deterrence* (2016).

93 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (n 87) 541 [21.60].

94 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (n 87) 275 [8.9].

95 *Corrective Services Act 2006* (Qld) s 182; Queensland Sentencing Advisory Council (n 86) ch 2.

imprisonment, unless there are exceptional circumstances.[96] If a person who has been convicted of serious child sexual abuse is convicted again of serious child sexual abuse, there is a mandatory sentence of life imprisonment.[97]

- In South Australia, a sentence of imprisonment may not be suspended for a serious sexual offence (including sexual offences for which the maximum penalty prescribed is at least five years imprisonment),[98] or made the subject of a home detention order,[99] and there are mandatory minimum non-parole periods of 80% of the sentence for 'serious repeat offenders'.[100] The South Australian parliament has passed legislation for mandatory sentences of indeterminate duration for certain people who have been convicted of child sex offences.[101]
- In Victoria, for rape and sexual offences against children, the court must make a custodial order.[102]
- In the Northern Territory, where a court finds a person guilty of a sexual offence, the court must record a conviction and not wholly suspend the sentence of imprisonment,[103] and there are mandatory minimum non-parole periods of 70% for a sexual offence against a child under 16.[104]
- For categories of Commonwealth child sexual offences, there are mandatory minimum penalties.[105]
- In Tasmania, the introduction of minimum mandatory sentences for sexual offences was negatived on 27 November 2024.[106]

4.81 The ALRC also received feedback that sentencing discount regimes are not working to encourage resolution by guilty pleas. Some jurisdictions have legislated sentencing discount regimes that recognise the utilitarian benefit of a guilty plea.[107] Some judicial officers noted that once the matter had reached the trial court, the sliding scale of discounts for a plea of guilty was reduced to 5% which gives very little incentive for an accused person to plead guilty rather than wait for a trial. One legal aid provider indicated that discount schemes have limited impact because of mandatory sentencing regimes. The ALRC received feedback that an examination of the Early and Appropriate Guilty Plea Scheme in NSW could prove beneficial to improved outcomes for sexual assault matters.

4.82 The ALRC also heard that post-sentence regimes (such as sex offender registers and high-risk offender regimes) can apply to all people convicted of sexual

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96 *Penalties and Sentences Act 1992* (Qld) s 9(4).
97 Ibid s 161E.
98 *Sentencing Act 2017* (SA) ss 96(3)(ba), 96(9).
99 Ibid s 71(2)(b).
100 Ibid s 54.
101 Sentencing (Serious Child Sex Offenders) Amendment Bill 2024 (SA).
102 *Sentencing Act 1991* (Vic) ss 3, 5(2G).
103 *Sentencing Act 1995* (NT) s 78F.
104 Ibid s 55A.
105 *Crimes Act 1914* (Cth) ss 16AAA, 16AAB, 16AAC.
106 Sentencing Amendment (Presumption of Mandatory Sentencing) Bill 2023 (Tas).
107 *R v Sharma* (2002) 54 NSWLR 300.

offences and may further disincentivise people from pleading guilty.[108] The ALRC understands that it may be the far reach of these measures to capture all persons convicted of an offence, regardless of the nature of the offending that impacts the resolution by pleas of guilty.

4.83 A range of stakeholders from across the justice system, including judicial officers, the Offices of the Directors of Public Prosecutions, legal aid providers, and members of the criminal bar supported **Recommendation 2**. In making this Recommendation, the ALRC is not suggesting that sentences for people convicted of sexual offences should be more lenient, or that prosecutors and people who have experienced sexual violence should compromise on the facts of the offending. Sentences should reflect the facts and circumstances of the offending and the person convicted of the offence. An investigation of the extent to which, if at all, the sentencing regimes are inadvertently increasing the necessity for jury trials should occur because of the impact trials have upon people who have experienced sexual violence and the criminal justice system as a whole. The inquiry should also consider measures that may encourage appropriate early guilty pleas.[109]

4.84 It is important that the recommended national inquiry consult with people who work in the criminal justice system (including judicial officers, defence lawyers, prosecutors, and police) about their experiences of the sentencing regimes. It is also important that the inquiry consult with people who have experienced sexual violence about the sentencing regimes. As discussed in **Chapter 2**, people who have experienced sexual violence have different justice needs when it comes to the person who uses sexual violence being held accountable for the crime.

4.85 Consistent with our Terms of Reference, the terms of **Recommendation 2** are limited to inquiring into the impact of factors such as mandatory sentencing provisions on sexual offence matters proceeding to trial, rather than criminal matters proceeding to trial generally. The recommended national inquiry is justified as a standalone inquiry into barriers that may impede timely finalisation of sexual offence proceedings because of the impacts of unreasonable delays and the trial process itself upon people who have experienced sexual violence. However, there is benefit in the inquiry having a wider lens. Factors such as mandatory sentencing provisions and restrictive sentencing discounts also apply to other criminal proceedings. Increased resolution of those matters by guilty plea necessarily reduces the number of criminal matters proceeding to trial. Reduction of trial backlogs generally may enable earlier trial dates to be listed for sexual assault matters that would further reduce delays in finalising sexual assault matters that proceed to trial.

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108 Not Published, *Submission 134*; Aboriginal Legal Rights Movement, *Submission 172*.

109 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 3) 95.

## Building a shared evidence base to inform best practices

**Recommendation 3**

The National Judicial College of Australia should be funded to manage and staff an ongoing research team and, in consultation with heads of jurisdiction in each of the trial courts that hear most sexual offence matters (District Courts in New South Wales, Queensland, South Australia and Western Australia; the County Court in Victoria; and the Supreme Courts in the Australian Capital Territory, Northern Territory and Tasmania), locate a member of the research team in each of the trial courts to coordinate the building of a shared evidence base by supporting the evaluation of reform measures implemented in trial courts to improve responses to sexual violence, including:

a. research and evaluation projects regarding reform measures implemented in trial courts to improve responses to sexual violence, including:

   i. jury directions to address myths and misconceptions (including the implementation of the Model Jury Directions Bill) (**Chapter 8**, **Recommendation 21**);

   ii. the calling of expert evidence to address myths and misconceptions (**Chapter 8**, **Recommendations 23–25**);

   iii. recorded police statements (**Chapter 9**, **Recommendation 29**)

   iv. pre-recorded evidence hearings (**Chapter 9**, **Recommendations 28–30**);

   v. intermediaries (**Chapter 10**, **Recommendation 31**);

   vi. ground rules hearings (**Chapter 10**, **Recommendation 32**);

   vii. specialist lists (discussed in **Chapter 4**);

   viii. measures to reduce delays (such as case management programs) (discussed in **Chapter 4**); and

   ix. measures to support the delivery of victim impact statements (**Chapter 10**, **Recommendation 34**);

b. research and evaluation projects regarding the practical operation of relevant legislative provisions, including provisions that address:

   i. access to a complainant's personal, sensitive, or confidential information (including access to a complainant's sexual assault counselling communications) (**Chapter 12**, **Recommendation 43**) and the involvement of an independent legal representative to represent complainants in applications for access to that information (**Chapter 6**, **Recommendation 9**);

   ii. the cross-examination of complainants by unrepresented accused persons (**Chapter 12**, **Recommendation 42**);

   iii. the admissibility and use of complaint evidence and distress evidence (discussed in **Chapter 19**);

   iv. the admissibility and use of tendency and coincidence evidence (discussed in **Chapter 19**);

   v. the availability and use of interpreters (**Chapter 10**, **Recommendation 33**);

   vi. the admissibility and use of sexual history and sexual reputation evidence (**Chapter 12**, **Recommendation 44–45**); and

   vii. elections for juryless trials in sexual assault trials (discussed in **Chapter 19**);

c. research and evaluation projects regarding:

   i. the impact of vicarious trauma upon trial judges who preside over sexual assault matters, including measures to address that trauma (discussed in **Chapter 4**);

   ii. affirmative models of consent (to be conducted by the Australian Institute of Criminology) (**Chapter 11**, **Recommendations 35–37**);

   iii. section 41 of the *Evidence Act 1995* (Cth) and whether it is reducing improper questioning and increasing appropriate judicial intervention (as commissioned by the Standing Council of Attorneys-General) (**Chapter 12**, **Recommendation 41**); and

   iv. the practical operation of confidential communication and sexual assault counselling privilege provisions (including the adequacy of current subpoena processes) and identification of areas of improvement (as commissioned by the Standing Council of Attorneys-General);

d. nationally standardised and ongoing data collection and statistical analysis on sexual violence matters in the courts (**Chapter 5**, **Recommendation 5**);

e. the involvement of the courts in consultations to formulate a Model Jury Directions Bill addressing myths and misconceptions in sexual violence trials (**Chapter 8**, **Recommendation 21**);

f. the analysis of annual reports tabled in parliament regarding feedback made by complainants of sexual violence about their experiences of the criminal justice process for the information of judicial officers (**Chapter 5**, **Recommendation 6**);

g. court responses to requests from Attorneys-General for feedback on proposed legislative amendments relating to sexual violence laws and court processes; and

h. court responses to requests from law reform bodies about sexual violence.

The National Judicial College of Australia should convene national meetings of the research officers, nominated judicial officers from each of the trial courts, and representatives of the Judicial Commission of New South Wales and the Judicial College of Victoria, to ensure effective research planning, judicial education delivery, information sharing, and best practice identification.

Note: The National Judicial College of Australia and its research team may conduct some of the research and evaluation projects listed above, but will primarily support other research organisations or individuals to conduct those projects, including by being their principal point of contact with the courts and, for example, facilitating requests to the court for access to information (including access to data, transcripts, and hearings).

4.86 As discussed above, one of the challenges of improving the criminal justice system response to sexual violence in Australia is the existence of nine different criminal justice systems. The concept of wiping the slate clean and starting over again with one national system might have some instant appeal. However, aside from constitutional complexities, a blunt instrument approach to harmonisation has its risks. They include 'levelling-down' for the sake of consensus and undermining the constructive role that competitive federalism can play in promoting law reform.[110]

4.87 The benefit of separate criminal justice jurisdictions lies in the opportunity to trial and evaluate different responses and interventions. That benefit can be realised only if there is a collective goal to identify best practices through nationally

110 Guzyal Hill and Jonathan Crowe, 'Harmonising Sexual Consent Law in Australia: Goals, Risks and Challenges' (2023) 49(3) *Monash University Law Review* 1.

co-ordinated monitoring, evaluation, and communication between jurisdictions. This is recognised in the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault, under which one of the three priority areas is 'supporting research and greater collaboration to identify best practices, and to ensure actions are supported by a sound and robust evidence base'.[111]

4.88 Priority 3.1 of the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault is for a 'shared evidence base'.[112] The aim is to

> strengthen national datasets, share research and learnings … and commission academic research where needed to build a shared evidence base that informs best practice policy development, implementation, and evaluation.[113]

4.89 The Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault recognises that data and research 'are crucial to … evaluating the efficacy of responses and interventions, and informing future initiatives to improve criminal justice systems'.[114]

4.90 A critical element of effective reform is the evaluation of implemented reform measures and development of an evidence base for future initiatives. This was also a theme in what the ALRC heard as part of this Inquiry.

4.91 Many of the recommendations in the following eight chapters can be implemented and evaluated through the trial courts in each jurisdiction (the District Courts in New South Wales, Queensland South Australia, and Western Australia; the County Court in Victoria; and the Supreme Courts in the Australian Capital Territory, Northern Territory and Tasmania). Those trial courts are responsible for hearing most sexual offence matters in their respective jurisdiction. However, trial courts are not set up or funded to evaluate or even co-ordinate the evaluation of their own projects. Research and evaluation also tends to occur randomly depending upon a researcher's area of interest, availability, approvals, access to courts, and funding. For example, as part of a PhD, a researcher is evaluating the Priority Programme for sexual assault matters in the District Court of South Australia that will also be of great assistance to the court. A research and evaluation project is not something that many trial courts have the time or opportunity to guide. During this Inquiry the ALRC heard about measures courts have implemented in relation to sexual violence matters. These should be the subject of evaluation and shared learning.

4.92 **Recommendation 3** requires collaboration between researchers and the courts to build a shared evidence base, identify best practices, and inform future reforms. The placement of a researcher in each trial court will enable that researcher to become familiar with the law, processes, and work of that court. The employment of each researcher within a national research team will avoid a siloed approach

111 Attorney-General's Department (Cth) (n 6) 7.
112 Ibid 11.
113 Ibid.
114 Ibid.

and foster shared research and learnings. The ongoing placement and work of the researcher in each trial court must occur in consultation with the head of jurisdiction, prioritise a collaborative approach with the courts, and be nationally co-ordinated.

4.93 The National Judicial College of Australia (NJCA) is well-placed to co-ordinate the collaborative building of a shared evidence base through the trial courts in Australia and deliver the learning benefits back to the courts in the form of national judicial education, training, and programs. The NJCA was established in 2002 to design, develop, and deliver judicial education and training programs for judicial officers across Australia.[115] Part of the work of the Senior Researcher is to produce judicial resources for existing and new programs which includes the development of the *Managing Sexual Assault Hearing* judges' toolkit. In performing its current functions, the NJCA

> strives to foster and encourage powerful and transformative jurisdictional, cross-jurisdictional and trans-jurisdictional discourse, critical to the furtherance of public confidence in an Australian judiciary that understands the people that come before it.[116]

4.94 Co-ordination of **Recommendation 3** by the NJCA would promote investment in the process by the judiciary and a dynamic practice-based approach to judicial education and training about sexual violence and justice responses. The NJCA's placement of research officers in each court would enable courts to become more directly involved in the projects. It would foster an improved and more productive working relationship between the courts and researchers. Judicial officers would be less likely to dismiss academic research because of a belief that it is divorced from the practical reality of their everyday work. Researchers would have greater access to the practical realities of court operations and be less likely to regard the experiences of judicial officers as merely anecdotal.

4.95 Oversight by the NJCA would enable courts to be continuously informed about each other's practices (including through judicial education and training) and researchers to conduct evaluations that directly support the identification of best practices to be implemented in the courts. There are mutual benefits to bringing together the different perspectives of courts and researchers, enhancing collegiality and providing an opportunity to develop strong working relationships with a common goal of achieving practical improvements to the experiences of complainants of sexual violence in the courts.

4.96 It is not envisaged that the NJCA would itself conduct all the research and evaluation projects described in **Recommendation 3**. The national structure set up through the NJCA in each court would be a focal point for research organisations (such as the Australasian Institute of Judicial Administration, the Australian Institute of Criminology, the Australian Institute of Family Studies, the NSW Bureau of Crime Statistics and Research, the Crime Statistics Agency in Victoria and universities)

115 National Judicial College of Australia, 'About Us – NJCA' <www.njca.com.au/about-us/>.
116 Ibid.

and individual academics/researchers interested in conducting the evaluation and research projects. The NJCA would facilitate those projects by, for example, streamlining project requests to the courts for access to information (including data, transcripts, and hearings), monitor the progress of the projects, and collate the outcomes to construct a shared evidence base.

4.97 The NJCA should also convene national meetings of the research officers, nominated judicial officers from each of the trial courts, and representatives of the Judicial Commission of NSW and the Judicial College of Victoria to ensure effective research planning, information sharing, best practice identification, and judicial education delivery. The Judicial Commission of NSW and the Judicial College of Victoria have strong and long-standing working relationships with the courts in their respective jurisdictions for the delivery of education, training, and up to date research to judicial officers. Their contribution to the development of a shared evidence base is a key part of this recommendation because of the opportunity to build on existing resources, knowledge, skills, and established working relationships with the NSW and Victorian courts.

4.98 The implementation of **Recommendation 3** requires significant investment in the NJCA in terms of resourcing and development. Historically the NJCA has been underfunded to deliver national education to judicial officers and largely reliant upon voluntary involvement of judicial officers to contribute to education design and delivery. This recommendation involves the development of the NJCA as a body capable of bridging the gap between academic research and the practice of the courts. There are significant benefits to be realised in nationally co-ordinated collaboration between academic researchers, the courts, and researchers that include the identification of evidence-based best practices and development of future initiatives to strengthen criminal justice responses to sexual violence.

4.99 The NJCA should be funded to undertake the role of national co-ordinator that will include staffing and managing a research team; placing a researcher in each of the trial courts; establishing and maintaining collaborative communication with heads of jurisdiction; building a strong research culture through the involvement of established research organisations and individual researchers; facilitating and monitoring research and evaluation projects; convening national meetings and building a shared evidence base from which learnings can be identified and shared including via judicial education, training, and programs.

# 5. Accountability: Attrition

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## Introduction

5.1 Attrition rates are an important yardstick for measuring how the criminal justice system responds to reports of sexual violence. The term 'attrition' describes when reports of sexual violence do not progress to charge after a report is made to the police (because the complainant decides not to proceed, or the police decide not to investigate or lay charges) or are discontinued before trial (because the police or prosecution decide not to continue with the charges or the complainant decides not to give evidence).

5.2 A reasonable level of attrition is to be expected for all reports of crime, including reports of sexual violence. It is widely acknowledged that attrition levels for sexual offences are high,[1] with studies showing a consistent substantial rate of

1 Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crimes against Adult Victims: Barriers to Justice* (Research Paper No 611, Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice, November 2020) 1; Nina Hudson et al, *Understanding Adult Sexual Assault Matters: Insights from Research and Practice: An Educational Resource for the Justice Sector* (Australian Institute of Family Studies, Attorney-General's Department (Cth), 2024) 41; With You We Can, *Submission 132*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Centre for Women's Safety and Wellbeing, *Submission 193*; Rape and Sexual Assault Research and Advocacy, *Submission 206*; Full Stop Australia, *Submission 214*.

attrition during the police investigation stage.[2] Available data shows that up to 85% of sexual violence reports made to police do not progress to charge.[3] National data shows attrition levels for reports of sexual violence at the police investigation stage are higher than for other crimes.[4] The statistics are indicative of an unreasonable level of attrition; they point to a problem that needs to be investigated. They also tend to reflect and support what people who made reports of sexual violence told us about negative experiences during the police investigation stage (**Chapter 2**). These negative experiences can drive attrition and cause retraumatisation.

5.3 The high attrition rates in the Australian Capital Territory prompted a review of sexual violence matters reported to the police

> to better understand the issues preventing cases reported to ACT Policing progressing to the point of charge and most importantly, propose recommendations to the ACT Government to better ensure victim-survivors experiences of the criminal justice system are timely, respectful and responsive and perpetrators are held to account.[5]

5.4 It was considered that 'consistently low charge rates in the ACT over a number of years demonstrate the systemic change needed'.[6] A deep-dive review into all cases which did not progress to charge within an 18-month period found that the 'predominant reason for low charge rates in the ACT is a failure to properly and appropriately investigate sexual offences'. This was explained through an analysis of six themes, patterns, and trends and described as having 'profound consequences for victim-survivors who have sought to report to ACT Policing'.[7]

5.5 The high attrition rates in each jurisdiction need to be investigated to identify reasons for the attrition and develop strategies to address any systemic failures. In this way, the criminal justice system can take responsibility for unreasonable attrition and the negative experiences of complainants of sexual violence. The system exists to protect the safety of the community, which includes protecting people from sexual violence, which is a serious and prevalent crime. The criminal justice system is failing to fulfil its protective purpose when it has reached the stage where a consistently high proportion of people who report sexual violence to the police do not progress through the system and it cannot explain why. The low engagement and participation

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2 Rachael Burgin and Jacqui Tassone, *Beyond Reasonable Doubt? Understanding Police Attrition of Reported Sexual Offences in the ACT* (Swinburne University of Technology, 2024) 8; Sarah Bright et al, *Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update* (Crime Statistics Agency, 2021) 6; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, 2020) 14–15 [2.6]–[2.7].

3 Brigitte Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System* (Bureau Brief No 170, NSW Bureau of Crime Statistics and Research, May 2024) 1.

4 See 'national data' discussion below.

5 Christine Nixon and Karen Fryar, *Responding to Recommendation 15 of the Listen. Take Action to Prevent, Believe and Heal Report (2021): Sexual Assault (Police) Review Report* (2024) 18.

6 Ibid.

7 Ibid 22.

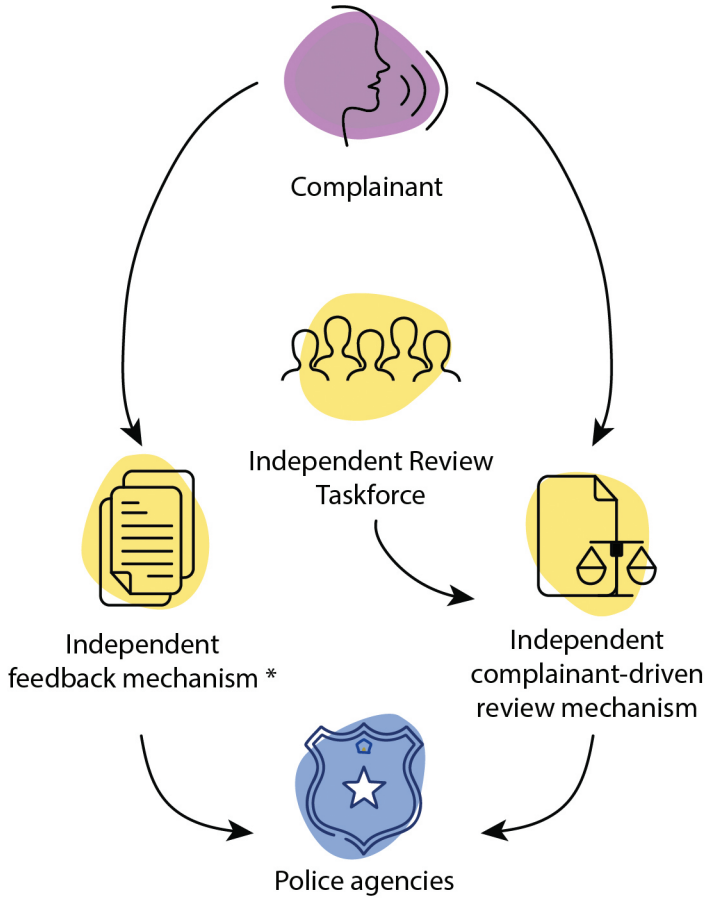
in the criminal justice system of people who have experienced sexual violence has been characterised as the 'decriminalisation of rape'.[8]

5.6 In this chapter the ALRC recommends a deep dive into attrition levels at the police investigation stage in each jurisdiction (other than the Australian Capital Territory) for reports of sexual violence, and other measures to monitor attrition and the reasons for it. The ALRC recommends that state and territory governments establish:

- an independent taskforce to:
  - undertake an initial review of all sexual violence matters that were reported to police but not progressed to charge (based on the Australian Capital Territory model, which also incorporated the ability of complainants to self-refer cases which were finalised without charge);
  - develop a model for an independent, ongoing, system-driven review mechanism for all sexual violence matters that are reported to police but not progressed to charge; and
  - develop a model for an independent, ongoing complainant-initiated review mechanism to enable a complainant to seek a review of the police decision not to progress to charge in their case.
- mechanisms for recording attrition data at all stages of the criminal justice process; and
- an independent mechanism for complainants of sexual violence to provide feedback on their experience of the criminal justice system to an independent body, to drive system reform.

8 Victims' Commissioner for England and Wales, *2019/2020 Annual Report* (2020) 16 <victimscommissioner.org.uk/document/annual-report-of-the-victims-commissioner-2019-to-2020/>.

***Figure 5.1: Measures recommended to enhance accountability for reports of sexual violence to police***




* the recommended independent feedback mechanism would accept feedback in relation to all elements of the criminal justice system, not just police agencies.

## High attrition rates at police investigation stage

5.7 If a crime is reported to the police, the process that follows is broadly one of investigation, assessment, and filing or laying charges. For reports of any crime, a reasonable level of attrition is to be expected during the police investigation stage for a multitude of reasons, including people withdrawing their report; unco-operative or unreliable witnesses; contradictory forensic evidence, an inability to identify or locate the accused person; or insufficient evidence to prove the crime alleged.

5.8 As outlined below, available data shows that for reports of sexual violence, the highest level of attrition is at the police investigation stage. National data shows that other reported crimes have much lower levels of attrition at that stage.

### *New South Wales*

5.9 In May 2024, the New South Wales Bureau of Crime Statistics and Research reported that in 2018, the largest point of attrition in the New South Wales criminal justice process was during the police investigation stage, with no legal action taken against an accused person in 85% of reported sexual assault incidents. In that year, 5,869 incidents of sexual assault, relating to 6,088 complainants, were reported to New South Wales police.[9] Only 872 incidents of sexual assault, relating to 918 complainants, proceeded to charges. The 85% attrition rate was consistent across contemporary child, historic child, and adult sexual assaults.[10]

5.10 The New South Wales police data contained limited information detailing the reasons for the attrition. For 75% of the reports where no charges were laid, no reason was recorded. For the remaining 25% where reasons were recorded, 48% of those recorded that the 'victim was unwilling', 40% recorded that there was 'insufficient evidence', 4% recorded that the accused person was a child under the age of criminal responsibility, 4% recorded 'withdrawn complaint', and 3% recorded the accused person was deceased.[11]

### *Victoria*

5.11 In September 2021, the Victorian Crime Statistics Agency reported that in the two years from 1 July 2015 to 30 June 2017, attrition for sexual offence incidents was highest during the police investigation stage, with a total of 75% of all incidents reported not progressing to charge.[12] This figure was calculated from the 14,910 incidents (which involved at least one sexual offence) reported to police in those two years. A total of 11,182 incidents (75%) had dropped out of the criminal justice process by the end of the police investigation stage. Only 2,222 incidents (25%) proceeded to charge.[13]

### *National data*

5.12 Apart from New South Wales and Victoria, data on attrition levels for sexual violence matters is not thoroughly or consistently collected and published in all jurisdictions or at a national level. The Australian Bureau of Statistics annual national data does give some insight into sexual assault attrition rates, for investigation outcomes at the point of 30 days after report.[14] Most sexual assault

9 Gilbert (n 3) 12.
10 Ibid 1.
11 Ibid 12–13.
12 Bright et al (n 2) 16.
13 Ibid.
14 The ALRC recognises that this dataset is limited in that it does not provide a complete picture of the attrition rate for sexual assault matters. It is used as an indication only.

police investigations are not finalised by that stage. For those matters which were finalised at that stage, the attrition level (that is, matters which did not proceed to charge) ranges from 44.1% in 2010, to 51.29% by 2015, and 59.62% by 2020.[15] In the Australian Capital Territory, for example, the attrition rate was 72.5% to 75.8% in 2018 to 2020.[16]

5.13 The national data for other reported crimes does not indicate comparable attrition levels for matters which are finalised at the same point in the policing stage.[17] For example, in 2021, for other crimes which were finalised within 30 days of reporting to police, there were significantly lower proportions of matters not proceeding to charge. The national attrition rate at 30 days for murder was 8%, for attempted murder was 3%, for manslaughter was 0%, for kidnapping/abduction was 13%, for armed robbery was 11%, for unarmed robbery was 16%, for blackmail/extortion was 31.5%, for unlawful entry with intent was 14.5%, for motor vehicle theft was 23%, and for other theft was 32%.[18]

## The high attrition rates reflect what complainants say

5.14 The high attrition rates reflect and support what complainants of sexual violence say. For decades, past inquiries have heard complainants speak about their feelings of disempowerment, disrespect, and retraumatisation by police responses to their reports.[19] In **Chapter 2** we consider what we were told about negative experiences at the police investigation stage. Some complainants told us how police responses were informed by myths and misconceptions or led them to making a complaint:

> I then had to speak to police …This entire experience was terrifying to me as a child. The interview was recorded, which I didn't want it to be. I didn't know what the purpose of the recording was or if it would be rewatched or shared with other people I didn't know. Police asked me what I was wearing, and how long my skirt was. They made me feel stupid and like I was making a big deal out of nothing. When they called me months later to say they chose not to press charges they said that next time I should do something differently like scream to make sure it didn't happen, as if it was my fault.[20]

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15 These percentages have been calculated by the ALRC based on ABS data: Australian Bureau of Statistics, 'Recorded Crime — Victims' Table 5 <www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/2023/1.%20Victims%20of%20crime%2C%20Australia%20%28Tables%201%20to%208%29.xlsx>.

16 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 67.

17 It should be noted that the ABS did not collect data for attrition in domestic or family violence offences.

18 These percentages have been calculated by the ALRC based on ABS data: Australian Bureau of Statistics (n 15) Table 5.

19 See, eg, Victims of Crime Commissioner (Vic), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (2023) 178–188; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 49–50; Burgin and Tassone (n 2) 45–52.

20 D Villafaña, *Submission 182*.

> The detective assigned to my case treated me with disrespect and contempt from the moment I first met him. His conduct made it extremely difficult for me to trust him as the police informant on my case, and after many incidents of unacceptable behaviour from this detective, I eventually had to make a complaint about him to Professional Standards Command.[21]

5.15 Some members of the Expert Advisory Group told the ALRC that people who have experienced sexual violence often feel that police treat them differently because of the nature of their report, and that police are not always following guidelines or upholding victims' rights. Some Expert Advisory Group members considered that the lack of accountability for this is a serious problem in investigating reports of sexual violence. An organisation run by one member submitted that people have 'experienced poor treatment, a lack of interest, bias and victim blaming, and inaction' from police reporting, which can lead to 're-traumatisation, mental health impacts, self-harm and suicide.'[22]

5.16 Submissions also highlighted that people who have experienced sexual violence seek accountability from the system, noting the lack of available avenues to do so and the absence of consequences.[23]

## Implementing accountability measures

5.17 The ALRC considers that the consistently high attrition rates for reports of sexual violence at the policing stage require measures to be implemented to investigate the reasons for the attrition; identify systemic problems; and improve complainants' experiences following their reports to police. The measures are to drive system accountability and rebuild the integrity of the system's responses to sexual violence. The United Nations Office on Drugs and Crime (UNODC) describes police accountability as requiring a 'conglomerate of processes' involving complementary internal and external accountability mechanisms.[24]

5.18 A police decision not to investigate or lay charges can be highly distressing for a person who has already overcome significant barriers to making a report. In 2021–22, the Victorian Victims of Crime Commissioner found an emerging trend of complainants feeling dissatisfied with investigatory and prosecutorial decisions, which people said were not transparent or accountable.[25]

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21 C Oddie, *Submission 145*.
22 Violet Co Legal & Consulting, *Submission 220*.
23 J Crous, *Submission 141*; Not published, *Submission 155*.
24 United Nations Office on Drugs and Crime, *Handbook on Police Accountability, Oversight and Integrity* (2011) 12 <www.unodc.org/documents/justice-and-prison-reform/crimeprevention/PoliceAccountability_Oversight_and_Integrity_10-57991_Ebook.pdf>.
25 Victims of Crime Commissioner (Vic) (n 19) 318.

5.19 Increasing accountability has important benefits for the community and policing, including:

- improving the quality of police responses and decision-making;
- meeting the justice needs of people who have experienced sexual violence, including the needs for information, a voice, and accountability (see **Chapter 2**);
- enhancing public trust in police (this is particularly important for marginalised communities (see **Chapter 3**); and
- beginning to restore faith in the response of the criminal justice system to sexual violence.

5.20 Other inquiries have recognised that an independent review mechanism for police decisions in sexual violence cases is an important accountability measure.[26] This has also been extensively discussed by academics.[27] In recommending an independent, multi-disciplinary review panel, the Victorian Law Reform Commission (VLRC) Sexual Offences Report considered that reviews conducted by people from outside a police agency 'allow for the testing of assumptions that might be held by the police and prosecution due to their organisational cultures and practices'.[28] There is broad support for the review mechanism to be independent. Submissions supported the VLRC model,[29] or similar independent review panels.[30]

5.21 Accountability measures for attrition levels at the police investigation stage have been implemented in Australia and overseas. Those measures include the Australian Capital Territory Sexual Assault (Police) Review (the ACT Review); the Violence Against Women Advocate Case Review Project in Canada; and Operation Soteria in the United Kingdom.

## The Australian Capital Territory review of attrition rates

5.22 In December 2021, the Sexual Assault Prevention and Response Program Steering Committee, in response to the attrition rates in the Australian Capital Territory at the police investigation stage (outlined above), recommended an independent multi-disciplinary taskforce to review all sexual offence cases reported

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26 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) rec 66; Victims of Crime Commissioner (Vic) (n 19) rec 4; Women's Safety and Justice Taskforce (n 19) rec 50.

27 Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making' (2018) 58(3) *British Journal of Criminology* 550, 557; Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Studies in Victims and Victimology, Palgrave Macmillan UK, 2016) 81 <link.springer.com/10.1057/978-1-137-51000-6>.

28 Victorian Law Reform Commission (n 26) 383 [17.172].

29 Centre for Women's Safety and Wellbeing, *Submission 193*; Sexual Assault Services Victoria, *Submission 203*.

30 Women's Legal Service NSW, *Submission 205*; Federation of Community Legal Centres (Vic), *Submission 213*; Full Stop Australia, *Submission 214*.

to ACT Policing from 1 July 2020 that were not progressed to charge, including those deemed unfounded, uncleared,[31] or withdrawn.[32]

5.23 The ACT Review was established and led by Professor Christine Nixon AO APM and Karen Fryar AM with findings published in March 2024. The ACT Review obtained data from ACT Policing, which showed that, as a percentage of sexual offence reports to the police from 2010 to 2021, over 70% did not proceed to charge in the majority of years up to 2017, and over 80% did not proceed to charge from 2018 onwards.[33] The intent of the ACT Review was to 'better understand the issues preventing cases reported to ACT Policing progressing to the point of charge'.[34] The ACT Review had two co-chairs, an oversight committee, and a review team.[35]

5.24 The ACT Review analysed 672 sexual offence cases reported between 1 July 2020 and 31 December 2021 that were not progressed to charge, and 12 self-referrals following an invitation to any complainant to self-refer their case from any time period into the ACT Review.

5.25 The data was analysed in two stages. One stage (the Investigation Case Analysis) was conducted by the Australian Capital Territory Office of the Director of Public Prosecutions and supported by ACT Policing.[36] After analysis of the 684 cases, 30 cases (4%) were recommended for immediate re-investigation, and 182 cases (27%) were identified for possible further action.[37] A funded multidisciplinary best-practice approach was recommended to achieve proper re-investigation of those matters.[38]

5.26 The other stage (the Process Review) was conducted by an independent researcher, Dr Rachael Burgin, with a research team, to identify patterns and trends, consult with some complainants, and review legislation and policies.[39]

5.27 The ACT Review found that 'the predominant reason for low charge rates in the Australian Capital Territory is a failure to properly and appropriately investigate sexual offences'.[40] It identified the following six key themes underpinning high attrition rates and made 28 recommendations to address them:

- 'A lack of victim-centred responses, including poor communication, limited access to or choice of appropriate supports and services, and a lack of focus on upholding victims' rights':[41]

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31 'Uncleared' refers to reports that were not cleared by any of the other means listed in this paragraph.
32 Sexual Assault Prevention and Response Steering Committee (ACT) (n 16) rec 15.
33 Nixon and Fryar (n 5) 18.
34 Ibid.
35 Ibid 60.
36 Ibid 71.
37 Ibid 25.
38 Ibid rec 1.
39 Ibid 20.
40 Ibid 22.
41 Ibid.

Reasons for withdrawal by complainants included lack of confidence that the case would be investigated; 'loss of contact' with the complainant; being presented by police with outcomes over which they had 'little or no input'; and feeling 'pressured to withdraw' or feeling they had 'responsibility to make the decision about whether to proceed'.[42]

- The influence of misconceptions about sexual violence:

  There was 'limited understanding' among police of responses to trauma, including the 'freeze' response.[43] The sexual history and reputation of complainants played a role in police decision-making, as did 'risk-taking' behaviours.[44] Police incorrectly believed that complainants aged 14 and above could have consented.[45]

- Sexual violence reports were subject to limited investigation:

  More than one third of adult sexual assault cases and almost half child sexual assault matters were closed with no police action recorded on the Police Real-time Online Management Information System (PROMIS).[46] Lack of understanding about the nature of the offence, or a belief that there was 'insufficient evidence', meant that general duty officers did not seek to refer the case to the specialist team.[47] Over one quarter of adult sexual assault cases and one third of child sexual assault reports were closed following the 'meet and greet' conversation with complainants, reflecting that the takeaway message received by complainants was that their report was unlikely to progress.[48] ACT Policing were incorrectly requiring complainants to record their police statements as the initial step before investigating.[49] In 87% of cases, there was an identifiable offender, yet just 17% were approached by police for adult sexual assault reports, and 15% for child sexual assault reports.[50]

- Limited information management systems impacting on 'consistent and accurate record keeping':[51]

  There were 'vast differences' in recording practices, including in the application of clearance types, and a failure to note a comprehensive narrative of the investigation in PROMIS.[52]

- Limited capability and capacity to respond:

  Pressure on resources was observed to cause delays in investigative processes and waitlists for counselling and support service.[53] There was

42 Ibid 27.
43 Ibid 36.
44 Ibid 37.
45 Ibid 38.
46 Ibid 40.
47 Ibid 41.
48 Ibid 42–3.
49 Ibid 43.
50 Ibid 46.
51 Ibid 22.
52 Ibid 51–2.
53 Ibid 53.

Inconsistent and incorrect application of the legal test to charge, relying on 'proof beyond reasonable doubt' and the need for corroborative evidence.[54]

- Inadequate collaboration, transparency, governance, and accountability measures.[55]

## The Violence Against Women Advocate Case Review Model

5.28 The Violence Against Women Advocate Case Review (VACR) model was developed by frontline violence against women advocates in Canada as an oversight mechanism to address high case attrition in police sexual assault investigations.

5.29 As part of this Inquiry, the ALRC consulted with model co-creator Sunny Marriner, who has led the implementation of VACR in Canadian jurisdictions. VACR has been endorsed by the Canadian Association of Chiefs of Police, and operates at the municipal policing level in some Canadian provinces. The review model involves a team of independent frontline sexual violence subject matter experts from survivor-based organisations in the policed community conducting quarterly reviews of all sexual violence cases concluded in the previous three months that did not proceed to charge. Review organisations must bring frontline sexual violence expertise, an intersectional lens, be engaged in supporting people who have experienced sexual violence as their core work, and have organisational mandates that include a commitment to driving systemic change in responding to sexual violence. Reviewers have full access to the entire case file and work independently. Reviewers list their feedback or concerns on each file, collate and analyse the data to capture issues and positive practices, and then communicate findings to the jurisdiction's senior police leadership at the conclusion of the review, a process that takes approximately three days.

5.30 Reviews identify issues both on a systemic and individual case level. When reviewers return the following quarter, senior leadership provide an update on how recommendations have been addressed, including investigations that were reopened or have received additional investigative action. All reviews under the VACR are conducted onsite, and the data captured remains confidential in accordance with applicable privacy legislation. VACR teams advocate for public reporting of high-level anonymised findings through annual updates to police agency boards and this is in place in some jurisdictions.

5.31 The VACR model is a system driven review of attrition. It is specifically designed to remove from complainants the burden, responsibility, and associated trauma of driving or advocating for oversight of problematic police decisions. The primary goal is to conduct a real-time review on behalf of current complainants by providing oversight of all sexual violence cases not progressed to charge. The secondary goal of the review is to improve the system's response to future complainants by identifying and addressing factors that contribute to high levels of attrition.

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54 Ibid.
55 Ibid 22.

## Operation Soteria

5.32 In 2019, the findings of the London Rape Review showed 86% attrition of rape reports in London at the police investigation stage.[56] This led to Project Bluestone as a pilot 'designed to bring together academic experts and operational policing to explore ways of improving, indeed transforming, the police response to rape and other sexual offences'.[57] Pathfinder Project Bluestone was the first practical application of the approach, delivered in Avon and Somerset.

5.33 In June 2021, Operation Soteria Bluestone was launched by the Home Office in the United Kingdom as part of the End-to-End Rape Review.[58] Two co-academic leads and a small central team established a network of individual researchers with mixed disciplinary skills and expertise. The Year 1 work programme involved deep dives into four police agencies from September 2021 to August 2022.

5.34 The Year 1 programme included an analysis of all police records of sexual offences reported between 2018 and 2020/21 which had recorded outcomes resulting in no charges.[59] Researchers were given access to thousands of police files related to sexual offending, with the aim of transforming the police response to rape and addressing systemic factors that underpin attrition at the police investigation stage.[60]

5.35 The Year 1 Report delivered significant and practical findings, emphasising that the work to improve the criminal justice system 'must be done in partnership, bringing together the police, government, justice agencies, the voluntary sector and communities'.[61]

5.36 During the second year, a national operating model for the investigation of rape and other sexual offences was developed.[62]

5.37 In July 2023, Operation Soteria was rolled out across 43 police agencies in England and Wales.

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56 Betsy Stanko, *Operation Soteria Bluestone: Year 1 Report 2021–2022* (769) 14 [12].
57 Ibid 15 [16].
58 Ibid 19 [24].
59 Ibid 4.
60 Ibid 12 [7]; Sexual Assault Services Victoria, *Submission 203*.
61 Stanko (n 56) 3.
62 Ibid 8.

# Taskforce to investigate attrition at the police stage

**Recommendation 4**

State and territory governments should each establish and fund an independent taskforce within 12 months of this Report to:

a. undertake an initial review of all reports of sexual violence made to police within the prior 12 to 18 months that did not progress to charge and publish a report of its findings and recommendations (modelled largely on the Sexual Assault (Police) Review in the Australian Capital Territory);

b. develop a model for an independent, ongoing review mechanism for all reports of sexual violence that the police do not progress to charge that publishes reports at appropriate intervals (and the model to be implemented within 24 months of the report published by the initial taskforce); and

c. develop a model for an independent, ongoing, and complainant-initiated review mechanism to enable complainants of sexual violence to seek a review of the police decision not to progress to charge in their case (and the model to be implemented within 24 months of the report published by the initial taskforce).

The taskforce and models should include specialist and diverse sector expertise (including sexual violence services, representatives from Aboriginal Controlled Community Organisations, and researchers with a mixed set of disciplinary skills and expertise) as part of its membership.

The initial review will, among other things: identify systemic reasons for attrition and make recommendations to address those reasons; identify and recommend any individual cases to be further investigated; and accept self-referrals from complainants whose matters did not proceed to charge at any time up to the commencement of the review.

The ongoing review mechanism, for all reports of sexual violence that the police do not progress to charge, will operate as a rolling review of all reports of sexual violence which the police do not progress to charge; monitor attrition levels, systemic reasons for attrition and compliance with recommendations; make ongoing recommendations to address systemic issues; and recommend any specific cases be re-investigated.

Governments should ensure information-sharing frameworks are in place to enable the reviews and respond to the initial review report and ongoing reports released by that review mechanism.

## An initial independent review taskforce in each jurisdiction

5.38 The three accountability measures discussed above (the ACT Review, the VACR, and Operation Soteria) have produced granular and insightful results. Their deep-dive approach to case reviews is essential for understanding why attrition rates are so high and developing ways to address the problems. They are practical examples of how independent reviewers and police can cooperate to analyse policing practices with a common goal of addressing complex issues surrounding attrition of reports of sexual violence.

5.39 The first part of our recommendation is for all jurisdictions (apart from the Australian Capital Territory) to conduct an initial review.

5.40 The ALRC recommends that each jurisdiction establish an independent taskforce to conduct an initial review of reports of sexual violence that did not progress to charge at the police investigation stage. This is based largely on the Australian Capital Territory model, with emphasis on the independence and expertise of the reviewers, which drives VACR and Operation Soteria. The initial review should:

- identify and review reports of sexual violence made to police which did not progress to charge in the 12 to 18 months prior to the commencement of the review. Each jurisdiction will need to select an appropriate time frame within the scope of 12 to 18 months. The selected timeframe will depend on the size of the jurisdiction and the need to ensure that a sufficient number of cases are reviewed to enable data saturation to be reached.[63] Larger jurisdictions may need to review matters which did not progress to charge for the prior 12 months whereas small jurisdictions may need to cover 18 months. The review must take a deep dive approach by conducting an investigation case analysis and process review, as described in the Australian Capital Territory Review;
- invite self-referrals from complainants (who may seek legal advice and advocacy from an independent lawyer) whose matters were finalised without proceeding to charge at any time up to the commencement date of the review;
- identify policing practices which are driving high levels of attrition,
- identify issues particularly affecting people who are disproportionately reflected in sexual violence statistics;
- consider any limitations on information management systems which impact consistent and accurate record keeping;
- recommend further investigation of specific cases, as required;
- make recommendations to address attrition levels;
- develop and recommend the model for the ongoing review mechanism for reports of sexual violence which do not progress to charge; and
- publish a report of its findings.

63 Nixon and Fryar (n 5) 64.

5.41 The taskforce must be independent and work collaboratively with the police. Membership of the taskforce is crucial for its effective operation. We agree that the goal is not simply for other justice agencies to 'check the work' of the police.[64] There are benefits to a membership model with specialist and diverse sector expertise, such as a hybrid of the memberships of the ACT Review, VACR (frontline sexual assault service workers) and Operation Soteria (researchers with a mixed set of disciplinary skills and expertise), and First Nations representation.

5.42 The ALRC acknowledges that the ACT Review occurred in a smaller jurisdiction and that reviews in larger jurisdictions, such as New South Wales and Victoria, are likely to be more resource intensive. However, all jurisdictions have unacceptably high attrition levels and the integrity of the criminal justice system's response to sexual violence requires the problem to be addressed. The United Kingdom police jurisdictions undertook a review on a scale which is larger than that which would likely be required in New South Wales and Victoria.

5.43 Governments should ensure information sharing frameworks are in place to enable the initial review. Preserving confidentiality, security, and privacy of information is essential. Legislative changes may be required. The ACT Review addressed those issues, including relevant security and ethics clearances.[65]

5.44 The recommended initial taskforce review should release its findings in a public report. The government in each jurisdiction must then be required to respond to that report.

## An ongoing independent review taskforce in each jurisdiction

5.45 It is critical that the recommended initial taskforce review in each jurisdiction is not a one-off review. The ALRC received submissions advocating for ongoing independent review of police decisions to address high rates of attrition.[66]

5.46 The ACT Review recommended an ongoing 'Standing Sexual Assault Review Mechanism'.[67] We agree this promotes real-time accountability for policing and minimises the need for any further one-off costly reviews. It ensures that recommendations of the initial review are implemented, system accountability continues, and culture changes. This is critical to rebuilding community trust in the criminal justice system.[68] For individual matters, this will be a timely review of the police decision not to charge.

5.47 VACR and Operation Soteria are strong examples of the value of an ongoing independent review mechanism.

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64 Ibid 110.
65 Ibid 20.
66 Sexual Assault Services Victoria, *Submission 203*; Full Stop Australia, *Submission 214*.
67 Nixon and Fryar (n 5) rec 11.
68 Ibid 48.

5.48 The ALRC anticipates that during the initial review, the taskforce in each jurisdiction will be well placed to develop a model for an independent system-driven ongoing review mechanism for reports of sexual violence that the police do not progress to charge. The ongoing review mechanism will be system driven in the sense that it does not require a complainant to initiate the process. The reports which did not progress to charge will be automatically reviewed. The ongoing independent review mechanism should be implemented within 12 months of the independent taskforce report.

5.49 As a baseline, we consider the ongoing independent review taskforce must:

- be independent from policing agencies;
- include specialist and diverse sector expertise as part of its membership;
- accept self-referrals from complainants (and their legal advisers) whose reports of sexual violence were finalised without progressing to charge, enabling complainants to advocate their position and receive a timely response;
- promote transparency, monitoring, and accountability in its work;
- continue to monitor reasons for attrition and make recommendations to senior police command as part of an ongoing collaborative working relationship;
- recommend that specific cases be further investigated;
- include appropriate training for all members, and vicarious trauma support;
- be supported by a legislative structure to enable information sharing, ensure security and confidentiality around that information, and protect the privacy of complainants; and
- report as required to the Attorney-General and relevant ministers.

5.50 In their annual reports, each police agency should respond to the work and recommendations of the ongoing independent review taskforce in their jurisdiction.

5.51 An ongoing independent review of all police decisions not to lay charges for reports of sexual violence ensures that systemic issues will be identified without placing the burden on complainants to lodge a review request. If the review process determines that a matter warrants further investigation, a trauma-informed approach must be adopted when informing the complainant, including not proceeding if that is the complainant's preference.[69]

5.52 This ongoing review mechanism is not intended to see the police progress every report of sexual violence through the system. That would simply drive problems up the line and increase attrition levels at the prosecution stage. As set out above, a reasonable level of attrition is to be expected for all reports of crime at the police investigation stage, including reports of sexual violence. The ongoing independent review taskforce is intended to ensure the system can account for the attrition levels and, in doing so, ensure appropriate decision making, improve the quality of investigations and experiences of complainants, develop best practice police

69 Sexual Assault Services Victoria, *Submission 203*.

responses to complainants of sexual violence, and change culture. It is expected that the attrition rate for sexual offences will decrease as a result of the ongoing review mechanism's operation in each state and territory.

5.53 The ALRC agrees with the UNODC view that a modern, democratic police agency is one that accepts civilian oversight to make it 'responsive and accountable to the needs of the public'.[70] The ongoing independent review taskforce will require a high level of collegiality, trust, and collaboration between police and reviewers. The process should not be seen as a criticism of police, but rather a way of restoring faith in the system's responses to sexual violence, through a mutual commitment to address this complex and persistent issue. During consultations, police agencies did not oppose this type of recommendation or scrutiny, but raised the issue of resourcing.

## A model for an independent review mechanism driven by complainants

5.54 In **Chapter 6**, we recommend that victims' charters should include the right for a complainant of sexual violence to seek a review of police decisions not to investigate or charge.

5.55 In **Recommendation 4**, we recommend that the independent taskforce develop a model to give effect to that right of review, and that the model is implemented within 12 months. The model is for a complainant-driven review process to complement the system-driven review process. We consider that the independent taskforce will be best placed to design a review mechanism which is suitable in each jurisdiction. It may be that it is a mechanism that could be incorporated within the functions of the system driven ongoing review mechanism. Or, it may need to be separate.

5.56 The Expert Advisory Group stressed the importance of the independence of police review mechanisms. This model is crucial to promote the rights and justice needs of complainants of sexual violence, including information, agency, and accountability. Some complainants may wish to take control of the review process themselves by seeking accountability of the police decision not to proceed to charge. Alternatively, a complainant may obtain independent legal advice and assistance to refer their matter for review and to advocate their concerns. This mechanism will enable them to have their own voices heard by advocating their position and obtaining a direct response.

5.57 The model should ensure that a complainant can exercise this right of review in real time.

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70 United Nations Office on Drugs and Crime (n 24) 8.

## Review of prosecution decisions

5.58 This Report recommends directing focus and significant resources on the police investigation stage for now, noting that available attrition data shows that the highest rates of attrition are at that stage.

5.59 The Child Sexual Abuse Royal Commission Criminal Justice Report noted that one of the key issues in establishing an independent review panel for the Offices of the Directors of Public Prosecutions is to ensure that the mechanism does not compromise prosecutorial independence.[71] Prosecutorial independence includes independence from both the political branches of government and from the police agencies. The same issue was recognised by the Women's Safety and Justice Taskforce.[72]

5.60 In **Chapter 6**, we recommend that victims' charters provide that complainants have the right to internally review a prosecution decision to discontinue the prosecution. Most Offices of the Directors of Public Prosecutions have a system of internal review which operates at the request of the complainant. Victoria has a discontinuance review framework that operates automatically, rather than at the complainant's request.

5.61 While we have not made a formal recommendation to this effect, the ALRC suggests that Offices of the Directors of Public Prosecutions that do not have a complainant-initiated right to review should establish one, and all Offices of the Directors of Public Prosecutions should consider an automatic review model for prosecutions which are discontinued.

5.62 For future reference, it should be noted that the United Kingdom's Crown Prosecution Service (CPS) has recently devised a model which incorporates external review of prosecution decisions. The CPS' National Operating Model for Adult Rape Prosecutions includes a No Further Action Scrutiny Process. That Process involves the CPS holding at least quarterly Rape Scrutiny Panels with multiple agency representation (including academics and voluntary sector specialist organisations), periodic national panels (involving external experts), and evaluating and publishing their rape scrutiny insights annually.[73]

71 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III–VI* (2017) 368–9.

72 Women's Safety and Justice Taskforce (n 19) 243.

73 Crown Prosecution Service, 'The National Operating Model for Adult Rape Prosecution' <www.cps.gov.uk/publication/national-operating-model-adult-rape-prosecution>.

# Collection of attrition data

**Recommendation 5**

The Standing Council of Attorneys-General should commission the Australian Bureau of Statistics, or other appropriate body, to devise a nationally consistent data collection framework for reports of sexual violence as they progress through the criminal justice system, and provide appropriate funding and support to police agencies, Offices of the Directors of Public Prosecutions, and courts to implement that framework to obtain nationally consistent data regarding sexual violence cases that:

a. are reported to the police;

b. do not proceed to charge;

c. are charged but otherwise discontinued by police before referral to Offices of the Directors of Public Prosecutions;

d. are discontinued by Offices of the Directors of Public Prosecutions;

e. are resolved by guilty plea;

f. are the subject of convictions following trial;

g. are the subject of acquittals following trial; and

h. are the subject of an appeal against conviction, including the outcomes of those appeals.

The data should:

i. dentify the reasons for reports not proceeding to charge or discontinuance of proceedings;

j. capture timeframes on the progression of the reports through the system;

k. include demographic information about groups who are disproportionately reflected in sexual violence statistics; and

l. be published online annually.

## The need to collect and publish data on attrition

5.63 Data on sexual offences as they progress through the justice system is not consistently collected or published across the country. Accurate and consistent data is critical for providing an evidence-base for ongoing reform measures.

5.64 The United Nations Committee on the Elimination of Discrimination against Women recommends that all parties establish a system to collect, analyse, and

publish statistical data on complaints of gender-based violence.[74] The CEDAW Committee considers this to be fundamental to 'enable the identification of failures in protection and serve to improve and further develop preventive measures'.[75]

5.65 Multiple independent reviews have called for strengthened collection and reporting of data. For example:

- In 2021, the Victorian Law Reform Commission made recommendations for improving data collection as part of the Victorian Government's Sexual Assault Strategy and for the publication of a regular qualitative review and attrition study by the Crime Statistics Agency, that includes police and prosecution records.[76]
- In 2021, the House of Representatives Standing Committee on Social Policy and Legal Affairs recommended that the Australian Government direct and appropriately resource the Australian Institute of Health and Welfare to develop a national data collection of police, justice, and legal service contact with people who have experienced family, domestic, and sexual violence.[77]
- In 2022, the Women's Safety and Justice Taskforce recommended the Queensland Government design and implement a mechanism for improved data integration across the criminal justice system, to better inform the identification of trends and issues and strategic policy, practice, and service delivery improvements.[78]
- In 2022, the Sexual Assault Prevention and Response Steering Committee recommended the Australian Capital Territory Government commission a Sexual Violence Data Collection Framework.[79]
- In 2023, the Law Reform Commission of Western Australia recommended that the WA Government develop and implement a plan for the collection of data, about complainants' experiences of each stage of the justice system, which can be used to guide future legal reform.[80]

5.66 Submissions and feedback received in this Inquiry supported enhanced data collection.[81] The Tasmanian Family and Domestic Violence Alliance Steering Committee submitted that 'there is a lack of transparency — including hidden data

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74 Committee on the Elimination of Discrimination against Women, *General Recommendation No 35: Gender-based violence against women, updating general recommendation No. 19*, UN Doc CEDAW/C/GC/35 (26 July 2017) 17 [34](b).

75 Ibid.

76 Victorian Law Reform Commission (n 26) recs 14, 17.

77 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Family, Domestic and Sexual Violence* (2021) rec 10.

78 Women's Safety and Justice Taskforce (n 19) rec 180.

79 Sexual Assault Prevention and Response Steering Committee (ACT) (n 16) rec 10.

80 The Law Reform Commission of Western Australia, *Project 113: Sexual Offences* (Final Report, 2023) recs 133–134.

81 ACON, *Submission 76*; Family and Sexual Violence Alliance Steering Committee (Tas), *Submission 202*; Women's Legal Service NSW, *Submission 205*; Law Council of Australia, *Submission 215*.

and information — relating to the justice system's treatment of sexual violence'.[82] The Expert Advisory Group emphasised the importance of collecting sufficiently granular data.

5.67 The National Plan to End Violence against Women and Children 2022–2032 recognises that 'data is crucial to understanding the problem of gender-based violence, measuring our progress towards ending it, and informing decisions about funding, service design and delivery'.[83] Priority 3, Initiative 3.1 in the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–2027 includes strengthening national datasets to build a shared evidence base that informs best practice policy development, implementation, and evaluation.

5.68 **Recommendation 5** calls for a nationally consistent data collection framework for sexual violence cases at various stages of the criminal justice process. Governments should then fund and support police agencies, Offices of the Directors of Public Prosecutions and courts to implement the framework, with a focus on attrition.

5.69 Consistent data collection across jurisdictions enables the evaluation of reforms in each jurisdiction to identify best practices, with a view to those best practices being adopted in other jurisdictions. Data should be disaggregated by demographic information about the complainant so that it shows if a person is from a group that is disproportionately reflected in sexual violence statistics, and comply with privacy regulations. As submitted by ACON, this will enable measures addressing attrition to take a nuanced approach.[84]

5.70 Some police agencies and Offices of the Directors of Public Prosecutions referred, in consultations for this Inquiry, to the difficulties of recording reasons for decisions in a way that is sufficiently generic to enable data collection, but also sufficiently granular to ensure the data is meaningful. Another issue raised was legal professional privilege attaching to reasons for prosecution decisions. It is important that the framework addresses those issues. For example, ACT Policing advised the ALRC that it is trialling 'a customised measure to assist in providing more detailed data in relation to sexual offence investigations.'[85]

5.71 The ALRC recognises the significant administrative burden on police agencies, Offices of the Directors of Public Prosecutions, and courts to collect data. They need to be supported and funded to implement the national framework and collect ongoing data.

5.72 Data should be published annually by crime statistics agencies, departments of justice, or organisations themselves. Using this data, ongoing national studies of

82 Family and Sexual Violence Alliance Steering Committee (Tas), *Submission 202*.
83 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 26.
84 ACON, *Submission 76*.
85 ACT Policing, *Submission 163*.

attrition in sexual violence cases by organisations such as the Australian Institute of Criminology, Australian Institute of Family Studies, or the Australian Institute of Health and Welfare, will assist to highlight areas for reform.

# A feedback mechanism

**Recommendation 6**

Each state and territory government should establish and fund an independent centralised feedback mechanism for complainants of sexual violence to report their experience of the criminal justice system.

The methods and formats (such as questionnaire development) for obtaining feedback should be considered in consultation with relevant stakeholders including Victims of Crime Commissioners, sexual violence service providers (including from Aboriginal Controlled Community Organisations), and people who have experienced sexual violence.

The mechanism should be managed by Victims of Crime Commissioners, or an equivalent independent body.

Victims of Crime Commissioners (or an equivalent independent body) should collate feedback with a view to identifying systemic issues in the criminal justice system and making recommendations to be published in an annual report which must be tabled in parliament.

Each state or territory government should be required to respond to the annual report in their jurisdiction within a prescribed period.

## Complainants' experiences of the criminal justice process

5.73 In addition to accurate and consistent data collection for reports of sexual violence, the voices of people who have experienced the criminal justice system are essential to identifying system failures and monitoring implemented reforms.

5.74 A feedback mechanism was established for the reforms implemented by Operation Soteria (see above). An online survey mechanism was developed to enable complainants of sexual violence to share their experiences of police responses during the implementation of Operation Soteria reforms. Almost 5,000

responses were collated in two reports covering the period from January 2023 to June 2024.[86] The surveys were:

> a tool for learning for police agencies, and of measuring, understanding, and reflecting on survivor experiences with a view to acting on these findings to improve how police interact with survivors, and investigate what happened to them.[87]

5.75 The data was described as 'extensive and rich'.[88]

## A model to receive and respond to feedback

5.76 The ALRC is recommending an ongoing independent mechanism for collating the experiences of complainants of sexual violence about their (both positive and negative) engagement with the criminal justice process. Complainants' voices about their experiences of the system will be heard and fed back to inform the system, which is then required to respond.

5.77 The ALRC recommends a feedback mechanism be established in each jurisdiction, rather than the establishment of one national feedback mechanism. This will enable each jurisdiction to hear and collate complainants' experiences of the processes in their jurisdiction. That data will become an invaluable evidence base for evaluating processes and reforms specific to that jurisdiction.

5.78 The data collection and analysis in each jurisdiction will have significant benefit on a national level. National research projects should be funded to compare and consider the annual reports from each jurisdiction with a view to identifying what is working well and what is not working well in each jurisdiction. This will enable best practices to be identified which may then inform and be adopted in other jurisdictions.

5.79 The feedback mechanism in each jurisdiction should be managed by an independent body, such as Victims of Crime Commissioners. There are Victims of Crime Commissioners in almost all states and territories (except the Northern Territory and Tasmania) but their status, roles and functions vary. Many are independent statutory officers (the Australian Capital Territory, Queensland, South Australia, and Victoria),[89] but two are not independent. Of those two, one has some statutory

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86 Katrin Hohl et al, *Operation Soteria Bluestone: Rape and Sexual Assault Survivors' Experience of the Police in England and Wales. Survey Report I: January – June 2023* (City, University of London, September 2023) (*'Rape and Sexual Assault Survivors' Experience of the Police in England and Wales. Survey Report I'*); Katrin Hohl et al, *Operation Soteria: Rape and Sexual Assault Survivors' Experience of the Police in England and Wales Survey Report II: July 2023 – June 2024* (City, St Georges, University of London, 13 November 2024) 1 (*'Operation Soteria Rape and Sexual Assault Survivors' Experience of the Police in England and Wales Survey Report II'*).

87 Hohl et al, 'Operation Soteria Rape and Sexual Assault Survivors' Experience of the Police in England and Wales Survey Report II' (n 86) 15.

88 Ibid.

89 *Human Rights Commission Act 2005* (ACT) s 27C(1); *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) ss 7, 11; *Victims of Crime Commissioner Act 2015* (Vic) ss 9, 13.

powers but is located within a justice agency (New South Wales),[90] and another is a non-statutory commissioner within a justice agency (Western Australia).[91]

5.80 The feedback methods and formats (including questionnaire development) should be developed in consultation with stakeholders, including Victims of Crime Commissioners, frontline sexual assault service providers (including from Aboriginal Controlled Community Organisations), and people with lived experience of sexual violence. The online survey mechanism used by Operation Soteria was developed over the course of 18 months 'with the generous input of survivors, those supporting and advocating for survivors, officers, and academic colleagues'.[92] An early version of the survey was piloted and cognitive testing of the questionnaire occurred.

5.81 The Victims of Crime Commissioners (or equivalent independent body) should be funded to manage the feedback process which includes responsibility for collating and analysing the responses, identifying systemic issues, and making recommendations in an annual report to be tabled in parliament. Depending on their capabilities, the Victims of Crime Commissioners (or equivalent independent bodies) may conduct the collation and analysis in-house, or be funded to engage an academic researcher or similar organisation to do so.

5.82 The government in each jurisdiction must formally respond to the annual reports within a prescribed time frame.

## Support for an independent complaints mechanism

5.83 Our recommended feedback mechanism is not a real-time complaints mechanism. It is a mechanism for complainants of sexual violence to feed their experience of the system back to an independent body to drive system reform.

5.84 Most Victims of Crime Commissioners (except Western Australia) have a system for receiving complaints from all victims of crime. Their powers vary. In New South Wales and Victoria, the Victims of Crime Commissioner may recommend that an agency apologise.[93] In Victoria, the Victims of Crime Commissioner may recommend agencies apologise, provide an explanation, facilitate a meeting, undertake additional training, change a policy, or provide information.[94] The Queensland and South Australian Victims of Crime Commissioners have a broad range of powers.[95] Victims of Crime Commissioners are not able to require or direct organisations such as police

90 *Victims Rights and Support Act 2013* (NSW) ss 8(1), 12.
91 Department of Justice (WA), 'Commissioner for Victims of Crime' <www.wa.gov.au/organisation/department-of-justice/commissioner-victims-of-crime>.
92 Hohl et al, 'Operation Soteria Rape and Sexual Assault Survivors' Experience of the Police in England and Wales Survey Report II' (n 86) 5.
93 *Victims Rights and Support Act 2013* (NSW) s 10(f); *Victims of Crime Commissioner Act 2015* (Vic) s 25J(1)(a).
94 *Victims of Crime Commissioner Act 2015* (Vic) s 25J.
95 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) s 10; *Victims of Crime Act 2001* (SA) ss 16, 16A.

agencies to take action. During consultations, we heard support from several Victims of Crime Commissioners for a formalised feedback process.

5.85 The Missing and Murdered First Nations Women and Children inquiry directs attention upon the discrimination that First Nations women experience when engaging with the police.[96] The report emphasises the need for an independent body to investigate complaints about police conduct because of the lack of trust in police to investigate themselves.[97] The Expert Advisory Group included strong advocates for an independent complaint review mechanism at the police investigation stage:

> victim/survivors who make reports of sexual violence to police should be able to make complaints regarding police conduct and/or the handling of police investigations to a fully independent police complaints mechanism – that also provides remedy.[98]

5.86 The ALRC considers the ongoing review mechanism in **Recommendation 4** goes some way to responding to the Expert Advisory Group's call for complainants of sexual violence to have access to an independent, real-time review mechanism at the police investigation stage. However, it is not a mechanism for receiving and reviewing complaints about general police conduct.

5.87 The ALRC is unable to make a recommendation on a real-time, fully independent complaints or police complaints mechanism for complainants of sexual violence, without further research and consultation. This has not been possible within the timeframe for this Inquiry.

96 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Missing and Murdered First Nations Women and Children* (2024) 173 [7.21].
97 Ibid 175 [7.31].
98 Violet Co Legal & Consulting, *Submission 220*.

# 6. Accountability: Victims' Rights and Criminal Justice Independent Legal Services

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## Introduction

6.1 In this chapter, we focus on increasing complainant participation and engagement in the criminal justice system by promoting a culture of respect for their rights. We recommend that complainants of sexual violence have access to independent legal advice and to targeted legal representation, to provide them with legal knowledge, support, and advocacy throughout the process, and give them an ability to drive real-time system accountability.

6.2 In the criminal justice system, complainants are not parties to proceedings. Police and Offices of the Directors of Public Prosecutions agencies decide whether to file or lay charges, and prosecute the case on behalf of the state. While the prosecution considers the complainant's interests, they do not represent the

complainant. This process can be a surprise to many complainants.[1] One person who has experienced sexual violence recalled being told 'it wasn't really about me, and that I was a "passenger in the plane that they were flying", so to just sit back and try and relax'.[2]

6.3 This sense of alienation and disregard for complainants can result in 'secondary victimisation', where the complainant feels harmed by the way the justice system treats them.[3]

6.4 While complainants are not a party to the proceedings, this does not equate to an absence of rights and interests in those proceedings. Complainants of sexual violence are not 'just' a witness; they have rights and interests set out in victims' charters, which are legislated in most jurisdictions. The rights contained in victims' charters seek to recognise that complainants are an integral part of the criminal justice system, not mere bystanders.[4] The rights and interests of complainants include the rights to information about the process, to be treated with dignity, and to have their privacy respected and protected.

6.5 Victims' charters should be regarded as setting standards for the way criminal justice system agencies respond to all victims of crime, including victims of sexual violence. The ALRC recommends that all victims' charters should be enacted in legislation and contain a consistent key set of rights for complainants of sexual violence.

6.6 A criticism of victims' charters is that the rights they set out are not legally enforceable. The ALRC considers that creating a culture of respect for the rights and interests set out in victims' charters is an important part of rebuilding the integrity of the criminal justice system response to sexual violence. This can be done by implementing measures which drive accountability for their non-observance.

6.7 In **Chapter 5**, which discusses attrition, we make recommendations for a range of high-level, system-driven accountability measures. In this chapter, we focus on a significant real-time, complainant-driven accountability measure. The ALRC recommends that complainants of sexual violence who decide to report to police should have access to independent legal advice throughout the criminal justice process, with targeted legal independent representation. If implemented, the ALRC considers this measure would improve a complainant's experience, help create a culture of compliance with victims' rights, and counter barriers to participation and ongoing engagement. As one submission expressed:

> Innovations through [Independent Legal Representation] can provide a roadmap to victim advocacy, support and representation, nationwide, to empower and

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1 Judith Lewis Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence against Women* 571, 581.

2 Name withheld, *Submission 6*.

3 Michael O'Connell, 'Victims' Rights: Integrating Victims in Criminal Proceedings' [2017] *Australasian Institute of Judicial Administration* 1, 1.

4 Ibid.

> protect victim-survivors of sexual violence, and address the ongoing social and cultural problems that prevent victim-survivors from engaging with the criminal justice system, or that lead to their attrition in the process once they have already engaged.[5]

6.8 As noted in **Chapter 3**, which discusses informed and supported engagement by complainants with the justice system, Independent Legal Advice Services (ILS) are an important measure to address under-engagement with the justice system by people who have experienced sexual violence. In **Chapter 3**, we discuss the early advice stage of ILS. In this chapter, we discuss the criminal justice stage, which is necessary to support the sustained engagement of complainants. The ALRC received submissions which recognised independent legal advice and representation for complainants as a positive step towards improving the criminal justice response to complainants.[6] One stakeholder said that 'it could be the factor that finally makes a difference'.[7]

# Victims' rights

## What is a victims' charter?

6.9 In recent decades there has been greater recognition of people affected by crime.[8] In the 1970s, advocates highlighted how poorly complainants were treated in the justice process, particularly complainants of sexual violence.[9] This led to international recognition of the harms done to victims of crime. In 1985 the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (UN Victims of Crime Declaration),[10] which outlines rights and interests that govern the treatment of victims.

6.10 Australian jurisdictions have recognised victims' rights by developing charters, declarations, or guidelines in relation to victims of crime, and by enacting reforms aimed at implementing these rights (see below). In 2013, Attorneys-General from every Australian jurisdiction endorsed the National Framework for Rights and

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5 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*.

6 Name withheld, *Submission 12*; Name withheld, *Submission 14*; Not published, *Submission 31*; Victim Support ACT, *Submission 112*; BPW Australia, *Submission 127*; S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*; With You We Can, *Submission 132*; Not published, *Submission 137*; Not published, *Submission 151*; Name withheld, *Submission 162*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Not published, *Submission 171*; National Women's Safety Alliance, *Submission 184*; Centre for Women's Safety and Wellbeing, *Submission 193*; Law Council of Australia, *Submission 215*.

7 With You We Can, *Submission 132*.

8 Tyrone Kirchengast, Mary Iliadis and Michael O'Connell, 'Development of the Office of Commissioner of Victims' Rights as an Appropriate Response to Improving the Experiences of Victims in the Justice System: Integrity, Access and Justice for Victims of Crime' (2019) 45(1) *Monash University Law Review* 1, 9–10.

9 Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Routledge, 2020) 43–4.

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

Services for Victims of Crime 2013–2016, which was intended to support a national approach to victims' rights and services.[11]

6.11 Broadly, victims' charters govern the treatment of victims of crime by public agencies and officials, and in some cases, by non-government agencies and contractors funded by the state to provide services to victims. The charters may impose specific obligations on the police and the prosecution. Victims' charters set out the rights or entitlements of victims to participate in certain processes, and to have input into certain decisions that affect them. Victims' charters are intended to create cultural change to shift the way justice system agencies treat victims of crime.[12]

## Legislated victims' charters

**Recommendation 7**

The Commonwealth, and those states and territories that do not currently have a legislated victims' charter, should enact such a charter.

6.12 The Commonwealth, and those states and territories that do not currently have a legislated victims' charter, should enact such a charter. In most jurisdictions, victims' charters are enacted in legislation.[13] However the Northern Territory's *Victims of Crime Rights and Services Act 2006* (NT) empowers 'the Minister to issue a Charter of Victims Rights',[14] though the charter itself is not enacted in legislation; the Tasmanian 'Charter of Rights of Victims of Crime' is not a legislated charter,[15] and nor is the National Framework for Rights and Services for Victims of Crime.[16]

6.13 The ALRC recommends that victims' charters should be enacted in legislation in all jurisdictions.

6.14 Several submissions supported strengthening victims' charters.[17] The Queensland Sexual Assault Network submitted that 'victim-survivor's needs and human rights need to be elevated and brought more into view in the criminal justice

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11 Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime 2013–2016* (2014).

12 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2016) 56 [4.76].

13 *Victims of Crime Act 1994* (ACT); *Victims Rights and Support Act 2013* (NSW); *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1; *Victims of Crime Act 2001* (SA); *Victims' Charter Act 2006* (Vic); *Victims of Crime Act 1994* (WA).

14 *Victims of Crime Rights and Services Act 2006* (NT) s 30.

15 Department of Justice (Tas), 'Charter of Rights for Victims of Crime' <www.justice.tas.gov.au/victims/victims-rights/charter-of-victims-rights>.

16 Standing Council on Law and Justice (n 11).

17 Relationships Australia, *Submission 21*; B McKimmie, F Nitschke, G Ribeiro, and A Thompson, *Submission 125*; Knowmore, *Submission 187*.

system',[18] and the ALRC considers that legislation is the appropriate means by which to do so. The ALRC agrees with the Victorian Law Reform Commission's (VLRC) view that legislating victims' rights 'would enshrine in the law our expectations of how [complainants] should be treated' and 'send a powerful signal to the public and to the agencies required to comply'.[19]

## A consistent set of key rights in victims' charters

**Recommendation 8**

The Standing Council of Attorneys-General should commission an appropriately funded national review of victims' charters to identify and consolidate a key set of rights for victims of sexual violence which should then be legislated in victims' charters in the Commonwealth and all states and territories. Subject to the review, the key set of rights should include:

a. Where police decide not to investigate or lay charges:
   i. the right to be informed by police about the right to seek reasons, and a review, of the decision;
   ii. the right to reasons for the decision; and
   iii. the right to a review of the decision.

b. Where prosecutors decide to withdraw or otherwise discontinue all charges in relation to a prosecution:
   i. the right to be informed by prosecutors about the right to seek reasons, and a review, of the decision;
   ii. the right to reasons for the decision; and
   iii. the right to review of the decision.

c. The right to request that the person interviewing them is of a particular gender, and to have that request accommodated where possible.

d. The right to be informed of, and make use of, available flexible evidence measures and flexible arrangements for giving a police statement, evidence, and a victim impact statement.

e. The right to be informed of alternative justice options (including civil justice, restorative justice, conciliation, and victims of crime schemes).

f. The right to interpretation and translation, including for First Nations people who speak a language other than English.

18 Queensland Sexual Assault Network, *Submission 70*.

19 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 84 [4.138].

Victims' charters should also require justice agencies to take into account, refrain from discriminating on the basis of, and be responsive to, the particular needs of groups who are disproportionately reflected in sexual violence statistics.

## Victims' rights vary among states and territories

6.15 The rights recognised in victims' charters vary across each state and territory.[20]

6.16 Key elements of the UN Victims of Crime Declaration have been implemented in all victims' charters, which provide that:

- victims are to be treated with courtesy, respect, and dignity;[21]
- victims are to receive information about the investigation, prosecution, and court processes associated with their case, including information about their role as a witness at trial;[22] and
- victims' privacy is to be respected and protected.[23]

6.17 Other key victims' rights recognised in many jurisdictions are for victims to:

- have their views presented and considered at sentencing, either through a victim impact statement or a harm statement;[24]
- be given clear, timely, and consistent information about support services that are available to them;[25]
- have minimal contact with the accused;[26]

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20 For a discussion of the primary differences between the various victims' charters in Australia, see generally Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II* (2017) 199–200.

21 *Victims of Crime Act 1994* (ACT) s 14C(1); *Victims Rights and Support Act 2013* (NSW) s 6.1; Northern Territory Government, *Northern Territory Charter of Victims' Rights* 4; *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1 pt 1 div 1 cl 1; *Victims of Crime Act 2001* (SA) s 6(a); Department of Justice (Tas) (n 15); *Victims' Charter Act 2006* (Vic) s 6(1); *Victims of Crime Act 1994* (WA) sch 1 cl 1.

22 *Victims of Crime Act 1994* (ACT) ss 15D, 15E, 16A, 16C, 16D, 16E, 16F, 16G, 16L, 16M; *Victims Rights and Support Act 2013* (NSW) ss 6.4, 6.5, 6.6, 6.12, 6.13; Northern Territory Government (n 21) 5–6; *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1 pt 1 div 2; *Victims of Crime Act 2001* (SA) ss 8, 9; Department of Justice (Tas) (n 15); *Victims' Charter Act 2006* (Vic) ss 8, 9, 9A, 10, 11; *Victims of Crime Act 1994* (WA) sch 1 cls 6–8.

23 *Victims of Crime Act 1994* (ACT) s 14F; *Victims Rights and Support Act 2013* (NSW) s 6.8; Northern Territory Government (n 21) 5; *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1 pt 1 div 1 cl 2; *Victims of Crime Act 2001* (SA) s 14; Department of Justice (Tas) (n 15); *Victims' Charter Act 2006* (Vic) s 14; *Victims of Crime Act 1994* (WA) sch 1 cl 5.

24 Except for Western Australia.

25 Except for Tasmania and Western Australia.

26 Except for the Northern Territory, South Australia, and Western Australia.

- be registered on a victims register and receive information about the offender, if they choose;[27] and
- have the prosecutor seek their views, or at least inform them, before making certain decisions (such as substantially modifying charges, discontinuing charges, accepting a plea, opposing an application for sentence indication, appealing a sentence, appealing an acquittal).[28]

6.18 Beyond these similarities, some rights that are key to complainants of sexual violence are only reflected in some jurisdictions' charters:

- Only the Australian Capital Territory, South Australia, and Victoria specifically provide that justice agencies should take into account, and be responsive to, the particular needs of victims.
- Only the Australian Capital Territory, New South Wales, and Northern Territory charters include the entitlement to financial assistance.
- Only Tasmania and Victoria provide the right to receive reasons for certain prosecution decisions.
- Only the Australian Capital Territory provides the right to be given aids and adjustments to enable full participation in the administration of justice.

## A national review of victims' rights

6.19 The ALRC received submissions which highlighted the importance of victims' rights to people who have experienced sexual violence, and the need for rights to be strengthened.[29]

6.20 In Queensland, the Women's Safety and Justice Taskforce recommended the review of the Queensland Charter of Victims' Rights to consider whether rights should be added or expanded.[30] Such a review was considered to be timely 'given the growing evidence base about the prevalence and issues related to violence against women and the impacts of trauma'.[31] Some jurisdictions currently have a review underway or are required by legislation to conduct a review periodically,[32] but those reviews concern the rights of all victims, rather than focusing on the rights of people who have experienced sexual violence.

6.21 The ALRC recommends that the Standing Council of Attorneys-General commission a national review of victims' charters to develop a key set of rights for complainants of sexual violence. The review should consolidate rights and obligations

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27 Except for New South Wales, South Australia, and Tasmania.
28 Except for New South Wales, the Northern Territory, and Tasmania.
29 S Filmer, *Submission 30*; P Brennan, *Submission 87*; D Erlich and N Meyer, *Submission 115*; Knowmore, *Submission 187*; Women's Legal Service NSW, *Submission 205*.
30 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) rec 19.
31 Ibid 139.
32 For example, the Victorian Victims of Crime Commissioner will report on a victims' charter review in September 2025. The Australian Capital Territory must review the operation of its victims' charter after the end of its third year of operation.

that already exist across the different jurisdictions. It should also involve a comparative review of victims' charters to identify a key set of rights for people who have experienced sexual violence. The ALRC recommends that, subject to the review, the key set of rights should include the rights identified in **Recommendation 8**, discussed below.

6.22 The national review should consider jurisdictions in which people who have experienced sexual violence have access to 'enhanced rights' (England and Wales),[33] and 'specific rights' (Scotland).[34]

6.23 Once identified, the key set of rights should be incorporated in victims' charters in the Commonwealth and all states and territories to ensure consistent and equal protection for complainants of sexual violence, regardless of where they are located.

### *Rights associated with trauma-informed practice*

6.24 Providing complainants of sexual violence with information and choice is a fundamental part of trauma-informed practice that supports early and sustained engagement with the justice system. This Report makes a range of recommendations that are intended to improve access to information and choice. The ALRC considers that many of these should be reflected in the key set of rights for complainants of sexual violence, including:

- the right to early legal information and advice about justice options (**Recommendation 1**), including alternative justice options (**Recommendation 58**), civil justice options (**Recommendations 46–55**), and financial assistance schemes (**Recommendations 56–57**);
- the right to request that the police investigative interviewer is of a particular gender, and to have that request accommodated where possible (**Recommendation 26**);
- the right to be informed of, and make use of, available flexible evidence measures and a victim impact statement (**Recommendation 34**); and
- the right to a trained interpreter (**Recommendation 33**).

### *Rights which reflect diverse needs*

6.25 As discussed in **Chapter 3**, people who are disproportionately reflected in sexual violence statistics may experience difficulties accessing and participating in the justice system. Criminal justice system agencies must ensure their engagement is consistent with Australia's international law obligations to respect the rights of diverse groups,[35] and that their conduct is not discriminatory. This obligation should be reflected in Commonwealth, state and territory victims' charters.

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33 Ministry of Justice (UK), *Code of Practice for Victims of Crime in England and Wales* (2020) 10–11.

34 The Scottish Government, *Victims' Code for Scotland* (2015) 6.

35 As set out in the *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities, International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women*, and the *Declaration on the Rights of Indigenous Peoples*.

6.26 Some submissions to this Inquiry supported greater recognition in victims' charters of the diverse needs of people who have experienced sexual violence. For example, the National Aboriginal and Torres Strait Islander Women's Alliance told the ALRC that charters should include culturally informed obligations in relation to First Nations people who have experienced sexual violence.[36] Some stakeholders noted that victims' charters lacked cultural context.[37] Others noted that victims' charters should respect the rights of older people.[38]

6.27 Victims' charters in some jurisdictions already require criminal justice system agencies to take into account, and be responsive to, people's particular needs relating to their identity or characteristics.[39] The ALRC considers this to be a key right which should be consistent across Australia. Section 14C of the *Victims of Crime Act 1994* (ACT) could be used as a guide. The review could also consider s 7A(b) of the *Victims' Charter Act 2006* (Vic), which requires agencies to take into account, and be responsive to, the particular needs of people living in rural and remote locations.

### *Improving accountability for victims' rights*

6.28 Victims' charters are intended to guide justice system agencies' contact with victims. They are not legally enforceable.[40] Charters do not contain mechanisms to ensure justice agencies comply with them,[41] and rights are non-justiciable,[42] meaning that individuals cannot bring an action if they believe that their rights have been breached. Many charters explicitly state that the rights they contain do not amount to legal rights.[43]

6.29 Many submissions questioned the utility of victims' rights if they cannot be enforced.[44] Victims' rights are widely considered to be frequently 'evaded, circumvented and resisted' because there are no legal consequences for non-compliance.[45] One stakeholder described this as a 'significant and fundamental shortcoming',[46] and

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36 National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*.
37 Not published, *Submission 67*.
38 Australian Centre for Evidence Based Aged Care, *Submission 101*.
39 *Victims of Crime Act 1994* (ACT) s 14C; Northern Territory Government (n 21) 4; *Victims of Crime Act 2001* (SA) s 6; *Victims' Charter Act 2006* (Vic) ss 6(2) and 7A(b).
40 See, eg, *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) s 42(a); *Victims' Charter Act 2006* (Vic) s 1(a); Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 20) 200; Victims of Crime Commissioner (Vic), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (November 2023) 174.
41 With minor exceptions: in South Australia the *Correctional Services Act 1988* (SA) sets a maximum penalty of $10,000 for officials who breach confidentiality with respect to certain information. In other states, the substance of a right is also required elsewhere in legislation.
42 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*.
43 *Victims of Crime Act 1994* (ACT) s 18K; *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) s 43; *Victims of Crime Act 2001* (SA) s 5; *Victims' Charter Act 2006* (Vic) s 22; *Victims of Crime Act 1994* (WA) s 3(3).
44 A Williams, *Submission 19*; P Brennan, *Submission 87*; Name withheld, *Submission 95*.
45 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 20) 224.
46 Knowmore, *Submission 187*.

some Victims of Crime Commissioners flagged it as a longstanding issue. The ALRC heard from people who felt their rights were not respected:[47]

> I do not believe I was given adequate explanation as to what was happening, why, and how it would impact my statement. I do not feel as though I was treated with courtesy, compassion, and respect throughout the process.[48]
>
> There are no rights for victims, there is no privacy and there is no support or financial assistance for the amount of time taken out of your work'.[49]
>
> I learned early on that I was completely alone, had no rights, and no one would stand up for me.[50]

6.30 It is important to acknowledge the work undertaken by agencies to develop policies that promote victims' rights, but there is a clear need to improve compliance.[51] Implementing accountability measures can improve compliance with victims' charters and bring about necessary culture change. In addition to other accountability measures discussed in **Chapter 5**, the ALRC considers that the availability of independent legal advice, advocacy, and targeted representation for complainants of sexual violence (see below) is a significant accountability measure which will strengthen respect for victims' rights.

6.31 Police decisions not to investigate, or to lay or file charges, and prosecution decisions to withdraw or otherwise discontinue all charges, are significant decisions which can be retraumatising for complainants of sexual violence, especially when the decisions are not explained. Some Offices of the Directors of Public Prosecutions have already developed policies on providing reasons for decisions upon request.[52] The set of key rights to be included in all victims' charters should include rights which promote complainant understanding of, and system accountability for, those significant decisions.

6.32 The right to request reasons for those decisions is an important step in promoting understanding and accountability. The extent to which this right will be exercised by complainants will vary. Some complainants may not wish to request reasons while others may seek legal advice and advocacy to make a request. The communication of requested reasons must be trauma-informed. One Victims of Crime Commissioner told the ALRC that the trauma of sexual violence can cause some complainants to have difficulty retaining information. As such, written reasons may be appropriate in some circumstances.

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47 See, eg, Name withheld, *Submission 162*.
48 Name withheld, *Submission 160*.
49 H Robbins, *Submission 139*.
50 Name withheld, *Submission 14*.
51 Relationships Australia, *Submission 21*; WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Knowmore, *Submission 187*; South-East Monash Legal Service Inc, *Submission 210*; Full Stop Australia, *Submission 214*.
52 See, eg, Director of Public Prosecutions (SA), *Guideline Number 12: Victims of Crime* (2023) 2.

6.33 Police and prosecution agencies may be limited in the extent to which they are able to provide detailed reasons, but the fact of that limitation should be made clear to complainants. For example, police may not be able to provide fulsome reasons if it would jeopardise another investigation or if there were security considerations. The discretion not to provide detailed reasons in those circumstances should be articulated in victims' charters.

6.34 Another reason that the prosecution may not be able to communicate detailed reasons to the complainant, is that reasons for prosecution decisions are subject to legal professional privilege. That privilege can be waived by the relevant Office of the Director of Public Prosecutions, but there may be valid reasons for maintaining legal professional privilege in some cases. Offices of the Directors of Public Prosecutions are independent and must retain their discretion to make decisions on whether to waive legal professional privilege in these circumstances. This is particularly so where the disclosure of reasons could jeopardise an investigation of a criminal offence or prejudice another proceeding. Such a qualification on the right to reasons is articulated in s 9C of the *Victims' Charter Act 2006* (Vic).

6.35 During consultations, one police agency stated that complying with a requirement to provide reasons would be difficult within existing resources. To the extent required, police and the Offices of the Directors of Public Prosecutions should be adequately funded to implement processes which ensure complainants understand their decisions. Some guidelines issued by some Offices of the Directors of Public Prosecutions, such as the South Australian Guidelines, provide for reasons to be given in a manner and time of the complainant's choosing.[53]

6.36 Victims' charters should include a right to review of significant decisions. To exercise that right, a complainant may seek the advice and advocacy of an independent legal adviser. The ALRC recommends that police and prosecuting agencies' guidelines set out their review and complaint processes (**Chapter 7**). The ALRC recommends that an independent taskforce should, as one of their functions, develop a model to give effect to the right to a review of police decisions not to proceed to charges: **Chapter 5**.

53 Ibid.

# Independent legal advice and representation

**Recommendation 9**

As a component of the Independent Legal Services recommended in **Recommendation 1**, the Australian Government, together with state and territory governments, should fund and support independent legal advisers who will be available to:

a. provide complainants of sexual violence with legal advice as required during the criminal justice process; and

b. represent complainants in court when applications are made to subpoena or inspect materials which may contain a complainant's personal, sensitive, or confidential information (including sexual assault counselling communications).

**Recommendation 10**

The Commonwealth, states, and territories should amend relevant legislation to provide that independent legal advisers have standing to appear in court on behalf of complainants of sexual violence in applications to subpoena or inspect materials directed to third parties which may contain a complainant's personal, sensitive, or confidential information, including sexual assault counselling communications. The legislative changes should include a mechanism which ensures the complainant is notified that a subpoena has been sent to a third party to produce personal, sensitive, or confidential information, including sexual assault counselling communications, relating to the complainant.

## Independent legal services: real time accountability

6.37 In **Chapter 5**, we make recommendations for measures to drive high-level justice system accountability. Those measures need to be complemented by a measure which supports complainants remaining engaged in the system by enabling them to drive system accountability in real time as they progress through the criminal justice process.

6.38 The ALRC considers that providing complainants with access to independent legal advice and targeted legal representation is such a measure. An independent legal adviser can help uphold the existing rights and interests of complainants, provide advice for complainants to better exercise the choices available to them in the process, and through this, drive some accountability for system responses.[54]

54 With You We Can, *Submission 132*.

Improving complainants' experiences of the process and increasing their confidence and trust in criminal justice system responses are prerequisites for rebuilding its integrity.

6.39 Independent legal advice and independent legal representation are related but different concepts. In some settings, independent legal advice includes independent legal representation. In this Report,

- independent legal *advice* refers to legal information, advice, and out-of-court legal advocacy; and
- independent legal *representation* refers specifically to courtroom advocacy and representation.

6.40 Independent legal advice and representation gives complainants access to a lawyer who is knowledgeable about the criminal justice system and focused on a complainant's rights and interests. It is crucial that the advice given to complainants is accurate, practical, and informed. This measure does not change or scale back the role of the prosecutor, but rather preserves and respects it. As submitted by the Law Council of Australia, maintaining Offices of the Directors of Public Prosecutions' operational independence is crucial to the prosecutor fulfilling their broader obligation of safeguarding the proper administration of justice.[55]

6.41 The independence of the legal advice and representation is key to system accountability and to restoring faith in criminal justice system responses to sexual violence. Legal advice must be available to complainants from lawyers who are not connected with the police or prosecution.[56] The ALRC heard that many communities with histories of police and institutional harms, such as First Nations' peoples, people engaged in sex work, and some culturally and linguistically diverse communities, may not wish to engage with parts of the same system to seek information or representation on their legal rights (see **Chapter 3**).

## Upholding rights and interests

6.42 Independent legal advice and representation, which ensures a focus on the rights and interests of complainants, can improve their experience of the criminal justice process. This was a major theme in submissions to this Inquiry, from people who have experienced sexual violence:

> I was not aware that the DPP were not representing me. I had just assumed that they were there for me, it was quite a shock to me to find out that I was considered a witness in my own rape.[57]

> I feel that at the time that I reported, I needed legal advice. As much as the defendant immediately got legal advice as soon as he learnt of the matter, why

55 Law Council of Australia, *Submission 215*.
56 Ibid.
57 A Brownlie, *Submission 39*.

> wasn't I entitled to legal advice? I considered hiring my own lawyer, but couldn't afford this.[58]
>
> My daughter didn't even have a lawyer. She had no one advising her how to navigate the system. The Court Supporter was sympathetic, but not legally trained. They can direct you on the agenda and give you a box of tissues, but my daughter needed someone powerful and influential who understood what was going on. Someone she could build trust with, someone on her side. She needed to be better informed.[59]

6.43 All victims' charters state that victims have a right to receive information about the investigation, prosecution, and court processes associated with their report of sexual violence, including information about their role as a witness at trial.[60] As discussed in **Chapter 2** and **Chapter 3**, information is a key justice need for people who have experienced sexual violence. All too often, complainants do not have information about the criminal process.

6.44 Access to independent legal advice would enable complainants to exercise their right to information. Complainants would be able to obtain information about:

- their legal rights, so that they would know about, understand, and are able to exercise those rights;
- their options, and be made aware of the implications and risks of those options; and
- the criminal process, including what to expect and legal processes that may be unfamiliar to them.

6.45 The exercise of their right to information would enable them to have a legal understanding of what is going on and the decisions which are made.

6.46 All victims' charters include a right for victims to have their privacy respected and protected. Complainants of sexual violence are highly vulnerable to police, prosecution, or defence seeking access to records (including counselling notes, medical history, and mobile phones) which contain their personal, confidential, and sensitive information. If access is obtained, the records are available to both parties to the proceedings. Excessive and unnecessary access risks interfering with complainants' right to privacy and exposing them to psychological harm.[61] The availability of independent legal advice and targeted legal representation would help to protect their right to privacy.

6.47 All victims' charters include a right to be treated with courtesy, respect, and dignity. Access to an independent legal adviser to advocate on their behalf if that

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58 Name withheld, *Submission 6*.
59 Name withheld, *Submission 69*.
60 See above for a discussion of the rights protected in victims' charters.
61 Law Commission of England and Wales, *Evidence in Sexual Offences Prosecutions* (Consultation Paper No 259, 2023) 364–5 [8.4]; Olivia Smith and Ellen Daly, *Final Report: Evaluation of the Sexual Violence Complainants' Advocate Scheme* (Londonborough University and Northumbria Police and Crime Commissioner, 2020) 21–4.

right is breached may achieve a different response and help drive culture change in criminal justice agencies.

6.48 Many victims' charters require prosecutors to seek the views of the complainant, or at least inform the complainant, before making certain decisions. An independent legal adviser can help complainants express those views and understand the decisions.

6.49 As set out in **Recommendation 8**, victims' charters should include a right to request reasons for and to review decisions made by police and prosecutors not to investigate, charge, or proceed with a prosecution. Those decisions are significant because they bring an end to the complainant's involvement in the criminal justice process. An independent legal adviser would be able to provide advice and advocacy to request reasons, help explain the decisions, and discuss the merits of any review. This would contribute to complainants having a sense of control and agency over the process, ensuring understanding of the decisions, and drive system accountability for those decisions where necessary.

## The unique position of complainants of sexual violence

6.50 It is important to address why complainants of sexual violence should have access to independent legal advice and representation rather than all complainants generally.

6.51 The Terms of Reference require the ALRC to focus upon complainants of sexual violence. However, the ALRC also agrees with the view of the Law Commission of England and Wales, that the position of complainants of sexual violence is unique compared to complainants of many other offences.[62]

6.52 Sexual violence has been described as 'a unique violation that often leaves its victims with deep traumas that last for many years, sometimes forever'.[63] Unlike for other offences, the criminal justice process requires complainants of sexual violence to give statements to police and evidence in court about highly intimate and deeply personal matters.[64] They can be subjected to intrusive forensic medical examinations and asked personal questions about many other aspects of their lives. Studies have shown that they 'may be at a higher risk than other victims of crime of being re-traumatised by the criminal justice system'.[65]

6.53 Prosecution cases often rely solely upon the evidence of the complainant because there is no other witness or supportive evidence. The credibility of

62 Law Commission of England and Wales (n 61) [8.4].

63 Government Equalities Office (UK) and Home Office (UK), *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (2010) 28.

64 Kerstin Braun, 'Legal Representation for Sexual Assault Victims - Possibilities for Law Reform?' (2014) 25(3) *Current Issues in Criminal Justice* 819, 821.

65 Ibid.

complainants of sexual violence is often robustly challenged in court.[66] While discrediting a witness is commonplace in criminal trials, complainants of sexual violence 'endure a level of scrutiny and personal attack unknown in other cases', which can be more deeply personal and distressing.[67]

6.54 The response of the criminal justice system to complainants of sexual violence is steeped in myths and misconceptions about sexual violence, people who use sexual violence, and people who experience sexual violence. As discussed in **Chapters 4**, **7**, and **8**, deeply entrenched myths and misconceptions about sexual violence inform the system's response to complainants from the moment they report to police throughout the process. Complainants are exposed to suspicion, blame, and disbelief. The common law labelled them an unreliable class of witness.[68] Overcoming entrenched laws and attitudes has proven difficult.[69]

6.55 The low levels of complainant engagement with the criminal justice system and high levels of complainant attrition after engagement are unique to sexual violence matters and contribute to unacceptably low accountability for people who use sexual violence (see **Chapter 5**). Standing alone, those matters justify this measure.

## Support for independent legal services overseas and in Australia

6.56 The idea of independent legal advice and representation for complainants of sexual violence is not a new one.[70] Reviews internationally, and in Australia, have recognised the challenges that complainants face in the criminal justice process and the value of independent legal advice and representation.[71]

6.57 In 2010, the Stern Review in the United Kingdom recognised that complainants could misunderstand the criminal justice process and feel disappointed in the prosecutor, who they thought would represent them the same way that defence lawyers represent the accused.[72] The Stern Review looked at Ireland and France, where people who experienced sexual violence had access to their own lawyer in limited circumstances, and noted that the contribution legal counsel made to improving the complainant's experience was an important one.[73] It suggested that

66 Law Commission of England and Wales (n 61) 364–5 [8.4].
67 With You We Can, *Submission 132*.
68 *Kelleher v The Queen* (1974) 131 CLR 534, 534. See also **Chapter 4**.
69 See **Chapter 4**. See also, Law Commission of England and Wales (n 61) 18–19 [1.60].
70 For example, in Ireland, independent legal advice and representation has been advocated for since 1987, and a form has been available in legislation since 2001: Mary Iliadis, 'Victim Representation for Sexual History Evidence in Ireland: A Step towards or Away from Meting Victims' Procedural Justice Needs?' (2020) 20(4) *Criminology and Criminal Justice* 416.
71 Victorian Law Reform Commission (n 19); Women's Safety and Justice Taskforce (n 30); Victims of Crime Commissioner (Vic) (n 40); Government Equalities Office (UK) and Home Office (UK) (n 63); John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) ('*Gillen Review*'); Law Commission of England and Wales (n 61).
72 Government Equalities Office (UK) and Home Office (UK) (n 63) 97.
73 Ibid 98.

these ideas were worth considering and expressed 'hope they will stay on the agenda'.[74] The ideas have stayed on the agenda.

6.58 Since then, independent legal advice has been recommended in Northern Ireland by the Gillen Review,[75] and has been provisionally proposed by the Law Commission of England and Wales.[76]

6.59 In Australia, independent legal advice has been recommended by the VLRC,[77] Queensland's Women's Safety and Justice Taskforce,[78] and the Victorian Victims of Crime Commissioner.[79]

6.60 In 2022, the Meeting of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault identified 'legal advice and support' for sexual assault complainants as falling under one of its priority areas.[80]

6.61 Generally, the reviews referred to in this section indicate that legal services should be state funded, independent, and confidential. Other themes arising in these reviews are:

- The scope of independent legal advice — generally, reviews promoted independent legal advice in relation to confidential information, such as counselling communications,[81] or sexual history.[82] The VLRC recommended a broader scope, including legal advice about justice options and restorative justice referrals.[83]
- The timing of legal advice — some reviews suggested that legal advice should be available to complainants from the time of reporting up until the start of the trial.[84] The Law Commission of England and Wales is proposing that legal advice be available throughout criminal proceedings, including in relation to navigating flexible evidence measures.[85]
- Whether there should be standing to appear — generally, reviews promoted independent legal representation or standing in relation to specific topics, such as access to private material and sexual history evidence.[86] The review by the Victorian Victims of Crime Commissioner goes further and recommends

74 Ibid.
75 Gillen (n 71) 187, recs 40–41.
76 Law Commission of England and Wales (n 61) 365 [8.5].
77 Victorian Law Reform Commission (n 19) 268, rec 46.
78 Women's Safety and Justice Taskforce (n 30) 279.
79 Victims of Crime Commissioner (Vic) (n 40) 385, rec 22.
80 Attorney-General's Department (Cth), *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–27* (Meeting of Attorneys-General, August 2022) 9.
81 Women's Safety and Justice Taskforce (n 30) rec 63.
82 Law Commission of England and Wales (n 61); Gillen (n 71) rec 40; Victorian Law Reform Commission (n 19) 268, rec 46.
83 Victorian Law Reform Commission (n 19) 268, rec 46.
84 Ibid 264; Gillen (n 71).
85 Law Commission of England and Wales (n 61) 365 [8.5].
86 Gillen (n 71).

standing in relation to stages such as cross-examination and where the complainant is giving evidence at a committal hearing.[87]

6.62 The ALRC's recommended model is similar to the provisional proposal of the Law Commission of England and Wales.[88]

## Implementation of independent legal services overseas and in Australia: promising signs

6.63 As noted above, some jurisdictions overseas have implemented independent legal services.

6.64 In Northumbria, England, the Sexual Violence Complainants' Advocate scheme (SVCA) ran for 18 months (2018–2020) to respond to concerns about the violation of complainants' privacy rights during rape investigations.[89] A main concern was that police made excessive requests for mobile phones and other personal records from complainants without informed consent.[90] A survey showed that almost one fifth of complainants who reported to police later withdrew, citing police requests for private data as an important or very important factor in that decision.[91] Local lawyers provided advice to adult rape complainants, focusing on privacy rights, with some guidance on the legal process and recorded police interviews.[92]

6.65 In Northern Ireland, Sexual Offences Legal Advisers (SOLAs) were introduced in 2021 to provide free, independent legal advice to adults who are thinking about reporting sexual violence.[93] Advice provided by a SOLA is confidential and subject to legal professional privilege.[94] SOLAs offer advice before trial, can object to the disclosure of private material to the defence, and can object to the use of the complainant's sexual history in court.[95]

6.66 Some jurisdictions across Australia have implemented or are piloting models of independent legal advice and representation for complainants in sexual offences cases.

6.67 The former South Australian Commissioner for Victims' Rights, Michael O'Connell, made use of a legislative power to provide some complainants with legal advice and representation.[96] He engaged independent lawyers to speak

87 Victims of Crime Commissioner (Vic) (n 40) 385, rec 22.
88 Law Commission of England and Wales (n 61) ch 8.
89 Smith and Daly (n 61) 3.
90 Ibid 18.
91 Ibid 24.
92 Ibid 5.
93 Department of Justice (Northern Ireland), 'Justice Minister Launches Scheme to Provide Free Legal Advice to Victims of Sexual Offences' (31 March 2021) <www.justice-ni.gov.uk/news/justice-minister-launches-scheme-provide-free-legal-advice-victims-sexual-offences>.
94 Victim Support (Northern Ireland), 'Sexual Violence - SOLAs (Sexual Offences Legal Advisers)' <www.victimsupportni.com/help-for-victims/solas/>.
95 Department of Justice (Northern Ireland) (n 93).
96 O'Connell (n 3) 7–9; *Victims of Crime Act 2001* (SA) s 32A.

with complainants about the trial process, attend meetings with complainants and prosecutors, and give advice about victim impact statements.[97] Resources limited his ability to intervene in more cases.[98]

6.68 New South Wales and Queensland provide independent legal assistance to complainants of sexual offences in relation to the disclosure of counselling notes (in Queensland),[99] and confidential therapeutic records and counselling notes (in New South Wales) in criminal proceedings.[100]

6.69 Complementing independent legal assistance programs, some legal practices also already provide advice to people who have experienced sexual violence. For example, Violet Co Legal & Consulting is a private legal firm in New South Wales, which is led by a First Nations person who has experienced sexual violence.[101] The firm provides advice and representation to women, particularly First Nations women, in matters relating to sexual harassment and sexual assault.[102]

6.70 In September 2023, the Commonwealth Government allocated $7.65 million across three pilot programs in the Australian Capital Territory, Victoria, and Western Australia.[103] These pilots 'explore new ways to provide legal services for sexual violence victims and survivors that do not add to their trauma'.[104] Broadly, the pilots consider the following key themes:[105]

- Advice available throughout the criminal justice process — generally, the pilots provide legal advice at various stages of the criminal process. The Australian Capital Territory pilot seems to provide the broadest support 'at all stages' (including general advice and information, police and prosecution engagement) during criminal proceedings and after sentencing.[106]

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97 O'Connell (n 3) 7–9.

98 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*.

99 'Sexual Assault Counselling Privilege (Counselling Notes Protect)', *Legal Aid Queensland* (14 December 2021) <www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Civil-law/Sexual-Assault-Counselling-Privilege-Counselling-Notes-Protect>.

100 Legal Aid New South Wales, 'Sexual Assault Communications Privilege Service' <www.legalaid.nsw.gov.au/my-problem-is-about/victims-rights/victims-support-scheme/sexual-assault-communications-privilege-service>.

101 The director of Violet Co Legal & Consulting is a legal practitioner who is a member of the Expert Advisory Group.

102 Violet Co Legal & Consulting, *Submission 220*.

103 Department of Treasury (Cth), 'Federal Financial Relations: Pilot Funding for Specialised and Trauma-Informed Legal Services for Victims and Survivors of Sexual Violence', *Federal Financial Relations* <www.federalfinancialrelations.gov.au/agreements/pilot-funding-specialised-and-trauma-informed-legal-services-victims-and-survivors>.

104 The Hon Amanda Rishworth MP and The Hon Mark Dreyfus KC MP, 'Supporting Victims and Survivors of Sexual Violence: Piloting New Legal Services Models' (Media Release, Attorney-General's Department (Cth), 20 November 2023).

105 Victims Legal Services (Victoria), *Submission 188*; Women's Legal Service Victoria, *Submission 207*; Women's Legal Services Australia, *Submission 212*; John Quigley and Sue Ellery, 'Legal Support Pilot to Assist Sexual Assault Victims' (Media Release, 20 September 2023).

106 Shane Rattenbury MLA, 'Specialised Legal Support for Sexual Assault Victim-survivors' (Media Release, 20 September 2023).

- Scope of advice and representation available — the pilots offer independent legal advice and representation in a range of areas, including representing complainants in applications to access certain confidential records and preparing victim impact statements. Notably, pilots provide legal advice in matters adjacent to the criminal justice process such as applications for financial assistance for victims of crime and intervention orders. The Australian Capital Territory pilot refers clients within its legal centre to address other areas of legal need, including family law, migration law, and employment law.[107]
- Partnerships with specialist legal services — to ensure that the service can address diverse experiences and needs, some pilots have partnered with community legal providers, including First Nations providers such as Djirra in Victoria and the Aboriginal Family Legal Service in Western Australia.
- Partnerships with non-legal support services — some pilots support people who have experienced sexual violence with their non-legal needs. The Australian Capital Territory pilot provides a 'wrap-around' service, including financial assistance, counselling, and specialist support. The Victorian pilot links complainants to broader health justice partnerships through 'warm referrals'.

6.71 The implemented models of independent legal services have shown promising signs.

6.72 The evaluation of the Northumbrian SVCA scheme in December 2020 found that it highlighted the issues faced by complainants and created a framework to address them. It noted the following benefits:

- Complainants reported increased confidence in the process, trusting the independent lawyers to hold criminal justice practitioners accountable.[108]
- Complainants reported increased wellbeing.[109]
- The project improved how police responded to data requests from prosecutors and led to 'remarkable' changes in practice.[110]

6.73 In South Australia, former Victims of Crime Commissioner O'Connell reported that one legal practitioner engaged to provide independent legal advice described their involvement to be 'enlightening and educational'.[111] Complainants felt empowered, felt they were heard, and found prosecution decisions tolerable.[112] One practitioner said that their involvement in providing independent advice and

107 Women's Legal Centre ACT, *Submission 169*.
108 Smith and Daly (n 61) 7.
109 Ibid 60.
110 Ibid 36.
111 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*.
112 Michael O'Connell, 'Improving Access to Justice: Procedural Justice Through Legal Counsel for Victims of Crime' in Janice Joseph and Stacie Jergenson (eds), *An International Perspective on Contemporary Developments in Victimology: A Festschrift in Honor of Marc Groenhuijsen* (Springer, 2020) 207, 213–18.

representation helped 'change the legal culture with respect to the observance of victims' rights' in the case they worked on.[113]

6.74 Although the Australian pilots are in their early stages, the ALRC heard that there is already strong demand for the services.[114] The Aboriginal Family Legal Service (WA) reported that that the pilot model is 'making meaningful strides to address … key causes of secondary victimisation' for people who have experienced sexual violence.[115]

6.75 In advocating for broader implementation of independent legal advice and representation, a co-author of a submission shared her experience, as a complainant of sexual violence, of the independent legal advice program in New South Wales:

> For the first time I felt like somebody believed me. I felt like somebody cared what I wanted, and without judgement, too. And more than that, he made sure I understood the ramifications behind what I wanted, deciphering legal jargon and giving me full opportunity to understand the legal decisions being made about me, without me.[116]

6.76 Similarly, we heard that, in Queensland:

> Victim survivors who are assisted through [Women's Legal Service Queensland'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.[117]

## The model of independent legal services at the criminal justice stage

6.77 The ALRC's recommended model is for an independent legal adviser to provide legal advice to complainants throughout the criminal justice process with targeted legal representation.

### Independent legal support throughout the criminal process

6.78 Restoring faith in the criminal justice system by improving the experience of complainants of sexual violence requires independent legal advice to be available to them throughout the criminal process.

6.79 The extent to which accessing legal advice is needed will depend upon the individual complainant; whether there are police, prosecution, or defence requests

113 Ibid 218.
114 Women's Legal Service Victoria, *Submission 207*.
115 Aboriginal Family Legal Services (WA), *Submission 40*.
116 Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.
117 Women's Legal Service Queensland, *Submission 211*.

for access to private information; the general progress of the matter though the criminal justice system; the legal complexity of the matter; and the nature of the responses from police and prosecutors.

6.80 Matters that should be subject to independent legal support for complainants include:

- access to rights as set out in the victims' charters;
- requests made by police for mobile phones or records containing personal, sensitive, or confidential information, and the legal implications of those requests;
- communications from the police about decisions not to investigate the report of sexual violence;
- communications from the police about the decision not to file or lay charges;
- the right to request reasons from police when decisions are made not to investigate, or file or lay charges, the right to seek a review of those decisions, and legal assistance with exercising those rights;
- communications from the prosecution about not proceeding with charges;
- the right to request reasons when the prosecution makes decisions not to proceed with charges, the right to seek a review, and legal assistance with exercising those rights;
- communications from the prosecution about negotiating with the defence about charges and a complainant's involvement in those discussions;
- the committal process generally;
- advice about pre-recorded evidence hearings, including the implications of choosing that option (for example, that the hearing would happen before the trial, the pre-recording will be played later at trial to the jury, the complainant may not need to attend or give evidence at the trial, but this is not guaranteed, and the risk of negative inferences from pre-recorded evidence, including jury perception) (see **Chapter 9**);
- the availability of flexible evidence measures;
- advice in relation to defence subpoenas for access to a complainant's personal, sensitive, or confidential information, including protections around sexual assault counselling communications;
- the trial process generally, including the recording of a complainant's evidence at trial, legislative protections regarding questions about sexual reputation, prior sexual history and cross-examination, and suppression orders, if relevant to the jurisdiction;
- the sentencing process generally, including the right to provide a victim impact statement and advice about the content of that statement; and
- the appeal process generally, including an explanation of appeal grounds, the possible outcomes of the appeal, re-trials, and the use of recorded evidence for re-trials.

## The parameters of legal representation and standing

6.81 While most people we heard from support independent legal advice for complainants, there were a range of views about the degree of independent legal representation before and during a criminal trial. Some advocated for independent legal representation at a range of stages of criminal proceedings, such as pre-trial applications and during cross-examination of the complainant at trial.[118] Others supported independent legal representation at pre-trial hearings on matters that have the 'potential to significantly impact the rights and privacy of the complainant' such as access to confidential counselling notes and other personal information such as telephone records and contents of mobile phones.[119] Some consultees did not think independent legal representation was needed at any stage.

6.82 The ALRC recommends legal representation for complainants on applications for subpoenas to produce materials (and subsequent applications to inspect produced materials) that may contain a complainant's personal, sensitive, or confidential information, including sexual assault counselling communications. This would provide complainants with access to legal advice and a lawyer to represent them in court at hearings (pre-trial or during the trial) that deal with subpoenas for those materials which are directed to the complainant personally or to a third party (such as to a counsellor).

6.83 **Recommendation 10** addresses the question of standing. The independent lawyer would have automatic standing to appear in court at a hearing about a subpoena directed to the complainant personally to produce materials in the complainant's possession (such as diaries). The complainant could ask the independent legal representative to object to production of the materials on their behalf in court. This is because any person (or organisation) who receives a subpoena to produce materials in their possession can appear in court (or have their lawyer appear in court) at a hearing to object to production of the materials.

6.84 However, a person does not currently have automatic standing to appear at a court hearing about a subpoena sent to a third party to produce materials in their possession that relate to that person. That means a complainant (or the independent legal representative) would not have automatic standing to appear in court at a hearing about a subpoena directed to a third party (such as a counsellor) to produce personal, sensitive, or confidential documents relating to the complainant (such as the counselling notes). Legislative changes should be made to ensure the complainant's independent legal representative has standing to appear in court at those hearings. It cannot be assumed that the third party will obtain legal advice when they receive the subpoena or raise an objection to production of the material but even if they did, it is not their role to represent the complainant's interests in court. The legislative changes should include a mechanism which ensures the complainant is notified

118 See, eg, With You We Can, *Submission 132*.
119 See, eg, Law Council of Australia, *Submission 215*.

that a subpoena has been sent to a third party to produce personal, sensitive, or confidential material relating to the complainant.

6.85 This model of targeted representation focuses on protecting a complainant's right to privacy and preventing disproportionate access to complainant's personal, sensitive, or confidential information (including sexual assault counselling communications).[120]

6.86 At this stage, the ALRC does not consider there is a need to go further. Our recommended targeted representation is in the context of a broad model of legal advice. It is important to promote and protect the complainant's rights while protecting the accused person's right to a fair trial. We agree with the Law Commission of England and Wales, which is proposing a similar model of targeted legal representation, that this model maximises the benefits of legal support while managing concerns, such as the risk of erosion to the 'binary adversarial model' of a criminal trial.[121]

6.87 As noted above, the ALRC heard support for independent legal representation in court for applications to adduce evidence of the complainant's sexual history and during ground rules hearings. The ALRC has not had sufficient time to consult about the legal implications of extending representation to those applications. Important issues arise because of the complainant's status as a witness in the proceedings. Prior to giving evidence, witnesses should not have access to other evidence in the proceedings or notice of proposed cross-examination. It is important that a complainant's evidence is not compromised by creating an advantage (or even a perception of an advantage) for the complainant or affecting the fairness of the trial.

6.88 If an independent legal representative had standing to appear on applications to adduce evidence of a complainant's sexual history, they would receive notice of the application in advance of the hearing. The notice would set out the proposed evidence of sexual history sought to be led in cross-examination and the grounds to lead it. The independent legal representative may need to have access to parts of the prosecution brief to give context to the application and provide advice to the complainant about it. This may cause conflict with the principle that witnesses should not have access to other evidence in the proceedings. Also, to effectively take instructions from the complainant, the independent legal representative may need to advise the complainant of the proposed topics of cross-examination set out in the application. This would amount to pre-warning the complainant of topics of cross-examination. After representing the complainant in court during the hearing of the application, the independent legal representative may be restricted about what they could report back to the complainant. Similar issues arise for appearances by an independent legal representative at ground rules hearings. These are important issues for broad consultation.

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120 Law Commission of England and Wales (n 61) 364 [8.4].
121 Ibid 382 [8.68], 392 [8.104].

6.89 Independent legal advisers and representatives would be bound by existing legal practitioner conduct rules and ethical guidelines. It may be necessary to develop clear ethical guidelines for legal practitioners working as independent legal advisers and representatives.[122] Existing rules require legal practitioners not to engage in 'conduct which could amount to "coaching" a victim witness, including indirectly or unintentionally, about the content of evidence to be given'.[123] Independent legal advisers and representatives must not pass on to the complainant information that has been obtained from the police or prosecution which could compromise, or be seen to compromise, the integrity of the complainant's evidence. They should not become involved in the investigation of allegations or the gathering of evidence or engage in any conduct which may see them being called as a witness.[124] Complainants should be advised that when any witness is being cross-examined at trial, they must not discuss their evidence with any other person during cross-examination, which can last days. This means the independent legal adviser would not be able to speak to the complainant about their evidence during that time.

6.90 The ALRC recommends that independent legal advisers have standing to appear in court on behalf of the complainant in applications to subpoena or inspect materials from third parties which may contain a complainant's personal, sensitive, or confidential information, including sexual assault counselling communications. This is important so that the role of the independent lawyer in these situations is clear and they are empowered to make submissions relating to the court's decisions that impact the complainant. Standing would give them the ability to advocate for the complainant in court and raise objections.

## Design and implementation

6.91 In **Chapter 3**, we discuss the importance of an ILS and the design and implementation of the early advice stage. The following are important matters to consider in the design and implementation of the criminal justice stage of the ILS:

- Independent legal advice and representation should be publicly funded, in a similar way to how legal aid is funded for the accused in criminal proceedings. This is essential to ensure that the most vulnerable complainants can access the legal support they need. A model that requires complainants to engage with criminal proceedings as private participants would be too costly for many complainants.[125]

122 Law Council of Australia, *Submission 215*.
123 Law Council of Australia, *Australian Solicitor Conduct Rules 2021* (at November 2023) r 24; Law Council of Australia, Submission to the Attorney-General's Department (Cth), *Scoping the Development of Specialised and Trauma-Informed Legal Services for Victims and Survivors of Assault* (12 May 2023) 10.
124 Law Council of Australia (n 123) 10.
125 Kirchengast, Iliadis and O'Connell (n 8) 26.

- Existing services and programs should be built upon. The recommended model should build upon existing pilots and programs of independent legal advice and representation across Australia, which are discussed above. This might involve resourcing existing services, such as women's legal services, legal aid organisations, including those tailored for First Nations peoples, and private practice providers who wish to or already conduct this work, so that they can fulfil this role.
- Advice and representation should be accessible. As discussed in **Chapter 3**, access to justice for people who have experienced sexual violence means being able to access support, regardless of where they live. Independent legal advice and representation should be available in rural, regional, and remote areas.
- There should be partnerships with specialist legal services. Learning from the pilots discussed above, to ensure that the service can address diverse experiences and needs, services delivering independent legal advice and representation should partner with specialist legal services, including those in the private sector. This may be especially important for people who are disproportionately reflected in sexual violence statistics, such as First Nations peoples.
- Non-legal support services should be included. Learning from the pilots discussed above, services delivering independent legal advice and representation should partner with other services who address non-legal needs to ensure a holistic approach to responding to people who have experienced sexual violence. They could work collaboratively with the justice system navigators recommended in the Report (**Chapter 3**). Where possible, there are benefits in these services being co-located — the ALRC also heard that people who have experienced sexual violence should not have to move from place to place to access the support they need.
- Independent legal advisers should have the right training. The independent legal adviser must be specialised and experienced in the criminal justice system and be culturally-sensitive and trauma-informed.[126]

6.92 The ALRC also heard that implementing independent legal advisers may reduce funding for other services that support people who have experienced sexual violence. Careful service design and role allocation will help to reduce this risk.

6.93 Our proposed model is a significant reform that will require ongoing evaluation.

126 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*.

## Confidentiality

6.94 The ALRC expects that confidentiality between a complainant and the independent legal adviser will be preserved by legal professional privilege, as in any lawyer-client relationship. Legal professional privilege applies under the common law to protect communications between a client and their lawyer from disclosure 'where those communications were made for the dominant purpose of giving or obtaining legal advice or services'.[127] This is important so that the complainant can feel they can speak to their lawyer openly without the concern that their information will be accessed or used against them.

127 See, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) 337 [12.1].

# 7. Education, Training, Guidelines, and Information

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## Introduction

7.1 Many previous reports have made recommendations for people who work in the criminal justice system to have education and training about responses to complainants of sexual violence.[1] Education and training programs are being developed and implemented; however, there is a need for those programs to be enhanced, ongoing, and funded.

1 Women's Safety and Justice Taskforce, *Hear Her Voice: Report One* (vol 3, 2021) 603–27; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) recs 68–9; Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (The Australasian Institute of Judicial Administration, Attorney-General's Department (Cth), CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, August 2023) 220–3; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 395–410; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 585–90, rec 40; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II* (2017) recs 3, 67–8.

7.2 The ALRC heard positive[2] and negative[3] accounts from people who have experienced sexual violence about their experiences with aspects of the criminal justice system, which is consistent with feedback from a recent survey.[4] Factors contributing to negative experiences included:

- a lack of communication from police and Offices of the Directors of Public Prosecutions;[5]
- conflicting information or inconsistent police and prosecuting procedures;[6]
- retraumatising questioning and practices (at police interviews, prosecution witness conferences, and during examination);[7] and
- perceived inadequacy of judicial interventions.[8]

2 See, eg, Name withheld, *Submission 14*; Not published, *Submission 15*; A Williams, *Submission 19*; Not published, *Submission 24*; S Cuevas, *Submission 33*; TBG *Submission 38*; A Brownlie, *Submission 39*; P Brennan, *Submission 87*; Name withheld, *Submission 95*; H Robbins, *Submission 139*; J Crous, *Submission 141*; Not published, *Submission 142*; C Oddie, *Submission 145*.

3 See, eg, Not published, *Submission 5*; Name withheld, *Submission 10*; Name withheld, *Submission 14*; Not published, *Submission 15*; Not published, *Submission 23*; S Filmer, *Submission 30*; Name withheld, *Submission 34*; Not published, *Submission 54*; Name withheld, *Submission 66*; Not published, *Submission 75*; Name withheld, *Submission 77*; Name withheld, *Submission 95*; Not published, *Submission 137*; J Crous, *Submission 141*; Not published, *Submission 142*; C Oddie, *Submission 145*; Not published, *Submission 151*; Name withheld, *Submission 160*; Name withheld, *Submission 162*; Not published, *Submission 171*; Not published, *Submission 173*; Not published, *Submission 176*; D Villafaña, *Submission 182*.

4 KPMG and Centre for Innovative Justice, RMIT, *'This Is My Story. It's Your Case, But It's My Story': Interview Study* (NSW Bureau of Crime Statistics and Research, July 2023). See also Centre for Innovative Justice, *Submission 216*.

5 Not published, *Submission 5*; S Filmer, *Submission 30*; Name withheld, *Submission 34*; Name withheld, *Submission 77*; Name withheld, *Submission 95*; J Crous, *Submission 141*; Not published, *Submission 142*; Name withheld, *Submission 160*.

6 Name withheld, *Submission 10*; Not published, *Submission 54*; S Lockwood, *Submission 78*; Name withheld, *Submission 162*; Not published, *Submission 171*; Not published, *Submission 176*.

7 Not published, *Submission 15*; Not published, *Submission 23*; Name withheld, *Submission 66*; Name withheld, *Submission 162*; Not published, *Submission 173*; Not published, *Submission 176*; D Villafaña, *Submission 182*.

8 Name withheld, *Submission 6*; Name withheld, *Submission 77*; J Crous, *Submission 141*; Women's Legal Services Australia, *Submission 212*.

7.3 Many stakeholders, including some members of the Expert Advisory Group, told us about the imperative for continuing education and ongoing trauma and cultural safety training for those working in the criminal justice system.[9]

7.4 Police and prosecution guidelines are important for transparency, accountability, and improving agency practices. In this chapter, the ALRC recommends that guidelines should be publicly available and, at a minimum, should include particular content.

7.5 Police agencies, Offices of the Directors of Public Prosecutions, and courts should also ensure that there is accessible and comprehensive online information about their processes.

9 See, eg, A Williams, *Submission 19*; S Filmer, *Submission 30*; Queensland Sexual Assault Network, *Submission 70*; ACON, *Submission 76*; Name withheld, *Submission 77*; We Are Womxn, *Submission 82*; National Centre for Action on Child Sexual Abuse, *Submission 85*; Tasmania Legal Aid, *Submission 88*; Parkerville Children and Youth Care, *Submission 91*; Name withheld, *Submission 95*; A Gregorio, *Submission 96*; Not published, *Submission 97*; D Erlich and N Meyer, *Submission 115*; Colin Biggers & Paisley, *Submission 124*; B McKimmie, F Nitschke, G Ribeiro, and A Thompson, *Submission 125* ; Not Published, *Submission 134*; Not published, *Submission 137*; Legal Aid NT, *Submission 146*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Royal Australian and New Zealand College of Psychiatrists, *Submission 154*; Our Watch, *Submission 157*; Name withheld, *Submission 162*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Sex Discrimination Commissioner (Cth), *Submission 168*; Women's Legal Centre ACT, *Submission 169*; WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Aboriginal Legal Rights Movement, *Submission 172*; K Seear, G Grant, S Mulcahy and A Farrugia, *Submission 177*; Refugee Advice and Casework Service, *Submission 179*; WEstjustice, *Submission 180*; Knowmore, *Submission 187*; Foundation for Alcohol Research and Education, *Submission 189*; Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 191*; Centre for Women's Safety and Wellbeing, *Submission 193*; Asylum Seeker Resource Centre, *Submission 194*; Youth Law Australia, *Submission 195*; Not published, *Submission 197*; Victorian Aboriginal Legal Service, *Submission 198*; Legal Aid NSW, *Submission 201*; Family and Sexual Violence Alliance Steering Committee (Tas), *Submission 202*; inTouch Women's Legal Centre, *Submission 204*; Women's Legal Service NSW, *Submission 205*; National Association of Services Against Sexual Violence, *Submission 209*; South-East Monash Legal Service Inc, *Submission 210*; Women's Legal Service Queensland, *Submission 211*; Women's Legal Services Australia, *Submission 212*; Federation of Community Legal Centres (Vic), *Submission 213*; Full Stop Australia, *Submission 214*; Law Council of Australia, *Submission 215*; Centre for Innovative Justice, *Submission 216*.

## Education and training of people who work in the criminal justice system

**Recommendation 11**

People who work in the criminal justice system and have relevant involvement in sexual violence matters, including judicial officers (magistrates, trial judges, and appellate judges); court staff; prosecutors and in-house witness assistance officers; defence lawyers; and police officers, should receive:

a. education about myths and misconceptions that utilises research on:

   i. trauma, memory, and responsive behaviour of complainants of sexual offences; and

   ii. sexual offending, grooming behaviour, and coercive control;

and

b. training about trauma-informed and culturally safe practices, including:

   i. best practice communication and engagement with complainants (including working with intermediaries and interpreters);

   ii. supporting the informed choices of complainants, including in relation to giving statements, flexible evidence measures, and giving evidence;

   iii. minimising retraumatisation in the justice system, including during questioning by police, prosecutors in witness conferences, and parties in court;

   iv. victims' rights, including their rights to privacy and laws and processes about sexual assault counselling communications;

   v. responding with an understanding of the intersection between family violence and sexual violence; and

   vi. practices which address the experiences and needs of groups who are disproportionately reflected in sexual violence statistics.

The education and training should:

c. be evidence-based;

d. inform and address the relevant organisation's guidelines about myths and misconceptions and trauma-informed and culturally safe practices; and

e. be developed with input from experts on trauma; memory and responsive behaviour of complainants of sexual offences; people who have experienced sexual violence; sexual assault services; and representatives of groups who are disproportionately reflected in sexual violence statistics.

**Recommendation 12**

Police agencies should mandate and be funded to ensure all police officers receive the education and training described in **Recommendation 11**, but tailored to reflect the tasks performed by specialist police officers and general duty police officers.

**Recommendation 13**

Commonwealth, state, and territory Offices of the Directors of Public Prosecutions should mandate and be funded to ensure that all employed solicitors, prosecutors, and witness assistance officers who work on sexual violence matters receive the education and training described in **Recommendation 11** (tailored to reflect the tasks performed).

**Recommendation 14**

All courts should strongly encourage the education and training described in **Recommendation 11** for court staff who work on sexual violence matters (tailored to reflect the tasks they perform).

**Recommendation 15**

State and territory bar associations and law societies should:

a. strongly encourage barristers and solicitors who work on sexual violence matters to complete the education and training described in **Recommendation 11** as part of ongoing professional development and training requirements;

b. be funded to enable the provision of this education and training to barristers and solicitors for free or at a discounted rate; and

c. collect and publish data on the number of participants who undertake this education and training.

**Recommendation 16**

Each court, through its head of jurisdiction, should strongly encourage all judicial officers (magistrates, trial judges, and appellate judges) who sit on sexual violence matters to undertake the education and training described in **Recommendation 11**.

The National Judicial College of Australia, the Judicial Commission of NSW, and the Judicial College of Victoria should be funded to provide that education and training and keep records of attendances.

Levels of attendance of judicial officers at education and training programs described in **Recommendation 11** should be included in court annual reports.

## Ensuring education and training is available and resourced

7.6 As discussed in **Chapters 4** and **8**, myths and misconceptions about sexual violence underpin criminal justice responses to complainants of sexual violence — from the time a report is made to police through to the appeal courts. They influence credibility and reliability assessments of what complainants have to say, which can impact decisions by:

- police to investigate; or to lay or file charges;
- prosecutors to discontinue or resolve charges;
- defence to subpoena documents or cross-examine in particular ways;
- trial courts to permit lines of cross-examination and direct juries about credibility and reliability assessments of the complainant (such as inconsistencies in the evidence); and
- appellate courts to allow appeals against convictions.

7.7 One part of **Recommendation 11** is for specific education about myths and misconceptions research to ensure that responses to complainants of sexual violence, and decision making, are evidence-based. The education is to ensure people who work in the criminal justice system have awareness and understanding of the research, including about: memory; the impact of trauma on memory; responsive behaviours; and the nature of sexual offending, including grooming behaviour and coercive control.

7.8 In **Chapter 8**, we recommend the establishment of a governing body of expert witnesses in the research areas outlined above to improve access by people who work in the criminal justice system to this knowledge base. One of the recommended roles of the governing body of expert witnesses is to prepare resources for the provision of this education (**Recommendation 24**).

7.9 The second part of **Recommendation 11** is for ongoing training of people who work in the criminal justice system to build skills to put trauma-informed and culturally safe principles into practice. Some of these skills have been discussed in other chapters as follows:

- best practice communication and engagement with complainants (including working with intermediaries and interpreters) (**Chapter 10**);
- supporting the informed choices of complainants, including in relation to giving statements, flexible evidence measures, and giving evidence (**Chapters 6** and **9**);
- victims' rights, including their rights to privacy; and laws and processes about confidential counselling privileges (**Chapters 6** and **12**);
- minimising retraumatisation in the justice system, including during questioning by police, by prosecutors during witness conferences, and by parties in court (**Chapters 9**, **10**, and **12**);
- responding with an understanding about the intersection between family violence and sexual violence (**Chapter 2**); and
- practices which address the experiences and needs (including cultural needs) of groups who are disproportionately reflected in sexual violence statistics.

7.10 These are areas that have been identified as important for education and training to implement a trauma-informed approach to responding to sexual violence (see **Chapter 1**), give effect to what people who have experienced sexual violence say they want or need from the justice system (**Chapter 2**), and reflect the experiences of those who have also experienced family violence or who are disproportionately reflected in sexual violence statistics (**Chapter 2**).

7.11 As noted above, the ALRC heard from stakeholders who had a negative experience communicating with police agencies and the Offices of the Directors of Public Prosecutions. These experiences highlight the need for best practice communication and engagement with complainants. For example, complainants of sexual violence told us:

> [The police officer] went through this statement with me in an open plan office area where people were constantly walking around near us and would have been able to overhear everything. I found this experience extremely humiliating and could have been easily avoided if the [police officer] had taken me into a private interview room.[10]

> My experience was dependent on who I got on the other end of the phone or of the email. The assigned witness assistance officer to the case changed several times, which led to inconsistency in information sharing and communication. Overall, I found dealing with the [Office of the Director of Public Prosecutions] quite frustrating and disempowering at times.[11]

7.12 Similarly, as discussed in **Chapter 12**, cross-examination can be a highly traumatising experience for complainants with questioning based upon myths and misconceptions.[12] The ALRC heard about retraumatisation during questioning in court:

> As a victim survivor my experience when being cross-examined was very triggering and re-traumatising. My memory was called into question numerous times. The defence was annoying, harassing and repetitive. I was feeling overwhelmed and started to worry that I was saying the wrong thing. I have an extremely good memory of events that had occurred but I was made to have self-doubt regarding my own memory when the defence kept repeating the same question to me over and over again. The prosecutor did object eventually and the judge said she felt I had answered the questions adequately and asked the defence to move on.[13]

7.13 Minimising retraumatisation in the justice system during court questioning involves training for:

- judicial officers, on the duty to intervene when questioning of complainants in court is improper;[14]
- prosecutors, on when they can and should object when cross-examination is improper;[15] and
- defence counsel, on what trauma-informed questioning of complainants looks like without compromising their duty to their clients.[16]

7.14 Further, training on practices that address the experiences and needs (including cultural needs) of groups who are disproportionately reflected in sexual violence statistics would include practices for engaging with complainants whose

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10 C Oddie, *Submission 145*. See also Name withheld, *Submission 14*; Not published, *Submission 36*; Not published, *Submission 62*; Name withheld, *Submission 66*; A McIntosh, *Submission 131*.

11 A Williams, *Submission 19*.

12 Julia Quilter and Luke McNamara, *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis* (Crime and Justice Bulletin No 259, NSW Bureau of Crime Statistics and Research, 2023) 18–30. See also Women's Legal Service NSW, *Submission 205*; Centre for Innovative Justice, *Submission 216*.

13 S Filmer, *Submission 30*.

14 We Are Womxn, *Submission 82*; Colin Biggers & Paisley, *Submission 124*; Not published, *Submission 197*.

15 Tasmania Legal Aid, *Submission 88*.

16 National Centre for Action on Child Sexual Abuse, *Submission 85*. See also **Chapter 12**.

first language is not English. This would be facilitated by judicial officers and court staff undertaking training in accordance with Standards 5 and 15 of the Judicial Council on Diversity and Inclusion's 'Recommended National Standards for Working with Interpreters in Courts and Tribunals'.[17]

7.15 The training about culturally safe practices should include building an understanding of people with intersecting identities who may experience sexual violence, including people who have experienced family violence; First Nations people; and people from culturally and linguistically diverse backgrounds. To ensure this understanding is reflected accurately in the training, this part of the training should be developed with input from: people who have experienced sexual violence; sexual assault services; and representatives of communities disproportionately reflected in sexual violence statistics. Co-design and delivery by Aboriginal Community Controlled Organisations and representatives from culturally diverse backgrounds would be necessary to ensure responses to sexual violence are culturally safe.

7.16 **Recommendation 11** is necessary to:

- support investigation, prosecution, and court decision-making in sexual offences to be evidence-based, rather than potentially influenced by myths and misconceptions;
- improve how complainants are treated in the criminal justice process and to minimise retraumatisation; and
- increase community confidence in the ability of the criminal justice system to respond effectively to sexual violence.

7.17 The education and training should be tailored to reflect the respective roles of people who work in the criminal justice system.

7.18 Police agencies and Offices of the Directors of Public Prosecutions should be funded to implement **Recommendation 11**. Funding is also required for the provision of education and training for self-employed solicitors and barristers. The ALRC heard that the cost of professional development for self-employed solicitors and barristers is a prohibitive factor on attendance. To implement **Recommendation 11**, law societies and bar associations should be funded so that education and training programs can be offered to self-employed barristers and solicitors free of charge, or at reduced rates.

7.19 Similarly, funding is needed to ensure the provision of education on myths and misconceptions, and training on trauma-informed and culturally safe practice programs for judicial officers. The ALRC heard that a complainant's experience of a criminal trial can depend greatly upon the judicial officer. A judicial officer proactively implementing trauma-informed practices and procedures can make the

17 Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2nd ed, 2022) Standards 5, 15.

complainant's experience of the criminal trial less traumatising.[18] The opposite can be retraumatising, and lead to the view that justice has not been done.[19]

7.20 The National Judicial College of Australia (NJCA), Judicial Commission of NSW, and Judicial College of Victoria are the main providers of education and training for judicial officers in Australia. Ongoing and increased funding is essential to ensure that new and existing programs are available and accessible for magistrates, trial judges, and appellate judges nationally. Some of the existing education and training programs and resources which may be further developed and updated include:

- the NJCA's recent 'Managing Sexual Assault Hearings Program';[20]
- the Judicial Commission of NSW courses and accompanying e-resources about trauma-informed courts;[21] and
- the Judicial College of Victoria courses and accompanying resources for judicial officers about complainants and witnesses in court.[22]

7.21 **Recommendation 11** is consistent with the National Plan to End Violence Against Women and Children 2022–2032 and the Aboriginal and Torres Strait Islander Action Plan 2023–2025, which require state and territory governments to take action to:

- promote trauma-informed and culturally safe responses to people who have experienced sexual violence;[23] and
- increase and improve training and awareness about gender-based violence for justice system professionals.[24]

## Mandatory and 'strongly encouraged' education and training

7.22 The ALRC has considered the arguments raised by stakeholders for and against mandatory education and training. We recommend that some people who work in the criminal justice system have mandatory education and training due to the

18 Centre for Innovative Justice, *Submission 216*.

19 See, eg, K Seear, G Grant, S Mulcahy and A Farrugia, *Submission 177*.

20 The Managing Sexual Assault Hearings Program is delivered every few months in different Australian cities. The next iteration of the program is being delivered in March 2025 at Hobart, Tasmania: National Judicial College of Australia, 'Managing Sexual Assault Hearings, March 2025 — Hobart' <www.njca.com.au/Judicial-Education-Programs/managing-sexual-assault-hearings-march-2025-hobart/>.

21 Judicial Commission of New South Wales, 'Equality before the Law Bench Book' <www.judcom.nsw.gov.au/publications/benchbks/equality/index.html>.

22 The 2025 Prospectus on judicial training programs includes programs relevant to the education and training described in **Recommendation 11**: Judicial College of Victoria, *2025 Education Prospectus* (2024) 11, 27, 29, 33. For a list of the Judicial College of Victoria's online resources: see also Judicial College of Victoria, 'Victims and Witnesses' <https://judicialcollege.vic.edu.au/resources/victims-and-witnesses>.

23 Department of Social Services (Cth), *Aboriginal and Torres Strait Islander Action Plan 2023–2025* (2023) 56; Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 118.

24 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 118.

high amount of direct interaction with people who have experienced sexual violence and complainants. For others, strongly encouraging education and training would be more suitable to foster a strong culture of ongoing professional development on topics relevant to sexual violence.

7.23 **Recommendation 12** mandates the education and training for police officers. Police are the 'gateway' to the criminal justice system, including general and specialist police.[25] The levels of attrition for complainants of sexual violence at the police stage are unacceptably high (**Chapter 5**). General duty police officers have been included in mandatory training because a complainant's initial contact with police will often be with general duty police officers and the ALRC heard about multiple retraumatising experiences at that point.[26] As stated in the Child Sexual Abuse Royal Commission Criminal Justice Report:

> initial contact with the police is likely to be highly influential in determining how they view the criminal justice system as a whole and whether they are prepared to continue to seek a criminal justice response.[27]

7.24 **Recommendation 13** mandates the education and training for employed solicitors, prosecutors, and witness assistance officers in Offices of the Directors of Public Prosecution. This is because of their role in preparing complainants as witnesses through the trial, sentencing, and appellate court processes and the significant decisions they make about resolving trials (for example, accepting pleas from defence or deciding that charges will not progress to trial).

7.25 Implementation of **Recommendations 12** and **13** would be feasible for police agencies and Offices of the Directors of Public Prosecutions as these agencies have a level of control over their workforce's professional development. As mentioned above, successful implementation would require sufficient funding to ensure there is capacity for training to be delivered.

7.26 **Recommendations 14** and **15** 'strongly encourage' education and training for court staff, barristers and solicitors, and judicial officers who work on sexual violence matters as the most suitable method to foster a culture of participation where ongoing professional development is expected and facilitated.

7.27 For court staff, the courts would be best placed to identify staff whose roles require education and training and can strongly encourage it in the context of their organisations.

7.28 For barristers and solicitors, the ALRC heard feedback from bar associations and preliminary views from the Law Council of Australia cautioning against mandating this education and training as it can promote a 'tick a box' mindset rather than a

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25 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 161.

26 See, eg, Name withheld, *Submission 14*; Not published, *Submission 36*; Not published, *Submission 68*; Not published, *Submission 142*; C Oddie, *Submission 145*.

27 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 1) 20.

focus on professional development, particularly if it applies to all barristers and solicitors.[28] It risks participants simply attending to comply with requirements, rather than for professional development purposes. Alternatively, if it is mandated only for barristers and solicitors who practise in sexual offences (criminal matters), it is very difficult for the professional body to ensure compliance because there is currently no requirement for practitioners in all jurisdictions to disclose their areas of practice. There may also be ethical and legal difficulties associated with imposing restrictions or restraint of trade on a barrister's practice for non-compliance. It may also create a shortage of lawyers available to work on sexual offences.

7.29 The ALRC considers that barristers and solicitors should be 'strongly encouraged' to undertake the recommended education and training. This would enable barristers and solicitors to choose programs best suited to their practices, increasing the likelihood of attendance for professional development purposes. Legal practitioners have a responsibility to undertake their own professional development to fulfill their obligations to their clients and the court. Recent decisions of the High Court of Australia and Court of Appeal in Tasmania have recognised the importance of the research in the way trials and appeals are conducted.[29] For legal practitioners to meet their professional obligations in this area of practice, they need to be knowledgeable about this research and the other topics described in **Recommendation 11**.

7.30 For judicial officers, the ALRC recommends that the education and training should be 'strongly encouraged' by heads of jurisdiction. In its 2021 Report, *Without Fear or Favour,* the ALRC addressed the topic of professional development for judges and 'the benefit of creating a culture where attendance at particular courses is both expected and facilitated'.[30] Courts should be adequately funded to ensure heads of jurisdiction can manage court lists and individual judicial workloads to create and foster that culture for the education and training in **Recommendation 11**. Since judges are hierarchical leaders in their profession, it would be disappointing to need to mandate their professional development, particularly when it is difficult to attach a consequence for non-compliance.

7.31 **Recommendations 15** and **16** would establish a way to monitor the professional development of future reforms, by requiring law societies and bar associations to collect and publish data on the number of participants who attend the education and training described in **Recommendation 11**. Similarly, each court would report annually on levels of attendance at the recommended education and training. To implement **Recommendation 16**, courts would communicate with NJCA and other existing judicial education bodies to obtain the relevant data.

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28 Correspondence from the Law Council of Australia to the Australian Law Reform Commission, 29 October 2024.

29 *BQ v The King* (2024) 419 ALR 153; *AWK v Tasmania* [2024] TASCCA 5.

30 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, 2021) [12.88].

## Trauma-informed education in law schools

**Recommendation 17**

The Law Admissions Consultative Committee (LACC) should ensure that education about myths and misconceptions research and trauma-informed and culturally safe responses to sexual violence (as described in **Recommendation 11**) are part of the current discussions between the six peak bodies (the Council of Australian Law Deans, LACC, Legal Services Council, Australian Law Students' Association, Law Council of Australia and the Australasian Professional Legal Education Community Ltd) around reforming legal education with a view to embedding that education within the curriculum of all law schools and practical legal education providers.

7.32 Law schools and practical legal education providers have a critical role in rebuilding the integrity of the response of the criminal justice system to sexual violence. They educate and train the legal practitioners and judicial officers of the future.

7.33 As discussed in **Chapter 8** and above, myths and misconceptions about sexual violence underpin criminal justice system responses to complainants and decision-making. Higher education teaching about the following has the potential to infuse the criminal justice system with an evidence-based response to sexual violence and change its culture:

- the research on the impact of trauma on memory and behavioural responses of complainants of sexual violence and the nature of sexual offending, grooming behaviour, and coercive control; and
- what a trauma-informed and culturally safe response to complainants of sexual violence involves.

7.34 In consultations, the ALRC heard that six peak bodies are currently in discussions about the structure of legal education in the higher education sector: the Council of Australian Law Deans; Law Admissions Consultative Committee (LACC); Legal Services Council; Australian Law Students' Association; Law Council of Australia; and the Australasian Professional Legal Education Community Ltd.

7.35 We recommend that LACC ensure that the significance of this education is discussed at those meetings with a view to it being embedded in curricula of law schools and practical legal education providers.

# Police and prosecution guidelines

## The need for trauma-informed and transparent guidelines

7.36 Guidelines help to define a 'benchmark' for police and prosecution processes and practices, and can therefore be a useful catalyst to improve practices across those agencies. Previous inquiries, and submissions to this Inquiry, outline some key tenets of effective police and prosecution guidelines, including that they are:

- transparent and publicly available (where operationally possible),[31] noting that all Offices of the Directors of Public Prosecutions publish prosecution guidelines;[32]
- trauma-informed and reflect complainants' rights;[33]
- address the needs of a diverse range of people who have experienced sexual violence, including people who are disproportionately reflected in sexual violence statistics;[34] and
- reviewed, updated, evaluated, and implemented throughout police agencies and Offices of the Directors of Public Prosecutions.[35]

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31 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 241; Legal Aid NSW, *Submission 201*.

32 See, eg, Director of Public Prosecutions (ACT), *The Prosecution Policy of the Australian Capital Territory* (2021) <www.dpp.act.gov.au/about_the_dpp/the_prosecution_policy>; Director of Public Prosecutions (Cth), *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2021) <www.cdpp.gov.au/publications/prosecution-policy-commonwealth>; Director of Public Prosecutions (NSW), *Prosecution Guidelines* (2021) <www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines>; Director of Public Prosecutions (NT), *Guidelines of the Director of Public Prosecutions* (2016) <https://dpp.nt.gov.au/__data/assets/pdf_file/0005/574124/DPP-Guidelines-Current-2016.pdf>; Director of Public Prosecutions (Qld), *Director's Guidelines* (2016) <www.publications.qld.gov.au/dataset/5ccbc93a-bb6e-4cfd-a9b6-7c22ba1a9949/resource/14407a5c-e40f-4301-b64c-28ce0dc94ba5/download/director-public-prosecutions-guidelines.pdf>; Director of Public Prosecutions (SA), *Statement of Prosecution Policy and Guidelines* <www.dpp.sa.gov.au/guidelines>; Director of Public Prosecutions (Tas), *Prosecution Policy and Guidelines* (2024) <www.dpp.tas.gov.au/__data/assets/pdf_file/0020/757001/DPP-Prosecution-Guidelines_v11.1-updated-22-November-2024.pdf>; Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (2023) <www.opp.vic.gov.au/wp-content/uploads/2023/09/DPP-Policy-21-September-2023.pdf>; Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2022) <www.wa.gov.au/system/files/2022-07/DPP_Statement_of_Prosecution_Policy_and_Guidelines_2022.pdf>. Each of these links were last accessed on 11 December 2024.

33 Women's Safety and Justice Taskforce, *Hear Her Voice: Report One* (vol 3, 2021) recs 46–47; Australian Human Rights Commission (n 1) 582.

34 Women's Safety and Justice Taskforce, *Hear Her Voice: Report One* (vol 3, 2021) recs 46–47; Not published, *Submission 75*.

35 National Centre for Action on Child Sexual Abuse, *Submission 85*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

**Recommendation 18**

Federal, state, and territory police agencies should prepare or review and update their guidelines on responding to complainants of sexual violence to ensure that their guidelines address, at a minimum, the following matters:

a. a requirement to log all complaints of sexual violence;

b. processes for responding to complainants of sexual violence, including complainants who are within groups that are disproportionately reflected in sexual violence statistics;

c. advising complainants prior to a formal interview of their right to seek independent legal advice and the availability of supports, including referrals to the Independent Legal Services, a Justice System Navigator, and support services;

d. criteria for making decisions regarding investigations or laying charges;

e. processes for interviewing complainants, including processes for taking a written statement or making an audiovisual recording;

f. communicating with complainants, including keeping complainants informed and updated;

g. timeframes;

h. the use of communication assistance, including interpreters and intermediaries;

i. the intersection between family violence and sexual violence; and

j. review and complaint processes.

The police guidelines (which are not operationally sensitive) should be made publicly available, published online and subject to ongoing review.

**Recommendation 19**

Offices of the Directors of Public Prosecutions should review and update their guidelines on responding to complainants of sexual violence to ensure their guidelines address, at a minimum, the following matters:

a. the decision to prosecute or not prosecute;

b. communicating with complainants, including keeping complainants informed and updated;

c. processes for responding to complainants of sexual offences, including complainants who are within groups that are disproportionately reflected in sexual violence statistics;

d. advising complainants of their right to seek independent legal advice and the availability of supports, including referrals to (where applicable) Independent Legal Services, a Justice System Navigator, witness assistance services, and support services;

e. meeting with complainants before trial;

f. preparation for trial, including the process of proofing complainants and court familiarisation;

g. the trial process generally;

h. the option of a pre-recorded evidence hearing;

i. the availability of flexible evidence measures;

j. the use of communication assistance, including interpreters and intermediaries;

k. applications for access to a complainant's personal, sensitive or confidential information, including sexual assault counselling communications;

l. sentencing and victim impact statements;

m. appeals;

n. timeframes;

o. resolving charges before trial;

p. decisions to discontinue the prosecution; and

q. review and complaint processes.

The prosecution guidelines should be made publicly available, published online, and subject to ongoing review.

## Public availability

7.37 All prosecution guidelines are publicly available. This is an important measure to support best practice, consistent, and transparent criminal prosecutions in Australia.[36]

7.38 Many police guidelines are not publicly available. It is in the public interest for sensitive aspects of police methods to remain confidential. For example, information on the method of ongoing investigations and mechanisms for undercover processes can only maintain their integrity if they are confidential.[37]

7.39 Equally, it is in the public interest for non-sensitive components of police guidelines to be publicly available. Transparency is a key tenet of successful police guidelines because it establishes a public accountability mechanism to ensure that police agencies are incorporating best practice measures in their work.[38] Further, it promotes meaningful engagement between police agencies and complainants.[39]

7.40 Some police agencies balance the competing public interests of confidentiality and transparency, publishing non-sensitive operational guidelines.[40] The ALRC recommends all Australian police agencies follow suit.

## Minimum requirements

7.41 Of the police guidelines that are publicly accessible, jurisdictions vary in the level of detail they provide about their responses and processes for reports of sexual violence.[41]

7.42 Generally, police guidelines include the following matters:

- responses to crimes that may be committed, including sexual offences;
- investigative processes; and

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36 Natalie Hodgson et al, 'The Decision to Prosecute: A Comparative Analysis of Australian Prosecutorial Guidelines' (2020) 44(3) *Criminal Law Journal* 155, 157; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 229.

37 Hayley J Cullen, Lisanne Adam and Celine van Golde, 'Evidence-Based Policing in Australia: An Examination of the Appropriateness and Transparency of Lineup Identification and Investigative Interviewing Practices' (2021) 23(1) *International Journal of Police Science & Management* 85, 94.

38 See Cullen, Adam and van Golde (n 37).

39 Christine Nixon and Karen Fryar, *Responding to Recommendation 15 of the Listen. Take Action to Prevent, Believe and Heal Report (2021): Sexual Assault (Police) Review Report* (2024) 33.

40 See, eg, Australian Federal Police, *Australian Federal Police Investigations Doctrine* (2020) <www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20Investigations%20Doctrine.pdf>; Queensland Police Service, *Operational Procedures Manual* (2024) <www.police.qld.gov.au/qps-corporate-documents/operational-policies/operational-procedures-manual>; Tasmania Police, *Tasmania Police Manual* (2024) <www.police.tas.gov.au/uploads/Tasmania-Police-Manual.pdf>; Victoria Police, *Victoria Police Manual* (2021). Each of these links were last accessed on 11 December 2024.

41 See, eg, Australian Federal Police (n 40); Queensland Police Service (n 40); Tasmania Police (n 41); Victoria Police (n 40).

- operational skills and practices.[42]

7.43 Generally, prosecution guidelines across Australia cover topics such as:

- the decision to prosecute, including consideration of factors such as evidentiary strength and the public interest;[43]
- prosecutors' rights, duties, and obligations throughout the prosecution process;
- discontinuing prosecutions; and
- publishing reasons for prosecutorial decision-making.[44]

7.44 Some Offices of the Directors of Public Prosecutions have specific guidance on contact with certain sexual offence complainants, such as children.[45] Others provide specific guidance on the prosecution process for 'sexual crimes'.[46]

7.45 The matters listed in **Recommendations 18** and **19** aim to bring police and prosecution guidelines to a minimum level or standard across Australia in relation to sexual offences.

7.46 At a minimum, police guidelines should:

- Set out the requirement for all reports of sexual violence to be logged. This is important for accountability and measuring attrition levels.
- Require complainants to be advised at the outset about their right to independent legal advice and address the referral of complainants to support services. This is important for recognising victims' rights, promoting the need for complainants to be well supported, and accountability.[47]
- Set out criteria for decisions to investigate and charge, and include the processes involved in reviewing those decisions. This increases transparency and accountability for decision-making.[48]
- Address interviewing complainants, to embed trauma-informed and culturally safe practices.[49]

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42 See, eg, Australian Federal Police (n 40); Queensland Police Service (n 40); Tasmania Police (n 40); Victoria Police (n 40).

43 Hodgson et al (n 36) 172.

44 Director of Public Prosecutions (ACT) (n 32); Director of Public Prosecutions (Cth) (n 32); Director of Public Prosecutions (NSW) (n 32); Director of Public Prosecutions (NT) (n 32); Director of Public Prosecutions (Qld) (n 32); Director of Public Prosecutions (SA) (n 32); Director of Public Prosecutions (Tas) (n 32); Director of Public Prosecutions (Vic) (n 32); Director of Public Prosecutions (WA) (n 32).

45 Director of Public Prosecutions (ACT), *Director's Instruction No. 13: Guidelines for Contact with Child Complainants in Sexual Offence Matters* (2019) <www.dpp.act.gov.au/__data/assets/pdf_file/0008/1413089/Directors-Instruction-No.-13-Guidelines-for-contact-with-complainants-in-sexual-offence-matters.pdf>.

46 Director of Public Prosecutions (Tas) (n 32) 30–6.

47 S Filmer, *Submission 30*; D Erlich and N Meyer, *Submission 115*; J Crous, *Submission 141*.

48 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 65.

49 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) rec 30; Name withheld, *Submission 10*.

- Include clear guidelines addressing the intersection of family and sexual violence, including any resulting legal and support needs.[50]

7.47 At minimum, prosecution guidelines should:

- Address the decision not to prosecute, the resolution of charges before trial, the decision to discontinue a prosecution, and a complainant's right to request a review of those decisions. This increases transparency for decision-making and accountability.
- Cover the preparation of complainants for trial and the need to advise them about the trial, sentencing, and the appeal process generally, including their right to make a victim impact statement. This recognises a complainant's need for information and understanding about the process, supports their engagement, and provides a framework for prosecution communications with complainants.
- Embed the requirement for prosecutors to tell complainants about the option of a pre-recorded evidence hearing, availability of flexible evidence measures, and applications for access to a complainant's personal, sensitive, or confidential information, including sexual assault counselling communications, and the availability of independent legal services in relation to such applications. This assists in promoting complainants' rights and their ability to make informed choices.

7.48 At minimum, police and prosecution guidelines should each:

- Address processes for responding to complainants of sexual violence, including processes for complainants within groups that are disproportionately reflected in sexual violence statistics. This ensures guidelines recognise the different needs and experiences of the broad range of sexual violence complainants.[51]
- Provide a framework for communicating with complainants, including the availability of supports such as intermediaries and interpreters,[52] which can be necessary for access to justice,[53] and keeping complainants informed and up to date.[54] This embeds 'accessible, responsive and streamlined' communications.[55] Regular and effective communication is important,[56] and 'key to keeping people engaged with the criminal justice process'.[57]
- Address time frames. Encouraging compliance with timeframes is important for many reasons, including because delay can compound the trauma and

50 See, eg, Not published, *Submission 151*.
51 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) rec 30; Name withheld, *Submission 10*; Centre for Innovative Justice, *Submission 216*.
52 Nixon and Fryar (n 39) 30.
53 Victorian Law Reform Commission (n 1) 351 [17.21].
54 See, eg, Centre for Innovative Justice, *Submission 216*.
55 Sexual Assault Prevention and Response Steering Committee (ACT) (n 48) rec 14.
56 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 1) rec 7(b).
57 Victorian Law Reform Commission (n 1) 357 [17.45], 361 [17.61].

stress of proceedings,[58] and complainants are often unsure about when the next step in their matter will take place.[59]

### Training about guidelines and ongoing review

7.49 The trauma-informed and culturally safe training in **Recommendation 11** should include training about the organisation's guidelines.

7.50 Past inquiries have noted that guidelines should be subject to ongoing review. This would include consulting with stakeholders such as specialist sexual assault services and people who have experienced sexual violence,[60] who would understand 'the strengths and areas of improvement' for police and prosecution decision-making.[61]

7.51 In **Chapter 5**, the ALRC recommends a mechanism to collate feedback from complainants of sexual violence about the criminal justice process. The mechanism would include the publication of an annual report which would be tabled in Parliament (**Recommendation 6**). When reviewing their guidelines, police agencies and Offices of the Directors Public Prosecutions should consider those annual reports.

## Police, prosecution, and court information

**Recommendation 20**

Federal, state, and territory police agencies, the Offices of the Directors of Public Prosecutions, and state and territory courts should ensure their online information on processes about sexual offence matters:

a. is easy to find;

b. explains to complainants what they can expect from the process;

c. provides information about all trauma-informed and culturally-informed processes, including the availability of flexible evidence measures;

d. is accessible to screen readers;

e. is available in an accessible format, including in easy read and audio or video format with captioning;

f. is available in multiple languages; and

g. is kept up to date.

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58 Sexual Assault Prevention and Response Steering Committee (ACT) (n 48) 39; Name withheld, *Submission 14*; J Crous, *Submission 141*.

59 Sexual Assault Prevention and Response Steering Committee (ACT) (n 48) 63; D Erlich and N Meyer, *Submission 115*.

60 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) rec 30.

61 Nixon and Fryar (n 39) 33.

## Justice system information should be accessible and comprehensive

7.52 Police agencies, Offices of the Directors of Public Prosecutions, and courts across Australia have online presences; however, the information relevant to sexual offences can be hard to access or incomplete.[62]

7.53 The ALRC received submissions from complainants of sexual violence who, before reporting to police, described searching for information online,[63] or going to the police station to seek information about the justice system.[64] One of these submissions explained how the aftermath of the experience of sexual violence made seeking information especially difficult:

> It is very difficult when one is dealing with such a life-altering traumatic experience to then have to dig through so many documents and websites in order to find some basic information. It also is difficult when a lot of available information is expressed in legal terms using jargon that can be difficult to understand.[65]

7.54 Inconsistencies 'exist from state to state across Australia in relation to the amount and type of information' on police and prosecution websites about reporting sexual offences.[66] Some themes observed in selected police agencies, Offices of the Directors of Public Prosecutions, and court websites include differences in:[67]

- levels of information about sexual offences, with some websites grouping sexual offences together with domestic and family violence;[68]
- details of how current the information is, for example, some websites publish the date at which information was last updated;[69]
- accessibility measures, for example, some websites provide easy read and braille or audio formats of their content, while others provide automated language translation systems;[70] and

62 A Brownlie, *Submission 39*; Name withheld, *Submission 69*; S Lockwood, *Submission 78*.
63 Name withheld, *Submission 34*; A Brownlie, *Submission 39*.
64 Name withheld, *Submission 135*.
65 J Crous, *Submission 141*.
66 S Lockwood, *Submission 78*.
67 Note that the citations for this section are for illustrative purposes only, and do not represent a full analysis of online information. Each website was last accessed on 11 December 2024.
68 South Australia Police, 'Your Safety' <www.police.sa.gov.au/your-safety>. Cf Queensland Police, 'Adult Sexual Assault' <www.police.qld.gov.au/units/victims-of-crime/support-for-victims-of-crime/adult-sexual-assault>; Queensland Police, 'What to Do If You Have Just Been Sexually Assaulted' <www.police.qld.gov.au/units/victims-of-crime/support-for-victims-of-crime/adult-sexual-assault/what-to-do-if-you-have>.
69 Queensland Police (n 68).
70 Office of the Director of Public Prosecutions (SA), 'Accessibility' <www.dpp.sa.gov.au/footer/accessibility>; Government of Western Australia, 'About This Website' <www.wa.gov.au/about-website#automatic-language-translation>.

- information about the flexible evidence measures available in sexual offence trials.[71]

7.55 Accessible and comprehensive information can improve the transparency of the justice system and allow those outside the system to observe whether it is working as it should (see also the discussion in **Chapter 5**). For people who have experienced sexual violence, such information can increase their 'sense of participation, voice and agency', by informing and equipping them to understand the criminal justice system and how cases progress through it.[72] The Specialist Approaches to Managing Sexual Assault Proceedings Review considered that information provision and communication can also build 'a sense of collaboration and trust', reducing the risk that people who have experienced sexual violence will be retraumatised or face systemic barriers when seeking justice.[73]

7.56 The ALRC heard widespread support for accessible, comprehensive, and accurate information on justice system processes for people who have experienced sexual violence. Previous inquiries and reports have also recommended increasing information for people who have experienced sexual violence.[74] An analysis of past recommendations highlights the common themes of procedural information people who have experienced sexual violence should be entitled to, which could be included on police, Offices of the Directors of Public Prosecutions, and court websites:

- options for reporting, including in person, over the phone, or online;[75]
- the general duties or roles of police, prosecution, and courts in the criminal trial process;[76]
- information on the processes police agencies and Offices of the Directors of Public Prosecutions are responsible for, such as investigating and charging an accused person,[77] or the purposes of different stages of a matter and thresholds for evidence;[78] and

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71 ACT Supreme Court, 'Witnesses' <www.courts.act.gov.au/supreme/coming-to-court/witnesses>; Office of Public Prosecutions (Vic), 'Going to Court' <www.opp.vic.gov.au/victims-witnesses/going-to-court/>; Director of Public Prosecutions (Tas), 'Witnesses and Victims' <www.dpp.tas.gov.au/witnesses_and_victims>; Office of the Director of Public Prosecutions (NSW), 'Sexual Assault Matters' <www.odpp.nsw.gov.au/preparing-for-court/court-arrangements-vulnerable-witnesses/sexual-assault-matters>.

72 George et al (n 1) 223–4 [5.6.2].

73 Ibid.

74 Victorian Law Reform Commission (n 1) rec 18; Sexual Assault Prevention and Response Steering Committee (ACT) (n 48) 63.

75 Sexual Assault Prevention and Response Steering Committee (ACT) (n 48) 63–4; Victorian Law Reform Commission (n 1) 149–50 [7.35].

76 Sexual Assault Prevention and Response Steering Committee (ACT) (n 48) 63–4; Victorian Law Reform Commission (n 1) 143 [7.10].

77 Victorian Law Reform Commission (n 1) 143 [7.10]; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (2023) rec 7.

78 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 77) rec 7.

- information on the key steps and general timeframes of the criminal justice process.[79]

7.57 Information must also be tailored to the diverse experiences and needs of people who have experienced sexual violence.[80] Groups that are disproportionately reflected in sexual violence statistics, such as First Nations people, people from culturally and linguistically diverse backgrounds, and people with disability, may have specific or more complex communication needs. Therefore, information should be published online with a focus on its accessibility to support access to justice for such groups.

7.58 For example, the Royal Commission into Institutional Responses to Child Sexual Abuse heard that, for people who are culturally and linguistically diverse, translated materials need to also be culturally appropriate and meaningful.[81] We also note that while online information is accessible to many, using technology to bridge the gap in information sharing depends on 'a strong, reliable telecommunications system'. In remote areas, 'unreliable telephone and internet access' impacts the online delivery of information and services.[82]

79 Sexual Assault Prevention and Response Steering Committee (ACT) (n 48) 63–4.
80 Victorian Law Reform Commission (n 1) 148 [7.32].
81 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 9* (2017) 73.
82 Alison Campbell et al, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future* (Australian Human Rights Commission, 2020) 284.

# 8. Addressing Myths and Misconceptions: Jury Directions and Expert Evidence

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## Introduction

8.1 As discussed in **Chapter 4**, many people still hold incorrect beliefs about sexual violence and about how people who have experienced sexual violence behave.[1] These myths and misconceptions are embedded across the criminal justice system. They can lead to unfair assumptions about the credibility and reliability of people who have experienced sexual violence. Research from Australia and around the world now discredits these beliefs (discussed below). Some of Australia's highest courts have recognised this research.[2] Recently, the High Court of Australia found research

1 See, eg, Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crimes against Adult Victims: Barriers to Justice* (Research Paper No 611, Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice, November 2020); Nina Hudson et al, *Understanding Adult Sexual Assault Matters: Insights from Research and Practice: An Educational Resource for the Justice Sector* (Australian Institute of Family Studies, Attorney-General's Department (Cth), 2024).

2 *BQ v The King* (2024) 419 ALR 153; *AWK v Tasmania* [2024] TASCCA 5; *Aziz (a pseudonym) v The Queen* (2022) 110 NSWLR 317.

on the impacts of child sexual abuse to be 'relevant to the jury's assessment of the complainants' credibility'.[3]

8.2 **Chapter 7** discusses the need to educate people who work in the criminal justice system (such as judicial officers, legal professionals, and police) on myths and misconceptions about sexual violence. Similarly, juror education is also needed. Juries decide questions of fact in sexual violence trials and apply the relevant law to the facts to reach a verdict. Research shows that jurors, as members of the community, can be influenced by incorrect beliefs.[4] This 'distorts the process of fact-finding', potentially affecting a juror's assessment of a complainant's credibility and reliability.[5]

8.3 Juror education is needed to restore a complainant's credibility to a neutral position and counter any juror bias.[6] This chapter sets out recommendations for supporting jury decision-making through jury directions and expert evidence.

8.4 These are not new approaches. Most Australian jurisdictions have made some advances in using jury directions, expert evidence, or both. However, there has been little movement in the influence of myths and misconceptions in the criminal justice system, including in jury decision-making in sexual offence matters.[7] In this chapter, the ALRC recommends a national approach to jury directions and expert evidence, so that all states and territories benefit from these advances and have a range of options to address this persistent issue.

## Juror education to counter myths and misconceptions

> For victim-survivors to recall traumatic events in front of strangers is extremely stressful, triggering and re-traumatising and sometimes the ability to take in everything that is asked of you on the stand can be challenging.
>
> The usefulness in countering myths and misconceptions to the jury I believe is a must. The jury needs some understanding that a complainant may have a

3 *BQ v The King* (2024) 419 ALR 153 [2].

4 Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) *UNSW Law Journal* 707, 709; Jane Goodman-Delahunty et al, 'Greater Knowledge Enhances Complainant Credibility and Increases Jury Convictions for Child Sexual Assault' (2021) 12 *Frontiers in Psychology* 13; Jane Goodman-Delahunty, Natalie Martschuk and Annie Cossins, 'Validation of the Child Sexual Abuse Knowledge Questionnaire' (2017) 23(4) *Psychology, Crime & Law* 391, 399.

5 *Lehrmann v Network Ten Pty Limited* [2024] FCA 369, [532].

6 New Zealand Law Commission, *Evidence: Evidence Code and Commentary* (Report 55, Volume 2, 1999) 67 [C111].

7 Yvette Tinsley, Warren Young and Claire Baylis, 'Jurors' Use of Rape Myths in Aotearoa New Zealand' in Greg Byrne and Jacqui Horan (eds), *Sexual Assault Trials: Challenges and Innovations* (Lexis Nexis, forthcoming).

lapse of memory after the incident occurred and during the court proceedings due to re-traumatisation.[8]

8.5 Jury directions, expert evidence, and agreed facts are three ways of educating juries in a criminal trial about the research which discredits commonly held beliefs about sexual violence:

- Jury directions are given by trial judges. They are statements about or explanations of the law that the jury must follow.
- Expert evidence may be given at trial by people who are qualified experts on topics that are not commonly understood in the community.
- Agreed facts may be compiled by the prosecution and defence on topics of evidence that are not in dispute and are provided to the jury during the trial to save the time and expense of calling witnesses.

8.6 In this context, the purpose of jury directions, expert evidence, and agreed facts, is to avoid juries assessing the credibility and reliability of a complainant's evidence based on common incorrect beliefs. This is intended to reduce the risk that trial outcomes are influenced by myths and misconceptions about sexual violence.

8.7 Jury directions and expert evidence may both be effective in countering myths and misconceptions. There is debate about which method may be more effective.[9]

8.8 Research indicates that jury directions may reduce the influence of myths and misconceptions,[10] especially when given at the same time as the evidence which triggers incorrect beliefs.[11] Others are of the view that they may have minimal or no effect and that there is a need for empirically tested research.[12]

8.9 Expert evidence may improve jurors' knowledge in this area, depending on its timing and the kind of evidence being considered.[13] Expert evidence must relate to the facts of the case and is most effective when called before the complainant gives their evidence.[14] There are generally two types of expert evidence on myths

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8 S Filmer, *Submission 30*.

9 B McKimmie, F Nitschke, G Ribeiro, and A Thompson, *Submission 125*; Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) 17(1) *The International Journal of Evidence & Proof* 74, 93.

10 B McKimmie, F Nitschke, G Ribeiro, and A Thompson, *Submission 125*; Cossins (n 9) 93; Julia Quilter, Luke McNamara and Melissa Porter, 'New Jury Directions for Sexual Offence Trials in New South Wales: The Importance of Timing' (2022) 46 *Criminal Law Journal* 138, 145; Faye Nitschke and Blake McKimmie, 'The Effectiveness of Educational Jury Directions in Adult Sexual Assault Trials' in Greg Byrne and Jacqui Horan (eds), *Sexual Assault Trials: Challenges and Innovations* (Lexis Nexis, forthcoming).

11 Quilter, McNamara and Porter (n 10) 144.

12 B McKimmie, F Nitschke, G Ribeiro, and A Thompson, *Submission 125*; Julia Cooper, 'Judges as Myth-Busters: A Re-Examination of Jury Directions in Rape Trials' (2022) 31(4) *Griffith Law Review* 485, 497; Nitschke and McKimmie (n 10).

13 Jane Goodman-Delahunty, Anne Cossins and Kate O'Brien, 'Enhancing the Credibility of Complainants in Child Sexual Assault Trials: The Effect of Expert Evidence and Judicial Directions' (2010) 28(6) *Behavioral Sciences and the Law* 769, 772, 780.

14 Cossins (n 9) 90.

and misconceptions: diagnostic clinical evidence; and evidence based on 'general educative scientific findings'.

8.10 Diagnostic clinical evidence involves the expert interviewing the complainant before the trial and providing a report. The expert gives specific opinions about the complainant's evidence (including their memory and behaviours) based on their interview with the complainant. This risks the expert straying into making their own credibility and reliability assessments of the complainant, which is the role of the jury.

8.11 The other type of expert evidence is evidence based on 'general educative scientific findings'.[15] This draws on common patterns of behaviour, and does not involve the expert interviewing the complainant.[16] This type of expert evidence is generally called in Australian jurisdictions. The ALRC has focused on this type of evidence, over diagnostic clinical evidence, because there is High Court precedent for its relevance and admissibility to the jury's assessment of complainants' credibility.[17] It is also a more efficient form of evidence because it does not require complainants to be interviewed for a psychological assessment, and has the benefit of consistent content about myths and misconceptions being led across all trials, which can be tailored to the specific issues at each trial. It also mitigates the risk of the expert giving an opinion about whether the complainant experienced sexual violence. That decision is a matter for the jury and is not evidence which an expert is entitled to give in court.

8.12 There are other advantages and disadvantages to the use of jury directions and expert evidence. Because jury directions are based in legislation or common law, they can be seen as more static than expert evidence, which has the advantage of being able to adapt to research as it emerges.[18] Some submissions noted that jury directions are simpler, quicker, and cheaper; but still help educate jurors.[19] The disadvantages of expert evidence are cost, limited availability of experts, the risk of delay, and increased trial duration. The most efficient way for undisputed expert evidence to be presented is by way of agreed facts, as raised by the High Court in *BQ v the King* ('*BQ*').[20]

8.13 The ALRC does not consider it necessary to recommend one approach over the other. Instead, both mechanisms should evolve alongside each other. In some sexual violence trials, the issues raised may mean that expert evidence is not required, as directions will be sufficient. However, some trials may be more nuanced and require expert evidence to be called in addition to jury directions. In

15 Jane Goodman-Delahunty and Mark Nolan, 'Autobiographical Memories of Sexual Assault' in Greg Byrne and Jacqui Horan (eds), *Sexual Assault Trials: Challenges and Innovations* (Lexis Nexis, forthcoming).

16 Jane Sullivan and Diana Piekusis, 'Expert Mental Health Evidence' in Greg Byrne and Jacqui Horan (eds), *Sexual Assault Trials: Challenges and Innovations* (Lexis Nexis, forthcoming).

17 *BQ v The King* (2024) 419 ALR 153.

18 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 443 [20.62].

19 Not published, *Submission 197*; Sexual Assault Services Victoria, *Submission 203*.

20 *BQ v The King* (2024) 419 ALR 153 [59].

other trials, the expert evidence may take the form of agreed facts which underlie the jury directions. The ALRC recommends improvements to the accessibility and delivery of expert evidence and to the identification and formulation of relevant jury directions. We expect that as courts and the community increasingly recognise this research, it will become more accepted and ways of introducing it to juries will be increasingly streamlined.

## Jury directions in legislation

**Recommendation 21**

The Standing Council of Attorneys-General should establish an appropriately funded expert multi-disciplinary working group to produce a model bill containing judicial directions to address myths and misconceptions in sexual offence trials, to be enacted by each state and territory (the Model Jury Directions Bill).

The multi-disciplinary working group should include experienced criminal trial judges and consult nationally with criminal trial judges, researchers, and stakeholders about the Model Jury Directions Bill.

Once adopted by states and territories, the effectiveness of the directions in the Model Jury Directions Bill should be subject to ongoing evaluation, including a review within five years after enactment.

**Recommendation 22**

The National Judicial College of Australia, the Australasian Institute of Judicial Administration, the Judicial College of Victoria, and the Judicial Commission of New South Wales, in collaboration with relevant experts, should be funded to publish a National Judicial Bench Book, to support and complement the Model Jury Directions Bill (**Recommendation 21**).

### The need for jury directions to counter myths and misconceptions

8.14 As discussed above, jury directions can be an effective, simple, and cost-efficient way to correct myths and misconceptions and educate jurors about trauma responses to sexual violence. While some states have legislated, or are in the process of legislating, those types of jury directions, there are differences in approach. The ALRC considers there is an opportunity for collaboration to make the approach nationally consistent, comprehensive, and best practice.

> I had been very concerned in the lead up to the trial about a lack of general knowledge in the community regarding responses to trauma … I strongly feel

> that there needs to be much more extensive directions to juries which properly educate them on both memory and responsive behaviour in trauma and to comprehensively debunk the myths and misconceptions that are unfortunately widespread in the community.[21]

## Different approaches to jury directions

8.15 The extent to which legislated directions address misconceptions differs in each jurisdiction. Victoria was the first jurisdiction to codify jury directions for sexual offence trials. The *Jury Directions Act 2015* (Vic) was passed in response to a growing sense that major reforms were needed to simplify jury directions, which had become too complicated. That Act now contains jury directions to counter common myths and misconceptions about sexual violence. It is considered the most comprehensive legislated approach to jury directions to date.

8.16 The Law Reform Commission of Western Australia recently recommended legislating a range of jury directions for sexual offence cases.[22] If implemented, these recommendations would bring Western Australia largely in line with the position in Victoria.

8.17 Some jurisdictions have legislated jury directions to address only some common misconceptions. Other jurisdictions limit some of the directions to sexual offences that occur within a family violence context.[23] Not all states and territories have a direction about the range of ways people respond to sexual violence.[24] Tasmania does not appear to have legislated any jury directions on these topics.

8.18 Jury directions legislation differs between jurisdictions in terms of whether it addresses the timing of a direction or whether it is mandatory to give a direction. In Victoria, directions must be given if the trial judge considers that the evidence could lead to reasoning based on a common myth or misconception, like a delay in reporting.[25] The direction must be given before such evidence is presented and can be repeated as needed.[26] In the Australian Capital Territory and South Australia, some directions are also mandatory but there are no provisions about the timing of those directions.[27] It is traditional for trial judges to give all their directions as a 'summing up' at the end of the trial, which is after the evidence is completed and closing addresses have been given by the prosecution and defence.

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21 J Crous, *Submission 141*.

22 The Law Reform Commission of Western Australia, *Project 113: Sexual Offences* (Final Report, 2023) recs 94–109.

23 In Queensland and Western Australia most relevant jury directions are for use only in family violence matters, which may sometimes involve charges relating to sexual violence.

24 *Criminal Procedure Act 1986* (NSW) s 292B; *Evidence Act 1977* (Qld) s 103ZT; *Evidence Act 1929* (SA) s 34N; *Jury Directions Act 2015* (Vic) ss 47E, 54H.

25 *Jury Directions Act 2015* (Vic) s 52.

26 Ibid ss 52, 54D, 54H, 54K.

27 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 80B, 80C; *Evidence Act 1929* (SA) s 34N.

8.19 Judges generally have a discretion to give jury directions at times they think appropriate during the trial, and to repeat them again in their summing up at the end of the trial. The ALRC intends that judges should retain this discretion in respect of legislated jury directions introduced by the Model Jury Directions Bill.

## The benefits of a national approach

8.20 The ALRC recommends that the Standing Council of Attorneys-General establish an expert multi-disciplinary working group tasked with developing a Model Jury Directions Bill.

8.21 A collaborative and national approach to the development of jury directions would encourage the national adoption of a consistent and comprehensive range of jury directions addressing common myths and misconceptions about sexual violence. A joint approach would endorse the importance of the need for reform and enable all jurisdictions to benefit from sharing practices, resources, and expertise. The Model Jury Directions Bill would contain directions supported by research, to ensure that directions given by trial judges on the impact of trauma on memory and how people respond to sexual violence are evidence-based. The process of codifying directions places a focus on their simplification to aid juror comprehension and assist trial judges to avoid lengthy and complex directions which can lead to error and successful appeals.[28]

8.22 Development of the legislated Victorian jury directions was informed by the views of a multi-disciplinary expert advisory group. Similarly, the national expert multi-disciplinary working group recommended by the ALRC should include, and consult with, experienced trial judges from different jurisdictions,[29] academics with relevant expertise (such as expertise in the impacts of trauma on memory, behavioural responses to sexual violence, and juror psychology), and relevant stakeholders. It is expected that the multi-disciplinary working group may include and consult with members of the national governing body of expert witnesses (**Recommendation 24**).

8.23 Many submissions supported the substance of **Recommendation 21**,[30] which echoes recommendations made by other inquiries at a jurisdictional level.[31]

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28 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (2017) 138.

29 As suggested to the ALRC by the Chief Justice of one state's Supreme Court.

30 Legal Services Commission (SA), *Submission 93*; Northern Territory Director of Public Prosecutions, *Submission 143*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Sex Discrimination Commissioner (Cth), *Submission 168*; WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Full Stop Australia, *Submission 214*.

31 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 28) recs 64–65; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) rec 77; Victorian Law Reform Commission (n 18) rec 78; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, 2020) recs 8.1–8.8.

8.24 **Recommendation 21** does not prescribe the content of the Model Jury Directions Bill. The ALRC notes that the Victorian jury directions scheme may be a useful starting point, to be considered in conjunction with more recent approaches in other states and territories.

8.25 The expert multi-disciplinary working group recommended by the ALRC should ensure that the Model Jury Directions Bill addresses myths and misconceptions about specific groups, particularly groups that are disproportionately reflected in sexual violence statistics. Canadian courts have recognised that directions can 'overcome stigma and prejudice',[32] and Australian courts should be able to do the same. The Victorian legislation already includes directions that non-consensual sexual acts take place between 'all sorts of people', including LGBTQIA+ people and people who are sex workers.[33] Submissions and other inquiries also suggested addressing myths about First Nations people and communities,[34] people with disabilities,[35] and cases where people meet through a dating app.[36]

8.26 The Model Jury Directions Bill should adopt the guiding principle set out in the *Jury Directions Act 2015* (Vic): 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.[37] The ALRC agrees with the Law Council of Australia's submission that maintaining 'flexibility and judicial discretion' is essential to 'ensure directions are appropriately tailored to the facts of the case'.[38] Juries must not be overwhelmed with directions that are not relevant to the issues at trial.

8.27 Finally, the ALRC recommends that the directions contained in the Model Jury Directions Bill should be evaluated every two years once enacted by states and territories. Ongoing review was widely supported in submissions.[39] The evaluation should include:

- obtaining feedback from trial judges, prosecutors, and defence about the directions;
- monitoring the decisions of appellate courts;
- ensuring the directions reflect any developing and generally accepted scientific and research-based findings;
- assessing the effectiveness of the directions by considering any jury research; and

32 *R v Barton* [2019] 2 SCR 579 [128].
33 *Jury Directions Act 2015* (Vic) s 47H.
34 Aboriginal Legal Rights Movement, *Submission 172*.
35 Women With Disabilities Australia & People with Disability Australia, *Submission 192*.
36 Victorian Law Reform Commission (n 18) 440 [20.45].
37 *Jury Directions Act 2015* (Vic) s 5.
38 Law Council of Australia, *Submission 215*.
39 J Quilter and L McNamara, *Submission 49*; B McKimmie, F Nitschke, G Ribeiro, and A Thompson, *Submission 125*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Women's Legal Services Australia, *Submission 212*; Law Council of Australia, *Submission 215*.

- monitoring the overall need to dispel myths and misconceptions in sexual violence trials.

8.28 This process can be led by the researcher embedded in each trial court, coordinated by the National Judicial College of Australia, Judicial Commission of NSW and Judicial College of Victoria.[40]

### A national judicial bench book about misconceptions in sexual violence matters

8.29 A bench book is a resource, often developed by a judicial education body, which has clear explanations of the law or procedure. Bench books often contain suggested wording for judicial directions and are widely used by judicial officers and lawyers.

8.30 A bench book for judicial directions addressing misconceptions in sexual offences should be developed to support implementation of the recommended Model Jury Directions Bill and a nationally consistent approach. It should be developed by judicial colleges, and the experts involved in formulating the recommended Model Jury Directions Bill. The bench book should cover the content and timing of directions. It would need to be carefully monitored so that it reflects advances in research and developing law. Like other measures in sexual assault trials, the bench book should take a trauma-informed and culturally appropriate approach. A recently drafted New Zealand bench book on responding to misconceptions about sexual offending offers example directions tailored to specific misconceptions and groups.[41] This could serve as a model for uniform suggested directions once uniform legislation is in place. The bench book could also draw on the National Family and Domestic Violence Bench Book.[42]

## Expert evidence

**Recommendation 23**

Relevant Commonwealth, state, and territory legislation should be amended, where necessary, to make admissible expert evidence about the impact of sexual violence on child and adult complainants.

40 See **Recommendation 3**.

41 Te Kura Kaiwhakawa | Institute of Judicial Studies (NZ), *Responding to Misconceptions about Sexual Offending: Example Directions for Judges and Lawyers* (2023).

42 Attorney-General's Department (Cth), Australasian Institute of Judicial Administration and The University of Melbourne, *National Domestic and Family Violence Bench Book* (2024) <https://dfvbenchbook.aija.org.au/>.

**Recommendation 24**

The Standing Council of Attorneys-General should commission the establishment of an appropriately funded governing body of expert witnesses in sexual violence matters to:

a. compile and maintain a panel of expert witnesses as an accessible resource for prosecution and defence who are seeking opinions, reports, and evidence from qualified experts about myths and misconceptions, including the impact of trauma on memory, responsive behaviour of complainants, and related topics;

b. prepare materials for a flexible approach to expert evidence, including audiovisual recordings of experts giving evidence in the form of modules which address research on the impact of trauma on memory and responsive behaviour of complainants with a view to those recordings being admissible as part of the prosecution case;

c. prepare summaries of those modules which may be used as the basis for agreed facts between prosecution and defence in sexual assault trials; and

d. be a resource for the education of people who work in the criminal justice system, including by producing training videos for police, prosecutors, and defence counsel on myths and misconceptions and trauma-informed practice (discussed in **Recommendation 11**) and contributing to programs organised by the National Judicial College of Australia, Australasian Institute of Judicial Administration, judicial colleges, Offices of the Directors of Public Prosecutions, Legal Aid Commissions, Aboriginal and Torres Strait Islander legal services, bar associations, law societies, and police.

Membership of the governing body should include experts and academics specialising in: memory, including the impacts of trauma on memory; responsive behaviour of people who have experienced sexual violence; sexual offences; and jury research.

Members of the governing body should undertake this work in consultation with experienced trial judges; academics who specialise in jury research; counsel experienced in conducting sexual violence trials; and other relevant stakeholders.

**Recommendation 25**

The Commonwealth, and each state and territory, should enact legislation to provide that the evidence of an expert on sexual violence (see **Recommendation 24**) may be admissible in the form of an audiovisual recording, but the expert (or another expert who adopts the video) must be available for cross-examination if required.

## The admissibility of expert evidence to counter myths and misconceptions

8.31 As discussed above, expert evidence is one of three ways of educating juries in a criminal trial about research which discredits commonly held beliefs about sexual violence, including research about trauma's effects on memory and behavioural responses to sexual violence. The ALRC recommends that jurisdictions make it clear in legislation that the admissibility of such expert evidence extends to trials involving adult complainants as well as child complainants. To support and promote the understanding, accessibility, and use of this evidence (including the potential for the prosecution and defence to agree facts), the ALRC recommends a national governing body of experts.

## Current use of expert evidence

8.32 Almost all state and territory laws expressly provide that expert evidence about the development and behaviour of children who have been victims of child sexual abuse is admissible in sexual offence trials.[43] Amendments to the Uniform Evidence Acts followed the ALRC's 2005 *Uniform Evidence Law* Report, which was published together with the New South Wales and Victorian Law Reform Commissions. The report acknowledged that while there was already scope in legislation to admit expert opinion evidence on child development and behaviour, Australian courts were reluctant to admit such expert evidence.[44] The Commissions recommended that the legislation should be clarified.[45] Victoria and South Australia have legislation that allows for expert evidence to be admitted on the nature and impacts of sexual

43 *Evidence Act 2011* (ACT) ss 79(2), 108C(2); *Evidence Act 1995* (NSW) ss 79(2), 108C(2); *Evidence (National Uniform Legislation) Act 2016* (NT) ss 79(2), 108C(2); *Evidence Act 1929* (SA) s 29C; *Evidence Act 2001 (Tas)* ss 79(2), 108C(2); *Evidence Act 2008* (Vic) ss 79(2), 108C(2); *Evidence Act 1906* (WA) s 36BE. The current exception is Queensland, which passed the *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld), to make that clarification.

44 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005) 316 [9.144].

45 Ibid rec 9-1.

violence in relation to all complainants, including adults.[46] Queensland's legislation will also soon make this clarification.[47]

## Legislation should expressly permit expert evidence to address myths and misconceptions about adult complainants

8.33 Similarly to the 2005 *Uniform Evidence Law* Report, the ALRC notes that while the current provisions which enable expert evidence in Australian jurisdictions may allow scope for the admission of expert opinion evidence on adult complainants, it is not typically being admitted in adult sexual offence matters. The ALRC recommends that jurisdictions with laws which contain express provisions relating only to child complainants extend the express admissibility to similar evidence relating to adult complainants.[48] There is no justification for limiting admissibility to child complainants. Research which discredits commonly held beliefs about sexual violence is equally compelling in relation to children and adults.[49] For example, the incorrect belief that a 'real' victim would not continue to have a relationship with a person who used violence against them is one that is held and discredited in relation to children and adults.[50]

8.34 Some members of the Expert Advisory Group recognised that there is value in an expert explaining to juries behaviours of child and adult complainants that may seem counterintuitive. The view was also supported in submissions received.[51]

8.35 The text of the recommended legislative provisions should make it clear that courts may admit expert evidence on the nature of sexual offences and the responsive behaviours of people who have experienced sexual violence. This should include evidence about myths and misconceptions that are commonly used to assess complainants' credibility and reliability.

8.36 The ALRC recognises that myths and misconceptions about sexual violence extend beyond the impacts of trauma on memory and appropriate responsive behaviours of complainants. Expert evidence could assist jurors to understand the nature of sexual violence outside of the complainant's response and behaviour. For example, there is a body of evidence on subjects such as common offender

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46 *Evidence Act 1929* (SA) s 34N(2a); *Criminal Procedure Act 2009* (Vic) s 388.

47 *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) s 33.

48 The Australian Capital Territory, New South Wales, the Northern Territory, Tasmania, and Western Australia.

49 For an overview of this research see Tidmarsh and Hamilton (n 1); Hudson et al (n 1).

50 Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (2017) 12, 17.

51 Older Women's Network NSW, *Submission 153*; Royal Australian and New Zealand College of Psychiatrists, *Submission 154*; Centre for Women's Safety and Wellbeing, *Submission 193*; Sexual Assault Services Victoria, *Submission 203*; Full Stop Australia, *Submission 214*.

behaviour and grooming behaviours.[52] A focus on the complainant's behaviour alone risks enforcing victim-blaming narratives. This is an important issue that the ALRC suggests should remain on the agenda for discussion.

### *Practical barriers to using expert evidence*

8.37 In 2017, the Child Sexual Abuse Royal Commission found that legislation expressly enabling the admission of expert evidence in child sexual abuse trials had not been frequently accessed.[53] In 2020, Horan and Delahunty found that, even though it is widely acknowledged that educative expert evidence is needed, it remained underused.[54] Our consultations and research lead us to the same conclusion. Most jurisdictions have not developed a practice of presenting expert evidence in trials to counter myths and misconceptions. Consultees have advised that this evidence is most commonly used in New South Wales. In other jurisdictions, expert evidence is not commonly called. In Victoria, the focus has been on jury directions, rather than expert evidence, to address myths and misconceptions. However, expert evidence has been called, including to 'explain the process of memory formation, storage and retrieval after an alleged traumatic event'.[55]

8.38 There are practical barriers to calling expert evidence in child sexual violence trials. The barriers, which were explored in detail by the Child Sexual Abuse Royal Commission, include:

- a lack of information about who qualifies as an expert on child sexual assault;
- prosecutors' lack of time to organise an expert witness;
- a lack of information about the impact of such evidence at trial; and
- that it is costly and difficult to obtain, particularly in regional areas.[56]

8.39 Cost was also raised as a concern in submissions and consultations with Offices of the Directors of Public Prosecutions as part of this Inquiry.[57] There are also few experts who can be called upon to give evidence in sexual assault trials.[58] The ALRC heard in consultations that experts are mostly located in the more populated states.

## A national governing body of experts for sexual violence matters

8.40 To improve the understanding of the utility of expert evidence in sexual violence trials, it is important to make it visible and accessible. To achieve this, the

52 See, eg, Gemma Hamilton and Patrick Tidmarsh, *The Intersections of Family Violence and Sexual Offending* (Routledge, 2023) 1–12; Hudson et al (n 1).
53 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 28) 154.
54 Horan and Goodman-Delahunty (n 4) 711.
55 Law Council of Australia, *Submission 215.*
56 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 28) 154–5.
57 See, eg, Northern Territory Director of Public Prosecutions, *Submission 143.*
58 Ibid.

ALRC recommends that the Standing Council of Attorneys-General establish a governing body of expert witnesses in sexual violence matters. The governing body would have several functions, one of which is to establish and maintain a panel of experts qualified to provide reports and give evidence in sexual violence trials. The panel should be established at a national level, to make qualified experts visible and accessible to prosecution and defence in any jurisdiction, including regional areas. In the 2021 Victorian Law Reform Commission (VLRC) Sexual Offences Report, the VLRC recommended a state-based independent expert panel.[59] As part of that inquiry, the County Court of Victoria noted that 'an expert panel is able to be more quickly and more flexibly applied to sexual offence proceedings', and would improve access to expert evidence.[60] The Queensland Women's Safety and Justice Taskforce made a similar recommendation.[61] The ALRC agrees that an independent expert panel would make the process of calling experts more efficient. To ensure the evidence is high quality and objective, panel members should be suitably qualified experts. Based on stakeholder input, the ALRC suggests the panel comprise experts and academics specialising in impacts of trauma on memory, responsive behaviour of complainants, sexual offences, and jury research.

8.41 Inclusion on the panel would not mean that the expert's evidence is admissible; that would be determined by the court. Nor would it mean that the prosecution or defence is limited to engaging or calling an expert who is on the panel. Members of the governing body may also be suitable members of the expert witness panel.

8.42 The role of the governing body should not be limited to putting together a visible and accessible panel of expert witnesses who may provide reports and be called at trial. The governing body should have a broader and more proactive role. It is for this reason that the governing body should be managed and have the input of a former judge and/or legal practitioners with experience in sexual violence trials. The role of the governing body should include:

- preparing audiovisual expert evidence modules on the impact of trauma on memory and responsive behaviour of sexual violence complainants (discussed below);
- preparing summaries which may form the basis for agreed facts (discussed below);
- developing materials to promote a flexible approach to placing expert evidence before juries (such as standardising reports which may then be adapted to issues nominated by prosecution and defence);
- considering and developing ways to identify, train, and recruit additional experts to be available to provide reports and give evidence; and
- being available as a resource for the education of people who work in the criminal justice system about research on the impact of trauma on memory and responsive behaviour of people who have experienced sexual violence,

59 Victorian Law Reform Commission (n 18) rec 80.
60 Ibid 444–5 [20.67]–[20.76].
61 Women's Safety and Justice Taskforce (n 31) rec 80.

including the production of training videos for police, prosecution and defence counsel on myths and misconceptions and trauma-informed practice (discussed in **Recommendation 11**), and programs organised by the National Judicial College of Australia, Australasian Institute of Judicial Administration, judicial colleges, Offices of the Directors of Public Prosecutions, legal aid organisations, Aboriginal and Torres Strait Islander legal services, bar associations, law societies, and police.

8.43 The governing body could also contribute to the development of a Model Jury Directions Bill and a National Judicial Bench Book, discussed above.

## Flexible approaches to expert evidence

8.44 It would not be possible for an expert witness to provide a report and give evidence about counter-intuitive responses to sexual violence in every sexual violence trial in all jurisdictions.

8.45 The ALRC recommends that the governing body develop materials to promote a flexible approach to the presentation of the evidence. This would help to address demands on individual experts, reduce wait times for reports, enhance the prosecution ability to make early disclosure, and reduce the need for experts to give evidence in court (other than for potential cross-examination).

8.46 Some courts have commented on the length of expert reports,[62] which can lead to delays and add to the complexity of trials. The materials prepared by the governing body should include standardised written modules addressing different myths and misconceptions, from which reports can be readily compiled and provided to target the trial issues identified by counsel.

8.47 The materials should include a series of video modules on a range of myths and misconceptions. Rather than calling an expert to give evidence in person, the prosecution may tender the relevant video modules to be played to jurors at trials. The modules could cover:

- common myths and misconceptions relating to the effects of trauma on memory and reasons for delayed reporting; and
- stereotypes about particular groups of complainants, such as those that are disproportionately reflected in sexual violence statistics.

8.48 Pre-trial, the prosecution would need to identify to the defence which video modules the prosecution considers are relevant to the issues in the trial. The modules may be discussed in a pre-trial hearing to allow the defence to indicate if the evidence is disputed. If so, the prosecution may either call the expert who appears in those modules for cross-examination or another expert who adopts the evidence in those modules and is available for cross-examination (either in person

62 *DH v R* [2015] NZSC 35 [100]; *Aziz v The Queen* [2022] NSWLR 110 [94].

or remotely) after the modules are played to the jury. The defence may also call an expert. The expert need not be a panel member.

8.49 In some jurisdictions, video modules of expert evidence are likely to be admissible,[63] but to prevent challenges about admissibility, the ALRC recommends jurisdictions enact legislation to make clear that this evidence can be admissible.

8.50 The governing body could also produce written summaries of the modules which may be used by the parties as the basis for agreed facts. If the defence does not dispute the expert evidence video, parties could adopt or adapt the written summary as agreed facts. As discussed above, an agreed statement of facts can make the process more efficient and is a practice recognised by the High Court in *BQ*.[64] The ALRC expects that this practice would be used more often if expert evidence becomes more routine, the content of the evidence more accepted, and the Model Jury Directions Bill for jury directions developed.

63 See Uniform Evidence Acts ss 79, 108C.
64 *BQ v The King* (2024) 419 ALR 153 [59].

# 9. Recorded Evidence

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## Introduction

9.1 One of the most challenging aspects for complainants who engage with the criminal justice system is giving evidence at trial. This chapter discusses two measures which have been introduced to minimise retraumatisation associated with giving evidence: recorded police statements and pre-recorded evidence hearings.

9.2 In this chapter, the ALRC recommends that:

- measures be taken to improve the quality of recorded police statements;
- pre-recorded evidence hearings be extended as an option to adult complainants as an informed choice;
- empirical research projects be commissioned and funded to monitor the use and effectiveness of recorded police statements and pre-recorded evidence hearings; and
- technology, suitable for recording and playing good quality evidence, is available to police and courts, including in regional and remote areas.

## A note on terminology

9.3 Terms used to describe recorded evidence in legislation differ across Australian jurisdictions. The table below defines the main terms used in this Report.

***Table 9.1: Recorded evidence terminology***

| Term | Definition |
|---|---|
| **Recorded police statement** | A recording of the police interview of the complainant. The recording may be used at trial as the complainant's evidence-in-chief (in whole or in part). |
| **Pre-recorded evidence hearing** | A hearing to record the evidence of a witness (including their evidence-in-chief, cross-examination, and any re-examination) without the jury present, at an earlier date than the remainder of the witnesses in the proceedings.<br>The witness can be in the courtroom or at another location, such as within the court precinct or at a remote witness facility using audio-visual (AV) link or closed-circuit television (CCTV).<br>The pre-recorded evidence is then played to the jury (or judge alone, if a judge-alone trial) as the complainant's evidence. |
| **AV link or CCTV** | An AV link or CCTV allows a witness to give live evidence in a room away from the courtroom where the trial or hearing is being held.<br>An AV link or CCTV can be used at pre-recorded evidence hearings and at trial. |
| **Recording of evidence given at trial** | The witness gives evidence at trial in the courtroom or from a location outside court via AV link or CCTV.<br>The evidence is recorded for potential use in any subsequent trials (if there is a mistrial or hung jury), retrials (if there is a successful appeal against conviction), appeals or other related proceedings. |

# Key issues

9.4 The concept of using recorded police statements and pre-recorded evidence hearings in sexual offence trials for complainants who are children or people with cognitive impairment can be traced back to the United Kingdom's 1989 Report

of the Advisory Group on Video Evidence (Pigot Report).[1] Since then, Australian jurisdictions and many other countries have implemented and extended the practice to varying degrees. Recently, the Tasmania Law Reform Institute researched the history, operation, benefits,[2] and the 'emerging case against the widespread use' of recorded police statements and pre-recorded evidence hearings.[3]

9.5 The perceived benefits of recorded police statements and pre-recorded evidence hearings have been identified to include:

- the welfare of the complainant — by reducing the stressful and traumatising experience of waiting to give evidence at the trial and the adversarial nature of the trial itself;
- reducing the number of times a complainant needs to speak about their experience; and
- improving the quality of the complainant's evidence, including by capturing a fresher account and enabling it to be given in a less stressful environment.[4]

9.6 These benefits have been recognised as especially important for complainants who are children and people with cognitive impairment.[5]

9.7 After three decades of implementation, recorded police statements and pre-recorded evidence hearings continue to be used as important evidence measures, but reviews (particularly in the United Kingdom) have raised multiple concerns about the quality of recorded police statements and pre-recorded evidence hearings.[6] The ALRC heard similar support, but also that the poor quality of technology used to record and play recorded evidence is a major drawback, sometimes making the recording unwatchable.[7] There is also debate about whether recorded evidence negatively impacts how the jury perceives the complainant's credibility, when

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1 Home Office (UK), *Report of the Advisory Group on Video Evidence* (1989).

2 Tasmania Law Reform Institute, *An Evaluation of the Pre-Recorded Evidence Scheme in Tasmania* (Research Paper No 7, 2024).

3 Ibid pt 5.

4 Ibid 38 [4.1.2], 40 [4.2.5]–[4.2.6]. See also Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (The Australasian Institute of Judicial Administration, Attorney-General's Department (Cth), CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, August 2023) 227; Fair Agenda and Sexual Assault Services Victoria, *Improving the Court Experience: A Model for Pre-Recording Testimony in Sexual Assault Cases* (November 2024) 14–17; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II* (2017) 78; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 468–9 [21.88]; We Are Womxn, *Submission 82*; Northern Territory Director of Public Prosecutions, *Submission 143*; Fair Agenda, *Submission 159*; Not published, *Submission 197*.

5 See Tasmania Law Reform Institute (n 2) 40 [4.2.5], 41 [4.2.7]; The Law Reform Commission of Western Australia, *Evidence of Children and Other Vulnerable Witnesses* (Final Report, Project No 87, 1991) 45–6 [4.5]–[4.12].

6 Tasmania Law Reform Institute (n 2) pt 5.

7 See Not published, *Submission 80*; Tasmania Legal Aid, *Submission 88*; Not Published, *Submission 134*; Legal Aid NT, *Submission 146*; Not published, *Submission 197*.

compared to evidence given live at trial.[8] There are questions about the extent to which recorded police statements and pre-recorded evidence hearings are sufficient to reduce trauma for complainants (given the traumatising impacts of delays in the system) and whether they produce the complainant's best evidence.[9]

9.8 Past reports have found that the benefits of recorded police statements and pre-recorded evidence hearings outweigh the drawbacks.[10] However, the drawbacks persist and need to be addressed to ensure the benefits can be fully realised.

## Addressing concerns about recorded police statements

**Recommendation 26**

The Standing Council of Attorneys-General should establish an appropriately funded national taskforce to develop a national quality assurance framework for police interviewing of complainants of sexual violence.

a. The national taskforce should, in relation to the police agency in each jurisdiction:

   i. use the quality assurance framework to review agency interviewing guidelines and work with the agency to ensure they are founded upon generally accepted evidence-based practices for interviewing complainants;

   ii. evaluate agency implementation of those guidelines, including by objectively evaluating interviewer and organisational performance;

   iii. provide feedback to the police agency, which would include communicating key elements of the research and identifying areas for improvement; and

   iv. receive reports back from the police agency in response to the feedback and areas identified for improvement.

8 Tasmania Law Reform Institute (n 2) 45–47 [4.7]–[4.8]; George et al (n 4) 77–8; K Seear, G Grant, S Mulcahy and A Farrugia, *Submission 177*. See also Name withheld, *Submission 95*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Not published, *Submission 134*; Fair Agenda, *Submission 159*.

9 Tasmania Law Reform Institute (n 2) 70 [5.1.1].

10 See, eg, ibid 38–9 [4.1.1]–[4.1.4], 70 [5.1.1]; Judy Cashmore and Rita Shackel, *Evaluation of the Child Sexual Offence Evidence Pilot* (Final Outcome Evaluation Report, Victim Services, NSW Department of Justice, August 2018) 67.

b. The taskforce should include:

   i. members with extensive high-level police governance experience; and

   ii. experts in the field of investigative interviewing of complainants of sexual violence and in the evaluation of interviewer training.

c. As required, the taskforce should consult with relevant stakeholders, including:

   i. experts on the impact of trauma;

   ii. people who have experienced sexual violence;

   iii. representatives from groups who are disproportionately reflected in sexual violence statistics and other experts who can advise on cultural sensitivity with respect to police investigations;

   iv. experienced prosecution and defence counsel; and

   v. trial judges experienced in conducting sexual assault trials.

**Recommendation 27**

Federal, state, and territory police agencies should ensure that trauma-informed environments are available for interviewing complainants of sexual violence, including the provision of:

a. a comfortable space;

b. privacy;

c. the ability to accommodate a support person or victim advocate; and

d. disability access.

Arrangements should be put in place to allow for statements to be taken from outside police premises, including at culturally appropriate locations.

9.9 Commonwealth, state, and territory legislation provides for recorded police statements of complainants of sexual violence — who are children or people with a

cognitive impairment or intellectual disability — to be used as their evidence-in-chief.[11] Some jurisdictions extend the provisions to a broader range of adult complainants but eligibility is limited by witness or charge categorisation.[12] Most jurisdictions do not have provisions which apply this measure to all adult complainants of sexual violence.[13]

9.10 The ALRC considered recommending the extension of recorded police statements to all adult complainants of sexual violence. Submissions to this Inquiry discussed the benefit of adult complainants having that option.[14] However, the ALRC is concerned about reports in Australia and overseas that recorded police statements are often not fit to be used as evidence-in-chief.[15] A particular challenge of recorded police statements as an evidence measure is their dual purpose: investigatory (collecting information for the investigation) and evidentiary (presenting the complainant's best evidence).[16] The two purposes are not always compatible,[17] and there is a view that it 'sets a [recorded police statement] up to fail'.[18]

9.11 In 2016, a research report for the Child Sexual Abuse Royal Commission concluded with an 'overriding message' that while implementing measures such as recorded police statements has been a

> major step forward in improving the trial process for complainants of child sexual abuse, limitations in the system are reducing the value of these measures, and impeding their intended purpose and benefits.[19]

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11 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 43, 52; *Crimes Act 1914* (Cth) ss 15YM(1)–(4); *Criminal Procedure Act 1986* (NSW) s 306U; *Evidence Act 1939* (NT) ss 21B(2)(a); *Evidence Act 1977* (Qld) s 93A; *Summary Offences Act 1953* (SA) s 74EB; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 5A(3); *Criminal Procedure Act 2009* (Vic) s 367; *Evidence Act 1906* (WA) s 106HB. Noting that the provisions for Western Australia may be amended if the Evidence Bill 2024 (WA) is enacted which would expand recorded police statements to include people with a cognitive impairment.

12 The jurisdictions which provide recorded police statements for adults with limitations based on witness or charge categorisation: *Crimes Act 1914* (Cth) s 15YAB (if deemed a 'special witness'); *Summary Offences Act 1953* (SA) s 74EA(1a) (if the matter involves child sexual abuse).

13 Jurisdictions which do not provide recorded police statements for adults include New South Wales, Queensland, Tasmania, Victoria, and Western Australia. The Australian Capital Territory and Northern Territory provide recorded police statements for adult complainants of sexual offence matters without limitation: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 43, 52; *Evidence Act 1939* (NT) ss 21AB(c), 21B(1).

14 See, eg, G Hamilton and D Gerryts, *Submission 55*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Not published, *Submission 197*; Women's Legal Service Victoria, *Submission 207*; Full Stop Australia, *Submission 214*.

15 For a synthesis of 'the emerging case against widespread use' of pre-recorded evidence, refer to Tasmania Law Reform Institute (n 2) pt 5.

16 G Hamilton and D Gerryts, *Submission 55*.

17 Not published, *Submission 197*.

18 G Hamilton and D Gerryts, *Submission 55*; Women's Legal Centre ACT, *Submission 169*; Victorian Law Reform Commission (n 4) 469.

19 Martine Powell et al, *An Evaluation of How Evidence is Elicited from Complainants of Child Sexual Abuse* (Report for Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 245.

9.12 The research pointed to 'two systemic problems', being 'poor-quality questioning' and technology.[20] The Child Sexual Abuse Royal Commission made an extensive recommendation about investigative interviews for use as evidence-in-chief for child complainants of sexual abuse, including the need for specialist training, refresher training, expert review, and improving the technical quality of the interviews.[21]

9.13 In 2021, the Victorian Law Reform Commission (VLRC) did not recommend expansion of recorded police statements to adult complainants because of concerns about the quality of recorded police statements for children and adults with cognitive impairment. The VLRC suggested that Victoria Police consider professional development to improve the quality of recorded police statements before the issue of expanding this to adults was reconsidered.[22]

9.14 The ALRC heard that the skills and training of police to conduct interviews suitable for admission as evidence-in-chief continue to impact the variable quality of recorded police statements. Greater resourcing and training is needed to ensure consistent quality of recorded police statements for court purposes.[23] If an interview is conducted by an officer without specialist skills, the complainant's evidence is likely to be compromised from the beginning.[24] The ALRC received submissions indicating concerns about police capacity to conduct the interviews appropriately for the purpose of a criminal trial.[25] While most states and territories have police interviewer training programs, they differ in terms of resourcing, structure, content, delivery, and review mechanisms; and there is an absence of formal independent evaluation.

9.15 The ALRC heard that unavailable, inadequate, or faulty technology remains an ongoing problem, which is particularly acute in regional and remote areas.[26] Poor quality technology diminishes the impact of the evidence and denies the complainant the opportunity to have their best evidence put before the court.[27] A recent research project observed that despite the introduction of 'special measures' in legislation over 20 years ago, unavailable or faulty technology are the most likely contributors to non-use of 'special measures' for child complainants.[28]

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20 Tasmania Law Reform Institute (n 2) 60 [4.13.10].
21 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 4) rec 9.
22 Victorian Law Reform Commission (n 4) 469 [21.96].
23 G Hamilton and D Gerryts, *Submission 55*; Legal Aid NT, *Submission 146*; Women's Legal Centre ACT, *Submission 169*; Not published, *Submission 197*.
24 See generally Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 4) 462.
25 J Crous, *Submission 141*; Fair Agenda, *Submission 159*; Women's Legal Service Victoria, *Submission 207*.
26 Tasmania Legal Aid, *Submission 88*; Legal Aid NT, *Submission 146*; Not published, *Submission 197*.
27 Legal Aid NT, *Submission 146*; Not published, *Submission 197*.
28 Eunro Lee et al, 'Special Measures in Child Sexual Abuse Trials: Criminal Justice Practitioners' Experiences and Views' (2019) 18(2) *QUT Law Review* 1, 9, 19.

9.16 The poor experience in the United Kingdom with the expanded use of recorded police statements provides further reason for caution. A 2010 review of recorded police statements in the United Kingdom found a wide range of criticisms about police interviewing techniques, describing the techniques as an issue of considerable concern.[29] In 2023, the United Kingdom Parliament Justice Committee Inquiry considered evidence that the expanded use of recorded police statements to adult witnesses was 'ill-advised', 'done without any apparent assessment of the consequences', and with 'many unresolved issues'.[30]

9.17 Providing complainants with an ability to make an informed choice is a well-recognised principle of a trauma-informed approach.[31] However, systemic problems with recorded police statements have endured for a significant period. In those circumstances, resources and expertise need to be focused upon addressing these concerns rather than calling for more funding to extend a measure which is known to be problematic. It is also important to learn from the United Kingdom experience and 'pause' now to assess, address, and improve.

## A national approach to recorded police statements and interviewing

9.18 The ALRC considers that a national and collaborative approach is required to address the quality of recorded police statements and to ensure best practice interviewing of all complainants of sexual violence. The ALRC recommends that a national taskforce be formed to bring a consistent focus to this systemic problem in each jurisdiction.

9.19 Extensive research on forensic interviewing of child complainants of sexual violence has led to general agreement about best practice methods,[32] like using open ended questions, avoiding leading questions, and encouraging narrative detail.[33] The ALRC heard that these best practice methods are equally applicable to adult complainants of sexual violence. This approach is more trauma-informed, helping people feel understood and not judged.[34] Such practices also support the complainant to give their best evidence. Open ended questions lead to more accurate answers by allowing for a better recollection of memories.[35]

9.20 The key role for the national taskforce would be to operate as a robust national quality assurance regime for police interviewing of complainants of sexual violence in each jurisdiction. To do this, the taskforce would distil key elements of

29 Government Equalities Office (UK) and Home Office (UK), *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (2010) 68–9.
30 Tasmania Law Reform Institute (n 2) 72 [5.2.5].
31 For discussion of trauma-informed principles, see **Chapter 1**.
32 Powell et al (n 19) 150.
33 Martine Powell, 'Investigative Interviewing: #askgoodquestions' (2020) 42(2) *InPsych* 16.
34 Ibid 18–20.
35 Ibid 18–19.

the best practice methods from the literature to formulate a guidance document. The taskforce would review interviewing guidelines in each jurisdiction against this guidance document and work with police to make sure their guidelines are founded upon generally accepted evidence-based practices.

9.21 To evaluate police implementation of best practice guidelines, the taskforce would develop objective measures to evaluate interviewer and organisational performance in each jurisdiction. The taskforce's approach would be like the one adopted in the research commissioned by the Child Sexual Abuse Royal Commission.[36]

9.22 The focus of the taskforce would be quality assurance, to ensure that best practices for interviewing are met and sustained.[37] The police would retain the flexibility to design and deliver interviewer training programs that suit their parameters. The taskforce would have the important function of evaluating how that training translates into practice, including the provision of feedback, identification of areas for improvement and ongoing dialogue with police.

9.23 Central to the effectiveness of the taskforce would be a collaborative working relationship with the police. The membership of the taskforce would include a person with extensive high-level police governance experience who understands and respects organisational processes. It would also include an expert in the field of investigative interviewing of complainants of sexual violence and in the evaluation of interviewer training.

9.24 Criteria for the taskforce's evaluation of interviews and organisational performance would include trauma-informed and culturally safe practices. The taskforce would consult with experts on the impact of trauma on memory and responsive behaviours to sexual violence; people who have experienced sexual violence; representatives from groups who are disproportionately reflected in sexual violence statistics; and other experts who can advise on cultural sensitivity with respect to police investigations. For example, best practice interviewing for First Nations people might include tailoring the interview to respect particular communication styles and cultural protocols. This would require consultation with representatives from Aboriginal Community Controlled Organisations (ACCOs).

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36 Powell et al (n 19) ch 9.

37 For examples of methods for evaluating the long-term effectiveness of specialist interview training, see generally Michael E Lamb, 'Difficulties Translating Research on Forensic Interview Practices to Practitioners: Finding Water, Leading Horses, but Can We Get Them to Drink?' (2016) 71(8) *American Psychologist* 710, 712–14; Mairi S Benson and Martine B Powell, 'Evaluation of a Comprehensive Interactive Training System for Investigative Interviewers of Children' (2015) 21(3) *Psychology, Public Policy, and Law* 309; Patrick Tidmarsh, Gemma Hamilton and Stefanie J Sharman, 'Changing Police Officers' Attitudes in Sexual Offense Cases: A 12-Month Follow-Up Study' (2020) 47(9) *Criminal Justice and Behavior* 1176; Patrick Tidmarsh, Stefanie Sharman and Gemma Hamilton, 'Police Officers' Perceptions of Specialist Training, Skills and Qualities Needed to Investigate Sexual Crime' (2019) 22(1) *Police Practice and Research* 1.

9.25 As part of ensuring the recorded police statements are fit for use as evidence-in-chief, the taskforce would consult with prosecutors, defence counsel, and trial judges experienced in conducting sexual assault trials. It is a difficult task for police officers to conduct an investigatory interview and simultaneously produce a recorded police statement that complies with the rules of evidence.[38] Recorded police statements often include irrelevant or inadmissible matters, do not have sufficient information for trial purposes, and present the complainant's account in a disjointed way.[39] The recommended taskforce would consult to find a way through the potential incompatibility of the two purposes of recorded police statements to present the complainant's best evidence.

9.26 Interviews of complainants also need to be quality investigative interviews. The taskforce would consult with experts on the nature of sexual violence offending, including grooming and coercive control. Questions focused on the behaviour of the accused person can lead to important lines of inquiry for investigation and may help jurors better understand the context of the complainant's responses,[40] rather than being influenced by myths and misconceptions.[41]

9.27 The ALRC considers this national quality assurance is required to ensure the ongoing viability of recorded police statements as an evidence measure for complainants who are children or adults with a cognitive impairment. This may then lead to recorded police statements becoming an option for adult complainants to choose as part of an informed choice in how they give evidence in a criminal proceeding. It will also lift the standards of police interviewing of complainants of sexual violence generally.

## Facilitating trauma-informed environments for police interviews

9.28 The ALRC heard accounts about police interview environments being unsuitable. People who have experienced sexual violence discussed being interviewed in stark, uninviting rooms that left them feeling like they were being interrogated.[42] In one example, a body camera was used to record the interview in a school where the school bell and phone calls could be heard in the background.

9.29 The ALRC recommends that all federal, state, and territory police ensure that written or recorded evidence is taken in a comfortable, accessible, and private environment that can accommodate a support person. The approach should be flexible so that evidence can be taken outside police premises, including at culturally

38 G Hamilton and D Gerryts, *Submission 55*; Fair Agenda, *Submission 159*; Not published, *Submission 197*; Law Council of Australia, *Submission 215*.

39 Women's Legal Centre ACT, *Submission 169*; Victorian Law Reform Commission (n 4) [21.92]–[21.95].

40 Tidmarsh, Sharman and Hamilton (n 37) 2.

41 See **Chapter 8**.

42 Brisbane Rape and Incest Survivor Support Centre, *Submission 107*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Not published, *Submission 171*; Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 105, 114.

appropriate locations. **Recommendation 27** aims to support a trauma-informed approach by supporting the complainant's sense of safety and needs.[43]

9.30 As mentioned above, a major benefit of recording police statements is that it reduces the complainant's exposure to the stress of the courtroom.[44] A less stressful environment also allows a person to give better quality evidence.[45] For complainants to experience this benefit, the police interview environment needs to feel safe and be comfortable.

## Expanding evidence choices for adult complainants

**Recommendation 28**

The Commonwealth, states, and territories should enact or amend legislation, where necessary, to provide all adult complainants of sexual offence proceedings in County, District, or Supreme Courts with the option of giving their evidence (evidence-in-chief, cross-examination, and any re-examination) at a pre-recorded evidence hearing (recorded in the absence of a jury).

Offices of the Directors of Public Prosecutions in each jurisdiction should adopt guidelines which ensure:

a. an adult complainant is:

   i. given a choice to give evidence either at a pre-recorded evidence hearing or at the time of trial;

   ii. given information relevant to making that choice; and

   iii. advised that to help make the choice, they may speak with a Justice System Navigator or obtain advice from the Independent Legal Services (see **Recommendations 1** and **9**); and

b. the prosecution will not make an application for a pre-recorded evidence hearing unless the complainant has been consulted and made an informed choice to proceed in that way.

43 See **Chapter 1**.

44 See also A Williams, *Submission 19*; Name withheld, *Submission 95*.

45 Victorian Law Reform Commission, *Sexual Offences* (Final Report, 2004) 280–1 ('*Sexual Offences*') cited in Tasmania Law Reform Institute (n 2) 44 [4.6.3].

9.31 The ALRC recommends that the option of pre-recorded evidence hearings should be extended to all complainants of sexual violence.[46] A pre-recorded evidence hearing is an evidence measure which was introduced in Australia and overseas because of concerns about the impact of trial processes upon children and people with a cognitive impairment.[47] It is now an evidence measure available in many Australian jurisdictions for complainants who are children or adults with a cognitive impairment.[48]

9.32 In most jurisdictions, a pre-recorded evidence hearing is not an option available to all adult complainants:

- Adult complainants are generally not eligible for pre-recorded evidence hearings unless they have a cognitive impairment — only the Northern Territory and Queensland legislation provide all adult complainants with the ability to participate in pre-recorded evidence hearings.[49]
- In some jurisdictions some adult complainants in limited sexual offence matters can have their evidence pre-recorded — in South Australia and Tasmania, adults can only participate in pre-recorded evidence hearings if it concerns a child sexual abuse offence.[50]
- In the Australian Capital Territory and Western Australia, individual adult complainants must come within the definition of a 'special witness' or 'vulnerable adult' to access a pre-recorded hearing.[51]

9.33 The Pigot Report (discussed above) received extensive evidence about pre-recorded evidence hearings, including evidence from multi-disciplinary experts, about the welfare of child complainants and the integrity of their evidence in the criminal justice system.[52] The Pigot Report recommended pre-recorded evidence hearings for all child complainants and found that

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46 If the matter proceeds in a magistrates or summary court, where there is no jury, a pre-recorded evidence hearing would not be available. **Recommendation 28** is limited to extending pre-recorded evidence hearings to trial proceedings prosecuted on indictment.

47 Tasmania Law Reform Institute (n 2) 1 [1.1.3].

48 There are variations in eligibility in Australian jurisdictions including variation in the definition of 'child' and the nature of the impairment for a complainant to be eligible. While most jurisdictions define a 'child' for the purposes of pre-recorded evidence hearings as 'under 18 years old', South Australia provides for the eligibility of a child differently. In South Australia, a 'young child' under 14 years may participate in pre-recorded evidence hearings: *Evidence Act 1929* (SA) s 12AB(14).

49 *Evidence Act 1977* (Qld) ss 21A(1), (2)(e); *Evidence Act 1939* (NT) ss 21AB(c), 21B(2)(b). Jurisdictions which do not allow adult complainants to participate in pre-recorded evidence hearings include the Commonwealth, New South Wales, and Victoria. For details on the differences in the law of pre-recorded evidence, see Tasmania Law Reform Institute (n 2) Appendix D. Some adult complainants may also be eligible to participate in pre-recorded evidence hearings if the sexual offending is done in the context of family or domestic violence.

50 *Evidence Act 1929* (SA) s 12AB; *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss 3, 6, 6A.

51 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 42, 43, 60; *Evidence Act 1906* (WA) ss 106R(1)(a), 106RA.

52 Home Office (UK) (n 1) 16–18; Tasmania Law Reform Institute (n 2) 40 [4.2.5]–[4.2.6].

> there [was] no obvious reason why measures designed to reduce the stress experienced by witnesses and so ensure that the court receives clearer and fuller testimony should be permanently restricted to children.[53]

9.34 The Pigot Report recognised that adult witnesses may suffer 'an unusual and unreasonable degree of mental stress' if required to give evidence live at trial and that judges should have a 'substantial discretion' to determine eligibility for pre-recorded evidence hearings and other measures.[54]

9.35 In the thirty years since the introduction of recorded evidence measures, some complainants of sexual violence report that they continue to suffer a high degree of retraumatisation during the criminal justice process, especially from the experience of giving evidence at trial.[55] In recognition of the need to minimise the retraumatisation of adult complainants, past reports have recommended that pre-recorded evidence hearings be extended as an evidence measure available to all complainants in sexual offence proceedings.[56] Several members of the Expert Advisory Group supported pre-recorded evidence hearings as a standard option for all complainants.[57]

9.36 Pre-recorded evidence hearings would enable adult complainants to give their evidence earlier in the process, without needing to wait for the trial.[58] Delay can have significant impact on complainants, increasing the stress associated with the trial and contributing to retraumatisation.[59] If the pre-recorded evidence hearing takes place soon after the alleged offence, it may reduce the impact of delay on memory and additionally reduce any potential anxiety of the complainant associated with waiting to give their evidence at trial.[60] Pre-recorded evidence hearings may also create a less stressful environment away from the pressures of a 'live' trial before a jury. For example, the court may more readily accommodate requests for breaks without the pressure of keeping a jury waiting for long periods. The ALRC has previously recognised the importance of facilitating mechanisms that minimise the negative experiences of complainants of sexual violence in the criminal justice system where this can be done without prejudicing the right of the accused person to a fair trial.[61]

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53 Tasmania Law Reform Institute (n 2) 41 [4.2.7] citing Home Office (UK) (n 1) 27.

54 Tasmania Law Reform Institute (n 2) 41 [4.2.7] citing Home Office (UK) (n 1) 28, 31.

55 See, eg, S Filmer, *Submission 30*; J Crous, *Submission 141*; Full Stop Australia, *Submission 214*.

56 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, 2010) recs 26–27; New Zealand Law Commission (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, 2015) recs 3, 5; New Zealand Law Commission, *The Second Review of the Evidence Act 2006* (Report 142, 2019) rec 13, 160–1 [9.40]–[9.44]; Victorian Law Reform Commission (n 4) rec 86.

57 Several members of the Inquiry Expert Advisory Group and others, *Submission 165*. See also George et al (n 4) 227.

58 See Northern Territory Director of Public Prosecutions, *Submission 143*. See also Tasmania Law Reform Institute (n 2) 68 [4.18.3] citing Scottish Government, *Vulnerable Witnesses Act — Section 9* (2023) 14–15.

59 See **Chapter 4**.

60 New Zealand Law Commission (Te Aka Matua o te Ture) (n 56) 83 [4.69].

61 Australian Law Reform Commission and New South Wales Law Reform Commission (n 56) 1231 [26.182].

9.37 In making **Recommendation 28**, the ALRC carefully considered the Tasmania Law Reform Institute's research paper on pre-recorded evidence, which sets out an emerging case against widespread use of pre-recorded evidence hearings, particularly in the United Kingdom.[62] The research paper synthesised some of the key aspects from the evidence before the 2023 United Kingdom Parliament Justice Committee Inquiry, which underpinned the Inquiry's assessment of the need for a fundamental reassessment of 'special measures' in the United Kingdom, including pre-recorded evidence hearings.[63] Those key aspects included that:

- Full pre-recorded evidence hearings were suitable for young children and 'truly vulnerable' witnesses, but any expansion to adult complainants was an overuse of a measure which should remain targeted.[64]
- Recorded evidence could be considered inferior to live evidence at trial, due to, among other things, a 'distancing effect'.[65]
- Jury convictions were consistently and substantially lower when complainant evidence was pre-recorded, though it was noted that factors other than pre-recorded evidence may have contributed to this.[66]
- Evidence quality was reduced because technology was not fit for purpose.[67]
- Prosecutors routinely made applications for pre-recorded evidence hearings without proper consultation with complainants, raising concerns about a lack of informed consent and agency.[68]
- There may be less urgency to hear a trial where the evidence has been pre-recorded, which may impact the complainant's sense of 'closure' as they await a trial outcome.[69]
- Pre-recorded evidence hearings were having a crippling impact on court capacity and creating inefficiencies such as doubling the preparation work for practitioners (the hearing and then the trial), with fewer practitioners being prepared to take on the work due to the pressure and workload.[70] It was also noted that pre-recordings were sometimes blamed as the sole cause of a much wider and systemic problem of delay in the United Kingdom criminal justice system.[71]

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62 Tasmania Law Reform Institute (n 2) pt 5.
63 Ibid pt 5.2.
64 Ibid 74–5 [5.2.9]–[5.2.12].
65 Ibid 78–9 [5.2.21]–[5.2.25].
66 Ibid 75–9 [5.2.13]–[5.2.25]. In comparison, there are studies which suggest that evidence given during pre-recorded evidence hearings compared to live at trial has little to no effect on jury perception: see, eg, Natalie Taylor and Jacqueline Joudo, *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study* (Research and Public Policy Series No 68, Australian Institute of Criminology, 2005).
67 Tasmania Law Reform Institute (n 2) 82–3 [5.2.31]–[5.2.34].
68 Ibid 80–1 [5.2.26]–[5.2.30].
69 Ibid 83–4 [5.2.35]–[5.2.36].
70 Ibid 84–5 [5.2.37]–[5.2.38].
71 Ibid 85–6 [5.2.39]–[5.2.40].

9.38 The Law Council of Australia echoes the concerns about delay and inefficiencies that can be caused by the overuse of pre-recorded evidence hearings.[72] Their submission also highlights concerns that recordings may create barriers to communication of the evidence, with greater research needed to determine how digital evidence may influence the court and jury's perception of witnesses.[73]

9.39 It is critical that the implementation of **Recommendation 28** does not increase delays in listing the trials. Trial courts need to be adequately funded and resourced to guard against that outcome. Police, Offices of the Directors of Public Prosecutions, and Legal Aid Commissions need to be adequately funded and resourced to ensure

- the police and prosecution have completed disclosure before the pre-recorded evidence hearing;
- there is compliance with timelines and case management orders made by the courts;
- prosecutors are available to prepare and conduct the hearings and trials in a timely way; and
- the number of defence counsel prepared to undertake the additional workload does not diminish.

9.40 It is also important that the implementation of **Recommendation 28** does not cut across efforts being made by trial courts to prioritise the listing of the trials. For example, the District Court of Queensland has recently released a practice direction for case management to list trials to take place within eight months after indictment.[74] The District Court of South Australia has a Criminal Priority Programme which lists certain trials to take place within three to four months of first mention in the District Court.[75] Those programmes deliver the benefits of reduced trial delay, both for the complainant and the accused person, with the option of a pre-recorded evidence hearing if one is still required.

9.41 It may be that many of the problems which developed in the United Kingdom with the expansion of pre-recorded hearings could be avoided in Australia by focusing resources upon reducing trial delays so that complainants (and accused persons) have the benefit of an earlier trial outcome. Trial delay has been described as 'a key source of major stress for victim survivors'.[76] If trial delay is reduced, some adult complainants may make an informed choice not to give evidence at a pre-recorded evidence hearing, with the consequence that those hearings may not in practice become so widespread.

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72 Law Council of Australia, *Submission 215*.

73 Ibid citing Law Institute of Victoria, *Submission to the Victorian Law Reform Commission,* Improving the Response of the Justice System to Sexual Violence (15 January 2021).

74 District Court of Queensland, *Practice Direction No 3 of 2024: Sexual Violence Case Management*, 19 July 2024, [8.15].

75 For information about the Criminal Priority Programme: see Courts Administration Authority of South Australia, 'District Court Sitting in Adelaide' <www.courts.sa.gov.au/download/district-court-sitting-in-adelaide/>.

76 Sexual Assault Services Victoria, *Submission 203*.

9.42 The ALRC does not consider the problems in the United Kingdom to be a barrier to making this recommendation, but avoiding that experience should be a prominent feature in its implementation.

9.43 The ALRC received submissions that pre-recorded evidence hearings should be available to all complainants as an informed choice.[77] Individual complainants will have different preferences and make different choices about how to give evidence — some may prefer to pre-record their evidence, while others may prefer to give evidence live in the trial, where it could facilitate 'healing'.[78]

9.44 To ensure adult complainants are able to make an informed choice, the ALRC recommends that Offices of the Directors of Public Prosecutions adopt guidelines requiring adult complainants to be informed about the option of a pre-recorded evidence hearing. The guidelines should require prosecutors to provide complainants with relevant information to help make a choice and advise complainants they have access to a Justice System Navigator, or independent legal advice to help make the choice (see **Chapters 6** and **7**). The guidelines would provide that the prosecution will only make an application for a pre-recorded evidence hearing after consulting with the complainant who then makes an informed choice to proceed in that way. This is to address the concern raised in the United Kingdom Parliament Justice Committee Inquiry that prosecutors would regularly make applications for pre-recorded evidence hearings without consulting complainants.[79]

9.45 The topics of information given to complainants should include:

- A pre-recorded evidence hearing may enable them to give their evidence earlier than giving their evidence at trial.
- A pre-recorded evidence hearing is held without a jury being present and may be less stressful than giving evidence when a jury is present.
- If the evidence is pre-recorded, the evidence will be played to the jury at trial.
- Any issues about the adequacy of technology in that jurisdiction.
- Pre-recording the evidence does not guarantee their evidence is complete and they may still be required to attend to give further evidence at trial, but it is much less likely.[80]
- Jury perceptions may be different depending on whether evidence is recorded or given live at trial. Reference could be made to research on this topic,

77 See, eg, A Williams, *Submission 19*; Northern Territory Director of Public Prosecutions, *Submission 143*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Fair Agenda, *Submission 159*; Sexual Assault Services Victoria, *Submission 203*; Full Stop Australia, *Submission 214*.

78 See, eg, Fair Agenda, *Submission 159* quoting National Association of Services Against Sexual Violence, Submission No FV 195 to Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response* (October 2010).

79 Tasmania Law Reform Institute (n 2) 80–1 [5.2.26]–[5.2.30].

80 Generally, a party applies for leave from the court before the complainant can be called to give further evidence at trial. See, eg, *Criminal Procedure Act 2009* (Vic) ss 384, 385.

including the research presented at the United Kingdom Parliament Justice Committee Inquiry.

- There could be a long delay between a pre-recorded evidence hearing and a trial outcome.[81]
- Various other flexible evidence measures (such as one-way screens, AV link or CCTV, closed court, court companions, and canine companions) are available whether they choose a pre-recorded evidence hearing or choose to give evidence at trial.

## Monitoring the use of recorded evidence measures

**Recommendation 29**

The Australian, state, and territory governments should ensure that the use of recorded police statements and pre-recorded evidence hearings is monitored and reviewed, by collaborating to commission and fund relevant empirical research projects.

9.46 As stated above, the important issues raised in the United Kingdom Parliament Justice Committee Inquiry provide targeted areas for consideration when implementing **Recommendation 28**. A major criticism of the expansion of pre-recorded evidence hearings in the United Kingdom was the lack of empirical research into how it was working in practice.[82] The use of pre-recorded evidence hearings in Australia should be carefully monitored. The ALRC recommends that empirical research projects be commissioned and funded to provide empirical evidence about the effectiveness or recorded police statements and pre-recorded evidence hearings and help guard against the problems which developed in the United Kingdom.

9.47 The inadequacy of empirical evidence about the use of recorded police statements was also an issue before the United Kingdom Parliament Justice Committee Inquiry.[83] The commissioned research projects should extend to the use of recorded police statements. This would complement the work of the taskforce in **Recommendation 26** by providing empirical evidence about the effectiveness of recorded police statements as an evidence measure in trials and help inform whether they should be rolled out as an option for all adult complainants of sexual violence.

9.48 The commissioned research projects may be facilitated by access to information via the research positions in trial courts described in **Recommendation 3**.

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81 See also Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; WA Family and Domestic Violence Legal Workers Network, *Submission 170*.

82 Tasmania Law Reform Institute (n 2) 71–2 [5.2.3]–[5.2.5].

83 Ibid 72 [5.2.5].

## The need for suitable technology

**Recommendation 30**

The Australian, state and territory governments should ensure that adequate technology, suitable for recording and playing evidence, is available to police agencies and courts, including in regional and remote areas.

9.49 As discussed above, the technology available for recorded police statements and pre-recorded evidence hearings can be inadequate. The ALRC heard that sometimes the lighting and sound in a recording can be so poor that the complainant cannot be heard or seen properly.[84] Some recordings can be so poor in quality that they cannot be replayed. The complainant may need to be recalled, sometimes after years, to give evidence again,[85] which undermines the value of pre-recording the evidence.

9.50 Complainants of sexual violence who choose to give evidence at trial may also have their evidence at trial recorded for later use at a subsequent trial (which may happen if there is, for example, a hung jury,[86] mistrial, or an order for a retrial following an appeal against conviction).[87] The recordings may be played at the subsequent trial to avoid the need for the complainant to give evidence again.

9.51 Many reports have recommended that suitable technology should be made available in police facilities and courts.[88] But the issues with technology remain.[89] The ALRC reiterates these recommendations, given how essential technology is to the presentation of the complainant's recorded evidence to the jury. It is acknowledged that this may require significant expenditure. But the full benefits of recorded police

84 See also Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (2017) 28; Victorian Law Reform Commission (n 4) 465 [21.68].

85 Tasmania Legal Aid, *Submission 88*.

86 A hung jury is when the jury is unable to reach a verdict at the end of the trial.

87 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69; *Criminal Procedure Act 1986* (NSW) pt 5, div 3; *Evidence Act 1939* (NT) s 21E; *Evidence Act 1929* (SA) ss 13C, 13D; *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss 7A, 7B; *Criminal Procedure Act 2009* (Vic) ss 362, 379; *Evidence Act 1906* (WA) ss 106RA, 106T. Queensland will soon have a new provision in s 21AAC of the *Evidence Act 1977* (Qld) once pt 5 div 2 of the *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) commences.

88 See, eg, Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 4) recs 55, 57; Tasmania Law Reform Institute (n 2) rec 13; Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, *Who Was Looking After Me? Prioritising the Safety of Tasmanian Children* (7 August 2023) recs 16.5, 16.12. See also Australian Law Reform Commission and New South Wales Law Reform Commission (n 56) 1232 [26.187].

89 See, eg, Not Published, *Submission 134*; Legal Aid NT, *Submission 146*.

statements and pre-recorded evidence hearings require that technology is suitable.[90] It may be that the suggestions of a 'distancing effect' described above could be mitigated by improved technology.

90 'The full benefits of pre-recorded or remote evidence may not be realised if there are technical problems with the recording and playback of such evidence': Tasmania Law Reform Institute (n 2) 61 [4.13.11] quoting Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 4) 79.

# 10. Improving Criminal Justice Processes

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## Introduction

10.1 Removing communication barriers is essential for access to justice and effective participation in the criminal justice system. It is the responsibility of the criminal justice system to ensure it meets the communication needs of all witnesses to enable them to participate and give their best evidence.

10.2 For complainants of sexual violence, communication needs are particularly acute for children, and people who are cognitively impaired or have other communication needs, who do not speak English as their first language (including First Nations people and people from culturally and linguistically diverse backgrounds), or people who are deaf or hard of hearing.

10.3 Intermediaries, ground rules hearings, and flexible evidence measures have been implemented to help the system meet the communication needs of complainants and other witnesses during criminal justice processes to enable their fair and effective participation. The provision of trained interpreters (including Auslan) is fundamental for access to justice.

10.4 In this chapter, the ALRC recommends:

- intermediaries be available across Australia to child complainants in sexual offence matters and complainants with communication needs (including but not limited to complainants with cognitive impairment);
- ground rules hearings about the evidence of complainants should be an available option in all sexual offence trials, on application by a party to the proceedings or on the court's own motion, before the complainant gives evidence;
- funding a national approach to address the shortage of trained interpreters;
- extending flexible evidence measures as an available option for complainants who choose to read out their victim impact statement during sentencing proceedings; and
- broadening the format for victim impact statements to include pre-recorded audio-visual or audio statements.

10.5 In line with the Terms of Reference, this chapter focuses recommendations on complainants of sexual violence. While not discussed, some of the recommendations in this chapter could apply equally to the accused or witnesses other than complainants. Governments could consider broader application of the ALRC recommendations upon implementation.

## Intermediaries for effective participation

**Recommendation 31**

The Commonwealth, states, and territories should each legislate, establish, maintain and fund an intermediary scheme which ensures an intermediary is available in sexual violence matters for child complainants and complainants with communication needs at the police interview, pre-recorded evidence hearing, and trial stages.

The Standing Council of Attorneys-General should establish an appropriately funded peak body to support the recruitment, professional development, and provision of intermediaries across Australia by:

a. developing national accreditation standards for intermediaries (in consultation with Aboriginal Community Controlled Organisations) which respects and includes competency in working with First Nations complainants;

b. creating an inter-jurisdictional register of intermediaries; and

c. providing national professional development opportunities and access to vicarious trauma support.

## What is an intermediary?

10.6 An intermediary is a communication specialist who facilitates communication between witnesses and people who work in the criminal justice system. The role of an intermediary is to assess the communication needs of eligible witnesses; provide advice to police, lawyers, and the court on how to meet those communication needs; and in some cases be present when the witness is asked questions.[1] Intermediaries do not give evidence for the witness.[2] They are professionals who are independent and impartial.[3] They do not have an emotional support role.[4]

10.7 Intermediaries typically have qualifications as speech therapists, social workers, psychologists, and occupational therapists,[5] although other qualifications may also be appropriate for the role.[6] There should be scope for other qualified persons who are trained and considered culturally appropriate to fulfil the role.[7]

10.8 As discussed later in this chapter, legislation generally makes intermediaries available to children and witnesses who have communication needs. Intermediaries are available for child complainants because the system needs to adapt to their developing understanding and communication abilities.[8] Legislative definitions of what is considered to be a communication need vary but can be more expansive than cognitive impairment. A comprehensive approach should be adopted and include, for example, people with physical disability that affects speech.[9]

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1 Penny Cooper and Michelle Mattison, 'Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21(4) *The International Journal of Evidence & Proof* 351, 352, 354.

2 For an outline of the role of intermediaries as defined in legislation, see generally *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AI; *Criminal Procedure Act 1986* (NSW) s 294L; *Evidence Act 1977* (Qld) s 21AZM; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7H; *Criminal Procedure Act 2009* (Vic) 389I.

3 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AI(2); *Criminal Procedure Act 1986* (NSW) s 294L; *Evidence Act 1977* (Qld) s 21AZM(3); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7H(2); *Criminal Procedure Act 2009* (Vic) s 389I(2).

4 See generally Cooper and Mattison (n 1) 254; Tasmania Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* (Final Report No 23, 2018) vii.

5 Penny Cooper, 'A Double First in Child Sexual Assault Cases in NSW: Notes from the First Witness Intermediary and Pre-Recorded Cross-Examination Cases' (2016) 41(3) *Alternative Law Journal* 191, 191–2; Anita Mackay and Jacqueline Giuffrida, 'Ensuring the Right to a Fair Criminal Trial Using Communication Assistance' (2022) 10(1) *Grifith Journal of Law and Human Dignity* 1, 7.

6 Teachers were added as an acceptable qualification to become an intermediary in New South Wales in October 2016: Judy Cashmore and Rita Shackel, *Evaluation of the Child Sexual Offence Evidence Pilot* (Final Outcome Evaluation Report, Victim Services, NSW Department of Justice, August 2018) 45. See also *Criminal Procedure Act 1986* (NSW) s 294M.

7 South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, 2021) 76–80, rec 11. See also Northern Territory Director of Public Prosecutions, *Submission 143*.

8 Sarah A Lount et al, 'Tough Talk: Youth Offenders' Perceptions of Communicating in the Youth Justice System in New Zealand' (2018) 51(4) *Australian & New Zealand Journal of Criminology* 593, 601–2, 608; Full Stop Australia, Submission to the Attorney-General's Department (Cth), *Commonwealth Intermediary Scoping Study*.

9 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 15 [15.25]–[15.29].

## The reason for intermediaries

10.9 The idea for an intermediary can be traced back to the United Kingdom's 1989 *Report of the Advisory Group on Video Evidence* (Pigot Report) which included a recommendation that questions from lawyers to children in court should be relayed through an 'interlocutor' approved by the court.[10] The 'interlocutor' could be a paediatrician, child psychiatrist, social worker or other person who enjoys the child's confidence.[11] The idea was developed further in a subsequent report, *Speaking Up for Justice*, which recommended an intermediary to assist vulnerable witnesses, including children, to give their best evidence at pre-trial hearings and the trial, including a system for accreditation.[12]

10.10 Recommendations in the ALRC's *Seen and Heard* report were made in response to a recognition that the criminal justice system was failing the effective participation of children in it. Research pointed to the confusion, intimidation, and distress experienced by child witnesses because of complex language and interrogatory style questioning in the hostile alien environment of a courtroom.[13] The failing was not limited to lawyers taking advantage of child witnesses during cross-examination. It included a general failure of judges and lawyers to moderate their language and appreciate the need for expert assistance to effectively communicate with child witnesses.[14] The introduction of intermediaries brought about a cultural change in the questioning of witnesses.[15]

## Intermediary schemes overseas

10.11 In 1999, legislation in England and Wales established the role of an intermediary to facilitate communication in the courtroom for child and vulnerable adult witnesses.[16] An intermediary scheme was piloted in 2004 then rolled out nationally in 2008.[17] Under the current Witness Intermediary Scheme (WIS), a witness is eligible for assistance from an intermediary in court if they are under 18 at the time of the hearing or the court considers their evidence is likely to be diminished by a 'mental disorder', 'significant impairment of intelligence and social functioning', or

10 Home Office (UK), *Report of the Advisory Group on Video Evidence* (1989) 24 [2.32], rec 6.
11 Ibid.
12 Home Office (UK), *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998) recs 47–8.
13 This research is discussed in Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Final Report No 84, 1997) [14.110]–[14.111].
14 Ibid [14.112]–[14.115].
15 See generally Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (2017) 96.
16 Cooper and Mattison (n 1) 353.
17 Ministry of Justice (UK), *The Witness Intermediary Scheme* (Annual Report, 2023) 6. See also Cooper and Mattison (n 1) 353–4.

a 'physical disability' or 'physical disorder'.[18] The WIS provides eligible witnesses with an intermediary at the police interview stage and at court when giving evidence.[19]

10.12 The WIS has a national focus. The Ministry of Justice has overall responsibility for the scheme with delegated management to a Witness Intermediary Team within the National Crime Agency (NCA). The Ministry carries out national recruitment of intermediaries, 'identifying candidates with skills and expertise in a wide range of communication needs' and is responsible for national training content and delivery.[20] Once assessed, the intermediaries are registered. The NCA matches requests for registered intermediaries from the police and Crown Prosecution Service using a centrally held database.[21]

10.13 In Northern Ireland, legislation established the intermediary role in 1999.[22] An intermediary scheme was piloted in 2013, extended in 2015 and then fully rolled out in 2017.[23]

10.14 The Department of Justice operates the scheme, including recruitment, training, and maintaining a register. The scheme covers vulnerable witnesses (for the prosecution or defence and including the accused) who have a communication need, including children and people with a neurological disorder, learning disability or physical disability.[24] An intermediary may be appointed to facilitate witness communication when giving a statement during the police interview stage and giving evidence in court.[25]

## Intermediary schemes in Australia

### *New South Wales*

10.15 The first pilot intermediary scheme in Australia commenced in New South Wales in 2016.[26] A witness intermediary was established by legislation as an officer of the court with 'a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence'.[27] Eligible witnesses were children (under 16 years or under 18 years with a communication difficulty) giving evidence in prescribed sexual offence proceedings.[28] The legislation did not provide for an intermediary to be appointed during the police interview stage.

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18 *Youth Justice and Criminal Evidence Act 1999* (UK) s 16; Ministry of Justice (UK) (n 17) 6.
19 Cooper and Mattison (n 1) 354.
20 Ministry of Justice (UK) (n 17) 9, 32, 37.
21 Ibid 9.
22 Cooper and Mattison (n 1) 356.
23 Department of Justice (NI), 'Northern Ireland Registered Intermediary Scheme' <www.justice-ni.gov.uk/articles/northern-ireland-registered-intermediary-scheme>.
24 Ibid; Cooper and Mattison (n 1) 356.
25 Department of Justice (NI) (n 23).
26 *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW).
27 Ibid sch 1 inserting *Criminal Procedure Act 1986* (NSW) s 88(2).
28 *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) sch 1 inserting *Criminal Procedure Act 1986* (NSW) s 88(2).

10.16 The pilot scheme commenced in Newcastle and Sydney and was administered by Victims Services (Department of Communities and Justice). The scope of the pilot was based on the WIS in England and Wales with intermediaries available at the police interview stage and when giving evidence in court.[29]

10.17 In January 2024, the scheme was rolled out across the state.[30] Intermediaries can assist with a police interview for children under 18 years.[31] For District Court trials, intermediaries are appointed by a judge for all complainants and prosecution witnesses under 16 years. Intermediaries may also be appointed for complainants and prosecution witnesses if they are age 16 years or older and have difficulty communicating, provided the complainant or witness was under 18 years at the time the accused was committed for trial or sentence.[32] Victims Services maintain a panel of intermediaries, including their training and accreditation, and match requests for intermediaries from that panel.[33]

### *Other jurisdictions*

10.18 In response to a recommendation made by the Child Sexual Abuse Royal Commission,[34] intermediary schemes are operational in the Australian Capital Territory, Queensland, Tasmania, and Victoria.[35]

10.19 The role of the intermediary is legislated in the court setting, including their independent status as impartial officers of the court.[36] The schemes provide for intermediaries to be available for the police interview, as well as in court.[37] Depending on the jurisdiction, witness eligibility may include both complainants and witnesses in sexual offence matters or child sexual offence matters if they are:

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29 Cashmore and Shackel (n 6) 96.

30 *New South Wales*, Commencement Proclamation under the Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023*, 2023 No 630, 1 December 2023*.

31 Victims Services (NSW), 'Child Sexual Offence Evidence Program' <https://victimsservices.justice.nsw.gov.au/how-can-we-help-you/programs-and-initiatives/child-sexual-offence-evidence-program.html>.

32 *Criminal Procedure Act 1986* (NSW) ss 249E (definition of 'witness'), 294M(3).

33 Victims Services (NSW) (n 31).

34 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II* (2017) rec 59. With similar recommendations in Tasmania Law Reform Institute (n 4); Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2016) recs 30–1.

35 Mackay and Giuffrida (n 5) 7.

36 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AI(2); *Criminal Procedure Act 1986* (NSW) s 294L; *Evidence Act 1977* (Qld) s 21AZM(3); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7H; *Criminal Procedure Act 2009* (Vic) s 389I(2).

37 ACT Human Right Commission, 'ACT Intermediary Program' <www.hrc.act.gov.au/intermediaries>; Queensland Courts, 'Who Are Intermediaries' <www.courts.qld.gov.au/services/queensland-intermediary-scheme/who-are-intermediaries>; Department of Justice (Tasmania), 'Witness Intermediary Scheme' <www.justice.tas.gov.au/carcru/witness-intermediary-scheme>; Supreme Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Program: Intermediaries and Ground Rules Hearing* (2023) 4 [3.6].

- a child — either under 18 years,[38] or under 16 years of age;[39] or
- an adult with a communication difficulty,[40] communication needs,[41] or cognitive impairment.[42]

10.20 No intermediary scheme is operational in other jurisdictions. In the 1990s, a role similar to intermediaries was introduced in legislation in Western Australia which gave judges a discretion to appoint a communicator for a child under 16,[43] but the role did not develop.[44] Western Australia will be introducing a formal intermediary scheme soon.[45] South Australia's legislative intermediary model provides for a 'communication partner' to assist witnesses, but the scheme became inoperative when direct government funding was withdrawn and the engaging party was required to pay for the communication partner.[46] The Northern Territory has no legislative provisions or scheme in place. The Commonwealth is conducting a scoping exercise for a Commonwealth intermediary scheme for federal sexual offences.[47]

## Intermediary schemes should be operational nationwide

10.21 Over the last two decades, intermediary schemes overseas and in Australia have been piloted, positively evaluated,[48] and implemented.

10.22 In England and Wales, the use of intermediaries has contributed to the effective participation of vulnerable witnesses in the trial process. In 2014, the Court

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38 Eligibility to access an intermediary for people under 18 years includes the Australian Capital Territory, Tasmania, Victoria, and Western Australia: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AJ; *Legislation Act 2001* (ACT) dictionary pt 1 (definition of 'child'); *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss 3 (definition of 'child'), 7I(1)(a), (b); *Criminal Procedure Act 2009* (Vic) s 389F; *Evidence Act 1906* (WA) s 106F. In New South Wales access to an intermediary is only available to people who are 16 years or over where they have difficulty communicating, and where the person was under 18 years old at the time the accused was committed for trial or sentence: *Criminal Procedure Act 1986* (NSW) ss 294E, 294M(3)(b).

39 In New South Wales and Queensland people under 16 years are eligible for an intermediary: *Criminal Procedure Act 1986* (NSW) s 294M(3)(a); *Evidence Act 1977* (Qld) s 21AZL(1).

40 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AJ; *Evidence Act 1977* (Qld) s 21AZL(1)(c).

41 *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss 7F, 7I.

42 *Criminal Procedure Act 2009* (Vic) s 389F; *Evidence Act 1977* (Qld) s 21AZL(1)(b).

43 *Evidence Act 1906* (WA) s 106F.

44 Cooper and Mattison (n 1) 352 citing Home Office (UK) (n 12) 58.

45 Explanatory Memorandum, Evidence Amendment Bill 2024 (WA).

46 South Australian Law Reform Institute (n 7) xviii–xxv, 238–48.

47 Attorney General's Department (Cth), 'Sexual Violence' <https://www.ag.gov.au/crime/sexualviolence>.

48 See, eg, Miriam Vandenberg, *Process Evaluation of the Witness Intermediary Scheme Pilot in Tasmania* (2022); Cashmore and Shackel (n 6); Cooper and Mattison (n 1) 355. For consideration of the effectiveness of intermediary and ground rules hearing schemes in the UK, see Hayden M Henderson, Samantha J Andrews and Michael E Lamb, 'Examining Children in English High Courts with and without Implementation of Reforms Authorized in Section 28 of the Youth Justice and Criminal Evidence Act' (2019) 33(2) *Applied Cognitive Psychology* 252; Hayden M Henderson and Michael E Lamb, 'Does Implementation of Reforms Authorized in Section 28 of the Youth Justice and Criminal Evidence Act Affect the Complexity of the Questions Asked of Young Alleged Victims in Court?' (2019) 33(2) *Applied Cognitive Psychology* 201.

of Appeal Criminal Division stated that the 'treatment of vulnerable witnesses has changed considerably in the last few years', and recognised the 'well understood and valuable use of intermediaries' for children and adult witnesses whose evidence in former years would not have been heard.[49] The Court observed a change to the culture of courtroom advocacy:

> It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way around.[50]

10.23 Since then, feedback about the use of intermediaries in England and Wales has been positive where it has been concluded that without the presence of an intermediary, many vulnerable witnesses would not be able to attend and give evidence.[51]

10.24 In Northern Ireland, an evaluation of the use of intermediaries at the police interview stage concluded there was 'no doubt' that

> access to justice was facilitated in a significant number of cases that officers may not have been able to investigate before and full disclosure was made with [intermediary] assistance by some very vulnerable people with little verbal communication. The [intermediary schemes] have also assisted suspects at police interview stage and potentially mitigated against a miscarriage of justice.[52]

10.25 A positive evaluation of the New South Wales pilot scheme in 2018 reported

> strong consensus that witness intermediaries make a unique contribution in facilitating questioning and communication with child witnesses by police and at court.[53]

10.26 Police and legal professionals reported on the educative role played by intermediaries in developmentally appropriate and effective questioning, including prosecutors and defence counsel noting that intermediaries had influenced them to 'fundamentally rethink' how they ask questions.[54] Stakeholders believed that child witnesses were more confident in answering questions with intermediaries present, appeared to give better evidence, and the presence of intermediaries prevented 'badgering of the child by defence'.[55] The authors noted the 'potential for wide-ranging

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49 *R v Lubemba* [2014] EWCA Crim 2064 [38], [42].

50 Ibid [45].

51 Law Commission of England and Wales, *Evidence in Sexual Offences Prosecutions* (Consultation Paper No 259, 2023) [7.2.31].

52 Department of Justice (NI), *Northern Ireland Registered Intermediaries Schemes Pilot Project: Post-Project Review* (2015) [87].

53 Cashmore and Shackel (n 6) 3.

54 Ibid 3, 47. See also Joyce Plotnikoff and Richard Woolfson, 'A New Profession' in *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press, 2015) 282–4; Vandenberg (n 48) 21–2. The final evaluation of the Tasmanian pilot is being considered by the Tasmanian Government: Department of Justice (Tasmania) (n 37).

55 Cashmore and Shackel (n 6) 55.

impact in changing cultural attitudes and the way that criminal justice professionals work with child witnesses'.[56]

10.27 Similarly, the evaluation of the Tasmanian pilot in 2022 'found that there is widespread support' for the purpose of the scheme and 'its potential to contribute positively to criminal justice processes in Tasmania'.[57] The evaluation observed that intermediaries were generally considered essential for child witnesses, but noted division about whether teenagers required an intermediary.[58] Recent evaluation of the pre-recorded evidence scheme in Tasmania heard positive feedback about the use of witness intermediaries, including their educative value, and that police, prosecutors, and defence lawyers embraced the recommendations made by intermediaries.[59]

10.28 The ALRC received submissions which supported the operation of intermediary schemes across Australia.[60]

10.29 The first part of **Recommendation 31** is for schemes across Australia to make an intermediary available to child complainants and complainants with communication difficulties at the police interview stage and the stage at which evidence is given in court (at a pre-recorded evidence hearing or at the trial). Many of the complainants who are eligible for an intermediary will be eligible for a recorded police statement. As discussed in **Chapter 9**, recorded police statements are played in court at trial as the complainant's evidence-in-chief. It is crucial that intermediaries are engaged for police interviews to assist communication and enable them to present their best evidence.

10.30 We note past recommendations for intermediaries to be available to suspects (when interviewed by police) and accused persons (who elect to give evidence in court) who are under 18 years old or have communication needs.[61] Expanding access to intermediaries for this group would assist in the communication of their rights when being interviewed by the police and their rights at trial, including the right to silence.[62] Legislation in Northern Ireland, the Australian Capital Territory, and South Australia provides for the accused to have access to an intermediary at the court

56 Ibid 48.
57 Vandenberg (n 48) 35.
58 Ibid 12. The latest review of the Tasmanian intermediary pilot was an interim evaluation prepared by Dr Vandenberg. A final review of the Tasmanian intermediary pilot has been completed by Professor Cooper and is currently being considered by the Tasmanian Government: Department of Justice (Tasmania) (n 37).
59 Vandenberg (n 48) 20–1; Tasmania Law Reform Institute, *An Evaluation of the Pre-Recorded Evidence Scheme in Tasmania* (Research Paper No 7, 2024) [6.8.4].
60 See, eg, Northern Territory Director of Public Prosecutions, *Submission 143*; Older Women's Network NSW, *Submission 153*; Embolden, *Submission 156*; WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Aboriginal Family Legal Services (WA), *Submission 40*; National Centre for Action on Child Sexual Abuse, *Submission 85*.
61 Tasmania Law Reform Institute (n 4) rec 3; Victorian Law Reform Commission (n 9) rec 58(a).
62 See generally Mackay and Giuffrida (n 5) 14–16.

stage.[63] In submissions and some consultations it was suggested that intermediary schemes should extend to accused persons.[64] The Australian Capital Territory plan to conduct an evaluation of its intermediary scheme, the results of which are expected to be released in 2025, which could inform future use of intermediaries for accused persons.[65] The ALRC supports intermediaries being available for suspects and accused persons who are under 18 years of age or have communication needs.

## Developing a national intermediary profession

10.31 Without forward planning, the expansion of intermediary schemes could see a lack of available intermediaries, variability in quality, and insufficient diversity.[66] The evaluation of the New South Wales intermediary scheme pilot found a shortage of First Nations and culturally and linguistically diverse intermediaries,[67] which makes it harder for a witness to be matched with a culturally appropriate intermediary. The availability of intermediaries to service regional police stations and courts is another challenge that needs to be addressed.

10.32 The second part of **Recommendation 31** aims to foster a national intermediary profession that manages the risk of an intermediary shortage and promotes consistency in quality. There are three aspects to achieving that aim. The first is developing a national accreditation standard so that there are no barriers to the availability and engagement of an intermediary across Australia. Jurisdictions with current operational intermediary schemes (including pilot schemes) have their own accreditation or registration standards. The ALRC recommends collaboration to focus on achieving a nationally consistent or transferable standard. It is also important that the accreditation standard recognises, respects, and includes skills that may be necessary for communication assistance for First Nations complainants. The standards should be developed in consultation with Aboriginal Community Controlled Organisations (ACCOs).

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63 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AG(2). See also, Australian Capital Territory procedural guidance on engaging intermediaries for accused before and at the court stage: ACT Human Rights Commission, *Procedural Guidance Manual: Intermediary Program* (2024) appendix 1. In South Australia, an intermediary can be provided before the court stage: *Summary Offences Regulations 2016* (SA) reg 19. Courts also have broad power to order access to an intermediary in court proceedings for all witnesses with complex communication needs: *Evidence Act 1929* (SA) s 14A. This scheme extends to suspects and defendants: South Australian Law Reform Institute (n 7) 221–4 [1.3.14].

64 Legal Aid NSW, *Submission 201*; Tasmania Legal Aid, *Submission 88*; J Smith, C van Golde, H Cullen and R Zhang, *Submission 121*; Sexual Assault Services Victoria, *Submission 203*. See also South Australian Law Reform Institute (n 7) rec 1; Tasmania Law Reform Institute (n 59) rec 3; Victorian Law Reform Commission (n 9) 323 [15.21]–[15.22].

65 Victims of Crimes Commissioner (ACT), Answer to question on notice No 34 to Standing Committee on Justice and Community Safety Legislative Assembly of the ACT, *Inquiry into Referred 2019–20 Annual and Financial Reports and Budget Estimates 2020–21* (8 March 2021).

66 For a discussion on the availability of intermediaries, see Northern Territory Director of Public Prosecutions, *Submission 143*. See also WA Family and Domestic Violence Legal Workers Network, *Submission 170*.

67 Cashmore and Shackel (n 6) 45.

10.33 The second aspect is the establishment and maintenance of an inter-jurisdictional register which will support the provision and matching of intermediaries across Australia. The third aspect of fostering a national profession is training and access to vicarious trauma support.[68] The ALRC heard support for ongoing and nationally consistent education for intermediaries and people who will work with them.[69] The training would include role boundaries, intermediary understanding about court processes, and challenges intermediaries face in working with justice professionals unfamiliar with the role of an intermediary.[70] It could include collaborative training with intermediaries and police, lawyers, and judicial officers.[71]

10.34 Training programs in Australia and overseas can be used as a guide to develop ongoing, nationally consistent training.[72] In the United Kingdom the training program for WIS includes trial observations, police station visits, and meetings with relevant people who work in the criminal justice system.[73] Intermediaries overseas have noted the importance of mentorship and regular feedback.[74] Vicarious trauma support is essential for the wellbeing of intermediaries and for maintaining an experienced pool of professionals prepared to work in this area.

10.35 Informal networks already exist between Australian and New Zealand intermediaries. A collaborative and funded formalisation of an interjurisdictional intermediary network could support recruitment, diversity, knowledge sharing, and the delivery of best practice. It could also help ensure the effective participation of eligible witnesses, including complainants of sexual violence, across Australia.

68 Plotnikoff and Woolfson (n 54) 289–94.

69 WA Family and Domestic Violence Legal Workers Network, *Submission 170*; National Centre for Action on Child Sexual Abuse, *Submission 85*; Name withheld, *Submission 95*; Law Council of Australia, *Submission 215*.

70 Cashmore and Shackel (n 6) 58; Vandenberg (n 48) 15–17, 32–3; Plotnikoff and Woolfson (n 54) 289.

71 Cashmore and Shackel (n 6) 59–61.

72 See generally Tasmania Law Reform Institute (n 4) 95–103, rec 9; South Australian Law Reform Institute (n 7) pt 11.

73 South Australian Law Reform Institute (n 7) 254.

74 For a discussion about the importance of mentorship, strong continuing professional development, and regular feedback, see Plotnikoff and Woolfson (n 54) 289–90.

# Ground rules hearings for complainants in sexual offences

**Recommendation 32**

Trial courts should extend 'ground rules' hearings about the evidence of complainants of sexual violence as an available option in all sexual offence trials, to be held on application by prosecution or defence or on the court's own motion prior to the complainant giving evidence.

Where necessary, the Commonwealth, states, and territories should enact legislation to facilitate this.

## What is a ground rules hearing?

10.36 At a ground rules hearing, the judge and counsel can discuss the communication needs of eligible witnesses and have an intermediary present at the hearing, or consider the intermediary's report. These hearings 'provide an opportunity to plan any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person' in a criminal trial.[75] The court may make orders or give directions.

10.37 As outlined below, ground rules hearings were introduced as part of witness intermediary schemes, to discuss the conduct of a hearing for eligible witnesses, such as children, or adults with communication needs.

10.38 In Victoria, it has recently become mandatory for a ground rules hearing to be held before the complainant gives evidence in all sexual offence trials. At this stage, the ALRC is not recommending mandatory ground rules hearings, but is recommending the extension of ground rules hearings as an option in all sexual offence trials, whether by application by a party, or on the court's own motion.

## Current application of ground rules hearings

10.39 Except for the Northern Territory,[76] each Australian state and territory provides for ground rules hearings for certain witnesses. Some jurisdictions legislate ground rules hearings. Others provide for ground rules hearings in court practice notes or similar. The availability of a ground rules hearing in each jurisdiction differs according to witness or offence category.

75 Judicial College of England and Wales, *Equal Treatment Bench Book* (2024) 54.
76 Northern Territory Director of Public Prosecutions, *Submission 143*.

10.40 In Victoria, ground rules hearings must be held for complainants in all sexual offence proceedings.[77]

10.41 In the Australian Capital Territory, a ground rules hearing may be held for any witness in any criminal proceeding, where the court is satisfied it is 'in the interests of justice' to do so.[78]

10.42 In Tasmania, ground rules hearings must be held for witnesses in a 'specified proceeding' (which includes sexual offences) who have an intermediary.[79] Ground rules hearings are not legislated for witnesses without an intermediary.

10.43 In South Australia, legislation provides that ground rules hearings may be held before a pre-recorded evidence hearing.[80] Additionally, the District Court's information for the profession about the Criminal Priority Programme indicates that a ground rules hearing may be held where there is no pre-recorded evidence hearing.[81]

10.44 The Queensland Government has recently legislated, but not commenced, the discretionary power for courts to hold ground rules hearings for a broader class of witnesses in sexual offences, including complainants.[82] The Brisbane and Ipswich District Courts have recently commenced a Sexual Violence Case Management Pilot, mandating ground rules hearings for child or special witnesses (which includes sexual offence complainants), in addition to witnesses who have an intermediary appointed.[83]

10.45 In New South Wales, ground rules hearings are made available to child complainants and child prosecution witnesses in sexual offence proceedings, pursuant to a New South Wales District Court Practice Note.[84] The Practice Note outlines the relevant listing procedures in relation to these witnesses, including pre-recorded evidence hearings.[85]

10.46 Like New South Wales, Western Australian ground rules hearings are provided for in court guidance. They are generally ordered in child sexual abuse prosecutions where the witness is a child aged six years or under, is a special witness that requires a communicator, or when the prosecution demonstrates a 'substantial need'.[86] A bill

77 *Criminal Procedure Act 2009* (Vic) s 389B(3)(b).
78 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AB.
79 *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss 3, 7, 7K.
80 *Evidence Act 1929* (SA) s 12AB(13).
81 Courts Administration Authority of South Australia, 'District Court Sitting in Adelaide' <www.courts.sa.gov.au/download/district-court-sitting-in-adelaide/>.
82 *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) ss 15, 20.
83 District Court of Queensland, *Practice Direction No 3 of 2024: Sexual Violence Case Management*, 19 July 2024 [40].
84 District Court of New South Wales, *Criminal Practice Note 28: Child Sexual Offence Evidence*, 30 November 2023.
85 Pre-recorded evidence hearings are dealt with in *Criminal Procedure Act 1986* (NSW) ss 294G–294K.
86 District Court of Western Australia, *Criminal Circular to Practitioners: Criminal, No 10: Ground Rules Hearings*, 25 January 2024 para 10.2.2.

is currently before the Western Australian parliament which provides for ground rules hearings more broadly.[87]

## Expanding the option of ground rules hearings

10.47 Ground rules hearings stemmed from the introduction of intermediaries in court proceedings — ground rules hearings were held so that the intermediary's report or recommendations could be considered and directed upon by the court.[88] Since then, it has become 'good practice' to discuss ground rules for young witnesses, or witnesses with communication needs, even if an intermediary has not been appointed.[89] This is partly due to the specific vulnerabilities of such groups, who may feel pressured to agree with leading questions, may not understand questions, or may wish to please the person asking the question.[90]

10.48 As discussed in **Chapters 6** and **12**, cross-examination can be highly distressing and retraumatising for complainants of sexual violence. Because of this, a pre-trial hearing may be beneficial to discuss 'the ground rules' for the evidence of adult complainants generally. Pre-trial directions may help in setting clear 'ground rules' before the complainant gives evidence, reducing the need for counsel to object or trial judges to intervene during evidence.[91] Ground rules hearings may promote relevant questioning and disciplined court environments, reducing stress for witnesses and improving the precision of their evidence.[92] They also help narrow the issues in dispute, which can result in more efficient trials.[93] The ALRC has heard that ground rules hearings have generally been considered a successful measure in New South Wales and the Australian Capital Territory.[94] In considering the success of ground rules hearings in Australia, the ALRC heard that because the models are relatively new, they will likely undergo further evaluation and refinement over time.

10.49 Given the benefits of ground rules hearings, the ALRC recommends that trial courts should have the option to hold ground rules hearings about the evidence of complainants in all sexual offence trials.

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87 Evidence Bill 2024 (WA) ss 284–289.

88 Penny Cooper, Paula Backen and Ruth Marchant, 'Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court' [2015] (6) *Criminal Law Review* 420, 422–5.

89 Ibid 421, quoting Royal Courts of Justice (England and Wales), *Criminal Practice Directions* (2013) 1 WLR 3164, para 3E.3.

90 Cooper, Backen and Marchant (n 88) 428.

91 Centre for Women's Safety and Wellbeing, *Submission 193*.

92 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 15) 99.

93 Ibid.

94 For New South Wales: see, eg, Not published, *Submission 197*; Women's Legal Service NSW, *Submission 205*; Cashmore and Shackel (n 6). For the Australian Capital Territory: see, eg, Women's Legal Centre ACT, *Submission 169*.

## Implementing optional ground rules hearings

10.50 Legislative provisions generally set out topics about which directions may be made at ground rules hearings, including:

- the manner and duration of questioning a witness;
- the use of communication aids for a witness;
- in some cases, what can and cannot be put to the witness; and
- generally, any direction regarding the 'fair and efficient conduct of proceedings', 'interests of justice', or that the 'judge considers appropriate'.[95]

10.51 Through the Intermediary Program Multi-Jurisdictional Committee, Victorian courts have provided further guidance on these topics with examples of specific matters that may be covered. For example, in relation to:

- the manner of questioning — the court can direct questions are asked in a way that requires a 'fact' as an answer rather than a 'yes' or 'no' answer, and that evidence is given wholly or partly in narrative form;
- the duration of questioning — the court can set the length of time that the witness is to be questioned, including timing of breaks;
- the questions which may or may not be put to the witness — the court can decide how differences in accounts or statements are presented, rather than allowing counsel to comment on inconsistencies during cross-examination; and
- the introduction, location, and clothing (such as wigs and gowns) of court participants during questioning.[96]

10.52 An additional issue relating to the scope of ground rules hearings is whether cross-examination questions should be provided to the court before or at the ground rules hearing. While this is not compulsory, the ALRC has heard this may be useful prior to the cross-examination of a very young child or witness with communication difficulties, where there has been a recorded police statement and the judge considers that the trial could be disrupted because questions are framed inappropriately. However, this is not a widespread practice.

10.53 There are difficulties associated with the court requesting cross-examination questions at a ground rules hearing prior to trial. If there is no recorded police statement to be tendered as the evidence-in-chief, the evidence-in-chief has not yet been given, so defence counsel will not have formulated all their questions. The request has the potential to undermine an accused's right to silence by requiring defence to disclose their case early. If the court delays the request until after the complainant's examination-in-chief, there is potential to disrupt and delay the complainant's evidence and the trial. Consideration also needs to be given to

95 See, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AF; *Evidence Act 1977* (Qld) s 21AZS; *Evidence Act 1929* (SA) s 12AB(11a); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7K(4); *Criminal Procedure Act 2009* (Vic) s 389E.

96 See, eg, Supreme Court of Victoria (n 37) para 5.4–5.5.

whether it is the role of the trial judge to be requesting cross-examination questions in advance for the purpose of vetting them.

10.54 The ALRC considers that as ground rules hearings continue to be used, best practices will be identified through the implementation of the research positions in each trial court. For discussion of the proposed research positions in each trial court, see **Recommendation 3**.

## Ground rules hearings for other witnesses

10.55 The Terms of Reference focus on sexual offence complainants. However, ground rules hearings can, and have, been used in relation to other witnesses in Australia, including accused persons.

10.56 The ALRC expects that a ground rules hearing would be held where an intermediary has been appointed for a witness. If an intermediary has not been appointed, the parties and court should have scope to decide if a ground rules hearing is needed on a case-by-case basis. In some cases, the witness may not need a ground rules hearing, and in these cases, time and resources would be better spent on other matters.

10.57 In some circumstances, ground rules hearings are available in Australia and the United Kingdom for accused persons who have or are eligible for an intermediary.[97] The Australian Capital Territory Human Rights Commission has provided some guidance on the interaction of intermediaries and ground rules hearings for accused persons.[98]

## Consideration of mandatory ground rules hearings

10.58 The ALRC has heard support for implementing mandatory ground rules hearings for sexual offence complainant evidence. Some submissions suggested expanding the Victorian scheme, which has mandatory ground rules hearings, to other jurisdictions.[99] Other stakeholders disagreed with the concept of mandatory ground rules hearings.

10.59 The Queensland Women's Safety and Justice Taskforce recommended ground rules hearings for domestic and family violence and sexual offences, in similar terms

97 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AA; *Criminal Procedure Rules 2020* (UK) SI 2020/759 r 3.9.

98 ACT Human Rights Commission (n 63) Appendix 1.

99 J Quilter and L McNamara, *Submission 49*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 191*; Women's Legal Service NSW, *Submission 205*; Women's Legal Services Australia, *Submission 212*.

to the Victorian provisions,[100] which were informed by the recommendations of the Victorian Law Reform Commission.[101]

10.60 The ALRC recommends that ground rules hearings for complainants be optional and available upon application, or on the court's own motion, rather than mandatory.

10.61 Ground rules hearings can be an effective measure to assist eligible witnesses give their best evidence at trial. However, ground rules hearings may not be necessary for every complainant of sexual violence. Despite recommending mandatory ground rules hearings,[102] the Victorian Law Reform Commission noted the

> effectiveness of ground rules hearings depends on the complainant and whether an intermediary is appointed. Sometimes there may only be 'modest improvements' in the complainant's experience of giving evidence, such as when there is no intermediary because, for example, the complainant is in their late teens and has no communication difficulties.[103]

10.62 The ALRC also heard that rigidly implementing ground rules hearings could result in additional funding requirements and create delays in proceedings, especially in regional and circuit courts.

10.63 Optional hearings give the parties and court flexibility to tailor the process based on the case and the needs of the complainant. As noted above, where there is legislative silence about ground rules hearings, courts have implemented their own practice directions about conducting ground rules hearings, which demonstrates existing acknowledgment of their benefits.

10.64 Mandatory ground rules hearings for complainants in relation to sexual offences are also recent innovations. They have not undergone any assessment or evaluation. The Victorian mandatory ground rules hearing for complainants scheme formally came into effect in 2023.[104] As noted above, the Brisbane and Ipswich District Courts' pilot mandatory ground rules hearing program for special witnesses (including sexual offence complainants) started in 2024.[105] The ALRC considers that the effectiveness of mandatory ground rules hearings in Victoria and Queensland should be evaluated before broader implementation is recommended.

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100 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 261, 271–2; Queensland Sexual Assault Network, *Submission 70*.

101 Victorian Law Reform Commission (n 9) [21.20]–[21.59], rec 84.

102 Ibid [21.41].

103 Ibid [21.26] (citations omitted).

104 *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 2(4)–(5).

105 District Court of Queensland, *Practice Direction No 3 of 2024: Sexual Violence Case Management*, 19 July 2024 pt B.

# National shortage of qualified interpreters

**Recommendation 33**

The Standing Council of Attorneys-General should:

a. develop a strategy to address the national shortage of interpreters to assist complainants of sexual violence in the criminal justice system; and

b. coordinate the Australian, state and territory governments to:

   i. ensure interpreters are consistently, efficiently, and appropriately engaged by justice agencies for complainants of sexual violence, from the point of police reporting to finalisation of the criminal process (including considering the mechanisms for engagement of interpreters by courts and tribunals as identified by the Judicial Council on Cultural Diversity in the 'Recommended National Standards for Working with Interpreters in Courts and Tribunals');

   ii. develop national standards for working with interpreters on sexual violence matters at the police and prosecution stage (in consultation with relevant stakeholders, including police agencies, interpreting agencies and services, people who have experienced sexual violence, and Aboriginal Community Controlled Organisations); and

   iii. provide for vicarious trauma support and training in trauma-informed principles for interpreters who work with complainants of sexual violence.

## Interpreters facilitate access to justice

10.65 The role of an interpreter is to break down communication barriers. An interpreter enables a person who speaks in one language to communicate with a person who speaks another language. The interpreter understands both languages and has the skills to hear a person speak one language and then speak it in a different language for the other person.

10.66 In legal settings the role of an interpreter is essential to ensure everyone has access to justice. In Australia, the language spoken in legal settings is English. People may have a communication barrier in legal settings because English is not their own language or their first language. They require an interpreter so they can

participate in the justice system, so they can be understood and heard.[106] The same applies for people who are deaf or hard of hearing. An Auslan interpreter is necessary to ensure they can participate in justice systems.

10.67 Interpreters who are involved in legal settings must be trained and adhere to a code of ethics that includes accuracy, impartiality, objectivity, and confidentiality.[107] First Nations interpreters also adhere to cultural protocols to ensure cultural safety.[108] The Judicial Council on Diversity and Inclusion has published *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (JCDI National Standards).[109]

10.68 The provision of competent interpreting services is fundamental to the legitimacy of our justice system. Access to justice is an essential element of the rule of law.[110] The JCDI National Standards summarise Australia's obligations to promote and observe fundamental human rights such as the right to equal treatment before tribunals and courts, which incorporates the right to the free assistance of an interpreter.[111] Commonwealth, state, and territory legislation provides for the right to access an interpreter in civil and criminal proceedings.[112] Courts and tribunals are obliged to ensure procedural fairness.[113]

10.69 Previous reports have recognised the critical nature of the national shortage of interpreting services in the justice system. The Law Council's Justice Project described the urgent need for interpreter services to ensure participation across the justice process, particularly for First Nations people.[114] Past recommendations have included a national interpreting service as a method to address access to trained

106 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, 2017) 322 [10.8]–[10.10]; Law Council of Australia, *The Justice Project: Courts and Tribunals* (Final Report, 2018) 42–3.

107 See Australian Institute of Interpreters and Translators, *Code of Ethics and Code of Conduct* (2012).

108 For example, the Aboriginal Interpreting WA Aboriginal Corporation embeds Aboriginal cultural protocols and the Australian Institute of Interpreters and Translators code of ethics when training, registering, and supporting their team of interpreters: Aboriginal Interpreting WA Aboriginal Corporation, 'Aboriginal Interpreting WA' <https://aiwaac.org.au/>.

109 The Judicial Council on Diversity and Inclusion was formerly called the Judicial Council on Cultural Diversity when writing the national standards for working with interpreters: Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2nd ed, 2022).

110 Australian Law Reform Commission (n 106) 319 [10.1].

111 Judicial Council on Cultural Diversity (n 109) 75–7. See also Australian Law Reform Commission (n 106) [10.8]–[10.9]. For the right to an interpreter, see also **Chapter 6.**

112 *Evidence Act 2011* (ACT) s 30; *Evidence Act 1995* (Cth) s 30; *Evidence Act 1995* (NSW) s 30; *Evidence (National Uniform Legislation) Act 2011* (NT) s 30; *Evidence Act 2008* (Vic) s 30; *Evidence Act 2001* (Tas) s 30. Western Australia will have an equivalent provision if the Evidence Bill 2024 (WA) comes into force. Queensland has a provision which gives the court power to order an interpreter if it is in the interests of justice to do so: *Evidence Act 1977* (Qld) s 131A.

113 For a discussion on how the JCDI National Standards adhere to obligations of courts and tribunals to ensure procedural fairness in the context of using interpreters, see Judicial Council on Cultural Diversity (n 109) 75–86.

114 Law Council of Australia, *The Justice Project: Courts and Tribunals* (n 106) 43–4.

interpreters in legal proceedings across Australia that is funded by Commonwealth, state, and territory governments.[115] The problem remains critical. We heard that the shortage of interpreters is especially acute for First Nations people (including in rural and remote areas), and for languages that are new and emerging in the Australian context.[116]

10.70 The shortage of interpreters in legal settings has been documented in previous research.[117] The ALRC also heard from stakeholders about the difficulty in identifying and locating a suitably trained interpreter who speaks the same dialect as the complainant. Sometimes there is a need to locate a suitable interpreter from interstate. In smaller communities, including in regional and remote areas, there can be a need to locate an interpreter from elsewhere to ensure the interpreter's impartiality.[118] Arranging interpreters, especially in remote communities, can be resource intensive.[119]

10.71 **Recommendation 33** seeks to place this important issue on the National Multicultural Framework agenda. In July 2024, the Multicultural Framework Review reported on the importance of interpreting and translation services in multi-cultural Australia.[120] The Review referred to the critical need for language services and made four recommendations.[121] The Review recognised the need to focus on high-risk settings, including law and justice, and to provide access to quality interpreting services that ensure the fair administration of justice and avoid the potential for miscarriages of justice in the court setting.[122] The Australian Government committed to the Framework's principles.

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115 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) rec 22.3; Law Council of Australia, *The Justice Project: Critical Support Services* (Final Report, 2018) 49–50. See also Australian Law Reform Commission (n 106) rec 10-1; Law Council of Australia, *Submission 215*.

116 Northern Territory Director of Public Prosecutions, *Submission 143*; Legal Aid NT, *Submission 146*; Not published, *Submission 197*. For a discussion on a shortage of training interpreters for legal settings for First Nations languages and new and emerging, languages, see Ludmila Stern and Xin Liu, 'See You in Court: How Do Australian Institutions Train Legal Interpreters?' (2019) 13(4) *The Interpreter and Translator Trainer* 361, 381.

117 See, eg, Ludmila Stern, 'Legal Interpreting in Domestic and International Courts: Responsiveness in Action' in Angela Creese and Adrian Blackledge (eds), *The Routledge Handbook of Language and Superdiversity* (Routledge, 2018) 396, 401–2; Martine B Powell et al, 'Professionals' Perspectives about the Challenges of Using Interpreters in Child Sexual Abuse Interviews' (2017) 24(1) *Psychiatry, Psychology and Law* 90, 91; Sandra Hale, 'Specialist Legal Interpreters for a Fairer Justice System' in Said Faiq (ed), *Discourse in Translation* (Routledge, 1st ed, 2018) 47, 48.

118 Northern Territory Director of Public Prosecutions, *Submission 143*; Circle Green Community Legal, *Submission 208*.

119 Northern Territory Director of Public Prosecutions, *Submission 143*.

120 Commonwealth of Australia, *Towards Fairness: A Multicultural Australia for All* (2024) 80–7.

121 Relevant recommendations include: a funded and sustainable national language policy (recommendation 12); measures to ensure the sustainability and quality of language services (recommendation 13); a fully funded capacity within the existing Translating and Interpreting Services (TIS) National business unit (Department of Home Affairs) to deliver general interpreting and translation services (recommendation 14); and additional funding to the National Accreditation Authority for Translators and Interpreters (NAATI) to address critical workforce quality and gaps (recommendation 15): ibid 86–7.

122 Ibid 84.

10.72 Our Terms of Reference require us to promote and consider just outcomes for people who have experienced sexual violence but we recognise that the critical shortage of interpreters has a broader impact across justice systems, including the accused and witnesses other than complainants in the criminal justice system. Due to the scope of this Inquiry, **Recommendation 33** concentrates on the provision of interpreters for complainants of sexual violence.

## Addressing the shortage of interpreters for sexual violence matters

10.73 The shortage of interpreters is an access to justice issue for people who have experienced sexual violence. Access to criminal justice requires complainants of sexual violence to be able to give their statements to the police, communicate with prosecutors, and give evidence to the courts in the language they are most confident in (including Auslan), with the assurance that their communication is accurately and impartially conveyed.[123] The national shortage of interpreters impacts First Nations people who have experienced sexual violence, people from culturally and linguistically diverse backgrounds, and migrants or newly arrived refugees. As recognised in our Terms of Reference, those people are among the population cohorts that are disproportionately reflected in sexual violence statistics.

10.74 We heard about the negative consequences for people who have experienced sexual violence when untrained people are used by police as interpreters (for example, friends or family members of a complainant or even a person who is alleged to have perpetrated sexual violence). This causes conflicts of interest, unsafe situations, and a reluctance (on the part of the complainant or untrained interpreter) to fully disclose or disclose at all.[124] It can lead to misinterpretations or misapprehensions of the situation.[125] It can also mean that the untrained interpreter acts as a 'gatekeeper' by selecting what is interpreted and how.[126]

10.75 We heard about the importance of cultural protocols and understanding cultural safety and appropriateness.[127] For example, people may require an interpreter of a specific gender to be able to fully disclose their experience.[128]

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123 For discussion on the value of interpreters see WA Family and Domestic Violence Legal Workers Network, *Submission 170*.

124 Refugee Advice and Casework Service, *Submission 179*; Women's Legal Service Victoria, *Submission 207*; Circle Green Community Legal, *Submission 208*; South-East Monash Legal Service Inc, *Submission 210*.

125 inTouch Women's Legal Centre, *Submission 204*.

126 Sandra Hale, 'Court Interpreting: The Need to Raise the Bar' in Malcolm Coulthard, Alison May and Rui Sousa-Silva (eds), *The Routledge Handbook of Forensic Linguistics* (Routledge, 2nd ed, 2021) 485, 496.

127 Aboriginal Legal Rights Movement, *Submission 172*; Sexual Assault Services Victoria, *Submission 203*; inTouch Women's Legal Centre, *Submission 204*.

128 Aboriginal Legal Rights Movement, *Submission 172*; Refugee Advice and Casework Service, *Submission 179*; Not published, *Submission 197*; inTouch Women's Legal Centre, *Submission 204*.

10.76 The shortage of trained interpreters can also contribute to delay and be a cause of additional stress to the complainant. The Refugee Advice and Casework Service highlighted instances where police did not use an interpreter to communicate due to time pressures and matters in court being delayed as a suitable interpreter was unavailable.[129] In their submission, the Northern Territory Director of Public Prosecutions summarised the impact due to the shortage of interpreters for Northern Territory courts, stating that

> cases are being adjourned when no interpreter is available. This places additional strain on an already overloaded system by delaying resolution, increasing the remand population, under-utilising the Courts, and causing additional stress to victims of crime.[130]

10.77 The ALRC also heard about the importance of properly briefing an interpreter about the work ahead of time.[131] In the context of sexual violence matters, briefing the interpreter about the work is important to ensure the interpreter is comfortable with interpreting distressing content as studies have shown that the interpreter's distress can affect the person they are interpreting for, especially children.[132] This can cause discomfort and stress to the person who experienced sexual violence, and could also risk the quality of evidence given.

10.78 During consultations, the ALRC heard that people who have experienced sexual violence who do not speak English as a first language can struggle to make informed decisions when engaging with the criminal justice system due to the shortage of interpreters.[133] Research has also shown that some women withdraw from reporting sexual violence that occurs in a domestic violence context as their experience was affected by the interpreter's lack of training in a sexual violence context.[134] In their submission, the Asylum Seeker Resource Centre highlighted a shortage of female interpreters. They also note experience with some interpreters refusing 'to interpret topics relating to sexual violence experienced by queer communities or sex workers'.[135] This underscores the importance of funding so

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129 Refugee Advice and Casework Service, *Submission 179*. See also Submission South-East Monash Legal Service Inc, *Submission 210*.

130 Northern Territory Director of Public Prosecutions, *Submission 143*.

131 Briefing an interpreter about the work is set out in standards 17.2 (by the court) and 24 (by legal representatives) in the JCDI National Standards: Judicial Council on Cultural Diversity (n 109).

132 Powell et al (n 117) 94, 96.

133 See also Asylum Seeker Resource Centre, *Submission 194*.

134 Olga Garcia-Caro Alcazar, 'Community Interpreting in Women's Domestic Violence Service Settings: A Need for Specialisation?' (Phd Thesis, RMIT University, forthcoming). See also South-East Monash Legal Service Inc, *Submission 210*.

135 Asylum Seeker Resource Centre, *Submission 194*.

that interpreters can receive training in trauma-informed practices, as described in **Recommendation 33**.[136]

10.79 In making **Recommendation 33** we address the national shortage of suitably trained interpreters through the lens of access to justice for complainants of sexual violence. There needs to be a funded national approach to the problem.

10.80 We also recommend the identification and funding of mechanisms to enable interpreters to be appropriately and efficiently engaged by justice agencies for complainants of sexual violence throughout the criminal justice process. The JCDI National Standards set out two types of standards for interpreters being engaged and working in courts and tribunals, 'recommended' and 'optimal' standards.[137] Many of those mechanisms could improve access to justice for complainants of sexual violence who require an interpreter, including standards 4–12 and optimal standards 1–4.[138] The ALRC supports their consideration as appropriate mechanisms.[139]

10.81 The JCDI's National Standards do not address standards for other parts of the justice process. As stated by the Law Council of Australia, '[i]nterpreters play an essential role at every stage of the justice process'.[140] The ALRC recommends the development of national standards for working with interpreters to include standards for police and prosecution agencies when engaging and working with interpreters for complainants of sexual violence who do not speak English as their first language.

10.82 National standards for working with interpreters on sexual violence matters need to be supplemented by nationally consistent and funded vicarious trauma support for interpreters and training in trauma-informed practices.[141] Vicarious trauma support is essential for the wellbeing of interpreters and for maintaining a pool of experienced and qualified interpreters prepared to work in this area. The

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136 For discussion about the importance of funding and trauma-informed training of interpreters, see, eg, Refugee Advice and Casework Service, *Submission 179*; Not published, *Submission 197*; Women's Legal Service Victoria, *Submission 207*; Circle Green Community Legal, *Submission 208*. For examples of times where the interpreter added inappropriate commentary: see, eg, Northern Territory Director of Public Prosecutions, *Submission 143*; Women's Legal Service Victoria, *Submission 207*.

137 Judicial Council on Cultural Diversity (n 109).

138 Standard 4 'provision of information to the public about the availability of interpreters'; standard 5 'training of judicial officers and court and tribunal staff'; standard 6 'engaging an interpreter in accordance with these Standards'; standard 7 'budget for interpreters; standard 8 'co-ordinating the engagement of interpreters; standard 9 'support for interpreters'; standard 10 'assessing the need for an interpreter; standard 11 'engaging an interpreter'; standard 12 'provision of professional development to interpreters on the Standards'; optimal standard 1 'simultaneous interpreting equipment'; optimal standard 2 'provision of tandem or team interpreting'; optimal standard 3 'provision of professional mentors'; optimal standard 4 'establishment of an interpreters' portal': ibid 15–18.

139 See also Law Council of Australia, *The Justice Project: Introduction and Overview* (Final Report, 2018) rec 5.3.

140 Law Council of Australia, *The Justice Project: Critical Support Services* (n 115) 46.

141 For discussion about the need for trauma-informed interpreters, including training in trauma-informed practices, see Refugee Advice and Casework Service, *Submission 179*; Not published, *Submission 197*; Women's Legal Service Victoria, *Submission 207*; Circle Green Community Legal, *Submission 208*.

current provision of vicarious trauma training and trauma-informed training is ad hoc and inconsistent. Some interpreting services have the resources to support ongoing development programs while others must outsource these programs.[142]

## Flexible evidence measures for victim impact statements

**Recommendation 34**

The Commonwealth, states, and territories should review and where necessary amend legislation, and courts should amend court rules, to implement flexible measures for victims of sexual offences to make and deliver their victim impact statements:

a. in a flexible format, including written, pre-recorded audio, or pre-recorded audio-visual statements;

b. utilising illustrative formats, such as drawings and photographs;

c. for written statements:

   i. read aloud by the victim in an open or closed court (with or without a screen) or via remote witness facilities and with a support person; or

   ii. read aloud by someone nominated by the victim; or

   iii. tendered without being read aloud; and

d. for pre-recorded audio or pre-recorded audio-visual statements:

   i. played in an open court; or

   ii. played in a closed court; or

   iii. tendered without being played in court.

10.83 Victim impact statements are important for the sentencing court and victims of crime.

10.84 One of the purposes of sentencing is to recognise the harm done to the victim.[143] The victim impact statement provides the sentencing court with the

142 Ludmila Stern and Xin Liu, 'Ensuring Interpreting in Legal and Courtroom Settings: Australian Language Service Providers' Perspectives on Their Role' (2019) 32(July) *The Journal of Specialised Translation* 90, 109–10.

143 *Crimes (Sentencing) Act 2005* (ACT) s 7(g); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Sentencing Act 1995* (NT) s 5(2)(b); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a); *Sentencing Act 2017* (SA) s 4(1)(c); *Sentencing Act 1997* (Tas) s 3(h); *Sentencing Act 1991* (Vic) s 5.

victim's perspective of the impact of the crime, which otherwise may not be heard, appreciated, or understood.[144]

10.85 For victims of sexual violence, victim impact statements provide an opportunity to directly participate in the sentencing process and have been described as 'meeting victims' needs for voice, validation and vindication in sentencing'.[145] They can have an important therapeutic effect.[146] There is a

> significant therapeutic benefit in allowing victims to read their statements to the Court. As a general comment, victims may feel excluded by Court processes or may feel they have not had the opportunity to put their statement of harm before a Court. A Victim Impact Statement is one of the ways that the legislature has allowed for victims to 'place before the Court, in their own words, the impact of the crime on them'.[147]

> I did make a Victim Impact Statement which I read out at sentencing. I think it allowed the accused, as well as everyone else in the courtroom *to actually hear me, to understand me* [emphasis added].[148]

10.86 We recommend that courts adopt flexible evidence measures for victims to make and deliver their victim impact statements.[149] Flexible and trauma-informed approaches support and encourage the participation of victims of sexual violence in the sentencing proceedings.

10.87 While some jurisdictions also permit oral victim impact statements,[150] South Australia is the only jurisdiction which expressly provides that a victim impact statement may be presented as a pre-recorded audio or audio-visual statement.[151] A submission to the Queensland Sentencing Advisory Council's current 'sentencing sexual violence review' set out a compelling reason to expand the formats for victim impact statements:

> [F]or young people from disadvantaged backgrounds, limited education, poor literacy skills and or mental health or impairments, it is difficult for them to provide written victim impact statements … consideration should be given to allowing young victims to express their harm to the Court through recorded

144 Julian Roberts, 'Victim Impact Statements: Lessons Learned and Future Priorities' (2008) Spring(1) *Victims of Crime Research Digest* 3.

145 Sentencing Advisory Council (Qld), *Sentencing of Sexual Assault and Rape: The Ripple Effect* (Consultation Paper, March 2024) 62. See also Rhiannon Davies and Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (Routledge, 2021) 92–100.

146 South-East Monash Legal Service Inc, *Submission 210*.

147 *R v Porter (No 3)* [2022] ACTSC 236 [65].

148 Name withheld, *Submission 86*.

149 Sexual Assault Services Victoria, *Submission 203*.

150 *Crimes (Sentencing) Act 2005* (ACT) s 52(1); *Sentencing Act 1995* (NT) s 106A (definition of 'victim impact statement').

151 *Sentencing Act 2017* (SA) s 14(3).

> statements or representations made through a lawyer as an alternative to written victim impact statements.[152]

10.88 The option of a pre-recorded audio or audio-visual format for victim impact statements should be available to all victims of sexual violence. Some victims might express themselves with drawings, photographs, or poems. The use of any flexible evidence measures that are available to complainants for giving evidence (such as remote witness facilities, screens, support persons, canine companions in certain jurisdictions, and a closed court) should also be available to victims of sexual offences who choose to read out their victim impact statement in sentencing proceedings.

10.89 In 2017, the Child Sexual Abuse Royal Commission made such a recommendation for victims of child sexual abuse offences.[153] The ALRC endorses that recommendation and recommends extending this to all victims of sexual offences who choose to read their victim impact statement to the court (**Recommendation 34**), which includes access to flexible evidence measures while reading a victim impact statement in court. Some stakeholders indicated that they supported this aspect of the recommendation.

10.90 The flexible evidence measures should incorporate respect for the privacy of the victims by allowing:

- a victim's statement to be read by a person nominated by the victim;
- a pre-recorded audio or audio-visual statement to be played in closed court or by the judge in chambers; and
- written statements to be read in closed court or tendered without being read aloud in court.

10.91 People who have experienced sexual violence are entitled to know about and have an opportunity to make victim impact statements (**Chapter 6**). To support an informed choice, victims should be provided with clear and consistent information about their right to make a victim impact statement, the role of the victim impact statement in the sentencing process, and how they might seek assistance in preparing their statement. Victim participation in the sentencing process is particularly important:

> It is clear that a 'lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable' … Participation is intrinsically valuable. The perception of some degree of control empowers and strengthens the individual … It is clear that providing an individual with some degree of control and autonomy is an important first step in

152 Youth Advocacy Centre, Submission No 30 to Queensland Sentencing Advisory Council, *Sentencing Sexual and Domestic Violence Review* (3 May 2024).

153 The Royal Commission recommended making special measures (alternative arrangements) available for victim survivors of child sexual abuse to give Victim Impact Statements, as far as this is 'reasonably practicable': Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 34) rec 78.

> the healing process. Victim participation is the first step in regaining self-esteem lost as a result of criminal victimisation.[154]

10.92 To ensure that people who have experienced sexual violence are provided with an informed opportunity to prepare and provide a victim impact statement, we recommend that Commonwealth, state and territory Directors of Public Prosecutions guidelines include a requirement that the prosecution inform eligible victims of their right to make a statement, as explored in **Chapter 7**.

154 Alan Young, *The Role of the Victim in the Criminal Process: A Literature Review 1989–1999* (Victims of Crime Research Series, Department of Justice Canada, August 2001) 11.

# 11. Consent

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## Introduction

11.1 Lack of consent is a central feature of sexual offences in Australia.[1]

11.2 Most sexual offences require proof,[2] at a minimum, that:

- the accused person engaged in sexual conduct involving the complainant; and
- the complainant did not consent to that conduct.[3]

11.3 However, there are considerable differences in how the laws of consent operate across Australian jurisdictions. This depends both on the way that consent is defined in each jurisdiction and on how each jurisdiction approaches the required

1 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, 2020) 60 [4.51].

2 Proof of a lack of consent is not required for offences involving people under the age of consent or people who lack the capacity to consent. The ALRC recognises that the age of consent differs between jurisdictions. See **Chapter 19**.

3 This consent-based approach to sexual offences is widely accepted: see New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, 2020) 56 [5.2]. However, many countries still retain sexual offence models which are not based around consent: *Progress on the Sustainable Development Goals: The Gender Snapshot 2021* (UN Women and UN DESA Statistics Division, 2021) 10.

mental state of the accused person who is alleged to have committed a sexual offence.

11.4 The laws of consent have been the subject of much attention in recent years, resulting in several jurisdictions adopting or considering more 'affirmative' models of consent. These models include requirements that consent is communicated (by words or actions) and that each participant takes steps to affirm that the other participants are consenting.[4] However, there are significant differences in the models adopted (or proposed) in each jurisdiction, and limited evaluation as to their relative strengths and weaknesses.

11.5 This chapter considers the complexities of comparing models of consent in Australia, before exploring how consent is defined and the different models of consent operating across Australia. It then identifies opportunities for greater harmonisation, while acknowledging areas where efforts towards harmonisation are complicated.

11.6 This chapter includes recommendations:

- to evaluate existing affirmative consent models to identify best practice elements to achieve greater harmonisation;
- for greater consistency across jurisdictions in defining circumstances which are not consensual; and
- for continued community education so that the Australian community understands, and community views are in step with, legislative reforms.

11.7 Implementation of these recommendations would help achieve greater national harmonisation of consent laws and lasting social change.

## Complexities of comparing the laws of consent in Australia

11.8 It is difficult to compare the laws of consent operating in Australia.[5] There are differences across the jurisdictions in:

- how consent is defined — which is further shaped by prescribed circumstances in which there is no consent; and matters which do not, on their own, constitute consent;
- how sexual offences operate — including how the 'fault element' (the accused person's state of mind at the time of the alleged offence) is examined; and
- how the rules of criminal evidence and procedure operate.

4 Christopher Dowling et al, *National Review of Child Sexual Abuse and Sexual Assault Legislation in Australia* (Consultancy Report, Australian Institute of Criminology, 2024) 37.

5 Ibid xx–xxi.

## Approach to the fault element in code and non-code jurisdictions

11.9 Differences are particularly pronounced between 'code jurisdictions' (where the criminal law is completely codified in statute),[6] and 'non-code jurisdictions' (where the criminal law is not completely codified in statute, and common law still applies).[7] This is largely because of the different ways in which the 'fault element' operates in each jurisdiction.[8]

11.10 In code jurisdictions (except for the Northern Territory, which is discussed below), most sexual offences against people above the age of consent require the prosecution to prove beyond reasonable doubt:

- that the accused person intentionally engaged in the alleged sexual act (for example, sexual penetration) ('physical element'); and
- where lack of consent is an element of the offence, that the complainant did not consent (that is, the complainant's subjective state of mind at the time of the alleged offence) ('absence of consent').

11.11 In code jurisdictions, the fault element is simply the intention to engage in the alleged sexual act (for example, the accused person intended to sexually penetrate the complainant). Beyond this, the accused person's state of mind is only considered if a 'mistake of fact' defence is raised (for example, the accused person asserts they believed that the complainant was consenting when the sexual act occurred).[9] If the accused person raises this defence, the prosecution bears the onus of proving, beyond reasonable doubt, that the accused person's belief that the complainant was consenting was not honest or reasonable.

11.12 By contrast, in non-code jurisdictions, most sexual offences against people above the age of consent generally require the prosecution to prove:

- the physical element (for example, sexual penetration);
- the absence of consent (where lack of consent is an element of the offence); and
- the fault element (for example, that the accused person did not have a 'reasonable belief' that the complainant was consenting).[10]

11.13 However, there are also differences between non-code jurisdictions as to how the 'fault element' operates, including whether an 'objective' standard (such as

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6 The Northern Territory, Queensland, Tasmania, and Western Australia.

7 The Australian Capital Territory, New South Wales, South Australia, and Victoria.

8 See Dowling et al (n 4) xx–xi, 33–5. See also Guzyal Hill and Jonathan Crowe, 'Harmonising Sexual Consent Law in Australia: Goals, Risks and Challenges' (2023) 49(3) *Monash University Law Review* 1, 20–1.

9 *Criminal Code 1899* (Qld) ss 24, 348A; *Criminal Code 1924* (Tas) ss 14, 14A; *Criminal Code 1913* (WA) s 24.

10 See, eg, *Crimes Act 1958* (Vic) s 38(1).

reasonable belief)[11] or a 'subjective' standard (such as recklessness, knowledge, or honest belief) applies to a particular offence, and how that standard is assessed, which may include both subjective and objective considerations.[12]

11.14 The Northern Territory employs both approaches, depending on the offence charged. Where an offence has a fault element, the accused person's required mental state must be proven;[13] and where an offence does not have a fault element,[14] the accused person may raise a mistake of fact defence, which the prosecution must disprove.[15]

11.15 Approaches to the effect of intoxication of the accused person, including whether it was self-induced or not, also affect the fault element of the offence. For example, in Victoria, a 'reasonable person' (objective) standard is applied,[16] but in Tasmania, the test (which is subjective) refers to whether 'the accused [person]' would have made the mistake if not intoxicated.[17]

### *Complexities of harmonisation*

11.16 These differences highlight the challenges of harmonising the laws of consent, which must be considered in the full context in which they operate.[18] Any recommendations for national harmonisation therefore need to take these differences into account.

## Current approaches to the laws of consent in Australia

### Defining consent

11.17 Consent is defined fairly consistently throughout Australia.[19]

11.18 All jurisdictions define consent as 'free', 'voluntary', or both. However, jurisdictions differ in defining consent as something which is 'given' (Western

11 See, eg, *Crimes Act 1958* (Vic) s 36A, which provides that whether the belief is reasonable depends on the circumstances. The belief is not reasonable if 'within a reasonable time before or at the time the act takes place' the accused person 'does not say or do anything to find out' whether the complainant consents to the act.

12 For example, 'reckless indifference'. See, eg, *Criminal Law Consolidation Act 1935* (SA) s 47.

13 For example, 'sexual intercourse–without consent', which requires, for example, (1) intentional sexual penetration, (2) that the complainant did not consent, and (3) that the accused person was 'reckless' (fault element) in relation to the complainant's lack of consent: *Criminal Code 1983* (NT) s 208H.

14 For example, 'sexual intercourse–child under 16 years' which requires, for example, that (1) the accused person intentionally sexually penetrates the complainant, and (2) that the complainant was 14 or 15 years of age: *Criminal Code 1983* (NT) s 208J(3)–(4).

15 Ibid ss 32, 43AN, 43AX.

16 *Crimes Act 1958* (Vic) s 36B.

17 *Criminal Code 1924* (Tas) s 14A.

18 See Dowling et al (n 4) 177.

19 Ibid 31–2.

Australia and the Australian Capital Territory) or the result of 'agreement' (all other jurisdictions).[20]

11.19 In 2010, the ALRC and the New South Wales Law Reform Commission (NSWLRC) recommended that Commonwealth, state, and territory sexual offence provisions include a statutory definition of 'consent' based on the concept of 'free and voluntary agreement'. This definition aimed to protect the sexual autonomy and freedom of choice of people over the age of consent, and promote positive and communicative understandings of consent through the idea of 'agreement'.[21] The ALRC maintains this recommendation. Several recent law reform reports have also recommended the terminology of 'agreement'.[22]

11.20 In addition to defining consent, New South Wales and Victoria also include in their legislation 'objectives' or 'guiding principles' for courts to assist in interpreting and applying consent (and sexual offence) provisions.[23]

## Clarifying the definition of consent

11.21 The definition of what consent 'is' is also shaped by legislation which prescribes what consent is 'not'.

### *Negative indicators of consent*

11.22 Most Australian jurisdictions (except for Tasmania and the Commonwealth) have included in legislation matters which do not, on their own, constitute consent. These are sometimes described as 'negative indicators of consent' and are examples of circumstances that some people may believe, incorrectly, amount to consent.

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20 The Commonwealth, the Northern Territory, Queensland, South Australia, and Victoria all define consent as free and voluntary agreement; the Australian Capital Territory defines consent as an 'informed agreement' which is 'freely and voluntarily given' and 'communicated by saying or doing something'; New South Wales defines consent as free and voluntary agreement 'at the time of sexual activity'; and Tasmania defines consent as 'free agreement'. See, eg, *Criminal Code 1995* (Cth) s 268.14(3); *Criminal Code 1983* (NT) s 208GA(1); *Criminal Code 1899* (Qld) s 348; *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Crimes Act 1958* (Vic) s 36(1); *Crimes Act 1900* (ACT) s 50B; *Crimes Act 1900* (NSW) s 61HI(1); *Criminal Code 1924* (Tas) s 2A. Western Australia defines consent as 'a consent freely and voluntarily given': *Criminal Code 1913* (WA) s 319(2)(a). However, the Law Reform Commission of Western Australia has recently recommended that the definition of consent be amended to reflect 'agreement': see The Law Reform Commission of Western Australia, *Project 113: Sexual Offences* (Final Report, 2023) rec 1.

21 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, 2010) 1150 [25.86].

22 New South Wales Law Reform Commission (n 3) rec [5.12]; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 212, rec 43; The Law Reform Commission of Western Australia (n 20) 41 [4.29], rec 1; Northern Territory Law Reform Committee, *Inquiry into Affirmative Consent in Sexual Offences* (Final Report No 49, 2023) rec 1. However, the Queensland Law Reform Commission did not recommend the terminology of agreement: see Queensland Law Reform Commission (n 1) 91 [5.72]–[5.76].

23 *Crimes Act 1900* (NSW) s 61HF; *Crimes Act 1958* (Vic) ss 37A, 37B.

Examples include that the absence of resistance is not consent,[24] and prior consent does not equate to future consent.[25] The approach varies between jurisdictions in terms of which indicators are addressed, and whether they are addressed as part of the definition of consent, jury directions, or both. This will be considered in more detail below (see **Recommendation 36**).

### *Circumstances where there is no consent*

11.23 All jurisdictions have now legislated non-exhaustive circumstances in which there is no consent.[26] Generally speaking, these circumstances cover situations where a person lacks capacity to consent to sexual activity; is pressured into participating (that is, participation is not free or voluntary); or they participate due to a lack of information (for example, they had a mistaken belief or were fraudulently induced).[27] However, the circumstances differ in scope and in how specific they are.[28] This will be considered in more detail below (see **Recommendation 37**).

11.24 Some jurisdictions have also codified detailed jury directions about what does and does not amount to consent (see **Chapter 8**).[29]

## Models of consent

11.25 All Australian jurisdictions have moved away from resistance-based models of consent (that is, models which presume consent unless the complainant physically or verbally resists), and adopted more 'positive' models of consent.

24 See, eg, *Crimes Act 1900* (ACT) s 67(2); *Crimes Act 1900* (NSW) s 61HI(4); *Criminal Code 1899* (Qld) s 348(3); *Crimes Act 1958* (Vic) s 36(2).

25 See, eg, *Crimes Act 1900* (ACT) s 67(2); *Crimes Act 1900* (NSW) s 61HI(6); *Criminal Code 1899* (Qld) s 348(4); *Crimes Act 1958* (Vic) s 36(3).

26 *Crimes Act 1900* (ACT) s 67(1); *Crimes Act 1900* (NSW) s 61HJ; *Criminal Code 1983* (NT) s 208GA(2); *Criminal Code 1899* (Qld) s 348AA; *Criminal Law Consolidation Act 1935* (SA) s 46(3); *Criminal Code 1924* (Tas) s 2A(2); *Crimes Act 1958* (Vic) s 36; *Criminal Code 1913* (WA) s 319(2). The Commonwealth does so with respect to each offence: see, eg, in relation to the offence of 'rape', *Criminal Code 1995* (Cth) s 268.14(3).

27 The Law Reform Commission of Western Australia, *Project 113: Sexual Offences* (Discussion Paper Volume 1, 2022) 54 [4.65].

28 Dowling et al (n 4) 39.

29 See, eg, *Jury Directions Act 2015* (Vic).

11.26 It is generally accepted that positive models of consent better reflect contemporary understandings of a person's right to choose whether to engage in sexual activity,[30] and international 'good practice' standards.[31]

11.27 There are different interpretations of what a 'positive model of consent' means, especially the terms 'communicative consent' and 'affirmative consent'.[32] For instance, some commentators describe 'communicative consent' as a type of 'affirmative consent'. Others argue that certain minimum standards must be met before a consent model is considered 'affirmative'.[33]

11.28 Two of the main differences between consent models in Australia concern what they require in terms of communicating consent, and any steps to be taken to ascertain consent.

### *Communicating consent*

11.29 Most jurisdictions recognise that a lack of communication does not amount to consent. However, jurisdictions vary in how they frame the communication requirement, with some jurisdictions making this expectation clear in legislation:

- The Australian Capital Territory positively requires that consent must be communicated.[34]
- New South Wales, Queensland, Tasmania, and Victoria provide that 'not saying or doing anything' to indicate consent is not consent,[35] which implicitly requires that consent be communicated. This is not currently a requirement in Western Australia.[36] However, the Law Reform Commission of Western Australia (LRCWA) recently recommended that Western Australia adopt a similar approach.[37]

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30 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 78–9; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (2023) 102 [5.25]; Queensland Law Reform Commission (n 1) 79 [5.11]; New South Wales Law Reform Commission (n 3) 38 [3.25]–[3.32]; Australian Law Reform Commission and New South Wales Law Reform Commission (n 21) 1150 [25.86].

31 Dowling et al (n 4) 23. See also Indira Rosenthal, Rodney Croome and Robin Banks, *Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth* (Human Dignity Trust, 2019) 28; Division for the Advancement of Women, *Handbook for Legislation on Violence against Women* (United Nations, 2012) 24–25; John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) 362.

32 Queensland Law Reform Commission (n 1) 60 [4.52].

33 Rape and Sexual Assault Research and Advocacy, *Submission 206*.

34 *Crimes Act 1900* (ACT) s 50B.

35 *Crimes Act 1900* (NSW) s 61HJ(1)(a); *Criminal Code 1899* (Qld) s 348AA(1)(a); *Criminal Code 1924* (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36AA(1)(a).

36 Western Australia's legislation does not address communication. The legislation provides that a failure to resist is not consent: *Criminal Code 1913* (WA) s 319(2)(b).

37 The Law Reform Commission of Western Australia (n 20) rec 3.

- In the Northern Territory and South Australia,[38] judges are required to direct the jury to the effect that merely not saying or doing anything to indicate consent is not consent. The Northern Territory Law Reform Committee (NTLRC) has recently recommended that a communication requirement (similar to the Australian Capital Territory's model) be reflected in the definition of consent.[39]

### *Ascertaining consent*

11.30 Australian jurisdictions have also adopted different approaches to whether or how a participant in sexual activity must take steps, or say or do something, to ascertain or affirm that other participants are consenting.

11.31 Most jurisdictions (the Australian Capital Territory, New South Wales, Queensland, Tasmania, and Victoria) require, in certain circumstances, some consideration of any steps taken by the accused person to ascertain consent. There are two broad approaches:

- in non-code states (the Australian Capital Territory, New South Wales, Victoria), consideration of any steps taken by the accused person forms part of the 'fault' element — that is, whether the accused person's belief in consent was reasonable in the circumstances; and
- in code states (Queensland and Tasmania), where sexual offences do not include a fault element, consideration of any steps taken occurs as part of the mistake of fact defence — that is, whether the accused person's mistaken belief in consent was honest and reasonable.

11.32 Beyond these broad approaches, there are also substantive differences in how these requirements are expressed. These differences are set out in the following table:

38 *Criminal Code 1983* (NT) s 208PB; *Evidence Act 1929* (SA) s 34N(1).
39 Northern Territory Law Reform Committee (n 22) rec 1.

### *Table 11.1: Steps taken to ascertain consent*

| Jurisdiction | Provision[40] | Features |
|---|---|---|
| **Whether the accused person's belief in consent is 'reasonable' in the circumstances** | | |
| Australian Capital Territory[41] | 'the accused person's belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented' | Measure:<br>Say or do something to ascertain consent<br><br>Temporal requirement:<br>None<br><br>Exceptions:<br>None |
| New South Wales[42] | 'a belief that the other person consents to sexual activity is not reasonable if the accused person did not, **within a reasonable time before or at the time of the sexual activity**, say or do anything to find out whether the other person consents to the sexual activity'<br><br>Exception:<br>**Not applicable** if the accused person had, 'at the time of the sexual activity', a 'cognitive impairment' or a 'mental health impairment' and that impairment 'was a substantial cause of the person not saying or doing anything'. The onus is on the accused person to establish impairment (on the balance of probabilities) | Measure:<br>Say or do something to ascertain ('find out') consent<br><br>Temporal requirement:<br>Within a reasonable time before or at the time of the sexual activity<br><br>Exceptions:<br>Cognitive or mental health impairment |
| Victoria[43] | 'A's belief that B consents to an act is not reasonable if, **within a reasonable time before or at the time the act takes place**, A does not say or do anything to find out whether B consents to the act'<br><br>Exception:<br>**Not applicable** if the accused person had a 'cognitive impairment' or a 'mental illness' and that impairment or illness was 'a substantial cause' of the person not saying or doing anything. The onus is on the accused person to establish impairment (on the balance of probabilities) | Measure:<br>Say or do something to ascertain ('find out') consent<br><br>Temporal requirement:<br>Within a reasonable time before or at the time the act takes place<br><br>Exceptions:<br>Cognitive or mental health impairment |

40 Note: The 'provision' column only includes requirements as to consideration of 'any steps taken' (or equivalent) by the accused person. It does not include all considerations which are relevant to the assessment as provided for by the respective provisions.

41 *Crimes Act 1900* (ACT) s 67.

42 *Crimes Act 1900* (NSW) s 61HK.

43 *Crimes Act 1958* (Vic) s 36A.

| Jurisdiction | Provision[40] | Features |
|---|---|---|
| **Whether the accused person had a 'mistaken belief' as to consent which is not 'honest or reasonable'** | | |
| Queensland[44] | 'A belief by the person that another person consented to an act is not reasonable if the person did not, **immediately before or at the time of the act**, say or do anything to ascertain whether the other person consented to the act'<br><br>Exception:<br>**Not applicable** if the accused person had, 'at the time of the sexual activity', a 'cognitive impairment' or a 'mental health impairment' and that impairment 'was a substantial cause of the person not saying or doing anything'. The onus is on the accused person to establish impairment (on the balance of probabilities) | Measure:<br>Say or do something to ascertain consent<br><br>Temporal requirement:<br>Immediately before or at the time of the act<br><br>Exception:<br>Cognitive or mental health impairment |
| Tasmania[45] | An accused person's belief is not reasonable if (amongst other options) the accused person 'did not take reasonable steps, **in the circumstances known to him or her at the time of the offence**, to ascertain that the complainant was consenting to the act' | Measure:<br>Take reasonable steps to ascertain consent<br><br>Temporal requirement:<br>Circumstances known to the accused person at the time of the offence<br><br>Exceptions:<br>None |

11.33 South Australian legislation does not expressly require an accused person to take steps to affirm whether the complainant was consenting unless the required mental state is one of 'reckless indifference'.[46]

11.34 Western Australia and the Northern Territory have no such specific legislative requirements. However:

- the LRCWA has recently recommended that 'when the jury considers all the relevant circumstances of the case to determine whether the accused person's belief in consent was reasonable, it should consider what the accused person said or did to find out whether the complainant consented to the relevant sexual activity';[47] and
- the NTLRC has recently recommended that the definition of consent be amended to include that 'a person must take active steps, by words or actions, to find out whether the other person consents before engaging in sexual activity…' .[48]

44 *Criminal Code 1899* (Qld) s 348A.
45 *Criminal Code 1924* (Tas) s 14A.
46 *Criminal Law Consolidation Act 1935* (SA) s 47.
47 The Law Reform Commission of Western Australia (n 20) rec 28.
48 Northern Territory Law Reform Committee (n 22) rec 1.

### *Affirmative consent models*

11.35 Broadly speaking, an affirmative consent model requires:

- that consent is positively communicated (by words or actions); and
- that all participants take active steps to affirm that the other participants are consenting.[49]

11.36 The social theory of affirmative consent requires this process to be mutual and ongoing throughout, as opposed to consent being something that is 'achieved' and taken to 'exist' unless it is 'withdrawn'.[50]

11.37 The nature of the approach taken, in respect of both a communicative requirement and a requirement to take steps, therefore influences whether a legislative model of consent is described as 'affirmative':

- Most Australian jurisdictions (the Australian Capital Territory,[51] New South Wales,[52] Queensland,[53] Tasmania,[54] and Victoria[55]) have introduced models which have been described as 'affirmative'.[56]
- The LRCWA and the NTLRC have recently recommended the adoption of 'affirmative' models.[57]
- South Australia has recently consulted on affirmative consent.[58]

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49 Dowling et al (n 4) 32.

50 Rape and Sexual Assault Research and Advocacy, *Submission 206*.

51 The *Crimes (Consent) Amendment Act 2022* (ACT) commenced on 12 May 2022. It amended the *Crimes Act 1900* (ACT). Reforms included changes to the definition of consent, reasonable belief in consent, and to the list of circumstances in which there is no consent.

52 The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) commenced on 1 June 2022. It amended the *Crimes Act 1900* (NSW). Reforms included changes to consent provisions, knowledge about consent, and to the list of circumstances in which there is no consent.

53 Part 3, Division 3 of the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment 2024* (Qld) came into effect on 23 September 2024. It amended the *Criminal Code 1899* (Qld). Reforms included changes to the definition of consent, the defence of mistake of fact, and to the list of circumstances where there is no consent.

54 In 2004 the Tasmanian Parliament passed reforms (*Criminal Code (Amendment) Consent Act 2004* (Tas)) to the *Criminal Code 1924* (Tas). The reforms inserted a statutory definition of consent and constraints on the availability of the defence of mistaken belief in consent.

55 Part 2 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) came into effect on 30 July 2023. It amended the *Crimes Act 1958* (Vic). Reforms included changes to the definition of consent, reasonable belief in consent, and to the list of circumstances where there is no consent.

56 Dowling et al (n 4) 33.

57 The Law Reform Commission of Western Australia (n 20) rec 28; Northern Territory Law Reform Committee (n 22) rec 1.

58 Attorney-General's Department (SA), *Review of Sexual Consent Laws in South Australia* (Discussion Paper, 2023) 14–16.

11.38 However, as demonstrated by the discussion above, there is no 'single' model of affirmative consent in Australia.[59] There are different iterations, some of which are more closely aligned with the social theory of affirmative consent than others.[60]

# Pathway to greater national harmonisation

11.39 There are considerable differences between models of consent nationally. These differences complicate any harmonisation efforts.

## Is harmonisation desirable?

11.40 Concerns about whether harmonisation of the laws of consent is feasible and desirable include:

- that it would require sustained, cross-jurisdictional, and bipartisan support around the need for, and direction of, proposed reform;
- that harmonising the law of consent may not lead to harmonisation in practice, as the laws may develop differently over time, which may lead to greater complexity; and
- the risk of 'levelling down' to achieve consistency, at the cost of more progressive reforms and at the expense of 'competitive federalism'.[61]

11.41 The Senate Legal and Constitutional Affairs References Committee (Senate Committee), having conducted an inquiry into consent laws (Senate Inquiry into Current and Proposed Sexual Consent Laws in Australia), and having taken these and other concerns into account, reached the conclusion that 'Australia's criminal law frameworks should adopt a unified approach to sexual consent laws'.[62] The Senate Committee acknowledged that

> sexual violence is a crime without borders and all Australians should be able to refer to clear and consistent legislation, to understand when a sexual crime has been committed. In addition, clear and consistent legislation sets a strong legal and behavioural standard.[63]

11.42 While acknowledging the challenges of achieving national harmonisation, the Senate Committee concluded that there was willingness amongst jurisdictions 'to enact legislation that prevents and addresses the prevalence of sexual violence

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59 See also Hill and Crowe (n 8) 20–21.

60 For example, the inclusion of a temporal 'reasonable time' requirement into the NSW provision (*Crimes Act 1900* (NSW) s 61HK) is described by some experts as being inconsistent with 'ongoing' consent and lacking in evidentiary foundation. See Rape and Sexual Assault Research and Advocacy, *Submission 206*.

61 See, eg, Law Council of Australia, *Submission 215*. See also Law Council of Australia, Submission No 73 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (5 April 2023) 13–15 [40]–[53]. See also Hill and Crowe (n 8) 10–11.

62 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 30) 102 [5.23].

63 Ibid 101 [5.22].

nationally' and that the 'difficulty in achieving a necessary and worthwhile outcome is no reason to resist reform'.[64]

11.43 The ALRC agrees that greater harmonisation, even if complicated, is desirable. As the ALRC and NSWLRC acknowledged in 2010, the laws of consent 'educate the general community about "the boundaries of proscribed sexual behaviour"'.[65] More consistent laws between jurisdictions would help:

- clarify what consensual sexual activity is;
- ensure that everyone in Australia shares the same legal expectations and protections; and
- facilitate more consistent consent education, to bring about changes to attitudes and behaviours, and improve the effectiveness of legislative reforms.

11.44 However, to ensure that harmonisation 'levels up' and does not pursue consistency at the expense of progressive reforms and innovations, identification of a clear end goal is required,[66] along with a willingness on the part of each jurisdiction to work towards that goal in the interests of greater consistency nationally.

## What should the direction of harmonisation be?

11.45 Greater alignment could be achieved by all jurisdictions agreeing upon, and working towards, the key elements of a best practice model of consent.

11.46 The Senate Committee recommended that the ALRC 'includes an affirmative consent standard in any proposal to harmonise Australia's sexual consent laws' and take into account 'the evidence of the operation of recently adopted affirmative consent laws'.[67]

11.47 As noted above, an affirmative consent standard requires, from all participants to sexual activity: free and voluntary agreement, communication, and active steps by participants to ascertain whether the other participants are consenting to sexual activity.

11.48 The principles that underlay affirmative models of consent are:[68]

- sexual autonomy — the right to bodily integrity and freedom of choice; and
- sexual responsibility — all individuals who wish to engage in sexual activity must ensure that other participants consent to each sexual act.

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64 Ibid 102 [5.24]–[5.26].

65 Australian Law Reform Commission and New South Wales Law Reform Commission (n 21) 1147 quoting Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences against the Person* (1999) 35.

66 Hill and Crowe (n 8) 5–6.

67 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 30) rec 4.

68 The Law Reform Commission of Western Australia (n 27) 141–2 [5.105]–[5.106].

11.49 Affirmative consent provides that consent cannot ever be presumed, recognising that serious harm may be caused if a sexual activity occurs without consent.

11.50 Several submissions to this inquiry indicated support for affirmative models of consent.[69] There has however been significant debate (considered below) about whether — and if so, how — affirmative models of consent should be reflected in legislation.

### *Arguments in favour of an affirmative model*

11.51 Some of the main arguments in support of affirmative consent models include that such models:

- better reflect contemporary understandings of sexual relations based on mutuality and equality;[70]
- may reduce arguments being advanced by an accused person that a complainant's consent could be 'implied' from the circumstances in which the act occurred (for example, if the complainant did not resist),[71] and may reduce arguments being advanced that an accused person's belief in consent was 'reasonable' which are based on myths and stereotypes;[72]
- may shift undue focus in court proceedings on the complainant's communication and behaviour (that is, what they said or did to demonstrate they were not consenting), and shift focus on to the accused person (that is, what positive steps they took to ascertain whether the complainant was consenting);[73]
- may make it easier to ensure the criminal justice system responds effectively to more nuanced forms of sexual violence (for example, where a victim consents to one sexual act but not another);[74]
- are not unduly burdensome on the accused person, as it simply requires them to do or say something to affirm the complainant consents;[75] and

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69 For example, Scarlet Alliance, *Submission 186*; Australian Psychological Society, *Submission 106*; No to Violence, *Submission 196*; L Henderson-Lancett, D Luong, and D Kemp, *Submission 110*; Youth Affairs Council of South Australia, *Submission 123*; Our Watch, *Submission 157*; Family and Sexual Violence Alliance Steering Committee (Tas), *Submission 202*; Rape and Sexual Assault Research and Advocacy, *Submission 206*; Women's Legal Services Australia, *Submission 212*; Full Stop Australia, *Submission 214*; Queensland Sexual Assault Network, *Submission 70*.

70 New South Wales Law Reform Commission (n 3) [3.55].

71 However, see Rachael Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21(3) *Criminology & Criminal Justice* 334, 336.

72 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 300 [14.49].

73 New South Wales Law Reform Commission (n 3) 37–38 [3.23]–[3.25]; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 30) 101 [5.10]; Victorian Law Reform Commission (n 72) 300 [14.48]; Dowling et al (n 4) 23, 33, 166.

74 Dowling et al (n 4) 166.

75 New South Wales Law Reform Commission (n 3) 138 [7.113].

- may promote positive community education about consensual sexual activity, which may in turn bring about changes in attitudes and social behaviour, by encouraging people to actively seek consent, rather than presuming it or feeling a sense of entitlement.[76]

11.52 The adoption of such models would also further harmonisation of consent laws nationally.[77]

### *Arguments against an affirmative model*

11.53 Some of the main arguments against affirmative consent models include that such models:

- are artificial, prohibit spontaneity, and do not reflect the diverse ways in which sexual activity occurs within the community (which may not always involve express communication), and as such may capture otherwise consensual sexual activity;[78]
- unfairly shift the onus onto an accused person to demonstrate what steps they took, or to demonstrate how those steps were reasonable in the circumstances, which may adversely impact upon fundamental principles of the criminal justice system,[79] including the burden of proof, the presumption of innocence, and the accused person's right to silence;[80]
- may cause some sexual offences to become strict or absolute liability offences (depending upon the defences available);[81]
- may criminalise those who 'are unable to take measures to ascertain the complainant's consent due to personal circumstances beyond their control, such as those who have a cognitive impairment';[82]
- may not have any effect on trial practices, for example, by changing the way the prosecution case is put, or on judicial directions to correct misconceptions;[83] and

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76 See Sexual Assault Prevention and Response Steering Committee (ACT) (n 30) 5; Queensland Law Reform Commission (n 1) 83–4 [5.28].

77 The Law Reform Commission of Western Australia (n 27) 142 [5.106].

78 Victorian Law Reform Commission (n 72) 301 [14.54]; New South Wales Law Reform Commission (n 3) 74 [5.92]; Queensland Law Reform Commission (n 1) 90 [5.68]–[5.71]; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 2, 2022) 222.

79 Law Council of Australia (n 61) 18–19 [67]–[70]. See also Victorian Law Reform Commission (n 72) 413 [19.12].

80 Women's Safety and Justice Taskforce (n 22) 211; Liberty Victoria, Submission No 43 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (16 March 2023) 17–18.

81 Andrew Dyer, '"Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr"' (2019) 7(1) *Griffith Journal of Law & Human Dignity* 17.

82 The Law Reform Commission of Western Australia (n 27) 144 [5.111] citing New South Wales Law Reform Commission (n 3) 136 [7.114]. Some jurisdictions (New South Wales, Queensland, and Victoria) have specifically addressed this concern through the inclusion of a legislative exception: see **Table 11.1**.

83 Victorian Law Reform Commission (n 72) 301 [14.56]; Helen Mary Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012) 188–9, 200.

- may make the law more complex, potentially resulting in further delays (in the form of appeals) and greater traumatisation of the complainant.[84]

11.54 Some have also expressed that the criminal law is an ineffective tool for bringing about social change, or that it is not the purpose of the criminal law to try to promote behavioural change.[85]

### *The need to identify a best practice model for affirmative consent*

11.55 As detailed above, most jurisdictions have either adopted, or are considering whether to adopt, affirmative models of consent. Those jurisdictions which have recently adopted affirmative models have done so following law reform inquiries which involved consultation with key stakeholders in the respective jurisdictions.

11.56 The public policy rationale behind such reforms is threefold: to make the law of consent clearer; to allow for more effective prosecutions; and to bring about changes in social behaviour:

> No-one should assume someone is saying 'yes' just because they do not say 'no' or do not resist physically. People are entitled to expect that if someone wants to have sex with them, then that other person will ask — and that if the first person has not said something or done something to communicate consent, then the other person will take further steps to ascertain consent. This is just a basic matter of respect. It is time for the law to catch up with common human decency and common sense.[86]

11.57 Some commentators point to this trend in affirmative reforms as showing a 'clear impetus across Australia for such a model'.[87] While acknowledging that criticisms of the trend towards affirmative models remain, their argument is a pragmatic one — that it is unlikely that jurisdictions which have already adopted the model will reverse these reforms, and jurisdictions which have not adopted the model would be open to doing so.[88]

11.58 The ALRC agrees that harmonisation around an affirmative model of consent is the most viable option, given the current direction of reform across jurisdictions. The ALRC is also of the view than an affirmative model of consent reflects the principles of sexual autonomy and freedom of choice, which underpin sexual offence laws.[89] Affirmative consent recognises that consent cannot be presumed and recognises the serious harm which can be caused to a person where sexual activity occurs

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84 Victorian Law Reform Commission (n 72) 302 [14.59].

85 Ibid 300 [14.51]; New South Wales Law Reform Commission (n 3) 87 [6.42]; Queensland Law Reform Commission (n 1) 63 [4.68]–[4.72].

86 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, 7506–14 (Mark Speakman, Attorney General, and Minister for Prevention of Domestic and Sexual Violence) 7514.

87 Hill and Crowe (n 8) 6.

88 Ibid 7.

89 See also Australian Law Reform Commission and New South Wales Law Reform Commission (n 21) 1150 [25.86].

without consent. It represents a positive standard around which to harmonise and reflects best practice international standards.[90]

11.59 However, the ALRC also recognises that:

- there are significant differences between current models;
- there has been little evaluation of how they are working in practice; and
- if legislative reforms are to be effective, they must be accompanied by community education.

11.60 The following recommendations seek to address these barriers to harmonisation and build a broad consensus for reform.

## Steps towards national harmonisation: evaluation, opportunities, and lasting social change

### Best practice affirmative consent model: the need for evaluation

11.61 The ALRC considers that while harmonisation is desirable, evaluation is necessary before harmonisation of affirmative consent models can occur.

**Recommendation 35**

1. Jurisdictions that have recently adopted affirmative models of consent, or that are proposing to do so, should evaluate these reforms within five years of the reforms commencing. Tasmania (which has had an affirmative model of consent since 2004) should also conduct a review, within a reasonable timeframe.
2. The purpose of the evaluation is to ensure that a best practice affirmative model of consent is identified for the purposes of national harmonisation.
3. The Standing Council of Attorneys-General should commission, and ensure appropriate funding for, the Australian Institute of Criminology to prepare the evaluation criteria and conduct the evaluation. The evaluation should assess whether the reforms are:
    a. operating in a trauma-informed manner for complainants and consistently with the accused person's right to a fair trial; and

90 *Handbook for Legislation on Violence against Women* (n 31) 26.

b. having any impact on:

i. jury directions;

ii. the presentation of prosecution and defence cases at trial;

iii. cross-examination of complainants and accused persons; and

iv. community understandings of consent.

4. The Australian Institute of Criminology should liaise with court researchers (see **Recommendation 3**) to obtain data for the evaluation process.

5. People who have experienced sexual violence, police, prosecutors, defence lawyers, and judicial officers should be consulted as part of the evaluation process.

6. The Australian Institute of Criminology should provide the results of the evaluation to the Standing Council of Attorneys-General to consider the adoption of a nationally harmonised affirmative model of consent.

### *There has been limited evaluation of affirmative consent models*

11.62 Aside from Tasmania, most affirmative consent models operating in Australia have only come into effect recently. As described above, no single affirmative model has been adopted. There has been limited evaluation of the individual affirmative models, and no qualitative evaluation of the relative strengths and weaknesses of the different models adopted throughout Australia.

11.63 Tasmania's provisions were introduced in 2004.[91] Research in 2012 into the practical impact of those provisions indicated that the 'reforms are not being implemented as intended'.[92] Specifically, the author of the research concluded that judges and lawyers continued to rely on 'pre-reform' ideas of consent, and prosecutors were tailoring cases based on what they understood the jury already believed about rape, rape victims, and consent.[93] As far as the ALRC is aware, there has been no further evaluation to see if these problems persist.

11.64 The Senate Committee, having conducted its inquiry:

- concluded that the impact of affirmative consent models is 'not yet fully understood', pointing to the absence of empirical evidence;

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91 In 2004 the Tasmanian Parliament passed reforms to the *Criminal Code 1924* (Tas). The *Criminal Code (Amendment) Consent Act 2004* (Tas) inserted a statutory definition of consent (s 2A) and constraints on the availability of the defence of mistaken belief in consent (s 14A).

92 Cockburn (n 83) iii.

93 Ibid.

- concluded that qualitative assessment of the impact of these reforms at every stage of the criminal justice process was required; and
- suggested that the jurisdictions should work with the ALRC to develop a framework for evaluation.[94]

### *Evaluation would support development of a best practice model*

11.65 The ALRC considers that evaluation is needed to assess how reforms are working in practice, whether they have achieved their policy objectives, and whether they have resulted in any unintended or undesirable consequences. Any recommendation for harmonisation on this issue should be based upon evidence, including data analysis, and accompanied by timely evaluation of the impacts and effectiveness of affirmative models.[95]

11.66 Consultees broadly supported the need for evaluation.[96] Most consultees recognised that there has been significant recent reform and that there is currently a lack of information about how affirmative models are working in practice. However, there were differences in the impetus behind the support for evaluation. For example, some stakeholders support evaluation as they dispute whether the current legislative models are truly affirmative,[97] while others support it because they are concerned about the impacts of affirmative models on principles fundamental to a fair trial.[98]

11.67 Evaluation will build an evidence base which can then be used to identify whether the policy objectives are being met, and whether any concerns are substantiated. This evidence can then be used to develop a best practice model, or elements of a best practice model, which can be adopted in each jurisdiction. This would bring about greater consistency nationally.

### *What the evaluation should involve*

11.68 Some jurisdictions which have recently reformed their consent laws have in-built statutory review periods (the Australian Capital Territory,[99] New South Wales,[100]

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94 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 30) 100–101 [5.12]–[5.19]; recs 2, 4.

95 See also Hill and Crowe (n 8) 11.

96 See, eg, No to Violence, *Submission 196*.

97 See, eg, Rape and Sexual Assault Research and Advocacy, *Submission 206*: 'Law reform across Australia in recent years has been premised on the introduction of an affirmative standard of sexual consent. Yet, rarely have law reformers engaged sufficiently with the knowledge base about the standard. As a result, there are significant failings in attempts to legislate it'.

98 See, eg, Law Council of Australia, *Submission 215*.

99 The *Crimes Act 1900* (ACT); was amended on 12 May 2022 by the *Crimes (Consent) Amendment Act 2022* (ACT). Review is required to commence within 2 years of commencement: *Crimes Act 1900* (ACT) s 442D.

100 The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) commenced on 1 June 2022. Review is required (within 6 months after the period of 3 years after the commencement date, and 5 years thereafter): *Criminal Procedure Act 1986* (NSW) s 368.

and Queensland[101]). While this is positive, there is also a need for standardised evaluation criteria to ensure that the data can be meaningfully compared. The evaluation period is also important, to ensure that there is sufficient time for matters to progress from charge to finalisation (including any appeal period) to capture meaningful data. This will require considerable funding.

11.69 The ALRC has recommended that the Australian Institute of Criminology (AIC) be engaged to both:

- develop the evaluation criteria; and
- conduct the evaluation.

11.70 The AIC is a national research body which is well equipped to develop evaluation criteria, collect and evaluate data, and deliver evidence-based findings, which could then be used to support further reform.

11.71 The AIC is better placed than the ALRC to develop uniform evaluation criteria which will allow for meaningful analysis of the different models in operation in each jurisdiction. Such a task was beyond the scope permitted by the duration of this Inquiry.

11.72 However, the ALRC has identified general evaluation criteria (set out in **Recommendation 35** above) which align with the policy objectives which underpin affirmative consent reforms and which seek to address the main concerns raised by consultees. The evaluation criteria should include whether affirmative models of consent are:

- Operating in a trauma-informed manner — one of the purposes of affirmative reforms is to remove undue scrutiny of the complainant, which can be distressing.
- Operating consistently with the rights of accused persons — as detailed above, some of the main arguments against affirmative models include that they may erode the right to silence and the presumption of innocence.
- Impacting criminal proceedings — the reforms are intended to clarify the law of consent and facilitate effective prosecution. It will be necessary to see whether affirmative reforms alter the way matters are prosecuted, change defence lines of questioning, shift reliance on 'implied' consent narratives, reduce undue scrutiny of the complainant, and increase scrutiny of the accused person's behaviour.
- Impacting community understanding of consent — while the reforms are designed to improve the criminal response to sexual violence, they are also aimed at primary prevention, by seeking to make the boundaries of consensual sexual activity clear.

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101 Review of amendments made in response to recommendations of the Women's Safety and Justice Taskforce is required as soon as practicable 5 years after the commencement: *Attorney-General Act 1999* (Qld) s 14.

11.73 The ALRC recognises that for an evaluation to be effective, it is important that the views and experiences of all stakeholders are considered in developing and conducting the evaluation. There were, for example, different views about what the evaluation should cover. Some stakeholders also emphasised the need for specific evaluation of the impact of such models on First Nations people, to identify any disproportionate impacts on communities. Broad consultation is essential.

## Clarifying the definition of consent: opportunities for broad national consistency

11.74 While the ALRC considers evaluation is necessary before harmonisation of the model of consent can occur, the ALRC has identified two areas where broader consistency could be achieved within existing models of consent.

### *Negative indicators of consent*

**Recommendation 36**

The Commonwealth, states, and territories, with the assistance and oversight of the Standing Council of Attorneys-General, should review their legislation to ensure there is broad national consistency in the list of matters that do not, on their own, constitute consent (negative indicators of consent). Examples (based on existing legislation across the jurisdictions) include:

a. previous consent to a sexual act, of that kind or any other kind, either with the accused person or someone else; and

b. absence of resistance to sexual activity.

Note: These are expressed as general terms. The ALRC seeks to achieve broad consistency nationally, rather than being prescriptive about how such negative indicators should be expressed in legislation.

### *Reasons for reform*

11.75 As discussed in **Chapter 4**, myths about sexual violence abound. This includes myths about resistance and sexual assault,[102] and previous consent and sexual assault.[103]

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102 Nina Hudson et al, *Understanding Adult Sexual Assault Matters: Insights from Research and Practice: An Educational Resource for the Justice Sector* (Australian Institute of Family Studies, Attorney-General's Department (Cth), 2024) 16 (insight 2): 'Sexual assault does not necessarily involve the use of force and may not result in physical injury. Physical injury does not feature in most reported cases of sexual assault in Australian national statistics'.

103 Ibid 25 (insight 5): 'Consent to one sexual act does not mean consent to any and all other sexual acts, or to future sexual acts'.

11.76 One legislative response designed to counter this has been to specify, within legislation, matters which do not, on their own, constitute consent.[104]

### *Absence of resistance to sexual activity*

11.77 The Australian Capital Territory, New South Wales, Queensland, and Victoria provide, within the provision in which consent is defined, that the absence of resistance (physical and verbal) is not consent.[105] Western Australia provides that the absence of physical resistance is not consent.[106]

11.78 South Australia requires judges to direct that the person is not to be regarded as having consented 'merely because of' the absence of resistance or injury.[107] The Northern Territory requires a similar direction.[108]

### *Previous consent to sexual activity*

11.79 The Australian Capital Territory, New South Wales, Queensland, and Victoria provide, within the provision in which consent is defined, that previous consent to the same or different acts with the same or different persons is not consent.[109]

11.80 South Australia requires judges to direct that the person is not to be regarded as having consented 'merely because' they previously consented to an act with a person.[110] The Northern Territory requires a similar direction.[111]

### *Opportunity for harmonisation*

11.81 The inclusion of 'negative indicators' within legislation would address any risk that a finder of fact (a jury or judicial officer) may draw improper inferences from a person's consent to one sexual act, and make assumptions about consent to other acts with the same or a different person,[112] or may hold mistaken beliefs that

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104 Other methods by which such myths may be countered include jury directions and expert evidence: see **Chapter 8**.

105 *Crimes Act 1900* (ACT) s 67(2); *Crimes Act 1900* (NSW) s 61HI(4); *Criminal Code 1899* (Qld) s 348(3); *Crimes Act 1958* (Vic) s 36(2).

106 *Criminal Code 1913* (WA) s 319(2)(b).

107 *Evidence Act 1929* (SA) ss 34N(1)(a)(i)–(iii).

108 *Criminal Code 1983* (NT) s 208PB. The Australian Capital Territory and Victoria also require jury directions on absence of resistance: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C(b); *Jury Directions Act 2015* (Vic) s 47E.

109 *Crimes Act 1900* (ACT) s 67(2); *Crimes Act 1900* (NSW) s 61HI(6); *Criminal Code 1899* (Qld) s 348(4); *Crimes Act 1958* (Vic) s 36(3).

110 *Evidence Act 1929* (SA) s 34N(1)(a)(iv).

111 *Criminal Code 1983* (NT) s 208PB. The Australian Capital Territory and Victoria also require jury directions on previous consensual activity: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 80C(d); *Jury Directions Act 2015* (Vic) s 47F.

112 The emphasis here is on improper inferences — that is, ones based solely on prior consent (which are based on myths and stereotypes) — as opposed to matters which may be properly taken into account in the circumstances of the case. See The Law Reform Commission of Western Australia (n 20) 53–4 [4.93]–[4.95].

people who experience sexual violence will resist either physically or verbally. It also recognises that freeze responses do occur.[113]

11.82 There was some support for specifying matters which do not on their own constitute consent in legislation. Some stakeholders simply noted that such provisions already exist in their respective jurisdictions and some did not think that harmonisation was necessary or desirable. Some stakeholders considered that reform efforts should be directed towards removing such provisions, out of concern they may undermine the affirmative model of consent, by implying that such factors counter what is required under an affirmative model.

11.83 On balance, the ALRC considers that including negative indicators of consent within legislation presents an opportunity to recognise and counter common myths about consent which continue to persist.[114] This is consistent with an affirmative model which provides that consent is required for 'every instance of sexual activity',[115] and that consent must be communicated (by words or actions) and cannot be inferred from the absence of communication.[116] The ALRC recommends that the Standing Council of Attorneys-General include consideration of these indicators as part of the recommended harmonisation process.

### *Circumstances where there is no consent to sexual activity*

**Recommendation 37**

1. The Commonwealth, states, and territories, with the assistance and oversight of the Standing Council of Attorneys-General, should review relevant legislation, and amend that legislation where necessary, to ensure there is broad national consistency in the list of circumstances where there is no consent.
2. The circumstances where there is no consent should be considered and agreed upon, in respect of each of the following categories:
    a. where the person does not do or say anything to communicate consent;
    b. where the person has no capacity to consent, for example because they were: asleep, unconscious, or incapable of understanding the nature of the act; or because the person was incapacitated by drugs or alcohol;

113 Ibid 53 [4.89]–[4.92]; New South Wales Law Reform Commission (n 3) 65 [5.48]. See also Annie Cossins, 'Why Her Behaviour Is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 42(2) *University of New South Wales Law Journal* 462, 493.
114 See The Law Reform Commission of Western Australia (n 20) 52 [4.83].
115 New South Wales Law Reform Commission (n 3) 73 [5.88].
116 The Law Reform Commission of Western Australia (n 20) 45 [4.49].

c. where the person participates because of:

i. threats or use of force or harm (including economic or financial harm) to themselves, another person, an animal, or property;

ii. intimidation or coercion, including in the context of domestic or family violence;

iii. unlawful detainment; or

iv. an abuse of a position of authority, trust, or dependency;

d. where the person has a mistaken belief as to the identity of the other person or as to the nature or the purpose of the act;

e. where the person participates because of a fraudulent inducement or deception; or

f. where, contrary to an agreement that a condom would be used, there was intentional non-use, removal of, or tampering with, a condom.

Note: The ALRC seeks to achieve broad consistency nationally. The ALRC emphasises that the descriptions given in (2)(a)–(f) are descriptions of categories (which are based on existing legislation across the jurisdictions). It is for the states and territories, through the Standing Council of Attorneys-General, to try to ensure consistency of categories

### *Reasons for reform*

11.84 In 2010, the ALRC and the NSWLRC recommended that all jurisdictions should prescribe a non-exhaustive list of 'circumstances that may vitiate consent', and set out a minimum set of circumstances which should be included.[117] As noted above, all jurisdictions have now enacted lists, however some are more comprehensive than others.

11.85 As part of a recent review, the AIC prepared a table which sets out the general categories which jurisdictions have prescribed, along with the specific circumstances which fall within those categories.[118] A copy of this table is reproduced in **Appendix D**.[119] The ALRC notes that the table does not reflect recent reforms in the

117 Australian Law Reform Commission and New South Wales Law Reform Commission (n 21) rec 25-5.

118 Dowling et al (n 4) 40–1 (Table 4). The AIC noted it 'is important to emphasise that these lists are not exclusive. If a specific circumstance does not fall within the list of a jurisdiction, this does not mean that other legislation does not capture it': at 39.

119 The table prepared by the AIC, which is reproduced by the ALRC in **Appendix D**, was prepared by the AIC based on legislation as at 31 August 2023: Dowling et al (n 4) xi.

Northern Territory or Queensland, which have recently enacted more comprehensive lists.[120]

11.86 As the AIC noted, some jurisdictions have enacted 'comprehensive and specific' lists (for example, the Australian Capital Territory, New South Wales, and Victoria),[121] while others are broader in their approach.[122] As the LRCWA recently acknowledged, Western Australia has the 'least exhaustive' list.[123]

11.87 The ALRC considers that greater harmonisation would be beneficial.

### *Why is a list necessary?*

11.88 Lists of circumstances where there is no consent help to define the limits of consent.[124] Arguments in support of a non-exhaustive list include that it:

- makes it clear that a person should not engage in sexual activity in the listed circumstance;
- provides guidance on what consent is and how to interpret it;
- simplifies prosecution because the prosecution can prove a lack of consent where the facts fall within a listed category;
- encourages more consistent outcomes between cases where consent is in issue, while still allowing for flexibility; and
- educates the community about what is not consensual sexual activity.[125]

11.89 Several consultees supported the inclusion of a list, and generally agreed that greater consistency across jurisdictions would be valuable.

11.90 Some consultees were concerned that harmonisation efforts may result in some jurisdictions 'levelling down' rather than all jurisdictions 'leveling up' to reflect best practice. Some consultees did not think harmonisation was desirable.

11.91 The ALRC considers that there is benefit in each jurisdiction having similar prescribed circumstances. A comprehensive, but not exhaustive, approach is the best option. This would ensure that there is greater consistency nationally about circumstances where sexual activity is not consensual, while still allowing for circumstances which haven't been anticipated. Greater national consistency would:

- help efforts to refine what consent is;
- inform community education that is nationally consistent; and

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120 *Criminal Code 1983* (NT) s 208GA; *Criminal Code 1899* (Qld) s 348AA.

121 *Crimes Act 1900* (ACT) s 67(1); *Crimes Act 1900* (NSW) s 61HJ; *Crimes Act 1958* (Vic) s 36AA. Queensland has also recently enacted a comprehensive list: *Criminal Code 1899* (Qld) s 348AA.

122 Dowling et al (n 4) 39.

123 The Law Reform Commission of Western Australia (n 20) 55 [4.105].

124 Ibid 49 [4.66].

125 New South Wales Law Reform Commission (n 3) 79–80 [6.11]–[6.13]. See also The Law Reform Commission of Western Australia (n 20) 55 [4.103], 57 [4.112].

- promote positive behaviour change through a clearer message in law about when sexual activity is not consensual.

### *How could broader national consistency be achieved?*

11.92 The ALRC has based the above recommended categories on those identified by the AIC in their review of existing legislation. The ALRC has not sought to set out the precise wording of each circumstance where there is no consent.

11.93 Some stakeholders were concerned that the recommendation includes 'general categories' rather than precisely worded circumstances, and some consultees were concerned about certain proposed categories.

11.94 The Law Council of Australia expressed the preliminary view that:

> We agree that each state and territory, with the assistance of the Standing Council of Attorneys-General, should review its legislation with a view to ensuring there is national consistency in respect of circumstances where the law deems that there is no consent. However, such a review must carefully assess the precise wording of each prescribed circumstance combined with holistic consideration of the offence structure and evidentiary rules (such as rules regulating admission of sexual experience evidence) in that jurisdiction.[126]

11.95 The ALRC recognises that care is needed to ensure that harmonisation does not result in any jurisdiction 'levelling down'. The Standing Council of Attorneys-General could coordinate this process, to ensure each jurisdiction has input in refining the circumstances.

11.96 Each recommended category, along with some of the main concerns, are addressed below.

### *Circumstance 2(a) — 'where the person does not do or say anything to communicate consent'*

11.97 As detailed above, most jurisdictions specify that communication is necessary for consent to occur — the Australian Capital Territory states this requirement positively (that consent must be communicated).[127] New South Wales, Queensland, Tasmania, and Victoria state this in the negative — an absence of communication is not consent.[128] The LRCWA and NTRLRC have recently recommended the same approach.[129]

11.98 Some of the arguments made in support of a communication requirement include that it better reflects contemporary social expectations around consensual

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126 Correspondence from the Law Council of Australia to ALRC, 28 October 2024.

127 *Crimes Act 1900* (ACT) s 50B.

128 *Crimes Act 1900* (NSW) s 61HJ(1)(a); *Criminal Code 1899* (Qld) s 348AA(1)(a); *Criminal Code 1924* (Tas) s 2A(2)(a); *Crimes Act 1958* (Vic) s 36AA(1)(a).

129 The Law Reform Commission of Western Australia (n 20) rec 3; Northern Territory Law Reform Committee (n 22) rec 2.

sexual activity.[130] The idea that consent should be 'communicated' acknowledges that consent to a sexual activity is not to be presumed, and that consensual sexual activity involves ongoing and mutual communication, decision-making, and agreement between the people participating in the sexual activity.[131] It recognises that freeze responses to unwanted sexual contact can and do occur and makes it clear that if communication has not occurred, sexual activity should not take place.

11.99 Some arguments against communicative requirements include that they do not capture the various ways in which consent may be expressed.[132] Concerns have also been raised that a communicative requirement may increase scrutiny of the complainant's actions in cross-examination (about whether consent was communicated) and compromise the right to silence (by effectively requiring the accused person to give evidence to counter the complainant's account of whether consent was communicated). Concern was also raised by one First Nations stakeholder that a communicative requirement may disproportionately affect some Aboriginal people.[133]

11.100 Several stakeholders supported the recommendation to include 'a person does not do or say anything to indicate consent' as a circumstance in which there is no consent. However, there were also some strong objections to this approach.

11.101 Noting that most jurisdictions have already adopted this approach (based on broad consultation), and that it better respects a person's sexual autonomy by recognising that consent cannot be presumed, the ALRC recommends that the Standing Council of Attorneys-General includes a communication requirement as part of the recommended harmonisation process. Such a requirement would also help build momentum towards the adoption of a best practice model of affirmative consent.

### *Circumstance 2(b) — where the person 'has no capacity to consent' or 'is incapacitated'*

11.102 A person who is incapable of understanding the nature of the act, is unconscious or asleep, or is incapacitated due to drugs or alcohol, is unable to freely and voluntarily agree to sexual activity, and therefore cannot consent to sexual activity.

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130 The Law Reform Commission of Western Australia (n 20) 41–2 [4.34]–[4.39]; 45–6 [4.48]–[4.55]. See also Sexual Assault Prevention and Response Steering Committee (ACT) (n 30) 78–9; New South Wales Law Reform Commission (n 3) 83–90 [6.26]–[6.57].

131 New South Wales Law Reform Commission (n 3) 38 [3.25]–[3.28].

132 The Law Reform Commission of Western Australia (n 20) 43–4 [4.40]–[4.43]. See also Queensland Law Reform Commission (n 1) 87 [5.53]–[5.55], in which the QLRC did not recommend that consent be communicated by words of actions.

133 The stakeholder expressed concern that it would 'severely and adversely impact Aboriginal people, particularly those for whom English is not a first language and who are not educated or raised in a solely western tradition/culture', resulting in increased incarceration: Correspondence from a First Nations stakeholder to ALRC, 17 October 2024.

11.103 All jurisdictions, except for Western Australia,[134] recognise this in varying forms in legislation.[135] However, the LRCWA has recently recommended similar reforms, following broad consultation.[136]

11.104 Complexities may arise where a person agrees, before becoming incapacitated, to engage in sexual activity while asleep, unconscious or in a state of incapacitation. For example, they may agree to be awoken by the commencement of sexual activity.[137] There is a tension between such activity and affirmative models of consent, which require ongoing communication and steps to affirm consent.

11.105 In principle, the ALRC is of the view that there is a strong public interest in ensuring all sexual activity which involves people who are unconscious, asleep or incapacitated (by drugs or alcohol) as unlawful, noting the 'heightened vulnerability' of such people in such circumstances.[138]

### *Circumstance 2(c) — 'where the person participates because of (i) threats or use of force or harm, (ii) intimidation or coercion, (iii) unlawful detainment, (iv) abuse of a position of authority, trust or dependency'*

11.106 Participation in sexual activity is not the result of free and voluntary agreement if a person participates because they are forced or pressured to do so.

11.107 All jurisdictions recognise that consent cannot occur where there is use of 'force or violence', and all (except for the Commonwealth) recognise this where there is a threat or fear of force or violence.[139]

11.108 All jurisdictions (except for Western Australia) recognise that unlawful detention precludes consent and all jurisdictions (except for Western Australia and Tasmania) recognise that abuse of a relationship of authority, trust or dependence, precludes consent. The LRCWA has recently recommended that unlawful detention and abuse of a relationship of authority, trust, or dependence (along with other circumstances) be included in legislation.[140]

11.109 However, jurisdictions differ in terms of what other forms of pressure, both physical and non-physical, are specified. Some jurisdictions also include, for example, harm, threat or fear of harm, intimidation, coercion, and blackmail. Some also recognise that the threat or harm may be directed at someone other than the complainant, or at an animal or property.[141]

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134 Western Australia only specifically recognises that persons aged under 13 are incapable of consenting: *Criminal Code 1913* (WA) s 319(2)(c).

135 See **Appendix D**; *Criminal Code 1899* (Qld) s 348AA(1)(b)–(e); *Criminal Code 1983* (NT) s 208GA(2)(d)–(e).

136 The Law Reform Commission of Western Australia (n 20) rec 8.

137 See The Law Reform Commission of Western Australia (n 27) 60–1 [4.131]–[4.135].

138 Ibid 58. See also New South Wales Law Reform Commission (n 3) 95 [6.90], rec 6.5.

139 See **Appendix D**; *Criminal Code 1899* (Qld) s 348AA(1)(f); *Criminal Code 1983* (NT) s 208GA(2)(a).

140 The Law Reform Commission of Western Australia (n 20) rec 9.

141 See **Appendix D**; *Criminal Code 1899* (Qld) s 348AA(1)(f)–(g).

11.110 The ALRC is of the view that forced or pressured engagement is inconsistent with the principles of sexual autonomy and freedom of choice.[142] However, the ALRC also recognises that approaches differ between jurisdictions as to which forms of pressured engagement are included as circumstances in which there is no consent, and as to scope. The ALRC recommends that the Standing Council of Attorneys-General includes examples (2)(c)(i)–(iv) as part of the recommended harmonisation process, taking into account the different approaches in each jurisdiction.

### *Coercion in the context of family and domestic violence*

11.111 The reference to 'coercion' in **Recommendation 37** at **(2)(c)(ii)** is intended to include coercive control.

11.112 It is well-established that sexual violence is often associated with family and domestic violence.[143] It is also well-established that family and domestic violence is not limited to physical or sexual assault.[144] It can include a range of abusive conduct, including verbal, emotional, psychological, and financial abuse, social isolation, intimidation, and other forms of abuse designed to dominate and control. Such conduct is collectively described as coercive control.[145]

11.113 Two jurisdictions expressly include 'family violence' (Victoria) or 'domestic violence' (Queensland) 'involving psychological abuse or harm to mental health' as a specific example of 'harm' which precludes consent to sexual activity.[146]

11.114 The NTLRC recently recommended that legislation specifically include as a circumstance 'psychological harm to a person's health and safety or harm to the person's family, cultural or community relationships, or a course of action amounting to coercive control'.[147]

11.115 Consultees had a range of views on whether family violence and coercive control should be included as a general category. Some stakeholders felt the category of 'threats or use of force or harm, including economic or financial harm' was adequate. Some suggested that 'coercion' should be added as a category of harm. Others felt that family violence and coercive control required separate specification.[148]

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142 The Law Reform Commission of Western Australia (n 27) 68–9 [4.169].

143 About 39% of sexual assaults recorded in 2023, and reported to police, occurred in a family and domestic violence context - Australian Bureau of Statistics, 'Recorded Crime – Victims: 2023' <www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>.

144 For example, *Family Law Act 1975* (Cth) s 4AB; *Domestic and Family Violence Protection Act 2012* (Qld) s 8; *Family Violence Protection Act 2008* (Vic) s 5.

145 *Defining and Responding to Coercive Control: Policy Brief* (ANROWS Insights, January 2021).

146 *Crimes Act 1958* (Vic) s 36AA(1)(b) (example 'e'); *Criminal Code 1899* (Qld) s 348AA(1)(f).

147 Northern Territory Law Reform Committee (n 22) rec 2.

148 Women's Legal Services Australia, *Submission 212*: 'Models of consent must respond to the complexities of how consent functions in the context of domestic and family violence. This includes ensuring that legislation responds to the impacts of sexual coercion and force that can occur and cumulate over time. For example, including a non-exhaustive list of examples of circumstances and factors to demonstrate where consent is negated, such as the approach taken in Victoria'.

11.116 The ALRC considers that family and domestic violence and coercive control are unique and particularly pervasive forms of harm, involving the maintenance of power and dominance. The interaction between this behaviour, and consent to sexual activity, requires specific attention, as reflected by the National Plan. The ALRC recommends that the Standing Council of Attorneys-General consider this as part of the recommended harmonisation process.

### *Circumstance 2(d) — 'the person has a mistaken belief as to the identity of the other person, or as to the nature or the purpose of the act'*

11.117 Free and voluntary agreement necessitates that a person understands who other participants are and the nature and purpose of the sexual activity to which they are agreeing.

11.118 All jurisdictions (except Western Australia and the Commonwealth) include, as a circumstance in which there is no consent, 'mistaken identity'; and all jurisdictions (except Western Australia and the Australian Capital Territory) include 'mistake as to nature or purpose'.[149] Some jurisdictions include other specific examples of mistake, such as mistake as to marital status.[150] The LRCWA recently recommended that Western Australia's list of circumstances be amended to reflect mistaken beliefs as to identity, purpose, and nature.[151]

11.119 Noting that most jurisdictions have already adopted (or recommended) this approach, the ALRC recommends that the Standing Council of Attorneys-General includes mistake of fact as to identity, nature, or purpose as part of the recommended harmonisation process. However, the ALRC recognises that jurisdictions differ as to whether they specify that such a belief should be 'reasonable' (only Tasmania includes such a requirement),[152] and whether mistakes, deceptions, or frauds induced by a third party should be included or excluded.[153] These matters should be considered by the Standing Council of Attorneys-General.

### *Circumstance 2(e) — 'where the person participates because of a fraudulent inducement or deception'*

11.120 For an agreement to be 'free and voluntary', it cannot be obtained by fraud or deception.

11.121 Some jurisdictions include, as a circumstance in which there is no consent, where the person participates in the act due to fraud or deception.[154] For example, Queensland includes a 'false or fraudulent representation about the nature or purpose of the act', including about whether it is for 'health, hygienic or cosmetic purposes'.[155] Victoria includes a 'false or misleading representation' as

149 See **Appendix D**; *Criminal Code 1899* (Qld) s 348AA; *Criminal Code 1983* (NT) s 208GA(2).
150 *Crimes Act 1900* (NSW) s 61HJ(1)(j)(i).
151 The Law Reform Commission of Western Australia (n 20) recs 11, 12.
152 *Criminal Code 1924* (Tas) s 2A(2)(g).
153 See, eg, *Crimes Act 1900* (ACT) s 67(1)(i).
154 See **Appendix D**; *Criminal Code 1899* (Qld) s 348AA; *Criminal Code 1983* (NT) s 208GA(2).
155 *Criminal Code 1899* (Qld) s 348AA(1)(j). See also *Criminal Code 1983* (NT) s 208GA(2)(c).

a circumstance of non-consent, but only where it pertains to non-payment for sex work.[156] The Commonwealth and South Australia do not include 'fraud' or 'deceit' at all.

11.122 Western Australian legislation provides that consent is not 'freely and voluntarily given if it is obtained by … deceit, or any fraudulent means'.[157] However, the LRCWA recently reviewed its legislation, and recommended that 'the list of circumstances be framed solely in terms of mistaken beliefs, rather than referring to fraudulent or deceptive conduct'.[158]

11.123 A concern raised about 'fraud or deceit' as a circumstance is that it may cover conduct which should not be included.[159] For example, a person may lie about their wealth, profession, or feelings. Some jurisdictions specifically exclude such inducements from being circumstances in which there is no consent.[160] The ALRC agrees with this approach in principle and recommends that the Standing Council of Attorneys-General consider the examples of fraud which should be covered as part of the recommended harmonisation process.

11.124 Other concerns include that legislation, if not carefully drafted, may criminalise individuals for non-disclosure of their STI (sexually transmitted infection) or BBV (blood-borne virus) status, or aspects of their identity such as transgender status.[161] The LRCWA recently considered this issue in detail and recommended that mistake as to 'identity' should be limited to who the person is — not 'matters such as the person's sex, gender, gender history, profession or skill, or whether they have a particular attribute'.[162] The ALRC agrees with this in principle and recommends that the Standing Council of Attorneys-General consider this as part of the recommended harmonisation process.

### *Non-payment for sex work*

11.125 The reference to 'fraudulent inducement or deception' in **Recommendation 37** at **(2)(d)** is intended to include non-payment for sex work.

11.126 The ALRC notes that while prevalence data is very limited, it is generally accepted that sex workers experience greater susceptibility to sexual violence.[163] One example includes where there is non-payment of a sex worker for sex work.

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156 *Crimes Act 1958* (Vic) s 36AA(1)(m).

157 *Criminal Code 1913* (WA) s 319(2).

158 The Commission concluded that it was preferable to keep the issue of whether a person consented (subjective) separate from consideration of any criminal liability on the part of the accused person: see The Law Reform Commission of Western Australia (n 27) 86 [4.238]–[4.239], rec 12.

159 See generally The Law Reform Commission of Western Australia (n 20) 79–82 [4.209]–[4.222].

160 See, eg, *Crimes Act 1900* (NSW) s 61HJ(3).

161 ACON, *Submission 76*; Scarlet Alliance, *Submission 186*.

162 The Law Reform Commission of Western Australia (n 20) recs 14 and 16.

163 Queensland Law Reform Commission (n 1) 49 [4.7]. See also Antonia Quadara, 'Sex Workers and Sexual Assault in Australia: Prevention, Risk and Safety' (Issues No 8, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2008) 4–5, 7–10.

11.127 The Scarlett Alliance submitted that non-payment for sex work should be legislated, in all jurisdictions, as a circumstance in which there is no consent. They submitted:

> Payment for services serves as a cornerstone of consent in sex work. Sex workers agree to engage in sexual acts based on the negotiated terms and compensation. When payment is manipulated, stolen, or services are otherwise fraudulently obtained, our consent is violated.[164]

11.128 Queensland and Victoria specifically include, as an example of fraudulent misrepresentation, the circumstance where a sex worker's consent is based on remuneration (through payment or reward), and that remuneration does not occur as agreed.[165]

11.129 Concerns have been raised about the need to prove that there was fraud.[166] For example, it may be that an accused person only forms the intent not to pay after the sexual activity occurred, and as such, their initial agreement to pay was not fraudulent.

11.130 The ALRC recommends that the Standing Council of Attorneys-General, as part of the recommended harmonisation process, consider the approach adopted in Queensland and Victoria. It should also consider whether non-payment for sex work, absent any fraudulent misrepresentation, should be included. This would make the law clearer when these situations arise. The ALRC notes that some sex work remains criminalised in some jurisdictions, which complicates harmonisation.[167]

### *Circumstance 2(f) — 'there was, contrary to agreement, intentional non-use, removal of, or tampering with, a condom'*

11.131 There has been significant international focus on non-consensual removal, non-use, or tampering of a condom without consent during sex, commonly known as 'stealthing'.[168] Polling shows that only 15% of Australians are familiar with the term

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164 Scarlet Alliance, *Submission 186*.

165 *Criminal Code 1899* (Qld) s 348AA(1)(l); *Crimes Act 1958* (Vic) s 36AA(1)(m).

166 See The Law Reform Commission of Western Australia (n 20) 92 [4.283], quoting sex worker reform advocates Magenta: 'When a client does something that wasn't agreed to, boundaries are broken and consent no longer exists. If a client changes the terms of the booking without talking to the sex worker, consent is broken. It doesn't matter whether this is done by deceit, fraud, force, threat or intimidation'.

167 Sex work has only been decriminalised (or largely decriminalised) in New South Wales (eg, the *Disorderly Houses Amendment Act 1995* (NSW)), the Northern Territory (*Sex Industry Act 2019* (NT)), Victoria (*Sex Work Decriminalisation Act 2022* (Vic)); and Queensland (*Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Act 2024* (Qld)). The Scarlet Alliance notes that street-based sex work remains subject to restrictions in New South Wales: Scarlet Alliance, 'Sex Work Laws in Australia' <scarletalliance.org.au/resources/laws/>.

168 See generally Sienna Parrott and Brianna Chesser, *Stealthing: Legislating for Change* (The Australia Institute, October 2022); Alexandra Brodsky, 'Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 23(2) *Columbia Journal of Gender and Law* 108.

stealthing, 56% do not know what its legal status is, and 81% support criminalisation of such conduct.[169] The ALRC recognises that concerns have been raised about the use of this term, which may be seen as emotive, stigmatising or trivialising.[170] For that reason, the ALRC will use the language of 'non-consensual failure to use, removal of, or tampering with a condom'.

11.132 Most Australian jurisdictions (except the Commonwealth, New South Wales, and Western Australia) provide that there is no consent if a person agrees to engage in sexual activity on the condition that a condom will be used, and a condom is then intentionally not used, removed, or tampered with, before or during the sexual activity.[171]

11.133 In New South Wales, non-consensual condom removal features as an example within the definition of consent (that consent to sexual activity with a condom does not equate to consent to sex without a condom).[172] The Commonwealth and Western Australia do not have provisions covering this situation.

11.134 The LRCWA recently recommended including such conduct as a circumstance in which there is no consent.[173]

11.135 Non-consensual condom removal can have serious impacts for people who have experienced sexual violence, including the risk of unintended pregnancy or sexually transmitted infections and psychological trauma.[174] While it is unclear how common this behaviour is, some of the available research indicates that sex workers may be more likely to experience this form of sexual violence.[175]

11.136 Criminalising non-consensual condom removal would help prevent it by educating the community about it, encouraging reporting, and assisting prosecution. But there are different views about how such conduct should be addressed. Views differ about whether such conduct is already captured by legislation, or should be criminalised as a stand-alone offence,[176] or included as a consent negating circumstance, or in some other form.[177]

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169 Parrott and Chesser (n 168) 4. Polling conducted on a nationally representative sample of 1,001 Australians in July 2022.

170 See The Law Reform Commission of Western Australia (n 20) 105 [4.344].

171 *Crimes Act 1900* (ACT) s 67(1)(j) ('intentional misrepresentation' only); *Criminal Code 1983* (NT) s 208GA(2)(h); *Criminal Code 1899* (Qld) s 348AA(1)(n) (which also covers the circumstance where the other person 'becomes aware that the condom is no longer effective but continues with the act'); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(ga) ('misrepresentation (whether express or implied) as to the use of a condom during the activity' only); *Criminal Code 1924* (Tas) s 2A(2A); *Crimes Act 1958* (Vic) s 36AA(1)(o).

172 *Crimes Act 1900* (NSW) s 61HI(5).

173 The Law Reform Commission of Western Australia (n 20) rec 15.

174 Parrott and Chesser (n 168) 2.

175 Scarlet Alliance, *Submission 186*.

176 The Australian Capital Territory initially legislated stealthing to be a stand-alone offence (*Crimes (Stealthing) Amendment Act 2021* (ACT)). However, it has since repealed that offence, and included stealthing as a circumstance which there is no consent (*Crimes Act 1900* (ACT) s 67(1)(j)).

177 Dowling et al (n 4) 24. See also Victorian Law Reform Commission (n 72) 305–8 [14.77]–[14.97].

11.137 Several stakeholders agreed that non-consensual condom removal should be recognised as a circumstance in which there is no consent. The Scarlet Alliance submitted that inclusion of non-consensual 'condom non-use, tampering or removal' as a circumstance where there is no consent was 'essential':

> The use of a condom is the contingency factor in the consent — if this is violated, then the resulting offence is rape or sexual assault. Introducing stealthing as a separate stand-alone offence may result in this type of offending being treated less seriously than other sexual offending, with corresponding lesser penalties.[178]

11.138 The LRCWA also recently considered this issue in considerable detail.[179] The ALRC agrees with the LRCWA's conclusion that non-consensual condom removal 'constitutes a violation of sexual autonomy'.[180] The ALRC recommends that the Standing Council of Attorneys-General include 'non-consensual failure to use, removal of, or tampering with a condom' as a requirement in the recommended harmonisation process, noting that most jurisdictions have included this as a circumstance in which there is no consent.

## Lasting social change: the need for public education

11.139 The ALRC recognises that legislative reform alone will not bring about lasting social change.[181] Reforms must be accompanied by public education which reaches all members of the community.

**Recommendation 38**

The Australian Government should resource and support ongoing public education about consent. The Australian Government should build upon existing initiatives, with an emphasis on identifying gaps and meeting the needs of different communities.

a. Education programs should seek to explain:

   i. the importance of consent;

   ii. who can consent;

   iii. that consent requires free and voluntary agreement;

   iv. that not doing or saying anything to communicate consent is not consent (and include examples of ways that consent can be communicated);

178 Scarlet Alliance, *Submission 186*.
179 The Law Reform Commission of Western Australia (n 20) 111–13 [4.368]–[4.382].
180 Ibid 111 [4.372].
181 See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 30) 109 [5.74].

v. that steps should be taken by each participant to see if other participants are consenting (and include examples of steps that could be taken);

vi. that consent is required every time for every type of sexual activity (see **Recommendation 36**);

vii. that there are circumstances in which there is no consent (see **Recommendation 37**); and

viii. that sexual activity with a person who does not consent is a criminal offence.

b. Education programs should be:

i. informed by international technical guidance on sexuality education;

Ii. informed by evidence-based research on primary prevention of gender-based violence (consistent with the National Plan to End Violence Against Women and Children 2022–2032) and on how best to generate lasting social change;

iii. accessible and up to date; and

iv. specific to their context and audience (rather than general).

c. Education programs should be tailored to reach all groups in the community, with a focus on:

i. boys and young men;

ii. specific age groups including children at different developmental stages, young people, and older people;

iii. neurodiverse people;

iv. people with communication difficulties (who may have difficulties communicating consent);

v. people with impaired capacity to consent;

vi. people with impaired capacity to understand whether or not other participants are consenting;

vii. First Nations people;

viii. people in remote, rural, and regional communities; and

ix. people working in institutional settings with children, people with disabilities, and people in aged care.

d. Education programs should be developed through a process of participatory design, which includes children and young people, older people, First Nations communities, LGBTQIA+ communities, neurodiverse people, people with disabilities, and culturally and linguistically diverse communities.

### *Reasons for reform*

11.140 The purpose behind this recommendation is:

- to support primary prevention, consistent with the National Plan; and
- to support the implementation of legislative reforms, to ensure they are effective in bringing about changes to attitudes and behaviour, which are part of the objectives of affirmative reforms.

11.141 There was considerable support among consultees and stakeholders for the need for ongoing public education on consent.[182] As one stakeholder recognised:

> The absence of affirmative (or active) consent leaves room for misinterpretation and increases difficulty in convicting offenders. Furthermore, the fact that consent laws differ according to each State and Territory is confusing and complicates efforts to raise public awareness of the issues and to deliver education programs. A consistent message delivered to all Australians will help community understanding about the importance of affirmative consent and what constitutes acceptable sexual behaviour and what constitutes a sexual offence.[183]

182 See, eg, Youth Affairs Council of South Australia, *Submission 123*.

183 Australian Psychological Society, *Submission 106*. This was also a key finding as to stakeholder views on the key desired outcomes under the next National Plan: 'The next National Plan reflects the need for age-sensitive, trauma-informed and culturally sensitive education on respectful relationships, sexualities and consent across the schooling life span...The expansion of the Respectful Relationships program, under the next National Plan, also involves the provision of an independent review to consider the degree to which the curriculum materials are culturally sensitive and accessible for Aboriginal and Torres Strait Islander youth, young people living with a disability, and children and young people with diverse gender identity and/or sexualities': Kate Fitz-Gibbon et al, *National Plan Stakeholder Consultation Final Report* (2022) 14 [5.3].

11.142 Submissions to the Senate Inquiry into Current and Proposed Sexual Consent Laws in Australia were similarly supportive.[184] They emphasised that consent education should:

- model healthy relationships and sexuality in a sex-positive way;
- equip participants with practical examples and strategies; and
- not be 'one size fits all', but rather, designed to meet the diverse and intersecting needs and identities of people within the Australian community.

11.143 Several consultees in this inquiry and several submissions to the Senate Inquiry emphasised the need for inclusive and specific consent education (rather than generic programs). For example:

- education for boys and men, aimed at primary prevention;
- developmentally appropriate education for children, and for young people — some of whom have expressed anxiety, confusion, and reluctance to engage in sexual activity for fear of doing the wrong thing;
- education for older people, some of whom may have attitudes towards consent that no longer reflect current laws and social attitudes to sexual activity;[185]
- education and support for people with disabilities, which recognises their right to sexual autonomy;[186]
- culturally safe and appropriate education for LGBTQIA+ communities, which reflects that LGBTQIA+ people can be more at risk of sexual violence and what can be described as either attribute-based or identity-based abuse; and
- education for culturally and linguistically diverse communities, developed, and led by those communities.[187]

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184 We Are Womxn, Submission No 24 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (Undated, Undated) 2; Body Safety Australia, Submission No 29 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (Undated); Voices of Influence Australia, Submission No 34 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (16 March 2023) 14; Australian Education Union, Submission No 42 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (16 March 2023); Celebrate Ageing Ltd, Submission No 78 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (August 2023); Women's Legal Services Australia, Submission No 52 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (16 March 2023).

185 Celebrate Ageing Ltd (n 184).

186 Inclusion Australia, Submission No 39 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (16 March 2023); JFA Purple Orange, Submission No 41 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (16 March 2023); Women With Disabilities Australia, Submission No 36 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (Undated); Inclusion Australia.

187 Women's Legal Services Australia (n 184).

11.144 There was significant emphasis among consultees on the need to ensure culturally specific consent education for First Nations communities. This is in addition to ensuring any general education is also culturally informed and safe, and does not inadvertently target First Nations people as 'accused persons'. Consultees emphasised the importance of involving First Nations people, and partnering with First Nations communities and Aboriginal Community Controlled Organisations, in the development and delivery of any training, and in the development and implementation of consent laws more broadly. Some consultees expressed that this is essential to ensure that programs reflect the experiences of First Nations people and are responsive to their cultural and social needs.

11.145 Some consultees raised concerns that what was proposed by the ALRC may duplicate the efforts of the existing national campaign, 'Consent Can't Wait'. There was also some criticism of the national campaign and other consent education initiatives. Some consultees indicated that they felt the national campaign lacks diversity of representation and were critical of the campaign receiving significant funding, without increased resourcing of the sexual violence sector.

11.146 Some consultees considered that emphasis on consent education is misplaced, and obfuscates the true nature of sexual violence, by perpetuating a narrative that ignorance or confusion (rather than intent) is often the cause of sexual violence.

11.147 Consultees also emphasised the importance of ensuring that:

- any education initiatives are evidence-based and guided by best practice, including United Nations Educational, Scientific and Cultural Organization (UNESCO) 'international technical guidance on sexuality education';[188]
- education is ongoing rather than one-off, and audience specific rather than general;
- consent educators are adequately trained and resourced; and
- referral pathways and support services are adequately resourced to respond to the increase in disclosures which will flow from consent education.

11.148 The ALRC does not intend, through this recommendation, to duplicate existing educational efforts. The ALRC acknowledges the significant amount of work being done to improve consent education, both at the government level and by non-government organisations.[189]

11.149 Rather, the ALRC seeks to build on existing work to ensure that there is ongoing resourcing of evidence-based initiatives. Sustained efforts are required to bring about lasting social change. Any gaps in coverage of existing education programs should be identified, to ensure education programs are targeted and

188 *International Technical Guidance on Sexuality Education: An Evidence-Informed Approach* (UNESCO, 2nd rev ed, 2018).

189 See, eg, Department of Social Services (Cth), *The Commonwealth Consent Policy Framework: Promoting Healthy Sexual Relationships and Consent among Young People* (2024).

tailored to reach and reflect all members of the community, particularly groups who are disproportionately reflected in sexual violence statistics, and people who use sexual violence. Education initiatives should be, wherever possible, designed and delivered with people from the communities they are designed to reach, to ensure programs are relevant, inclusive, and effective.

# 12. Cross-Examination and Evidence

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## Introduction

12.1 Complainants in sexual offence proceedings are in a 'particularly vulnerable and distressing position' in the courtroom.[1] This is because of the emphasis on their evidence and the highly personal subject matter. In most proceedings, the complainant is the main witness, and there is often substantial focus on their credibility.[2] Complainants are also 'subject to some of the most invasive and traumatising aspects' of the adversarial process — including cross-examination, and applications made by the accused person, and sometimes the prosecution, to access and admit private personal information as evidence.[3]

12.2 People who have experienced sexual violence cannot be expected to participate in the criminal justice process, and will not be able to give their best evidence, if they are subjected to 'unnecessary trauma, intimidation, and distress'.[4] A respectful court room environment, in which cross-examination is controlled to limit retraumatisation, and in which questioning is focused on relevant and probative evidence, is imperative to ensure people who have experienced sexual violence are willing and able to engage in the criminal justice process.

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1 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005) 144 [5.78].

2 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, 2020) 26–7 [2.50].

3 Victims of Crime Commissioner (Vic), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (2023) 377.

4 See ibid 408. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2016) 203 [8.41].

12.3 In recognition of this, reforms have been introduced that include:

- limits on improper questioning of witnesses in cross-examination;
- restricting accused persons from directly cross-examining complainants in sexual offence proceedings; and
- restricting the admissibility of certain types of evidence, such as sexual assault counselling communications, sexual reputation evidence, and sexual history evidence.

12.4 Despite these reforms, complainants in sexual offence proceedings continue to report feeling traumatised by the process of giving evidence. This chapter considers ways to improve a complainant's experience of cross-examination while ensuring that accused persons can robustly test the evidence against them, consistent with the right to a fair trial.

## Cross-Examination

12.5 For many complainants, the experience of cross-examination is one of the most challenging aspects of a criminal trial. Some submissions have described the process as 'degrading, aggressive and humiliating',[5] and 'traumatising'.[6] One submission described the experience of giving evidence over three days as 'horrible':

> [the] most distressing part was when the judge would get impatient with me when I would get upset or not answer the question correctly. The defence barrister would purposefully ask questions in an abrupt manner, in order to upset me and throw me off. It was extremely difficult to keep my cool, and ensure that I answered the question without letting my emotions get the best of me. It went on for way too long … The judge did intervene a couple of times to the defence on a few questions. He also suggested I take breaks when I started crying. But I'd already been there for 2 weeks, so I wanted to get through my evidence and go back to work.[7]

12.6 Some submissions indicated that some complainants felt prosecutors were reluctant to intervene and that judges did not protect them.[8] One recalled a recent experience as follows:

> Being cross-examined was incredibly traumatising, in a completely different way to my assault. I felt invalidated and humiliated by the line of questioning and way I was spoken at. I was called a liar and that my story was not credible. This was also the first time I had seen my perpetrator since the assault occurred, and experiencing the two concurrently was very anxiety-inducing. I don't recall any interventions from the prosecution or judge, but I was incredibly anxious and stressed so it's hard to remember clearly. I often have nightmares about the barrister who cross-examined me.[9]

5 H Robbins, *Submission 139*.
6 Name withheld, *Submission 135*.
7 Name withheld, *Submission 6*.
8 D Erlich and N Meyer, *Submission 115*.
9 Name withheld, *Submission 135*.

12.7 Several submissions also raised concerns about the way in which confidential communications (including sexual assault counselling communications), sexual reputation evidence, and sexual history evidence are used in cross-examination to challenge a complainant's credibility.[10]

## Requiring judges to intervene to disallow improper questions

**Recommendation 39**

Each state and territory should amend relevant legislation, where necessary, and enact a provision that fully adopts section 41 of the *Evidence Act 1995* (Cth).

**Recommendation 40**

Judicial education should cover the duty to intervene imposed by section 41 of the *Evidence Act 1995* (Cth), to ensure its requirements are well understood and consistently applied.

**Recommendation 41**

The Standing Council of Attorneys-General should commission and ensure appropriate funding for research, within five years of all jurisdictions adopting section 41 of the *Evidence Act 1995* (Cth), to evaluate whether the provision, combined with judicial education, is reducing improper questioning and increasing appropriate judicial intervention.

10 See, eg, S Cuevas, *Submission 33*.

### *Reasons for reform*

12.8 Every Australian jurisdiction has legislated to restrict cross-examination to prevent 'improper' questioning of witnesses.[11] Most jurisdictions also have conduct rules that impose similar obligations on practitioners.[12]

12.9 As discussed above, despite these reforms, complainants of sexual violence continue to report that their experience of cross-examination was distressing and retraumatising.[13] While some stakeholders indicate that there has been improvement in the culture of cross-examination (which differs between jurisdictions), issues persist.[14]

12.10 Combined, **Recommendations 39** and **40** should encourage judicial intervention where required and appropriate. The recommendations will ensure there is consistency in what legislation defines as an 'improper' question, and that all judicial officers are subject to a positive obligation to disallow improper questions. In combination with judicial education about the purpose and operation of s 41 of the *Evidence Act 1995* (Cth), and practitioner education about minimising trauma in the justice system, including during questioning (see **Chapter 7**, **Recommendation 11**); this should improve cross-examination practices, by preventing improper questions to begin with. It should increase judicial intervention where needed, thereby reducing the risk that complainants are retraumatised during cross-examination.

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11 *Evidence Act 1995* (Cth) s 41; *Evidence Act 2011* (ACT) s 41; *Evidence Act 1995* (NSW) s 41; *Evidence (National Uniform Legislation) Act 2011* (NT) s 41; *Evidence Act 1977* (Qld) s 21; *Evidence Act 1929* (SA) s 25; *Evidence Act 2001* (Tas) s 41; *Evidence Act 2008* (Vic) s 41; *Evidence Act 1906* (WA) s 26.

12 *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 21.8; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* rr 21.8, 21.9; *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW, Vic, WA) rr 62, 63; Queensland Law Society, *Australian Solicitors Conduct Rules 2023* (Qld) rr 21.8, 21.9; Bar Association of Queensland, *2011 Barristers' Rule, as Amended* (Qld, as at 27 September 2024) rr 61, 62; Council of the Law Society of South Australia, *South Australian Legal Practitioners' Conduct Rules* (SA, as at 1 January 2022) rr 21.8, 21.9, 62, 63; *Legal Profession (Solicitors' Conduct) Rules 2020* (Tas) r 26.9 (Tas); *Legal Profession (Barristers) Rules 2016* (Tas) r 5, adopting the Australian Bar Association model rules, including the provisions under the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW). There is no equivalent rule in: *Legal Profession (Barristers) Rules 2021* (ACT); Law Society Northern Territory, *Rules of Professional Conduct and Practice* (as at May 2005); Northern Territory Bar Association Incorporated, *Barristers' Conduct Rules* (as at November 2020).

13 See, eg, Name withheld, *Submission 10*; D Erlich and N Meyer, *Submission 115*; Name withheld, *Submission 135*; H Robbins, *Submission 139*.

14 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 458–459 [21.27]–[21.34]; The Law Reform Commission of Western Australia, *Project 113: Sexual Offences* (Final Report, 2023) 8 [1.29]; Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 263–4; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (2023) 56–8 [3.73]–[3.75], [3.78].

## *Context*

12.11 Cross-examination is a process by which a witness' credibility, and the accuracy and reliability of their evidence, is tested by the defence to expose any weaknesses.[15]

12.12 Being cross-examined is, by its very nature, difficult for all witnesses.[16] This is particularly so for sexual offence complainants, for whom cross-examination presents a 'profound locus of retraumatisation':

> … the literature overwhelmingly indicates that victim-survivors' fear of what is not uncommonly 'brutal' cross-examination acts as a significant barrier and 'stops a lot of people coming forward'. It is a 'key issue' in re-traumatisation and a 'key factor' in the high attrition rate after a complaint is made.[17]

12.13 A complainant's experience of cross-examination can also affect whether they view the process as fair, and whether they feel their justice needs have been met.[18]

12.14 There is thus a tension between the need to ensure accused persons are able, through their lawyer, to robustly test the evidence against them; and the need to ensure that complainants (and witnesses generally) are protected from unnecessary retraumatisation during cross-examination, and able to give their best evidence. However, both needs are consistent with the concept of a fair trial. A fair trial does not require

> the most favourable procedures for the accused: it must take into account other interests, including the interests of the victim and of society generally in having a person brought to justice.[19]

12.15 Judges play an integral role in managing this tension, consistent with their obligation to regulate proceedings in a way that is fair to all participants in the criminal trial process, including complainants and other witnesses.[20]

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15 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 141 [5.70].

16 This is particularly so where there is 'a significant power imbalance between the questioner and the witness': Russell Boyd and Anthony Hopkins, 'Cross-Examination of Child Sexual Assault Complainants: Concerns about the Application of s 41 of the Evidence Act' (2010) 34(3) *Criminal Law Journal* 149, 149.

17 Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (The Australasian Institute of Judicial Administration, Attorney-General's Department (Cth), CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, August 2023) 221–22. See also Women's Safety and Justice Taskforce (n 14) 456; New South Wales Law Reform Commission (n 2) 26–7 [2.50]–[2.54]; Victorian Law Reform Commission (n 14) 20 [21.35]–[21.37]; Victims of Crime Commissioner (Vic) (n 3) 404–5.

18 With You We Can, *Submission 132*. See also Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Routledge, 2020) 57.

19 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2017, 4356 (Martin Pakula) quoted in *DPP v Smith* [2024] HCA 32, [47].

20 *R v TA* (2003) 57 NSWLR 444, 446 (Spigelman CJ). See also Lloyd Babb, 'What Does s 41 of the Evidence Act Mean to You as a Judicial Officer?' in *Sexual Assault Trials Handbook* (Judicial Commission of New South Wales, 2009).

### *Improper question provisions*

12.16 As noted above, every Australian jurisdiction has legislated restrictions on cross-examination to prevent 'improper questioning' of witnesses, including complainants in sexual offence proceedings.[21] These provisions are not intended to limit relevant and properly put cross-examination, nor does a failure to intervene to disallow an improper question affect the admissibility of any answer.[22] Rather, the purpose of these provisions is to resolve the tension explored above, in a manner consistent with a fair trial, by setting the boundaries of what is relevant and proper questioning, and what is not.

12.17 Improper question provisions differ between jurisdictions. Most jurisdictions have adopted section 41 of the *Model Uniform Evidence Bill* (model section 41),[23] or an amended version of it, into legislation. It applies to both civil and criminal proceedings.

12.18 The wording of model section 41 was the product of a joint recommendation of the ALRC and New South Wales Law Reform Commission in 2005.[24] The Commissions endorsed the view that such a provision would:

- protect witnesses from improper questioning;
- ensure that the court receives the best evidence; and
- overcome judges' reluctance to intervene in cross-examination;

  without encroaching on the right to a fair trial.[25]

12.19 Model section 41 is replicated in the *Evidence Act 1995* (Cth) (Commonwealth section 41),[26] and within the respective evidence legislation of the Australian Capital Territory, New South Wales, and Tasmania.[27] The Northern Territory, Queensland, and Victoria have also adopted model section 41, though with variations.[28]

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21 *Evidence Act 1995* (Cth) s 41; *Evidence Act 2011* (ACT) s 41; *Evidence Act 1995* (NSW) s 41; *Evidence (National Uniform Legislation) Act 2011* (NT) s 41(2); *Evidence Act 1977* (Qld) s 21; *Evidence Act 1929* (SA) s 25; *Evidence Act 2001* (Tas) s 41; *Evidence Act 2008* (Vic) s 41; *Evidence Act 1906* (WA) s 26.

22 A failure therefore does not, of itself, give rise to a right of appeal. See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 153 [5.115].

23 Model Uniform Evidence Bill 2019, prepared by the Parliamentary Counsel's Committee and endorsed by the Standing Committee of Attorneys-General on 26 July 2007, as amended by model provisions that the Committee agreed to include in the Model Uniform Evidence Bill on 7 May 2010 and amendments agreed to by the Council of Attorneys-General on 29 November 2019.

24 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 133–57 [5.37]–[5.132]. For a detailed summary of the history of this provision, see Natalie Martschuk et al, 'Judicial and Lawyer Interventions in Trials of Child Sexual Assault' (2021) 31 *Journal of Judicial Administration* 3, 4. See also Babb (n 20).

25 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 133 [5.37]–[5.38], 141–154 [5.70]–[5.118].

26 *Evidence Act 1995* (Cth) s 41.

27 *Evidence Act 2011* (ACT) s 41; *Evidence Act 1995* (NSW) s 41; *Evidence Act 2001* (Tas) s 41.

28 *Evidence (National Uniform Legislation) Act 2011* (NT) s 41; *Evidence Act 1977* (Qld) s 21; *Evidence Act 2008* (Vic) s 41.

12.20 South Australia and Western Australia have enacted separate provisions, which have some overlap with the requirements set out in model section 41, but also have some omissions and variations.[29] Currently, there is a Bill before the Western Australian parliament which, if enacted, will result in Western Australia substantially adopting model section 41, with some additions.[30]

12.21 Commonwealth section 41 is as follows:

**41 Improper questions**

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a ***disallowable question***):

(a) is misleading or confusing; or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

(2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:

(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and

(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and

(c) the context in which the question is put, including:

(i) the nature of the proceeding; and

(i) in a criminal proceeding—the nature of the offence to which the proceeding relates; and

(iii) the relationship (if any) between the witness and any other party to the proceeding.

29 *Evidence Act 1929* (SA) ss 22, 25; *Evidence Act 1906* (WA) s 26.
30 Evidence Bill 2024 (WA) cl 50.

(3) A question is not a disallowable question merely because:

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or

(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Note: A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section: see section 195.

12.22 Some key features of Commonwealth section 41 (for the purposes of comparison) include that it:

- applies to all witnesses;
- imposes a positive obligation on the court — that is, 'the court must intervene' — to stop improper questions if the court is of the opinion that the question is 'disallowable';
- provides a comprehensive list of disallowable question types;
- imposes a positive obligation on the court to consider a non-exhaustive list of factors when assessing whether a question is disallowable; and
- provides that parties can object to a question because it is improper.

## *Key issues in relation to improper question provisions*

12.23 The main issues in relation to improper questions are:

- inconsistency between jurisdictions on how improper questions are defined, what factors (if any) the court is required to consider when determining if a question is disallowable, and the fact that in some jurisdictions, there is no positive obligation on judicial officers to intervene; and

- ineffectual operation of the existing provisions, noting that some defence counsel continue to ask improper questions, prosecutors do not always object (out of concern this may prejudice the jury against the complainant), and judges do not always intervene to disallow improper questions.

### *Inconsistency: jurisdictions that have not fully adopted model section 41*

12.24 Of those jurisdictions which have not adopted model section 41 (or have adopted an amended version of it),[31] some of the key differences are:

- whether there is a positive obligation to intervene;
- which categories of witnesses are covered; and
- which factors are to be considered in deciding whether a question is disallowable.

12.25 These differences are explored below, with reference to Commonwealth section 41, which is reproduced above.

### *Commonwealth section 41(1) — Positive obligation to intervene for all witnesses:*

12.26 Queensland, South Australia, and Victoria impose a positive obligation to intervene for all witnesses.[32]

12.27 Only the Northern Territory and Western Australia have not imposed a positive obligation to intervene for all witnesses:

- The Northern Territory only imposes a positive obligation to intervene for 'vulnerable' witnesses. It permits, but does not require, intervention for all other witnesses;[33] and
- Western Australia permits intervention for all witnesses but does not impose a positive obligation to intervene.[34]

### *Commonwealth section 41(1)(a)–(d) — Disallowable question:*

12.28 The Northern Territory and Victoria include the same non-exhaustive categories of disallowable questions as Commonwealth section 41.[35]

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31 The Northern Territory, Queensland, South Australia, Victoria, and Western Australia.

32 *Evidence Act 1977* (Qld) s 21(1); *Evidence Act 1929* (SA) s 25(1); *Evidence Act 2008* (Vic) s 41(1). South Australia's legislation also permits judges to disallow questions that are 'vexatious and not relevant': *Evidence Act 1929* (SA) s 22.

33 *Evidence (National Uniform Legislation) Act 2011* (NT) s 41(2). A 'vulnerable witness' includes people under the age of 18, people with a cognitive impairment or intellectual disability, or any witness whom the court considers to be vulnerable (determined with regard to a range of specified criteria): at s 41(4).

34 Western Australia includes questions that are 'misleading' or 'unduly annoying, harassing, intimidating, offensive, oppressive or repetitive': *Evidence Act 1906* (WA) s 26(1). Western Australia also includes circumstances where the 'putting' of an otherwise proper question is 'unduly annoying, harassing, intimidating, offensive or oppressive': at s 26(2).

35 *Evidence (National Uniform Legislation) Act 2011* (NT) s 41(3); *Evidence Act 2008* (Vic) s 41(3).

12.29 Queensland has included more expansive categories of stereotypes.[36]

12.30 South Australia replicates Commonwealth section 41(1)(a), and substantively replicates Commonwealth section 41(b), (c), and (d).[37]

12.31 Western Australia substantially replicates Commonwealth section 41(1)(a) and (b) but omits Commonwealth section 41(1)(c) (manner and tone), and (d) (stereotypes).[38]

### *Commonwealth section 41(2) — Positive obligation to consider certain factors, such as characteristics, disability, or the nature of the proceedings, in determining if a question is disallowable:*

12.32 Victoria omits this requirement entirely.[39]

12.33 Queensland requires consideration of certain factors and has included a more expansive list of characteristics.[40]

12.34 The Northern Territory only requires consideration of the factors listed in Commonwealth section 41(2) in determining if a person is a vulnerable witness, rather than in determining if the question should be disallowed.[41]

12.35 South Australia and Western Australia permit, but do not require consideration of certain factors, and Western Australia provides a less expansive list of considerations.[42]

### *Approach adopted by Queensland and proposed in Western Australia*

12.36 Queensland has recently adopted a more expansive version of Commonwealth section 41. Specifically, it expands the stereotypes included in Commonwealth section 41(1)(d) and the characteristics listed in Commonwealth section 41(2)

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36 *Evidence Act 1977* (Qld) s 21(2)(d).

37 However, the word 'unnecessarily' is substituted for 'unduly', some categories are omitted, and South Australia requires a question to be disallowed if it is 'apparently based' on a stereotype, rather than if it 'has no basis other than' a stereotype. South Australia also requires questions to be disallowed if they are expressed in 'language that is unnecessarily complicated'. *Evidence Act 1929* (SA) ss 25(1), (3).

38 *Evidence Act 1906* (WA) s 26(1). Western Australia omits the categories of confusing and unduly humiliating in its provisions. Western Australia also includes circumstances where the 'putting' of an otherwise proper question is 'unduly annoying, harassing, intimidating, offensive, oppressive or repetitive': at s 26(2).

39 Subsections (2) and (4) of section 41 of the Victorian Act were repealed: *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 57(2). The previous s 41(2) restricted the positive duty to intervene to disallow improper questions put to vulnerable witnesses only, and defined vulnerable witnesses in s 41(4) using the language of Commonwealth s 41(2). The effect of the repeal was to extend the duty to intervene to all witnesses, but it also removed the requirement for judges to consider the factors outlined in Commonwealth s 41(2) in respect of any witness.

40 *Evidence Act 1977* (Qld) s 21(3).

41 *Evidence (National Uniform Legislation) Act 2011* (NT) s 41(4)(c).

42 *Evidence Act 1929* (SA) s 25(4); *Evidence Act 1906* (WA) s 26(3).

to include race, gender identity, sex, sex characteristics, and sexuality, but omits personality.[43]

12.37 Western Australia is considering adopting a more expansive version of Commonwealth section 41. This would expand the stereotypes included in Commonwealth section 41(1)(d) to include: race, gender identity, sexual orientation, and religious or political conviction; and would replace the terms 'mental, intellectual or physical disability' with 'disability'.[44]

12.38 The ALRC notes that Commonwealth section 41 is non-exhaustive, and as such, already permits consideration of such stereotypes and characteristics. However, the ALRC supports their codification because it makes the law clearer and reflects changes in community values.

### *Effectiveness of 'improper question' provisions*

12.39 The ineffectiveness of the 'improper question' provisions has been highlighted in several studies and reports. Commentators have stated and studies from the last decade reveal issues that continue to persist, including cross-examination that is myth-based, lengthy, confusing,[45] and likely to be disorienting and distressing.[46] Some improvements have been noted.[47] For example, a reduction in aggressive cross-examination techniques — especially in matters involving child sexual abuse complainants; as such practices are perceived by some practitioners as 'counterproductive'.[48] But the degree to which judges intervene to manage improper questions appears to be variable.[49] These issues have been attributed to the 'culture of the adversarial criminal trial',[50] a lack of awareness about the 'improper question' provisions,[51] or the 'flexibility' in how the 'improper question' provisions can be interpreted.[52]

12.40 Judicial reluctance to intervene also appears to stem from concerns that judicial intervention could form the basis of a ground of appeal.[53]

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43 *Evidence Act 1977* (Qld) ss 21(2)(d), (3)(a). This was amended by *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) s 56.

44 Evidence Bill 2024 (WA) cl 50.

45 Kara Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26(1) *Current Issues in Criminal Justice* 55, 63–4.

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

47 Victorian Law Reform Commission (n 14) 389 [18.6]–[18.7].

48 Nina J Westera et al, 'Courtroom Questioning of Child Sexual Abuse Complainants: Views of Australian Criminal Justice Professionals' (2019) 7(1) *Salus Journal* 20, 26–7.

49 Martschuk et al (n 24) 15–16; Victorian Law Reform Commission (n 14) 459 [21.34].

50 Sarah L Deck et al, 'Are All Complainants of Sexual Assault Vulnerable? Views of Australian Criminal Justice Professionals on the Evidence-Sharing Process' (2022) 26(1) *The International Journal of Evidence & Proof* 20, 29.

51 Westera et al (n 48) 27.

52 Deck et al (n 50) 29.

53 Martschuk et al (n 24) 6.

12.41 Prosecutors may also be reticent to object when problematic questioning of complainants occurs. Unlike the judge — whose role it is to monitor the fairness of proceedings for all parties — the prosecutor's role is to present the case against the accused person. They may be concerned that their intervention may be perceived as encroaching on the right of the accused person to test the evidence.[54] Or they may allow a question, which may be 'detrimental to a victim-survivor's wellbeing', because it may be perceived as beneficial to the prosecution case.[55]

### *How the recommendations resolve the issues*

12.42 Commonwealth section 41, which replicates model section 41, affords the most comprehensive protection for all witnesses, including sexual offence complainants. It imposes a positive obligation on the judicial officer to intervene and clearly sets out what types of questioning are disallowable, along with factors that must be taken into account by a judicial officer when assessing whether they need to intervene. If all Australian jurisdictions adopted Commonwealth section 41, this would make protections across jurisdictions consistent — a sexual offence complainant would not receive less protection by the law simply because of the location of the trial.

12.43 However, even where a provision equivalent to Commonwealth section 41 has been adopted and a positive duty to intervene exists, it remains underutilised. What is therefore required is a culture shift, which could be encouraged through judicial education about the duty to intervene to disallow improper questions. Judicial education that is consistent in each jurisdiction, and includes both trial and appellate judges, would help ensure its requirements are well understood and consistently applied. It would minimise the variation in judicial intervention. It would also help make practice across jurisdictions consistent, again ensuring that sexual offence complainants receive similar protections in practice regardless of where the trial is held.

12.44 If enacted, these recommendations should reduce the potential for retraumatisation of complainants during cross-examination by encouraging more consistent intervention by judicial officers, which in turn should deter practitioners from asking improper questions. This would also encourage fairer trial outcomes, by ensuring that the best evidence is made available to the court.

12.45 The support of heads of jurisdiction to lead this shift is essential. Education for the profession more broadly is also essential, to encourage prosecutors to intervene more readily and to discourage defence practitioners from asking improper questions (see **Chapter 7**, **Recommendation 11**).[56]

12.46 While most consultees expressed support for **Recommendations 39** and **40**, some felt they were unnecessary, querying whether improper questions persist.

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54 Ibid 15.

55 George et al (n 17) 32 citing Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 2, 2022) 278.

56 See George et al (n 17) 32–33.

12.47 Some stakeholders questioned the need for the word 'unduly', arguing that it is an unnecessary qualifier. Some commentators have expressed the opposite view, arguing that the term has 'a lot of work to do'.[57]

12.48 The word 'unduly' appears to recognise that in the adversarial context, witnesses will inevitably be asked 'uncomfortable' questions that they would 'rather not answer'.[58] It provides that questioning must reach a certain level of impropriety before it should be disallowed. The point at which questioning is disallowed will depend on the circumstances of the case, and to an extent, on judicial interpretation.[59] The word 'unduly' also reflects the notion that judicial intervention during cross-examination should only occur where necessary, as it carries with it the risk of prejudice to the accused person.[60]

12.49 The ALRC considers that the word 'unduly' assists in enabling defence practitioners to ask the questions required to test the evidence, while deterring questioning that crosses the threshold of what is necessary and appropriate, and becomes legally objectionable. However, this underscores the need for judicial training. Training should be informed by the experiences of complainants, to ensure that judicial assessments of when the 'line has been crossed' are informed by an understanding of the complainant's experience, and what a complainant would experience as, for example, 'unduly offensive' or 'intimidating'.

12.50 Some stakeholders stressed that judicial training should be voluntary rather than mandatory. As discussed in **Chapter 7**, the ALRC does not propose mandatory education.

12.51 Some stakeholders felt that something more than judicial education was required.[61] The ALRC is of the view that sanctions could lead to unintended consequences, including pressure to intervene that may affect the right to a fair trial, as well as potentially more appeals and therefore delays.

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57 See, eg, Steve Whybrow SC, quoted in Janet Albrechtsen, 'Rules of Cross-Examination Enter Dangerous Territory', *The Australian* (online, 8 June 2024) <theaustralian.com.au/inquirer/rules-of-crossexamination-enter-dangerous-territory/news-story/>.

58 Richard Weinstein, John Anderson and Judith Marychurch, *Uniform Evidence in Australia* (LexisNexis Butterworths, 2023) 162.

59 Ibid.

60 See *Libke v The Queen* [2007] HCA 30, [85] per Hayne J: *Trial judges are rightly reluctant to intervene in the course of counsel's cross-examination of a witness. That reluctance stems in large part from the fact that the trial judge will usually not know how counsel intends to set about the forensic task that is presented. Counsel's choices about the order, content and tone of cross-examination will usually be moulded by information that the trial judge does not know. Nothing that is said here should be read as denying the desirability of a trial judge avoiding such interventions as far as possible. But the obligation to ensure a fair trial will sometimes best be met by a timely reminder to counsel of the need to observe the rules that regulate the orderly conduct of a trial.*

61 See also Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan UK, 2020) 436–7.

12.52 There is, however, a need to address the 'traumatic culture of the adversarial system',[62] and the disconnection between what complainants experience as 'improper' and what judges perceive as fitting this criteria.[63] Commonwealth section 41(1) clearly requires judicial officers to consider impropriety from the subjective perspective of the witness; and Commonwealth section 41(2) requires the judicial officer to do so while taking into account the personal characteristics of the witness.

12.53 It is crucial that judicial education addresses the intent behind the 'improper question' provision and the need to reduce unnecessary traumatisation of the complainant. To do this, judicial education must include realistic examples of when the 'improper question' provision ought to be applied in practice, including experiential training (role plays). Judicial education that is informed by the experiences of complainants could help improve judicial understanding of what complainants experience as 'improper' questioning, so that judicial officers can more readily identify when intervention is necessary and mandated.

12.54 A multilayered approach is required if cross-examination practices are to shift and become more trauma-informed.[64] In this report, the ALRC makes other recommendations to improve cross-examination practices, including trauma-informed training for justice system professionals, including both prosecutors and defence counsel to reduce the instance of improper questions being asked in the first place (**Recommendation 11**); jury directions to address myths and misconceptions (**Recommendation 21**); and ground rules hearings (**Recommendation 32**).

## Preventing unrepresented accused persons from personally cross-examining complainants and their family members

**Recommendation 42**

The Commonwealth, states, and territories should amend relevant legislation, where necessary, to adopt a consistent approach to cross-examination by unrepresented accused persons in criminal proceedings by:

a. prohibiting unrepresented accused persons from personally cross-examining any complainant or family member of the complainant (a protected witness), in all sexual offence proceedings, in all courts;

b. providing that unrepresented accused persons are only permitted to cross-examine a protected witness through a person appointed by the court to ask questions on their behalf;

62 Ibid 439.
63 Boyd and Hopkins (n 16) 164–5.
64 George et al (n 17) 32–3. See also Victorian Law Reform Commission (n 14) 460–3 [21.35]–[21.59]; Quilter and McNamara (n 46) 37–8.

c. providing that if unrepresented accused persons wish to cross-examine a protected witness, the court must order that a person be appointed to ask questions on behalf of the accused person for the purposes of cross-examination only;

d. providing that any person appointed by the court for this purpose:

   i. must be a legal practitioner; and

   ii. is indemnified when providing such a service, provided they act in 'good faith';

e. providing that Legal Aid Commissions are funded and required in each jurisdiction to provide this service, irrespective of the accused person's capacity to pay for representation;

f. providing that appointed persons must not put improper questions to the protected witness on behalf of the accused person;

g. providing that judicial officers must advise accused persons of:

   i. their right to a court-appointed legal practitioner; and

   ii. the consequences (in terms of being able to lead evidence which contradicts, challenges, or discredits a witness) if they decline and decide not to cross-examine a witness;

h. providing that judicial officers must inform juries that:

   i. it is normal process for protected witnesses not to be questioned by an accused person directly and for legal practitioners to be appointed for that purpose; and

   ii. no inference (against or in favour of the accused person or protected witness) may be drawn from this process.

### *Reason for recommendation*

12.55 Accused persons who are unrepresented are entitled to a fair trial, which includes the right to test the evidence against them, through cross-examination of witnesses, including the complainant.

12.56 However, direct cross-examination by an accused person of a sexual violence complainant or the complainant's family members increases the risk of the complainant being retraumatised by the process, and the risk that the accused person may use legal processes to perpetuate abuse of the complainant — either directly, or through unfair cross-examination of the complainant's family members. Restricting direct cross-examination reduces that risk.[65]

65 Victims of Crime Commissioner (Vic) (n 3) 404.

12.57 All jurisdictions prohibit direct cross-examination by an accused person of a complainant and other categories of witness in certain sexual offences proceedings; and have legislated, in different ways, to provide alternatives to direct cross-examination (such as alternate questioners), to ensure the rights of unrepresented accused persons are upheld. However, there are differences between jurisdictions in:

- which witnesses are protected (beyond the complainant) and in which proceedings;
- whether the court must or may appoint someone to do it on the accused person's behalf, and if so, whether the alternate questioner must be a legal practitioner; and
- whether the respective Legal Aid Commission is required to provide or fund the alternate questioner.

12.58 Implementation of this recommendation would ensure that complainants receive the same protections, and accused persons are afforded the same rights, irrespective of jurisdiction.

### *Who is protected from direct cross-examination?*

12.59 All jurisdictions prohibit, in prescribed sexual offence proceedings, personal cross-examination of complainants by the accused person.[66] The Commonwealth prohibits cross-examination of child complainants and (without leave) 'vulnerable' adult complainants.[67] However, the Commonwealth has recently passed legislation which renders this prohibition absolute for vulnerable adult complainants (that is, leave cannot be granted).[68] The legislation has not, at the time of writing, come into effect.[69]

12.60 Most jurisdictions extend the protection beyond sexual offence complainants to other 'protected' or 'vulnerable' witnesses in sexual offence proceedings. For

66 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 43 (Table 43.4), 48(1); *Criminal Procedure Act 1986* (NSW) s 294A(2); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5; *Evidence Act 1977* (Qld) ss 21M, 21N; *Evidence Act 1929* (SA) s 13B; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A(1); *Criminal Procedure Act 2009* (Vic) ss 353–354, 356; *Evidence Act 1906* (WA) s 106G. The proceedings to which the prohibition applies differ between jurisdictions. For example, the Western Australian provision restricts the prohibition to 'serious sexual offences' and also allows non-child complainants to consent to direct cross-examination by the accused.

67 *Crimes Act 1914* (Cth) ss 15YF, 15YG.

68 Explanatory Memorandum, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (Cth) sch 1 it 27A, inserting s 157FA into to the *Crimes Act 1914* (Cth).

69 Unless specified otherwise, all references in this chapter to the *Crimes Act 1914* (Cth) refer to the version in force as at 1 November 2024.

example, several jurisdictions specifically include non-complainant child witnesses;[70] some specifically include people with cognitive or intellectual impairments;[71] and one jurisdiction specifically includes family members of the complainant.[72] Some provisions extend beyond these categories.[73] The ALRC supports the approach of prohibiting direct cross-examination by accused persons of cohorts of witnesses which are more vulnerable in cross-examination. However, the ALRC's recommendation focuses on protecting complainants and their family members.

### *Must an alternate questioner be appointed?*

12.61 All jurisdictions allow for cross-examination to be conducted on behalf of the unrepresented accused person by an alternate questioner:

- New South Wales, Queensland, and Victoria require that an alternate questioner be appointed;[74]
- the Commonwealth, the Australian Capital Territory, Northern Territory, South Australia, and Tasmania permit an alternate questioner to be appointed;[75] and
- Western Australia provides that the accused person may put questions through either a person approved by the Court (an alternate questioner) or through the judge.[76]

12.62 In terms of qualification, the Australian Capital Territory, the Northern Territory, Queensland, South Australia, Tasmania, and Victoria refer to the alternate questioner as being a 'legal practitioner' (or equivalent),[77] whereas the Commonwealth, the

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70 The Australian Capital Territory, New South Wales, Queensland ('witnesses who are aged under 16'), and Western Australia: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 43 (Table 43.4), 48(1); *Criminal Procedure Act 1986* (NSW) ss 306ZL(1)–(2), 306M(1); *Evidence Act 1977* (Qld) ss 21M, 21N; *Evidence Act 1906* (WA) s 106G. The Commonwealth also protects non-complainant child witnesses (in a 'child proceeding'), unless leave is granted: *Crimes Act 1914* (Cth) s 15YG(1A)(a).

71 ACT ('intellectually impaired witnesses'); NSW ('cognitively impaired persons'), and Queensland ('witnesses with an 'impairment of the mind'): *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 43 (Table 43.4), 48(1); *Criminal Procedure Act 1986* (NSW) ss 306M(1) (definition of 'vulnerable person'), 306ZL(1)–(2); *Evidence Act 1977* (Qld) ss 21M(1)(b), 21N.

72 Victoria includes 'family members' of either the complainant or the accused person: *Criminal Procedure Act 2009* (Vic) ss 354 (definition of 'protected witness'), 356.

73 For example, Victoria permits the court to declare any witness a 'protected person' for the purposes of direct cross-examination: ibid ss 355–6.

74 *Criminal Procedure Act 1986* (NSW) ss 294A(5), 306ZL(2), (5); *Evidence Act 1977* (Qld) s 21O(4); *Criminal Procedure Act 2009* (Vic) s 357(2).

75 *Crimes Act 1914* (Cth) ss 15YF(2), 15YG(5); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 48(4)(b); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) ss 5(2)(e), 3; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A(3); *Evidence Act 1929* (SA) s 13B(3)(b)(ii).

76 *Evidence Act 1906* (WA) s 106(G)(1).

77 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 48(4)(b)(ii) ('legal representative'); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5; *Evidence Act 1977* (Qld) s 21O(4) ('legal representative'); *Evidence Act 1929* (SA) s 13B(3)(b)(ii); *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss 8A(2)(b), (3); *Criminal Procedure Act 2009* (Vic) s 357(4).

Australian Capital Territory, and New South Wales simply refer to a 'person appointed by the court'.[78]

12.63 In terms of resourcing, Queensland and Victoria require that the respective Legal Aid Commission in each jurisdiction fund an alternate questioner.[79] Tasmania provides that the court may order that the Legal Aid Commission of Tasmania fund a lawyer for the purposes of cross-examination, if it is 'in the interests of justice'.[80] South Australia provides that the court must advise the accused person of their right to publicly funded assistance for the purpose of cross-examining the complainant.[81]

### *Other procedural requirements*

12.64 The Northern Territory specifies that the questions asked by the accused person must be put to the complainant unless the appointed person considers the question to be improper.[82] The Australian Capital Territory provision includes a note that the court must disallow improper questions or tell the witness the questions need not be answered.[83]

12.65 Several jurisdictions require advice to be given to accused persons about the consequences of not engaging representation for cross-examination.[84]

12.66 All state and territory jurisdictions require the judge to explain to the jury that appointment of a person to cross-examine or the prohibition of the accused person from examining the witness is a 'standard' or 'routine' procedure, and that the jury is not to draw any inferences.[85] The Commonwealth does not have an equivalent provision.

## *How the recommendation resolves the issues*

12.67 In 2010, the ALRC recommended that Commonwealth, state, and territory legislation should:

- prohibit an unrepresented defendant from personally cross-examining any complainant (and some other witnesses) in sexual assault proceedings; and

78 *Crimes Act 1914* (Cth) ss 15YF(2), 15YG(5); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 48(1)(b); *Criminal Procedure Act 1986* (NSW) ss 249A(2), 306ZL(2).

79 *Evidence Act 1977* (Qld) s 21O(4); *Criminal Procedure Act 2009* (Vic) s 357(2).

80 *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A(3).

81 *Evidence Act 1929* (SA) s 13(3)(b)(ii).

82 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(4).

83 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 48(3).

84 See, eg, ibid s 48(2); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(2); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A(2); *Criminal Procedure Act 2009* (Vic) s 357(5).

85 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 48(5); *Criminal Procedure Act 1986* (NSW) s 294A(7); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5A; *Evidence Act 1977* (Qld) s 21R; *Evidence Act 1929* (SA) s 13B(4); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A(4); *Criminal Procedure Act 2009* (Vic) s 358.

- provide that an unrepresented defendant be permitted to cross-examine the complainant through a person appointed by the court to ask questions on behalf of the defendant.[86]

12.68 The basis for the ALRC's previous and current recommendation is that it would avoid causing unnecessary distress or humiliation to the complainant.[87]

12.69 The ALRC also considers (consistent with its position in 2010) that the court should appoint a person to ask questions on behalf of the accused person. Requiring a judicial officer to ask questions on the accused person's behalf places them 'in a difficult position in determining the admissibility of the questions and may raise perceptions of bias'.[88] Similar concerns were raised in this Inquiry. As noted above, Western Australia still permits this practice.

12.70 In the 2010 Report, the ALRC acknowledged the 'practical' difficulties of Legal Aid Commissions providing representation and did not recommend that the person appointed should be a legal practitioner.[89] In this Inquiry consultees raised concerns about:

- the lack of qualifications of persons currently being appointed to ask questions on behalf of the accused person (where legislation does not specify that an appointed person must be a legal practitioner);
- the availability of legal practitioners to conduct this limited appointment, which related to concerns about inadequate liability insurance and the amount of work required to carry out this limited appointment; and
- the capacity of Legal Aid Commissions to administer such a scheme if not funded to do so.

12.71 The ALRC now considers that requiring that the alternate questioner be a legal practitioner is essential to limiting the risk of retraumatisation of the complainant. As noted in the 2010 Inquiry, the 'critical advantages of legal practitioner involvement' include:

- the skills that lawyers bring to this work in terms of understanding the rules of evidence;
- the public interest in testing the evidence presented by the witness; and
- the public interest in addressing the imbalance between the prosecution and the unrepresented accused person.[90]

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86 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, 2010) rec 28–5.
87 Ibid 1341 [28.128].
88 Ibid 1342 [28.129].
89 Ibid 1342 [28.131]–[28.132].
90 Ibid 1342 [28.130].

12.72 Practitioners are bound by professional and ethical conduct rules (which generally include a duty not to ask improper questions, as noted above) and are more likely to be adequately trained to conduct cross-examination appropriately.

12.73 Requiring the alternate questioner to be a legal practitioner also means they can exercise their forensic judgment and advise the accused person on appropriate lines of questioning. The ALRC recognises that this would require adequate resourcing (to ensure legal practitioners have the requisite time to understand the issues in the case). The ALRC also recognises that it would be preferable for the accused person to be represented throughout the full proceedings.

12.74 There was widespread support for **Recommendation 42** among consultees, with some consultees noting that the elements of the recommendation are substantially in place in their respective jurisdiction.

12.75 The ALRC notes that some concerns were raised about mandating that the alternate questioner must be a legal practitioner. However, these concerns were largely about resourcing and availability, rather than objections to the principles underpinning the recommendation.

12.76 This emphasises that funding is crucial to the success of this recommendation. Requiring and funding Legal Aid Commissions to engage legal practitioners to conduct cross-examination on behalf of unrepresented accused persons would help ensure that accused persons are consistently and efficiently represented, in line with the right to a fair trial. Adequate resourcing of Legal Aid Commissions should also ensure counsel are willing and available to conduct this work.

12.77 The ALRC notes that the Commonwealth currently funds a scheme, known as the 'Family Violence and Cross-Examination Scheme'. The scheme operates to fund Legal Aid Commissions to provide representation for the purposes of cross-examination, in circumstances where the Federal Circuit and Family Court of Australia has made an order prohibiting personal cross-examination of a witness in family law proceedings.[91] Extending this scheme to cover criminal sexual offence proceedings is consistent with that approach.

12.78 This recommendation also recognises the need to ensure that the process proposed does not cause, or risk, any prejudice to the accused person, and the jury need to be instructed that this is normal legal process, from which no inference can be drawn. Accused persons should also receive advice about their right to a court-appointed legal practitioner and the consequences of any choice not to cross-examine a protected witness.

## *Other issues*

12.79 There was real concern among some consultees about situations where persons who have been accused of sexual offences are unrepresented. For some it

91 Pursuant to *Family Law Act 1975* (Cth) s 102NA.

may be a choice, but for others, it is due to a lack of access to legal aid. The ALRC was told by some stakeholders that in some jurisdictions this was a pressing concern. Stakeholders identified the need for Legal Aid Commissions to be appropriately funded so that representation is available to those who require it, for the whole of proceedings, not just for the purposes of cross-examination.

# Evidence

## Review of sexual assault counselling communication privilege provisions

**Recommendation 43**

The Standing Council of Attorneys-General should commission and ensure appropriate funding for the Australian Institute of Criminology to conduct research:

a. on how confidential communication and sexual assault counselling privilege provisions are operating in practice (including the adequacy of current subpoena processes); and

b. to identify areas for improvement, consistent with the underlying public interest rationale for the provisions.

The Standing Council of Attorneys-General should, on the basis of that evaluation, consider whether sexual assault counselling communications should be absolutely privileged or admissible with the leave of the court (and if so, what the criteria for granting leave should be).

### *Problem*

12.80 There is a strong public interest in ensuring that people who have experienced sexual violence seek therapeutic support to help them overcome the effects of the trauma they have experienced.

12.81 While there are legal restrictions on the access and use of sexual assault counselling communications, and other confidential communications, complainants continue to express concern about potential access to this material. The perception this material could be accessed may:

- discourage or delay some people from seeking therapeutic assistance;
- expose people to further trauma (when applications to access private material are made, or granted); and
- create a barrier to reporting sexual violence.

12.82 Significant concerns have also been raised about how confidential communication and sexual assault communication privileges operate in practice.

## *Context*

12.83 'Confidential communications' are communications made, by (or to) a person, in confidence, in the context of a professional, therapeutic relationship.[92]

12.84 'Sexual assault counselling communications' are a subset of confidential communications. They include communications made by a complainant of sexual violence; and communications made to or about a complainant of sexual violence by a professional provider of therapeutic services. They concern communications made in connection with professional, therapeutic treatment for an alleged or proven sexual offence.[93]

12.85 Defence counsel may seek to access confidential communications for potential use in cross-examining the complainant or other witnesses.[94] The police may seek to access such material for investigative purposes. The prosecution may also seek to access such material as evidence that the complainant told someone they had experienced sexual violence. The material may be used either to support, or challenge, a complainant's version of events or their credibility.

12.86 Ongoing reform has resulted in legislation designed to restrict the disclosure and use of sexual assault counselling communications.[95] These schemes may operate as either a privilege (which can be waived) or an immunity (which cannot be waived) and are referred to as 'sexual assault communication privileges' or 'sexual assault counselling privileges'.[96] These schemes have expanded to include other kinds of confidential communications and in some jurisdictions, medical records.[97] The Commonwealth is the only jurisdiction without a confidential communications scheme.

12.87 Tasmania is the only jurisdiction which imposes an 'absolute' privilege on sexual assault counselling communications in all criminal proceedings (a complete

92 See, eg, *Criminal Procedure Act 1986* (NSW) s 296.

93 See, eg, *Evidence Act 2001* (Tas) s 127B. See also Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) 1257 [27.99].

94 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) 1257 [27.99].

95 Ibid 1257 [27.100].

96 'A "privilege" is a right to resist disclosing information that would otherwise be required to be disclosed. An "immunity" prevents the disclosure of certain information in court proceedings, generally when the public interest in non-disclosure outweighs the public interest in disclosure': ibid 1257 [27.102].

97 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 32BA, 32C.

barrier to the disclosure of the information unless the complainant consents).[98] The absolute privilege has been in place for over two decades.[99] It applies to any communications made, in confidence, 'by [or to] a victim of a sexual offence to a counsellor in the course of counselling or treatment of the victim by the counsellor for any emotional or psychological harm suffered in connection with the offence'.[100] The privilege prohibits the disclosure, production, adducing of, and admissibility of sexual assault counselling communications as evidence, unless the complainant consents.[101] Tasmania has also enacted qualified privileges (that is, privileged unless the court grants leave (permission)) for other protected confidences and medical communications.[102]

12.88 Some jurisdictions impose an absolute prohibition on the production and use of confidential communications in preliminary criminal proceedings.[103] Some jurisdictions also have an absolute prohibition on pre-trial discovery or disclosure of protected communications.[104]

12.89 Otherwise, in all other jurisdictions, the privilege (or immunity in the Australian Capital Territory and South Australia)[105] that applies in all criminal proceedings is qualified, both in relation to the production of confidential communications and their use in evidence.[106] Legislative provisions prevent the compelled production, or the adducing into evidence, of protected material except with leave of a court.

12.90 Each jurisdiction sets out a threshold test which must be met before leave will be granted. Some jurisdictions list factors which a court 'may', or in some

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98 *Evidence Act 2001* (Tas) s 127B. Tasmania is an 'outlier' in this regard, both nationally and internationally. Canada, Scotland, and Ireland all have 'enhanced' protections rather than blanket prohibitions. The Law Commission of England and Wales has 'provisionally proposed moving to a bespoke regime, specific to sexual offences, governing the production, disclosure, and admissibility of personal records held by third parties. A clear, unified regime governed by consistent judicial discretion will be better equipped to handle the delicate balance between the complainant's right to privacy and the defendant's right to a fair trial. The enhanced relevance thresholds would ensure that counselling records would only be used in the narrow set of circumstances where they contain evidence crucial to a fair trial.' See Charlotte Daintith, 'Law Commission Review of Evidence in Sexual Offences Prosecutions: Counselling Records' [2024] (8) *Archibold Review* 1, 3.

99 This provision was included at the inception of the *Evidence Act 2001* (Tas). This Act came into force on 1 July 2002, and replaced the *Evidence Act 1910* (Tas).

100 *Evidence Act 2001* (Tas) s 127B(1).

101 Ibid ss 127B(2), (5).

102 Ibid ss 126B, 127A.

103 See, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79C (preliminary proceedings); *Criminal Procedure Act 1986* (NSW) s 297 (preliminary proceedings); *Evidence Act 1939* (NT) s 56B (committal); *Evidence Act 1977* (Qld) ss 14C, 14D (bail proceedings and committals); *Evidence Act 1929* (SA) s 67F(1)(a) (committals).

104 See *Evidence Act 1939* (NT) s 56B(2); *Evidence Act 1929* (SA) s 67F(1)(c).

105 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79J; *Evidence Act 1929* (SA) ss 67E, 67F.

106 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79D; *Criminal Procedure Act 1986* (NSW) s 298; *Evidence Act 1939* (NT) s 56B; *Evidence Act 1977* (Qld) s 14F; *Evidence Act 1929* (SA) s 67F(1)(b); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C; *Evidence Act 1906* (WA) s 19C(1).

jurisdictions, 'must' consider,[107] or specify circumstances which don't permit a grant of leave.[108] The scope of material covered by the qualified privilege differs between jurisdictions.[109]

### *Rationale for sexual assault counselling communication privilege*

12.91 The main basis for limiting access to sexual assault counselling communications is that confidentiality is essential to establishing a therapeutic relationship and as such requires protection from unwarranted intrusion.[110] The particularly intimate and distressing nature of sexual offences also heightens privacy concerns.[111]

12.92 The primary purpose of legislation requiring leave to access sexual assault counselling communications (which was first introduced in New South Wales), was to:

> protec[t] a sexual assault victim from harm that may be caused if their records were revealed; and safeguar[d] the broader public interests in maintaining the integrity of counselling and promoting the reporting of sexual assault.[112]

12.93 Several law reform bodies, including the ALRC, have previously reviewed the sexual assault counselling privilege and have noted that it

> serves the important public interest of encouraging people who have been sexually assaulted to seek therapy, and may also encourage people who are sexually assaulted to report the crime to the police.[113]

12.94 Most submissions to this Inquiry which address confidential communications — including from people who have experienced sexual violence, advocates, academics, and justice sector stakeholders — have emphasised the public interest rationale (that is, the importance of confidentiality to a therapeutic relationship) behind the

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107 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79H(3); *Criminal Procedure Act 1986* (NSW) s 299D(2); *Evidence Act 1929* (SA) s 67F(6); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(2).

108 *Evidence Act 1906* (WA) s 19E(2).

109 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 79A(2); *Criminal Procedure Act 1986* (NSW) s 296(2); *Evidence Act 1977* (Qld) s 14A; *Evidence Act 2001* (Tas) s 126A; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32B(1); *Evidence Act 1906* (WA) s 19A(1) ('counselling communication').

110 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 514 [15.48]; Liberty Victoria, Submission No 89 to Australian Law Reform Commission, *Review of the Family Law System* (2018) 5; Royal Australian and New Zealand College of Psychiatrists, *Submission 154*.

111 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 515 [15.50].

112 Alicia Jillard, Janet Loughnan, and Edwina MacDonald, 'From Pilot Project to Systemic Reform: Keeping Sexual Assault Victims' Counselling Records Confidential' (2012) 37(4) *Alternative Law Journal* 254, 254.

113 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) [27.101].

sexual assault counselling privilege, or the effects that applications to access such material may have on the complainant.[114]

### *Should the privilege be qualified (permitted with leave) or absolute (prohibited entirely)?*

12.95 The rationale behind provisions which require leave before access is granted to a sexual assault counselling communication (qualified privilege), as opposed to completely prohibiting access (an absolute privilege), is that this 'strike[s] a balance'[115] between encouraging people who have experienced sexual violence to seek help, and ensuring that accused persons are able to access potentially exculpatory material.

12.96 The main concern expressed about completely prohibiting access is that placing restrictions on the ability to seek or compel evidence may deprive a court, and the parties, of potentially relevant evidence,[116] and that a failure to at least allow a judicial officer to inspect the material for relevance may result in a miscarriage of justice.[117]

12.97 In recognition of this, the ALRC, along with other reform bodies and advocacy groups,[118] has previously expressed the view that a

> qualified sexual assault communications privilege serves the broader public interest of ensuring the legal system is fair both to the accused and the complainant.[119]

12.98 However, it is questionable whether the balance has been appropriately struck by leave requirements. Despite the fact that (with the exception of Tasmania's absolute prohibition) a qualified sexual assault counselling communication privilege exists in each jurisdiction, and despite the fact that such schemes have been operating for decades, complainants remain concerned about the possibility that applications can be made to access their sexual assault counselling communications. It is argued that this may prevent people from seeking help and reporting offences. It is also a source of distress.[120]

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114 See, eg, S Filmer, *Submission 30*; Tasmania Legal Aid, *Submission 88*; Name withheld, *Submission 95*; With You We Can, *Submission 132*; Royal Australian and New Zealand College of Psychiatrists, *Submission 154*; Centre for Women's Safety and Wellbeing, *Submission 193*; Legal Aid NSW, *Submission 201*; Women's Legal Service Queensland, *Submission 211*; Women's Legal Services Australia, *Submission 212*; Full Stop Australia, *Submission 214*.

115 Law Council of Australia, *Submission 215*.

116 Liberty Victoria (n 110) 6.

117 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 521 [15.73].

118 See, for example, Liberty Victoria, which recommended that a qualified privilege (as opposed to an absolute privilege) should be implemented in the family law jurisdiction: Liberty Victoria (n 110) 9.

119 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) 1261 [27.118].

120 See, eg, S Cuevas, *Submission 33*; Name withheld, *Submission 95*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

12.99 For those who do seek help and also report, the knowledge others have sought or gained access to their material can be a source of trauma.[121] As one submission explained:

> the pursuit of my counselling and therapeutic records during the trial process was a profoundly invasive and traumatic experience. … My objections were based on the deeply personal nature of these records and the justified fear that disclosing them would provide my perpetrator with intimate details about my life and mental state — information far beyond what was necessary for the trial.[122]

12.100 Others have commented on the impact this had on their willingness to seek treatment: 'when I was told this could happen I did not want counselling until after the trial'.[123]

12.101 As the Royal Australian and New Zealand College of Psychiatrists noted in its submission, subpoenas of the medical history of people who have experienced sexual violence can increase trauma, deter reporting because of privacy concerns, and hinder recovery. It also noted that counselling is for therapy, not investigation, and therefore notes are often unsuitable for court.[124]

12.102 Stakeholders have expressed a range of views to this Inquiry about whether a qualified privilege is appropriate:

- Some viewed qualified privileges as affording complainants with adequate protection.[125]
- Some expressed concern about how effective the leave requirement is in practice.[126]
- Some thought there should be an absolute prohibition on access to sexual assault communications (unless the complainant consents) or alternatively, that material should only be accessible in exceptional circumstances, or otherwise called for provisions to be strengthened.[127]
- Many opposed an absolute prohibition, generally expressing the view that the public interest balance was appropriately struck by a qualified privilege.[128]

12.103 The ALRC considers there is significant merit in the absolute prohibition model adopted in Tasmania. Plainly, the mere perception that such material could be accessed undercuts the main purpose behind the privilege. People who have

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121 Victims of Crime Commissioner (Vic) (n 3) 238.
122 Name withheld, *Submission 95*.
123 H Robbins, *Submission 139*. See also P Brennan, *Submission 87*: '[records were not sought, however] it was something I greatly feared when thinking I would have to give evidence'.
124 Royal Australian and New Zealand College of Psychiatrists, *Submission 154*.
125 Legal Aid NT, *Submission 146*.
126 Not published, *Submission 197*.
127 See, eg, Name withheld, *Submission 95*; Older Women's Network NSW, *Submission 153*; Royal Australian and New Zealand College of Psychiatrists, *Submission 154*; Centre for Women's Safety and Wellbeing, *Submission 193*; Women's Legal Services Australia, *Submission 212*; Full Stop Australia, *Submission 214*.
128 See, eg, Law Council of Australia, *Submission 215*.

experienced sexual violence should not have to choose between getting therapeutic treatment for the harm they have suffered and seeking justice for what has occurred.

12.104 However, the ALRC also recognises that an absolute prohibition would mean that this material will generally not be available to accused persons to prepare their defence or for use in cross-examination.

12.105 Whether such a restriction is justified depends on the extent to which access to such material is truly necessary. The ALRC has previously acknowledged that sexual assault counselling communications are generally concerned with emotional and psychological responses given their therapeutic, rather than investigative purpose. Often they will have limited relevance to facts in issue and are unlikely to be probative of issues commonly raised in sexual offence proceedings.[129] However, there have been cases in which courts have found that lack of access to sexual assault counselling communications would be prejudicial to the accused person.[130]

12.106 The practical impact of restrictions on access to sexual assault counselling communications is relevant in deciding how the balance should be struck. If applications to access material are frequently granted, and if the material (once accessed) is frequently and successfully used by the defence, then this may justify retention of a qualified privilege. However, if applications are rarely granted, and the material is rarely of use, this would tend against a qualified privilege and in favour of an absolute prohibition. The justification for exposing all people who have experienced sexual violence to this potential harm becomes less tenable.

12.107 Prohibiting all access to sexual assault counselling communications is a utilitarian approach which prioritises the public interest in ensuring that people who have experienced sexual violence seek therapeutic treatment and are not deterred from reporting, over the possibility that a small number of accused persons may be denied access to potentially exculpatory material.

12.108 The law is often called upon to resolve competing public interests. For example, 'legal professional privilege' (also known as 'client legal privilege') raises considerations of a similar nature. The law must respond to the tension between:

- the public interest in ensuring that a person (who is a party or prospective party to a proceeding) has access to confidential legal advice in which they can engage in 'full and frank disclosure'; and
- the public interest in ensuring 'all relevant information is before the court'.[131]

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129 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 515 [15.49], citing Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5 Sexual Offences Against the Person, Report (1999) 279.

130 See, eg, *Duncan (a pseudonym) v The King* [2024] VSCA 27, [31]–[35].

131 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) 339–41 [12.12], [12.14].

12.109 In that scenario, the law has resolved squarely in favour of the right to confidential communication, which has been deemed essential to the administration of justice.[132]

12.110 It is difficult to conclude how the tension should be resolved in respect of sexual assault counselling communications. At present there is insufficient data to demonstrate:

- how often applications are made to access sexual assault counselling communications;
- the basis upon which applications are made (that is, the forensic purpose);
- how often leave is granted for such material to be accessed; and
- how often such material is used in evidence, particularly during cross-examination of complainants.

12.111 While the ALRC considers there may be merit in an absolute prohibition, and that too much weight may currently be afforded to the possibility such sexual assault counselling communications may have an evidentiary value, the ALRC is unable to reach a conclusion. However, the ALRC is of the view that data would assist in determining whether the balance is appropriately struck by a qualified prohibition.

12.112 The ALRC also acknowledges that the Australian Institute of Criminology is currently funding research into the protection of sensitive third-party evidence (including sexual assault counselling communications) from the perspective of a trauma-informed response for people who have experienced sexual violence.[133] The research project recommended by the ALRC should complement and build upon this research.

### *Other issues*

12.113 Concerns have been raised in this Inquiry about whether confidential communication privileges, including sexual assault communication privileges, are working well in practice:

> Although the laws theoretically safeguard these sensitive records, the real-world application often falls short, leaving victims survivors exposed to unacceptable risks.
>
> In my experience, I faced the distressing possibility that my entire counselling file could be disclosed to the defence, which was an almost unbearable invasion of privacy. The prolonged process and the anxiety of potentially having deeply personal information made accessible to my perpetrator added significant trauma to an already challenging ordeal. Although only a few lines

132 Ibid 339–41 [12.21].

133 See the 'Trauma-informed responses for sexual assault victims: Protecting sensitive third-party evidence' project: Australian Institute of Criminology, 'AIC funding to assist in crime and justice research' (Media Release, 4 December 2023) <www.aic.gov.au/media-centre/news/new-criminology-research-grants-awarded-australian-institute-criminology-1>.

were ultimately disclosed, the emotional toll and the time spent contesting the release were substantial.[134]

12.114 Concerns have also been raised about the scope of privileges, and to the control complainants have over their confidential information. For example, Queensland Legal Aid remarked that Queensland's laws do not protect disclosure of personal information, such as medical records, even if they are unrelated to the trial. Lawyers have reported that complainants are often shocked to find out that the defence can access their private medical information without their views being sought.[135]

12.115 Some of the common concerns include a lack of understanding of, and at times, lack of compliance with, confidential communication provisions, particularly around disclosure requests and subpoenas. Concerns raised include:[136]

- difficulties around ensuring informed consent, including insufficient information to complainants to enable informed consent when police seek their permission to access material for investigative purposes, including overly broad permission beyond what is relevant for investigative purposes;
- instances of inadvertent disclosure of records by police to prosecutors or defence of privileged material, before an application to access the material has been made, resulting in a breach of the complainant's privacy;
- defence making overly broad requests for material, and registry staff not being sufficiently qualified to identify privileged material, along with instances of defence issuing subpoenas without first applying for leave, which may result in restricted or irrelevant material being produced;
- lack of assistance available to subpoena recipients in responding to requests;
- applications to access material being made once the trial has already started, which may mean a claim of privilege could jeopardise the trial date, which puts pressure on the complainant to abandon the claim, or that a complainant

134 Name withheld, *Submission 95*. See also Women's Legal Services Australia, *Submission 212*: 'despite legislative provisions in each jurisdiction recognising that there are circumstances where communications should be protected, these provisions are often unclear, discretionary in application, and are applied inconsistently'. See also Legal Aid Queensland, *Submission 126*: 'the SACP legislative provisions in Queensland are often described by the judiciary as "unworkable" (see for example *TRKJ v Director of Public Prosecutions* [2021] QSC 297)'.

135 Legal Aid Queensland, *Submission 126*.

136 S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*; With You We Can, *Submission 132*; Northern Territory Director of Public Prosecutions, *Submission 143*; Women's Legal Centre ACT, *Submission 169*; WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Centre for Women's Safety and Wellbeing, *Submission 193*; Legal Aid NSW, *Submission 201*; Sexual Assault Services Victoria, *Submission 203*; Women's Legal Services Australia, *Submission 212*.

is unable to engage independent legal representation (where access to representation schemes is restricted to pre-trial proceedings);[137]

- preliminary examination of material (by judges, for the purposes of assessing whether leave ought to be granted), which can intrude upon the complainant's privacy, even if leave is not ultimately granted;[138] and
- complainants' lack of agency (control or input) with respect to applications to access their confidential material.

12.116 The ALRC recommends evaluation by the Australian Institute of Criminology of existing confidential communication schemes to see if they are working as intended, and whether in practice these schemes uphold the rights of complainants to privacy and autonomy over their confidential information, while ensuring relevant, probative evidence is before the court.

## Absolute prohibition on sexual reputation evidence

**Recommendation 44**

Section 4(1) of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT), dealing with sexual reputation, should be amended to provide that evidence of a complainant's sexual reputation is not admissible in a sexual offence proceeding. This absolute prohibition should extend to all sexual offence complainants. The availability of leave (in respect of section 4(1)(a)) and the term 'chastity' should be removed.

### *Problem and context*

12.117 Historically, evidence of a complainant's 'sexual reputation' or 'disposition' and evidence of 'sexual history' or 'sexual experience' were commonly relied on to attack a complainant's credibility, to either cast doubt on the complainant's truthfulness, or to invite juries to reason that the complainant was the 'type' of person who was 'more likely to consent' to the alleged sexual activity.[139]

12.118 It has since been acknowledged that such evidence is likely to be highly prejudicial against the complainant, as it evokes myths about credibility, propensity

137 See Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II* (2017) rec 73: The relevant state or territory government should work with its courts, prosecution and legal aid agencies to implement any necessary procedural or case management reforms to ensure that complainants are effectively able to claim the privilege without risking delaying the trial.

138 See also With You We Can, *Submission 132*: 'The essence of privacy is that once invaded, it can seldom be regained'.

139 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) 1243 [27.39]. See also Victorian Law Reform Commission (n 14) 476 [21.137]. See also Victims of Crime Commissioner (Vic) (n 3) 415.

to consent, and moral worthiness.[140] It also risks subjecting the complainant to unnecessarily intrusive and humiliating questioning. This is particularly so for sexual reputation evidence.

12.119 In response, every Australian jurisdiction has enacted legislation to place restrictions on the admissibility and relevance of such evidence.[141] Also known as 'rape shield' laws, these restrictions broadly have three aims: to prohibit the admission of evidence of a complainant's sexual reputation; to prevent the use of sexual history evidence to establish the complainant as a 'type' of person who is more likely to consent to sexual activity; and to exclude the use of a complainant's sexual history as an indicator of the complainant's truthfulness.[142]

12.120 As the ALRC has previously stated, 'statutory and judicial guidance about the meaning and boundaries' of the terms 'sexual reputation' and 'sexual history' and the 'evidence covered' is 'limited'.[143] However, a distinction may be drawn between:

- evidence which consists of a witness' 'opinion' of the complainant (reputation) or which is used to support 'type of person' reasoning (disposition), which are likely to be highly speculative; and
- evidence of actual prior sexual conduct by the complainant (sexual experience) which, if sufficiently connected to the alleged offence, may be relevant and probative.[144]

12.121 Some submissions raised the need for greater clarity in the definition of these terms:

> Evidence of a victim-survivor's past sexual activities could be relevant to both their 'sexual experience' and their 'sexual reputation.' It should be clear how restrictions on these forms of evidence interact, to ensure they are working as intended.[145]

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140 Law Commission of England and Wales, *Evidence in Sexual Offences Prosecutions* (Consultation Paper No 259, 2023) 137 [4.1], 164 [4.99].

141 See *Crimes Act 1914* (Cth) ss 15YB ('reputation of child witness or child complainant'), 15YC ('sexual experience of child witness or child complainant'); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 75 ('reputation'), 76 ('sexual activities'); *Criminal Procedure Act 1986* (NSW) s 294CB ('reputation and sexual experience'); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4 ('reputation and sexual activities'); *Evidence Act 1977* (Qld) ss 103ZG ('reputation'), 103ZH ('sexual activities'); *Evidence Act 1929* (SA) s 34L ('reputation and sexual activities'); *Evidence Act 2001* (Tas) s 194M ('reputation and experience'); *Criminal Procedure Act 2009* (Vic) ss 341 ('reputation'), 342 ('activities'), 343 ('sexual history'); *Evidence Act 1906* (WA) ss 36B ('reputation'), 36BA ('sexual disposition'), 36BC ('sexual experience').

142 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (n 1) 1237 [27.13].

143 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) 1239–1240 [27.22]–[27.23].

144 See Stephen J Odgers, 'Evidence of Sexual History in Sexual Offence Trials' (1986) 11 *Sydney Law Review* 73, 82. See also *Bull v The Queen* (2000) 201 CLR 443 [56]–[66]. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (n 129) 217–21.

145 Full Stop Australia, *Submission 214*.

## Sexual reputation

12.122 It is generally accepted that evidence of sexual reputation is highly prejudicial and 'too far removed' from the facts in issue in a sexual offence proceeding to be relevant or probative enough to warrant admission as evidence.[146]

12.123 In recognition of this, most jurisdictions have enacted absolute prohibitions on the admission of evidence of the complainant's 'sexual reputation'.[147]

12.124 In 2014, the ALRC recommended that all jurisdictions should enact absolute prohibitions, noting that the Commonwealth and the Northern Territory had not done so.[148] While the Commonwealth has recently introduced an absolute prohibition, the Northern Territory has retained its discretionary provision (discussed below).

### Commonwealth

12.125 Until recently, Commonwealth legislation restricted sexual reputation evidence, but only in respect of child witnesses and child complainants. Both types of evidence were admissible with leave. However, this has recently been amended by legislation which has introduced an absolute prohibition in respect of sexual reputation of evidence for child witnesses and child complainants in child proceedings, and vulnerable adult complainants in vulnerable adult proceedings. As noted above, the legislation has not, at the time of writing, come into effect.[149]

### Northern Territory

12.126 The Northern Territory has legislated to restrict the admission of sexual reputation and sexual experience evidence.[150] However, the restriction which applies to both kinds of evidence is qualified. This means evidence of sexual reputation can be admitted if leave is granted.[151] For the reasons outlined above, the ALRC considers that evidence of sexual reputation should not be admitted in any circumstance.

12.127 The provision also includes the expression 'reputation as to chastity'.[152] The term chastity is outdated and value-laden. It has no place in modern legislation and should be removed.[153]

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146 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) 1241 [27.29] citing Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (n 129) 219.

147 See *Criminal Procedure Act 1986* (NSW) s 294CB(2); *Evidence Act 1977* (Qld) s 103ZG; *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 2001* (Tas) s 194M(1)(a); *Criminal Procedure Act 2009* (Vic) s 341; *Evidence Act 1906* (WA) s 36B (along with an absolute prohibition on 'sexual disposition' in s 36BA).

148 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) rec 27–1.

149 *Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Act 2024* (Cth) sch 1 items 18–21, 26–27, amending *Crimes Act 1914* (Cth) s 15YB and inserting s 15YCA.

150 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

151 Ibid s 4(1).

152 Ibid.

153 Victorian Law Reform Commission (n 14) 479 [21.163], rec 89.

12.128 **Recommendation 44** was generally supported by stakeholders. However, it was not supported by two Northern Territory stakeholders. While Legal Aid Northern Territory and the Northern Territory Director of Public Prosecutions supported removal of the word 'chastity' from the provision, neither supported an absolute prohibition. Both expressed the view that there may be circumstances in which sexual reputation evidence may be validly admitted.[154] The ALRC accepts this position in respect of sexual history evidence, but not in respect of evidence of sexual reputation, for the reasons outlined above.

12.129 Amendments to legislation in the Northern Territory would ensure there is a consistent approach nationally to prohibiting of sexual reputation evidence. This will help ensure that:

- only evidence necessary to determine the facts in issue is before the court; and
- nationwide, complainants receive the same protections from exposure to unnecessary questions which may cause distress.

## Sexual history evidence

**Recommendation 45**

New South Wales should introduce a discretionary leave model for the admission of sexual history evidence, consistent with the approach adopted in all other jurisdictions.

12.130 Australian jurisdictions have adopted different approaches in relation to evidence of the complainant's 'sexual experience' or 'sexual history'. There are also differences in the terminology in legislation.[155] Statutory and judicial guidance about the meaning of these terms is limited.

154 Correspondence from Legal Aid Northern Territory to the Australian Law Reform Commission,16 December 2024; Correspondence from the Northern Territory Director of Public Prosecutions to the Australian Law Reform Commission, 9 December 2024.

155 See *Crimes Act 1914* (Cth) s 15YC (sexual experience of child witness or child complainant); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 76 (sexual activities); *Criminal Procedure Act 1986* (NSW) s 294CB(3) (sexual experience); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(b) (sexual activities); *Evidence Act 1977* (Qld) s 103ZH; *Evidence Act 1929* (SA) s 34L (sexual activities); *Evidence Act 2001* (Tas) s 194M (sexual experience); *Criminal Procedure Act 2009* (Vic) ss 342 (sexual activities), 343 (sexual history); *Evidence Act 1906* (WA) ss 36BA (sexual disposition), 36BC (sexual experience). The Commonwealth has recently introduced legislation which amends s 15YC and which introduces discretionary leave provisions in respect of sexual experience evidence in vulnerable adult proceedings: *Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Act 2024* (Cth) sch 1 items 24C–26. Unless specified otherwise, all references in this chapter to the *Crimes Act 1914* (Cth) refer to the version in force as at 1 November 2024 which pre-dates this amendment.

12.131 Whilst sexual history evidence also carries the risk of prejudice, and could distress and embarrass complainants, it has the potential to be probative, particularly where it concerns evidence of recent acts between the complainant and the accused person. As such, there may be circumstances where this evidence should be admitted.

12.132 In 2010, the ALRC and New South Wales Law Reform Commission (NSWLRC) recommended a 'discretionary' leave model, which sets out a threshold test for admitting sexual history and sexual experience evidence, along with mandatory considerations.[156] In doing so, the Commissions sought to develop a test that safeguarded complainants against irrelevant and harassing cross-examination, while upholding the accused person's right to a fair trial.[157] This recommendation has not been widely adopted.

12.133 All jurisdictions (except New South Wales) have 'discretionary' leave models, and all jurisdictions reflect some aspects of the model recommended by the Commissions in 2010. However, some key differences include:

- Whether leave is required before evidence of sexual activity between the complainant and the accused person can be admitted — all jurisdictions (except for the Australian Capital Territory, the Northern Territory, and South Australia)[158] require leave.[159]
- What the judge must consider when deciding whether to admit the evidence (where leave is required) — most jurisdictions (except for the Commonwealth, the Australian Capital Territory, and the Northern Territory) require judges to consider 'the distress, humiliation and embarrassment' that the complainant may experience.[160] Only Queensland and Victoria require the court to consider whether the evidence 'may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility'.[161]
- Whether the provision specifies that evidence is not considered 'substantially relevant' only because it 'raises an inference' as to the complainant's 'general disposition' — all jurisdictions (except for New South Wales and Tasmania) specify this.[162]

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156 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) recs 27–3, 27–4.

157 Ibid 1250 [27.75].

158 See *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 76; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4; *Evidence Act 1929* (SA) s 34L(1)(b).

159 *Crimes Act 1914* (Cth) s 15YC(1)(b); *Criminal Procedure Act 1986* (NSW) s 294CB; *Evidence Act 1977* (Qld) s 103ZH; *Evidence Act 2001* (Tas) s 194M(1)(b); *Criminal Procedure Act 2009* (Vic) s 342; *Evidence Act 1906* (WA) s 36BC.

160 *Criminal Procedure Act 1986* (NSW) s 294CB(4); *Evidence Act 1977* (Qld) s 103ZM(a); *Evidence Act 1929* (SA) s 34L(2); *Evidence Act 2001* (Tas) s 194M(2)(b); *Criminal Procedure Act 2009* (Vic) s 349(a); *Evidence Act 1906* (WA) s 36BC(2)(b).

161 *Evidence Act 1977* (Qld) s 103ZM(b); *Criminal Procedure Act 2009* (Vic) s 349(b).

162 See *Crimes Act 1914* (Cth) s 15YC(3); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 78(2); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(2); *Evidence Act 1977* (Qld) s 103ZN; *Evidence Act 1929* (SA) s 34L(3); *Criminal Procedure Act 2009* (Vic) s 352; *Evidence Act 1906* (WA) s 36BA (prohibits such evidence entirely).

12.134 By contrast, New South Wales has adopted an 'exclusionary' model which sets out a discrete set of exceptions to a general prohibition. Evidence is only admissible under one of those exceptions if the probative value of the evidence 'outweighs any distress, humiliation or embarrassment' that the complainant might suffer as a result of its admission.[163]

12.135 This model has been the subject of controversy, criticised by some as being too restrictive,[164] and for seeking to 'foresee' all circumstances in which sexual history evidence will be relevant 'without sight of the facts of a case or the purpose of the evidence'.[165]

12.136 New South Wales' exclusionary model can be contrasted with the discretionary models in the other jurisdictions. These discretionary models generally consist of a presumptive prohibition, an enhanced relevance test, and a threshold for leave (including a non-exhaustive list of factors which need to be considered when assessing whether that threshold has been met). These models arguably better balance the need to prevent prejudicial evidence being admitted and the complainant being subjected to unnecessary harm, while also allowing probative evidence to be admitted where it is substantially relevant to a fact in issue. For this reason, the ALRC recommends that New South Wales adopts a discretionary leave model, consistent with all other jurisdictions.[166] The ALRC recognises that there are considerable differences between the models operating in each jurisdiction. The ALRC has not had sufficient time to adequately consult on the effectiveness of the existing provisions in other jurisdictions. As such, the ALRC does not seek to specify which discretionary model should be adopted in New South Wales.

### *Other issues*

12.137 The ALRC has also received several submissions which have raised concerns about the use of sexual history evidence.[167] The ALRC encourages each jurisdiction to consider whether their respective provisions are working effectively, noting the principles underpinning the ALRC and NSWLRC's 2010 recommendation.[168]

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163 *Criminal Procedure Act 1986* (NSW) s 294CB.

164 See, eg, *Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847, [88]–[178] (Leeming JA). See also *Cook (a pseudonym) v The King* (2024) 419 ALR 1, [35]–[36] (Gordon ACJ, Edelman, Steward and Gleeson JJ) [74]–[75] (Jagot J). However, see J Quilter and L McNamara, *Submission 49*.

165 This is consistent with a previous recommendation of the ALRC and New South Wales Law Reform Commission: Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) 1245–6 [27.53]–[27.54].

166 Ibid.

167 See, eg, A Wallace and R Clynes, *Submission 42*; Youth Affairs Council of South Australia, *Submission 123*; B McKimmie, F Nitschke, G Ribeiro, and A Thompson, *Submission 125*; S Rosenberg, M Iliadis, M O'Connell and L Satyen, *Submission 128*; With You We Can, *Submission 132*; WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Rape and Sexual Assault Research and Advocacy, *Submission 206*.

168 Australian Law Reform Commission and New South Wales Law Reform Commission (n 86) recs 27–3, 27–4.

# 13. Civil Justice Pathways

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## Introduction

13.1 The Terms of Reference require the ALRC to consider alternatives to criminal prosecutions, including civil claims and compensation schemes. The consideration of alternatives to the criminal justice system should not be understood as implicitly suggesting that justice options are necessary in substitution of criminal justice. The importance of the criminal justice system is discussed in **Chapter 4** and elsewhere. The importance of making the criminal justice system more effective does not, however, deny the need to provide and improve additional justice pathways. Additional pathways should be available and accessible for people who have experienced sexual violence who want to pursue their civil law rights and entitlements, whether in addition to their engagement with criminal justice, or as an alternative to it.

13.2 It needs to be appreciated that whilst access to criminal justice is problematic for people who have experienced sexual violence, access to civil justice, and in particular to civil proceedings in courts and tribunals, is also problematic. The vast

majority of people who have experienced sexual violence, including groups which are disproportionately reflected in sexual violence statistics, face significant challenges in taking on the financial and other burdens of pursuing a legal proceeding. These barriers are described below, together with the advantages that civil justice pathways offer. The problem of lack of access, and the need to shift the burdens that are the primary barriers to access, are largely the focus of the recommended reforms addressed in **Chapters 14** and **15**.

13.3 This chapter gives a summary overview of civil justice generally and some of the relevant civil justice pathways, and contains recommendations for measures to improve a broad range of civil processes. Subsequent chapters provide greater detail on select individual civil processes, and contain more specific recommendations for reform.

13.4 There are several civil justice pathways that may provide some form of redress following sexual violence, and those pathways are the focus of this chapter and the following chapters. In particular, the recommendations in the following chapters focus on 'sexual harassment' provisions in discrimination and workplace legislation, and victims of crime schemes.

13.5 Finally, this chapter contains two recommendations for improving all civil processes, noting that the risks of retraumatisation, and the influence of myths and misconceptions, are similarly present in civil processes, as in criminal processes. **Recommendations 46** and **47** seek to make available, in civil proceedings, the measures, mechanisms, and evidentiary rules already available in criminal proceedings, or that the ALRC recommends should be available in criminal proceedings.

## Burdens and disadvantages of civil justice pathways

13.6 As stated earlier, civil processes can involve their own challenges.[1]

13.7 Navigating the range of civil proceedings that may be relevant can be confusing and overwhelming.[2] Civil legal pathways are more numerous and complicated than the criminal justice system, which is more consolidated in comparison. Consequently, the Independent Legal Advisor (see **Recommendation 1**) may be particularly useful in helping people who have experienced sexual violence to navigate the different civil legal options.

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1 See, eg, Not published, *Submission 37*; Redfern Legal Centre and Human Rights Law Centre, *Submission 89*; Parkerville Children and Youth Care, *Submission 91*; K Seear, G Grant, S Mulcahy and A Farrugia, *Submission 177*; Circle Green Community Legal, *Submission 208*.

2 See, eg, A Brownlie, *Submission 39*; Name withheld, *Submission 135*; Name withheld, *Submission 136*. See also Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 444–5, 451.

13.8 While civil actions give a greater role for and involvement of the person who has experienced sexual violence, this increased involvement can be burdensome and costly for individuals dealing with trauma and other personal consequences following the experience of sexual violence. The burdens of engaging with legal options, including the significant investment of time and money, can dissuade some people from pursuing a civil action.[3] For example, engaging private legal representation often costs significant sums that many prospective applicants cannot afford, or that might outweigh the amount of any court-ordered payment for compensation.[4] In addition, an applicant conducting litigation in-person is ordinarily required to identify and utilise relevant evidence, produce and review large volumes of documents, develop and refute legal arguments, comply with relevant timelines and deadlines, and make significant decisions about the proceedings on short notice.

13.9 Unlike criminal proceedings, the cost and organisational burden of conducting a civil proceeding usually has to be carried by the applicant. This is a very significant comparative disadvantage of civil proceedings for the applicant. However, as discussed below in relation to sexual harassment proceedings, there has been a recent trend to shift that burden from the individual who has experienced sexual violence to a regulator, and to institutional entities with responsibility and greater capacity to address sexual violence in the institution.

13.10 Like in criminal proceedings, the process of giving evidence in civil proceedings can be retraumatising. Many of the trauma-informed measures developed for criminal proceedings are not currently applicable to civil proceedings (see **Recommendation 46**).

13.11 Unlike criminal proceedings, there are time limits that determine how long after an incident of sexual violence a person can make an application for most civil processes.[5] Time limits have been largely removed for cases of historic child sexual abuse, but are still relevant for other forms of sexual violence.[6] Time limits can be problematic if a person requires time to process and recover from sexual violence before they feel ready to engage with the justice system.

13.12 A common civil order is for the respondent to pay compensation or damages. The respondent can only make such a payment if the respondent has significant assets (or relevant insurance). Many individuals do not have sufficient funds to pay even a modest award of damages. In addition, it can be difficult to enforce an

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3 Several stakeholders told us about how burdensome engaging with legal systems following sexual violence can be. See, eg, Not published, *Submission 23*; A Brownlie, *Submission 39*; Parkerville Children and Youth Care, *Submission 91*; Name withheld, *Submission 135*; J Crous, *Submission 141*.

4 Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) *Federal Law Review* 231, 239–40.

5 See, eg, *Limitation of Actions Act 1974* (Qld) s 11(1); *Limitation of Actions Act 1936* (SA) s 36; *Limitation of Actions Act 1958* (Vic) s 5(1AA).

6 For abolition of time limits in cases of child sexual abuse see, eg, *Limitation of Actions Act 1974* (Qld) s 11A; *Limitation of Actions Act 1936* (SA) s 3A; *Limitation of Actions Act 1958* (Vic) pt IIA div 5.

order for payment against an uncooperative respondent, even if the respondent has sufficient assets. These difficulties make it more difficult to obtain legal assistance, as lawyers may be reluctant to work on a no-win-no-fee basis unless it is evident that the respondent has sufficient assets to make the case financially viable.

13.13 If a number of people have experienced sexual violence in the same institution, those people might be able to pool their resources and participate in a 'class action' for more efficient litigation against the institution.

13.14 For some kinds of civil proceedings there is a risk that an adverse costs order will be made against the applicant if the civil action is unsuccessful.[7] This can mean that the applicant becomes liable for a significant debt under a court order, because they are required to pay at least some of the defendant's legal costs. Some reforms have recently been made in this area, to reduce the risk involved in bringing some kinds of actions.[8] **Recommendation 52** seeks to extend these reforms.

13.15 The use of civil litigation, as opposed to criminal prosecution, to address sexual violence specifically is also not without controversy. For example, some have argued that shifting the legal response for sexual violence from a 'public' area of criminal law (which seeks to prosecute offences in the public interest) to a 'private' area of civil law (which seeks to place a monetary value on an individual person's interests) is inappropriate.[9] Many would argue that people who use sexual violence should be made fully accountable for their conduct, including through sanctions like imprisonment, which are only available in criminal proceedings. Further, civil pathways can be less transparent. When civil legal proceedings settle out of court, there is an added concern that people who use sexual violence repeatedly can avoid detection through the common expectation placed on applicants to agree to confidentiality clauses.[10]

13.16 Civil and criminal justice pathways are not mutually exclusive: that is, a person can seek to pursue both. However, civil claims are often stayed pending the resolution of any simultaneous criminal matter.[11]

## Some advantages of civil justice pathways

13.17 The procedures and standards of proof in civil and criminal processes differ in important ways. Some significant differences may provide opportunities for better justice outcomes for some people who have experienced sexual violence.

13.18 The standard of proof in civil matters is lower than in criminal matters. A civil matter must ordinarily be proved 'on the balance of probabilities', rather than the

7 Costs ordinarily 'follow the event' in most forms of civil litigation, but less frequently under eg the *Family Law Act 1975* (Cth), the *Fair Work Act 2009* (Cth), or under victims of crime schemes.
8 *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth).
9 See, eg, F Gilroy, *Submission 58*.
10 See Saul Levmnore and Frank Fagan, 'Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases' (2018) 103(2) *Cornell Law Review* 311, 314.
11 See, eg, *McMahon v Gould* (1982) 7 ACLR 202; *Reid v Howard* (1995) 184 CLR 1.

more onerous criminal standard 'beyond reasonable doubt'. This means that it can be easier to prove alleged facts in civil actions than in criminal prosecutions. The precise standard of proof depends on a number of considerations including the gravity of the matters alleged.

13.19 When deciding whether a civil case has been proved on the balance of probabilities, a court must take into account: the nature of the cause of action or defence; the nature of the subject-matter of the proceeding; and the gravity of the matters alleged.[12]

13.20 In the case of *Briginshaw*, the High Court stated that the standard of proof in civil proceedings 'will naturally vary in accordance with the seriousness or importance of the issue',[13] and 'the degree of satisfaction demanded may depend … on the nature of the issue'.[14] Factors to be taken into account include: the nature of the allegation; the inherent unlikelihood of the allegation; and the consequences that would flow from the finding of fact.[15] For example:

> When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is … the same as upon other civil issues [but] weight is given to the presumption of innocence and exactness of proof is expected.[16]

13.21 In the context of alleged sexual violence specifically, the Federal Court has recently stated that an 'allegation of rape ranks high in the calendar of criminal conduct, and … needs to be approached with "much care and caution"' in civil proceedings.[17]

13.22 In civil proceedings the respondent has no right to silence, unlike a defendant in a criminal proceeding. Consequently, if a civil respondent chooses not to give evidence in proceedings, the decision-maker may draw unfavourable inferences against the respondent.[18] This distinction is important particularly in cases, like most sexual violence cases, where the alleged conduct occurred in a private setting, and the only available evidence in relation to critical facts is the evidence of the applicant and the respondent. To avoid the court drawing unfavourable inferences, the respondent will usually need to give evidence and that evidence will then ordinarily be tested in cross-examination, just as the applicant's evidence will be tested in cross-examination. A common concern of complainants in criminal trials relating to sexual violence is that they were made to feel as though they, rather than the

12 *Evidence Act 1995* (Cth) s 140.
13 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 344.
14 Ibid 361.
15 *Lehrmann v Network Ten Pty Limited* [2024] FCA 369 [102]; see also *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 [57].
16 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.
17 *Lehrmann v Network Ten Pty Limited* [2024] FCA 369 [104].
18 Section 89 of the *Evidence Act 1995* (Cth) applies only in criminal proceedings.

accused person, were on trial.[19] A civil trial may better facilitate the respective cases of each side being fully tested and tried.

13.23 The person who experienced sexual violence will usually be a party to the civil proceeding, in contrast to a criminal proceeding, in which they are instead a witness. Being a party means the person brings the action in their own name, chooses the orders that are sought, and has control over the conduct of the case, including the evidence and arguments presented on their behalf, and any settlement negotiations. Accordingly, a party in a proceeding can exercise significantly more choice or agency than a witness. Complainants in criminal trials have described their lack of agency in the proceedings as traumatic, and the ALRC heard that having agency is important to many people who have experienced sexual violence.[20]

13.24 In a criminal trial, the complainant has no control over who is made accountable for the sexual violence. Usually, it is only the person who has been accused of using sexual violence who is charged and, if convicted, made accountable to the law for their conduct. In contrast, civil proceedings alleging sexual violence can be, and are, commonly brought against a person who negligently facilitates the sexual violence, or who is vicariously liable for the conduct of the person who used sexual violence.[21] Furthermore, recent reforms mean that civil proceedings can be brought against an employer or person conducting a business or undertaking (PCBU) who has failed to take reasonable and proportionate measures to eliminate sexual violence in the workplace.[22] This means that a wider net of persons can be held accountable in civil proceedings than in criminal proceedings.

13.25 In addition, civil proceedings give rise to a wider range of applicable remedies, and a greater likelihood that those remedies will be effective in addressing sexual violence. For instance, an employer may be ordered to introduce organisation-wide training on preventing sexual harassment, and may be ordered to pay compensation, in circumstances where the person who used sexual violence has no capacity to pay but could be made accountable by a non-pecuniary order, such as an order to attend counselling.

13.26 From the point of view of a person who has experienced sexual violence and who is a complainant in a criminal trial, a 'successful' outcome is commonly limited to the accused person being convicted and sentenced. However, many people who have experienced sexual violence say they are not primarily interested in the accused person being 'punished'.[23]

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19 See, eg, Annie Cossins, 'Why Her Behaviour Is Still on Trial: The Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 42(2) *University of New South Wales Law Journal* 462, 462.

20 See also KPMG and Centre for Innovative Justice, RMIT, *'This Is My Story. It's Your Case, But It's My Story': Interview Study* (NSW Bureau of Crime Statistics and Research, July 2023) 66.

21 In summary, 'vicarious liability' means that a person or organisation can be held responsible for harm caused by somebody acting on their behalf. See, eg, Australian Human Rights Commission, 'Vicarious Liability' <www.humanrights.gov.au/our-work/employers/vicarious-liability>.

22 *Sex Discrimination Act 1984* (Cth) s 47C.

23 KPMG and Centre for Innovative Justice, RMIT (n 20) 90–1.

13.27 In contrast, civil proceedings provide to a person who has experienced sexual violence a broader range of processes for obtaining redress and a far broader range of remedies.

13.28 A civil proceeding is likely to be resolved without the need for a trial. Approximately 33% of all complaints lodged with the Australian Human Rights Commission (AHRC) are resolved through conciliation.[24] Data supplied to the ALRC by the AHRC suggests that a slightly higher proportion (approaching 40%) of sexual harassment complaints specifically have been resolved through conciliation in recent years. Roughly 35% of sexual harassment complaints in recent years have been terminated because there was assessed to be no reasonable prospect of settling the matter by conciliation. The ALRC was told that in the order of 9 out of 10 of those complaints that reach a court proceeding are settled at a court-run mediation.

13.29 Many persons who experience sexual violence want some form of resolution, but do not want to go to court to get it.[25] Conciliation or mediation can occur in a trauma-informed way including by avoiding direct contact between the parties.

13.30 Negotiated outcomes allow for very significant flexibility in the redress that can be provided by way of agreement.[26] Those outcomes can be designed to meet the bespoke healing and safety needs of the applicant. An apology or an acknowledgment of wrongdoing may be given. Preventative measures may be agreed to be taken in the absence of compulsion. Remedies such as those may be more effective in addressing sexual violence than criminal sanctions, and even if these negotiated remedies were available to be imposed in a criminal proceeding, they are often not imposed. As an example of what is possible in a negotiation, the ALRC heard that an important healing element of one settlement was the provision of proof by an institutional respondent that the person who had used sexual violence against a child was no longer alive.

13.31 The ALRC also heard that court-based mediations of sexual harassment claims on occasion result in very substantial monetary compensation, involving sums far higher than those obtained through a court determination. Very occasionally settlements involve the payment of millions of dollars, although those results are likely to be confined to circumstances where an affluent respondent faces substantial reputational damage should the case proceed to trial. Compensation awarded by courts to children who experienced sexual abuse have also recently

24 Australian Human Rights Commission, *Annual Report 2023–24* (2024) 21.

25 See, eg, H Robbins, *Submission 139*.

26 Some people want the person to recognise the harm they have done (see, eg, J Crous, *Submission 141*); some people want there to be greater access to behavioural change programs (see, eg, Name withheld, *Submission 12*); some people do not want to go to court but just want the violence to stop, or want the person to leave them alone (see, eg, H Robbins, *Submission 139*); see also Transforming Justice Australia, *Submission 185*.

been substantial.[27] It may be expected that these larger amounts will be reflected in settlements arrived at through negotiation or mediation.

13.32 People who have experienced sexual violence told the Respect@Work inquiry that they want a 'broader range of options to stop sexual harassment, especially less adversarial options'.[28] Some civil proceedings provide access to a tribunal that can resolve a claim of sexual violence. For example, the sexual harassment regimes established under state and territory anti-discrimination laws involve tribunal processes for the resolution of claims. Similarly, the *Fair Work Act* regime for dealing with sexual harassment provides the Fair Work Commission (FWC) as a tribunal empowered to quickly deal with applications for 'stop sexual harassment orders', and to conduct agreed arbitrations (see **Chapter 15**). Stop sexual harassment orders were introduced to provide a less adversarial, early intervention redress mechanism.[29] That regime could be extended to sectors beyond the workplace sector as **Recommendation 55** contemplates. Compared with court processes, tribunal processes tend to be more informal, less adversarial, quick, and inexpensive, and thus more accessible.

13.33 Criminal sanctions are punitive and can be rehabilitative but do not remedy a complainant's loss or harm. In some states and territories, a criminal court may make a compensatory order as part of criminal proceedings.[30] Civil proceedings make compensatory and remedial orders more readily available to a person who has experienced sexual violence.

## Different civil justice pathways

13.34 Civil justice pathways capable of providing redress following sexual violence, and which involve a cause of action that is justiciable before a court, are limited. The common law through tort law, and to a lesser extent contract law, has provided the traditional legal pathways. In recent decades, statutory discrimination laws, and in particular statutory prohibitions of sexual harassment, have provided additional pathways.

13.35 Torts evolved from the ancient writ of trespass and the recognition that trespass against a person should be actionable as a wrong.[31] Relevant to sexual violence, the tort of 'assault' occurs where the defendant has caused the plaintiff to be fearful

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27 Róisín Annesley KC, *Have the Policy Decisions in Historical Child Abuse Proceedings Gone Too Far to Right the Wrongs of the Past?* (Conference Paper, Trans-Tasman Bar Conference, 16 August 2024). See also Loretta Lohberger and Georgie Burgess, 'Judge Approves "momentous" $75 Million Settlement for Former Ashley Youth Detention Centre Detainees', *ABC News* (25 November 2024) <www.abc.net.au/news/2024-11-25/ashley-youth-detention-centre-class-action-settlement/104642214>.

28 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 2) 525.

29 Ibid.

30 See, eg, *Victims Rights and Support Act 2013* (NSW) pt 6; *Sentencing Act 1991* (Vic) pt 4 div 2; *Sentencing Act 1995* (WA) pt 16 divs 1, 2.

31 Penelope Crossley et al, *Law of Torts* (LexisNexis Butterworths, 6th ed, 2021) ch 2–3.

of imminent physical conduct.[32] The tort of 'battery' occurs when the defendant has made physical contact with the body of the plaintiff.[33] 'False imprisonment' occurs where the defendant has unlawfully deprived the plaintiff of their freedom of movement.[34]

13.36 Contract law may provide redress for sexual violence but only in the rare case where a contract imposes some obligation, either express or implied, upon an employer or like party to protect or guard against harm to another party to the contract. Negligence law may impose on an employer or like person a duty of care to avoid harm being inflicted upon another person such as an employee.

13.37 Each of the various common law and statutory pathways mentioned above may present opportunities for law reform. Given the time and resources made available for this Inquiry, the ALRC has chosen to focus on sexual harassment.

13.38 There are a range of reasons for that choice. First, contract law is rarely an available pathway to a person who has experienced sexual violence. Tort and negligence causes of action have increasingly been utilised in recent years in relation to sexual violence since recent reforms to the law were made to implement recommendations of the Child Sexual Abuse Royal Commission.[35] Those reforms have substantially assisted justice outcomes for people who experienced sexual violence as children, particularly where an institution is found to have some responsibility for the sexual violence.

13.39 Access to just outcomes for people who have experienced sexual violence may well be assisted by those laws being further reviewed and reformed. However, the ALRC considers that, generally speaking, Commonwealth sexual harassment laws now provide better opportunities for achieving reform which will benefit people who have experienced sexual violence.

13.40 Sexual harassment is a statutory claim under either the *Sex Discrimination Act* or the *Fair Work Act*, each of which is a law of the Commonwealth that applies uniformly across Australia. Uniformly applicable statutory law is more amenable to law reform than is the common law. To reform the common law uniformly would likely require the statutory intervention of every state and territory.

13.41 In addition, each state and territory has laws prohibiting discrimination and sexual harassment.

13.42 Sexual harassment legislation and the common law emanate from different sources and are based on different objectives. The focus of tort law (part of the common law) is injury to an individual arising from wrongful conduct. The remedies available are essentially limited to monetary compensation for the injury suffered. In contrast, legislation that addresses sexual harassment as a form of discrimination is sourced in

32 Ibid [3.16]–[3.22].
33 Ibid [3.1]–[3.15].
34 Ibid [3.28]–[3.41].
35 Annesley (n 27).

an internationally recognised human right — equality and non-discrimination. Sexual harassment legislation is made in satisfaction of Australia's international obligations to prohibit discrimination on the ground of sex.

13.43 By reason of its source in anti-discrimination law, sexual harassment legislation recognises a far wider range of wrongful sexualised conduct than does tort law. Relevantly, unlawful sexual harassment is not limited to an assault or a battery but extends to many forms of sexual violence, including non-physical conduct.

13.44 The broader objective of anti-discrimination legislation gives rise to wider forms of relief and redress, including preventative measures and measures directed to alleviate the systemic causes of the wrongdoing, than does the remedial objective of tort law, which is largely confined to the compensation of an individual.

13.45 Relief that has a deterrent or preventative purpose is justifiable in the context of sexual harassment legislation. For instance, some sexual harassment legislation imposes a positive duty to prevent sexual harassment from occurring. Wider forms of relief need to be available in recognition of the wider form of harm which can arise from the wider scope of wrongful conduct that sexual harassment legislation seeks to address.

13.46 Further still, as a law addressing discrimination, and unlike tort law, sexual harassment legislation can and does better recognise intersectional discrimination. People experience multiple forms of intersecting discrimination and sexual violence as the result of a combination of race, disability, age, gender or sex-based discrimination. Groups disproportionately reflected in sexual violence statistics are often subjected to discrimination because of a combination of these attributes. In determining whether conduct is lawful, sexual harassment legislation is more amenable to taking into account, and does take into account (s 28A of the *Sex Discrimination Act* being an example), intersectional discrimination and the nature of the relationship between the person experiencing sexual harassment and the person alleged to have engaged in sexual harassment.

13.47 Importantly, given that discrimination is a social problem, a law which seeks to address a form of discrimination can more justifiably look beyond the need for individual redress than can the common law. Sexual harassment law is more amenable than the common law to be used as a tool of social reform for addressing the systemic causes of sexual violence. Furthermore, it is law that can be made more effective by being the subject of a regulatory regime to regulate prevention, compliance, and enforcement. That point is best exemplified by turning to the important reforms initiated by some of the recommendations made by the landmark Respect@Work Report.

## Shifting the burden of addressing sexual violence

13.48 The Respect@Work Report concluded that the legislative regime dealing with sexual harassment needed to shift from an individual complaints-based system to a regulatory model.

13.49 The AHRC found that while sexual harassment was increasing, reporting of sexual harassment had decreased.[36] The AHRC commissioned a survey and received submissions that indicated that many individuals did not have confidence in the existing systems and complaint handling processes.[37] The system placed 'a heavy burden on individuals to make a formal complaint' in circumstances where the evidence showed that people who had experienced sexual violence 'lack confidence in existing systems to deliver effective responses'.[38]

13.50 The Respect@Work Report observed that the legislative framework was 'largely remedial in nature' and placed significant responsibility on individuals to initiate and pursue complaints.[39]

13.51 The Respect@Work Report recommended a shift in responsibility to employers to address work-related sexual harassment. The AHRC recommended that the *Sex Discrimination Act* be amended to introduce a positive duty for all employers to take reasonable and proportionate measures to eliminate sexual harassment as far as possible.[40] It was also recommended that the AHRC be given the regulatory function of assessing and enforcing compliance with the positive duty, including by enforcing compliance by seeking court orders.[41] **Chapter 14** details the legislative changes made to the *Sex Discrimination Act* to implement those recommendations.

13.52 The rationale for these recommendations was that, to be more effective, the legislative regime dealing with sexual harassment needed to shift from an individual complaints-based system and towards a regulatory model.

13.53 As the Respect@Work Report stated:

> The key benefit of a positive duty is that it shifts the burden from individuals making complaints to employers taking proactive and preventative action. As the positive duty is an ongoing duty, it shifts the emphasis from a complaints-based model to one where employers must continually assess and evaluate whether they are meeting the requirements of the duty.[42]

13.54 The imposition of a positive duty, and the regulatory obligations on the AHRC to enforce the duty, sought to diminish the burden on people who experience sexual

36 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 2) 479.
37 Ibid.
38 Ibid 442.
39 Ibid 471.
40 Ibid rec 17.
41 Ibid rec 18.
42 Ibid 479.

harassment by shifting the responsibility for dealing with sexual harassment in the workplace to employers, and by shifting the compliance and enforcement burden to the AHRC.

13.55 A similar move towards a regulatory model is also apparent in the recommendations made by the Respect@Work Report in relation to a prohibition on sexual harassment in the *Fair Work Act*.[43] Those reforms are further explained in **Chapter 15**.

13.56 The AHRC's recommendation in the Respect@Work Report, to ensure that sexual harassment is prohibited in the *Fair Work Act,* was made in the context of the existing powers and functions of the Fair Work Ombudsman (FWO) to enforce compliance with any obligation imposed by that Act:

> The strong regulatory powers and commensurate enforcement provisions within the Fair Work system provide a framework for sexual harassment within the workplace to be regulated and enforced.[44]

13.57 Individuals can enforce the prohibition on sexual harassment in the *Fair Work Act*. However, the FWO can reduce, or relieve individuals of, that burden. For example, the FWO can either commence its own proceedings, or it can support an individual in proceedings brought by the individual, if the FWO considers that to do so would promote compliance with the *Fair Work Act*.[45]

13.58 As set out in the following two chapters, each of the *Sex Discrimination Act* and the *Fair Work Act* prohibits sexual harassment. Those Acts provide individual causes of action for a person who experiences sexual harassment, but important roles are played by each of the AHRC (under the *Sex Discrimination Act*), and the FWC and FWO (under the *Fair Work Act*), to support applicants as they navigate through their various legal options. Each Act supports systemic responses to sexual harassment.

13.59 In summary, under Commonwealth sexual harassment laws, the AHRC, FWC, and FWO can respond to enquiries, have procedures in place to receive formal complaints and applications, and offer dispute resolution methods such as conciliation. Under the *Fair Work Act*, the FWC can also make stop sexual harassment orders and conduct an agreed arbitration. There can be little or no financial cost of engaging with these mechanisms including because these agencies operate more informally and proactively than courts that determine common law claims. The AHRC reports high rates of participant satisfaction and specialises in handling discrimination matters, including matters involving intersectional discrimination.[46]

13.60 If the AHRC suspects that an employer or PCBU may not be complying with its duty to eliminate sexual harassment, it has regulatory powers to monitor and

43 Ibid recs 28–34.
44 Ibid 534.
45 *Fair Work Act 2009* (Cth) s 682(1).
46 Australian Human Rights Commission, *Annual Report 2023–24* (n 24) 21–3.

support compliance, including powers to conduct inquiries, give compliance notices, apply to enforce compliance notices through the courts, and accept enforceable undertakings.[47] In addition, the FWO can investigate any suspected non-compliance with the *Fair Work Act* without having received a formal complaint, and has standing to make related applications to the FWC or to a court.[48]

13.61 Under **Recommendation 53** in this Report, the FWO would attain equivalent functions to the AHRC's functions in relation to enforcement of the positive duty.

13.62 In contrast, there is no government agency empowered to assist a person or to take legal action in sexual violence matters relying on the common law.

13.63 Some aspects of the common law appear more beneficial than existing sexual harassment law for people who have experienced sexual violence. For example, the relevant torts apply in all areas of life. In contrast, the prohibitions on sexual harassment in the *Sex Discrimination Act* and *Fair Work Act* apply in only some areas of life (but see **Recommendations 48** and **49**).

## The meaning and understanding of 'sexual harassment'

13.64 When this Report refers to 'sexual harassment', it refers to the broad range of sexual violence recognised by law and included in legislative definitions of sexual harassment.[49] This includes suggestive looks and comments, physical touching and sexual assault. It can also include displaying suggestive objects, written comments, and sharing images. Sexual harassment can be a single incident, or a pattern of behaviour. The specific definition of 'sexual harassment' in each of the *Sex Discrimination Act* and the *Fair Work Act* is analysed in the next two chapters.

13.65 The term 'sexual harassment' is often misunderstood. It was apparent from many of the consultations held by the ALRC that it is commonly thought that sexual harassment, as a cause of action, does not extend to physical touching, assault, or other forms of physical sexual misconduct. In addition, the word 'harassment' in the term 'sexual harassment' may tend to mislead, including because the word can suggest conduct that is repetitive, whereas the legislative definitions include one-off incidents.

13.66 Additionally, some people have expressed dissatisfaction in relation to the term 'sexual harassment' for such a wide range of conduct. Some people felt it to be an inappropriate label for conduct such as sexual assault.

13.67 The lack of understanding as to what kind of conduct is prohibited by the statutory prohibition on sexual harassment is a problem. This lack of understanding

47 *Australian Human Rights Commission Act 1986* (Cth) pt II div 4A.
48 *Fair Work Act 2009* (Cth) pt 5–2.
49 'Sexual harassment' has a broad meaning in laws such as the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth) and in state and territory anti-discrimination laws.

is one of the reasons sexual harassment occurs.[50] A lack of understanding also prevents people who experience sexual harassment from taking legal action, because they may not identify what they experienced as being sexual harassment.[51] Some stakeholders identified a lack of awareness about the sexual harassment cause of action as the major barrier for people who have experienced sexual violence accessing the remedies available under the *Sex Discrimination Act*.

13.68 Addressing the lack of awareness about what constitutes unlawful sexual harassment is important. That is part of the objective of **Recommendation 1** which includes the proposal that access to legal advice be provided to people who have experienced sexual violence. Further consideration should also be given to whether a more appropriate term than 'sexual harassment' should be adopted in future.

## State and territory sexual harassment legislation

13.69 Before turning to discuss the sexual harassment regime under the *Sex Discrimination Act* in the chapter that follows, it may assist to observe that legislation in each Australian state and territory prohibits sexual harassment as both a form of discrimination, as well as including a standalone specific prohibition on sexual harassment.[52]

13.70 These laws differ in how sexual harassment is defined, the areas of life in which sexual harassment is prohibited, and the remedies available for a breach. Similarly, the law in some jurisdictions includes a positive duty to eliminate sexual harassment (and other forms of discrimination),[53] though this does not apply in all jurisdictions.

13.71 Some provisions of the *Sex Discrimination Act* offer greater benefit to people who experience sexual harassment than corresponding provisions under state and territory anti-discrimination laws (especially if this Report's recommendations were to be implemented).

13.72 Some jurisdictions have recently reviewed their anti-discrimination laws. The Queensland Human Rights Commission review has resulted in amendments to the *Anti-Discrimination Act 1991* (Qld) that will take effect in July 2025.[54] The Law

50 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 2) 157–8.

51 Circle Green Community Legal, *Submission 208*.

52 *Discrimination Act 1991* (ACT) ss 58–66; *Anti-Discrimination Act 1977* (NSW) ss 22A–22I; *Anti-Discrimination Act 1992* (NT) ss 22–49A; *Anti-Discrimination Act 1991* (Qld) ss 118, 119; *Equal Opportunity Act 1984* (SA) s 87; *Anti-Discrimination Act 1998* (Tas) ss 17, 22; *Equal Opportunity Act 2010* (Vic) ss 92–102; *Equal Opportunity Act 1984* (WA) ss 24–6.

53 See, eg, *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1992* (NT) s 18B; *Equal Opportunity Act 2010* (Vic) s 15.

54 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (July 2022); Queensland Government, *Final Queensland Government Response to the Queensland Human Rights Commission's Report, Building Belonging – Review of Queensland's Anti-Discrimination Act 1991* (April 2023); *Respect at Work and Other Matters Amendment Act 2024* (Qld).

Reform Commission of Western Australia completed its review of anti-discrimination legislation in 2022 and recommended some harmonisation with the *Sex Discrimination Act*.[55] New South Wales is currently reviewing its anti-discrimination laws.[56]

13.73 The processes of the respective anti-discrimination commissions vary. However, broadly summarised, each anti-discrimination commission handles enquiries, receives and filters complaints, and offers early dispute resolution. Where dispute resolution is not successful, a complaint may ordinarily proceed to a tribunal that may make determinations or orders.[57]

13.74 Each state and territory anti-discrimination law provides that a relevant tribunal may, for example:

- direct a respondent to discontinue or not repeat unlawful discrimination (including sexual harassment);
- order the respondent to undertake any reasonable act or course of conduct to redress any loss or damage suffered by an applicant; and
- order payment of compensation.[58]

13.75 Legislation in some, but not all, states and territories includes provision for the types of orders contemplated by **Recommendation 50**. For example, Tasmanian anti-discrimination law empowers a tribunal to order the respondent to pay a fine or penalty,[59] and Queensland anti-discrimination law permits a tribunal to order the respondent to implement programs to eliminate unlawful discrimination.[60]

13.76 Positive duties to eliminate sexual harassment and other types of unlawful discrimination have been recently introduced in the Australian Capital Territory and Northern Territory and will soon be introduced in Queensland.[61] Victorian law has contained a positive duty since 2011.[62]

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55 See, eg, Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) rec 99.

56 NSW Law Reform Commission, 'Anti-Discrimination Act Review', *NSW Department of Communities and Justice* <www.lawreform.nsw.gov.au/law-reform-commission-home/current-projects/anti-discrimination-act-review.html>.

57 *Human Rights Commission Act 2005* (ACT) div 4.2A; *Anti-Discrimination Act 1977* (NSW) pt 9 div 2 subdiv 6, pt 9 div 3; *Anti-Discrimination Act 1992* (NT) pt 6 div 4A; *Anti-Discrimination Act 1991* (Qld) ch 7 pt 1 div 4, ch 7 pt 2; *Equal Opportunity Act 1984* (SA) pt 8; *Anti-Discrimination Act 1998* (Tas) pt 6 div 4; *Equal Opportunity Act 2010* (Vic) pt 8 div 2; *Equal Opportunity Act 1984* (WA) pt VIII.

58 *Human Rights Commission Act 2005* (ACT) s 53E; *Anti-Discrimination Act 1977* (NSW) s 108; *Anti-Discrimination Act 1992* (NT) s 88; *Anti-Discrimination Act 1991* (Qld) s 209; *Equal Opportunity Act 1984* (SA) s 96; *Anti-Discrimination Act 1998* (Tas) s 89; *Equal Opportunity Act 2010* (Vic) ss 125, 141; *Equal Opportunity Act 1984* (WA) s 127.

59 *Anti-Discrimination Act 1998* (Tas) s 89(1)(e).

60 *Anti-Discrimination Act 1991* (Qld) s 209(1)(f).

61 *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1992* (NT) s 18B; *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, which will commence on 1 July 2025, will insert a new Chapter 5C into the primary Act: *Anti-Discrimination Act 1991* (Qld).

62 *Equal Opportunity Act 2010* (Vic) s 15.

13.77 States and territories that have not legislated a positive duty include New South Wales, South Australia, Tasmania, and Western Australia. The Law Reform Commission of Western Australian has recommended introducing a positive duty into the *Equal Opportunity Act 1984* (WA).[63] The New South Wales Law Reform Commission is currently considering whether to introduce a positive duty.[64]

13.78 The scope of each positive duty varies. For instance, the *Sex Discrimination Act* has the narrowest application, in that the positive duties apply only in connection with work, and only in relation to specified types of harassment and discrimination.[65] In some states and territories, the positive duty applies in relation to all types of discrimination, sexual harassment, unlawful vilification, and in Queensland the duty will also apply to 'other objectionable conduct'.[66]

13.79 All positive duties identify the duty holder to be institutional in nature and all are applicable to at least employers and PCBUs.[67] All provisions list similar matters to be taken into account when determining whether a duty holder has complied with the positive duty.

13.80 The way in which positive duties are enforced by each anti-discrimination system varies:

- In all states and territories with a positive duty, the duty applies to the elimination of all discrimination, including sexual harassment.
- The Australian Capital Territory Human Rights Commission and Australian Capital Territory Civil and Administrative Tribunal can consider whether an entity has met its positive duty when considering a complaint of discrimination.[68]
- The Northern Territory Anti-Discrimination Commissioner may consider whether a positive duty has been contravened when considering a complaint of discrimination. After an investigation into compliance with the duty, the Commissioner can accept enforceable undertakings or prepare reports for government.[69]
- The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) can investigate serious breaches of the positive duty. After an investigation into compliance with the duty, VEOHRC can accept enforceable undertakings,

63 Law Reform Commission of Western Australia (n 55) rec 121.

64 NSW Law Reform Commission, 'Terms of Reference', *Anti-Discrimination Act Review* [7] <www.lawreform.nsw.gov.au/law-reform-commission-home/current-projects/anti-discrimination-act-review/anti-discrimination-act-review-terms-of-reference.html>.

65 *Sex Discrimination Act 1984* (Cth) s 47C.

66 *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, which will commence on 1 July 2025, will introduce s 131I(1) into the primary Act.

67 The Northern Territory provision identifies the duty holder simply as a 'person', however when considering what reasonable and proportionate measures the person took, a decision maker must consider the size of the person's business or operation; the nature of the person's business or operation, the person's resources, the person's business and operational priorities, and practicability and cost: *Anti-Discrimination Act 1992* (NT) s 18B(3).

68 *Human Rights Commission Act 2005* (ACT) ss 52(3), 53DB.

69 *Anti-Discrimination Act 1992* (NT) ss 18C, 18D.

refer the matter to the Victorian Civil and Administrative Tribunal, or provide reports to government.[70]

- The Queensland Human Rights Commission is to be granted expanded functions to conduct investigations into suspected systemic contraventions of the law, accept written undertakings, and issue compliance notices in relation to the new positive duty.[71] These functions are similar to the functions of the AHRC.

## Extent of utilisation

13.81 State and territory anti-discrimination bodies do not consistently publish the number of sexual harassment complaints they receive each year. Consequently, it is difficult to assess the total number of complaints of sexual harassment made each year to Commonwealth, state, and territory anti-discrimination bodies. In 2017–18, almost 700 complaints were reportedly made across Australia.[72]

13.82 Similarly, state and territory courts do not consistently publish the number of applications they receive each year regarding sexual harassment or sexual violence. The recommendations in this chapter and in the following two chapters seek to increase the utilisation of sexual harassment provisions.

## Improving civil justice processes

13.83 This section considers how civil law processes can be enhanced to make them more trauma-informed and safe, to increase access to justice for people who have experienced sexual violence.

13.84 As discussed in **Chapter 1**, a trauma-informed approach means recognising the impacts of trauma and victimisation and how these may affect a person's ability to participate, and then addressing these impacts. A trauma-informed approach is essential to minimise the retraumatising effects of the system; do no further harm to those who become involved; and elicit better evidence from witnesses, and better engagement from people involved in all relevant processes.[73]

13.85 By recommending a more trauma-informed approach, the ALRC seeks to:

- improve access to justice in civil proceedings;
- better facilitate physical, psychological, and relational safety;
- ensure courts, tribunals, and other civil processes are appropriately responsive to the individual needs of all participants; and

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70 *Equal Opportunity Act 2010* (Vic) ss 127, 139.

71 *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 39, which will commence on 1 July 2025, will introduce pt 1A div 1 sub-div 4 into the primary Act.

72 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 2) 111.

73 Sarah Kendall, 'The Trauma-Informed Trial: A Conceptual Framework to Guide Practice' (2024) 43(3) *University of Queensland Law Journal* 319, 320.

- diminish the effects of myths and misconceptions about sexual violence.

13.86 These recommendations also seek to achieve greater harmonisation of practice across the various civil justice pathways in each of the Commonwealth, states, and territories.

13.87 **Recommendation 46** is not intended as a comprehensive or prescriptive list of measures that could make civil processes more trauma-informed. Rather, the measures are examples of the types of reforms that would be expected to enhance a wide range of civil processes. In addition to the listed measures, individual bodies overseeing civil processes may identify further measures that would be beneficial in their particular context. Each body should undertake a review of the types of matters in which a person's experience of sexual violence may be relevant, and identify ways in which the body might be able to better meet the needs of the person, such that the person is able to effectively participate in the process, and the risk of retraumatisation is minimised.

13.88 For example, the Migration and Refugee Division of the former Administrative Appeals Tribunal published 'Guidelines on Gender' and 'Guidelines on Vulnerable Persons' setting out procedural measures that may be applied, including in matters involving sexual violence. The Guidelines cover a range of measures including: using an interpreter of a particular gender or with particular training; witnesses giving evidence separately from other family members; allocating a single point of contact; and permitting delay to obtain expert evidence.[74]

13.89 In addition, some tribunals may be able to hold particular hearings via audio-visual link (AV link), telephone, or using a 'shuttle' process, in matters in which that might helpfully reduce the degree of contact between the parties.

## What we heard

13.90 Several submissions to this Inquiry supported the introduction in civil proceedings of measures commonly provided for in criminal proceedings.[75] Measures attracting specific support in submissions included training of judicial officers, registrars, tribunal members, lawyers, and interpreters; and provision of flexible evidence measures. Some submissions suggested that insufficient trauma-informed practice and training is being provided (or implemented).[76] Some submissions argued that training should be mandatory.[77]

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74 Frances Simmons and Chantal Bostock, 'Administrative Review in Refugee Cases: The Vulnerable Persons Guidelines and the Role of Legal Representatives' (2024) 47(2) *University of New South Wales Law Journal* 448, 467–8.

75 Working Women Queensland, *Submission 122*; Legal Aid NT, *Submission 146*; WEstJustice, *Submission 180*; Sexual Assault Services Victoria, *Submission 203*.

76 Working Women Queensland, *Submission 122*; Legal Aid NT, *Submission 146*; WEstJustice, *Submission 180*.

77 WEstJustice, *Submission 180*.

13.91 Women with Disabilities Australia noted that trauma-informed measures would particularly assist women with disabilities who have experienced sexual violence to access justice pathways beyond criminal justice.[78] Other submissions also noted the importance of trauma-informed principles, practices, and approaches in the civil context.[79] Working Women Queensland argued that

> embedding a trauma-informed approach is imperative. Without these protections, victim-survivors continue to experience re-traumatisation and negative impact on the proceeding and outcomes.[80]

## Measures, mechanisms, and evidentiary rules

13.92 Over time a range of measures, mechanisms, and evidentiary rules have been introduced or amended in criminal proceedings to facilitate the safer participation of people who have experienced sexual violence. These reforms have been implemented following various inquiries, reports, and legislative reform. Reforms have included the introduction of intermediaries, reform to cross-examination practices, training and education on the nature and impact of sexual violence, and the adoption of flexible evidence measures.

13.93 These changes have largely occurred on a jurisdiction-by-jurisdiction basis, or even forum-by-forum, rather than uniformly across Australia. Moreover, developments in criminal processes have not always been accompanied by equivalent reform in civil processes. This has resulted in different forums across the Commonwealth, states, and territories each having in place different combinations of the measures, mechanisms, and evidentiary rules referred to below. Furthermore, the way that these measures, mechanisms, and evidentiary rules are legislated and implemented in practice differs across jurisdictions, and between criminal and civil processes.

13.94 The impact of trauma, and of myths and misconceptions, on a person who has experienced sexual violence may be just as severe when participating in a civil process as in a criminal process. The justifications for introducing and enhancing trauma-informed measures in criminal processes apply equally in the wide range of civil pathways, although the measures may need to be implemented differently taking into account the context of civil processes, and the particular forum involved.

78 Women With Disabilities Australia & People with Disability Australia, *Submission 192*.
79 National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*; Legal Aid NT, *Submission 146*; WEstJustice, *Submission 180*.
80 Working Women Queensland, *Submission 122*.

# Enhancing civil justice processes

**Recommendation 46**

1. Commonwealth, state, and territory laws relating to civil proceedings, as well as court and tribunal processes (including processes relating to their conciliation, mediation, and hearing functions) should be amended, where reasonably practicable, so that the following measures, mechanisms, and evidentiary rules are available in any civil proceeding in which an allegation of sexual violence is raised:

   ***Delay***

   a. Prioritise for hearing (and for any pre-recorded evidence hearing) matters involving children, or people with a cognitive impairment, who allege they have experienced sexual violence.

   ***Flexible evidence measures***

   b. Establish 'ground rules' for appropriate questioning of witnesses, and appropriate flexible evidence measures, as part of case management hearings.

   c. Record evidence given at trial by witnesses who allege having experienced sexual violence to avoid the need for that evidence to be given again on any re-trial.

   d. Any person who alleges they have experienced sexual violence should have access to the following flexible evidence measures:

      i. giving evidence with a one-way screen or other device to avoid visual contact with the person alleged to have used sexual violence;

      ii. giving evidence from a remote location within the court precinct via video link;

      iii. giving evidence from a remote location outside the court precinct via video link;

      iv. having a support person present while giving evidence; and

      v. having a canine companion present while giving evidence.

e. A court should have explicit discretion to close the court when a person who alleges having experienced sexual violence gives evidence, and the court should give significant weight to the potential for the person to experience trauma if they were to give evidence in open court.

f. Make available Indigenous Liaison Officers to assist courts to operate in culturally safer ways, and to assist First Nations people to engage with court proceedings, whether as a party, witness, or otherwise, in relation to matters in which sexual violence is a relevant issue.

***Interpreters***

g. Where necessary, make available an appropriately qualified interpreter trained in trauma-informed principles (see **Recommendation 33**) to interpret for a person who alleges sexual violence.

***Intermediaries***

h. Make available an intermediary for witnesses who are a child or have a communication difficulty and allege having experienced sexual violence.

***Improper questioning***

i. Relevant evidence legislation should be amended to introduce a provision equivalent to section 41 of the *Evidence Act 1995* (Cth) (where not already enacted in the particular jurisdiction), requiring a court to intervene when an improper question is put to a witness.

***Cross-examination***

j. Prohibit personal cross-examination by an unrepresented person of a witness when there is an allegation of sexual violence between the unrepresented person and the witness (or an allegation of violence against a family member of the witness) and provide for any cross-examination to be conducted by a legal practitioner who is made available without cost to the unrepresented person.

***Admissibility of evidence***

k. Require that the leave of the court or tribunal be obtained to compel the production of, or to produce, or to adduce, evidence of confidential sexual assault counselling communications made by a party or witness who alleges having experienced sexual violence, unless the party or witness has waived confidentiality. In considering whether leave should be granted, the court or tribunal should take into account the probative value of the evidence and the prejudice or harm that would be caused by the loss of confidentiality.

l. Exclude evidence of the sexual reputation of a witness who alleges having experienced sexual violence and require that the leave of the court be obtained for the admission of evidence about that person's sexual history.

m. Provide for admissibility of expert evidence regarding the nature and effects of sexual violence upon a person alleging having experienced sexual violence (including effects on memory, the nature and effects of trauma, and the nature of sexual violence), to be used for the purpose of assessing the credibility and reliability of the person's evidence.

The measures or mechanisms outlined above should, unless the court or tribunal otherwise determines, be made available only when the alleged sexual violence is capable of constituting a criminal offence.

2. Training and education should be made available to judges, tribunal members, court and tribunal staff, and lawyers involved in civil proceedings involving allegations of sexual violence in relation to:

   a. Trauma-informed practice, including cultural competence and cultural safety.

   b. Working with interpreters in sexual violence matters.

   c. Working with intermediaries in sexual violence matters.

   d. The duty to intervene to prevent improper questioning, to ensure that the requirements of a provision equivalent to section 41 of the *Evidence Act 1995* (Cth) are well understood and consistently applied.

3. Courts and tribunals should, where appropriate, publish a bench book relating to civil matters involving allegations of sexual violence.

## Reasons for the recommendation

13.95 This Recommendation seeks to improve access to justice and improve the experience of civil justice pathways for people who have experienced sexual violence by making civil processes more trauma-informed, and by diminishing the impact of common myths and misconceptions about sexual violence.

13.96 A number of measures, mechanisms, and evidentiary rules that implement a trauma-informed approach or address myths about sexual violence currently apply in criminal proceedings relating to sexual violence. In this Report, the ALRC has recommended reform to some of these initiatives. However, many of these initiatives that are applicable in the criminal justice system, are not currently expressly available in civil justice court processes, tribunal processes, dispute resolution processes (such as conciliation at a human rights body or anti-discrimination body), or investigations by regulators.

13.97 All civil processes should be conducted in a manner that is fair to all parties, does not unnecessarily traumatise any party, and does not rely on myths and misconceptions about sexual violence.

13.98 The ALRC recommends that the measures, mechanisms, and evidentiary rules set out below be implemented 'where reasonably practicable'. This qualification seeks to recognise that not all measures will be practicable in all civil processes, nor in all locations, and that it would be appropriate for each body and jurisdiction to have discretion to identify which measures should appropriately be implemented in each respective context, and how.

13.99 A number of bodies conducting civil processes probably already have discretion to implement at least some of the measures set out in **Recommendation 46**. For example, courts often have 'inherent powers' to control the conduct of proceedings.[81] Implementing this Recommendation would make explicit the available powers and responsibilities of relevant bodies. This would clarify for all people involved what they might expect. It would also assist to turn the minds of all involved as to what types of measures might be appropriate in a particular matter. Some aspects of the Recommendation contemplate that particular measures should be available as of right, rather than at the discretion of the particular forum in the particular matter. For those aspects, implementing the Recommendation would provide people who have experienced sexual violence with greater protection than is currently in place. Accordingly, it is anticipated that implementing the Recommendation would ease any concerns that a person may have when deciding whether or not to engage with a particular civil justice process.

13.100 The AHRC has recommended that the Standing Council of Attorneys-General give consideration to 'additional witness safeguards and protections' for alleged

81 See Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57, 63–70.

victims of sexual harassment in civil proceedings.[82] Suggested measures included closed courtrooms, remote or pre-recorded evidence, recording of evidence during the hearing, protection from cross-examination by a self-represented party, and the provision of support persons.[83]

13.101 A recent report in the Australian Capital Territory further recommended that any reforms relating to victim survivors giving evidence in criminal proceedings should be reflected in civil proceedings.[84] The report noted that current protections in family and civil proceedings are at the discretion of the court, such that victim survivors have less agency than if the relevant provision were to require the court to make those protections available on request.[85]

## Delay

13.102 As discussed in **Chapter 4**, delay in proceedings can have detrimental effects on those involved. It is common practice in criminal courts dealing with sexual violence to prioritise proceedings involving a complainant who is a child or who has a cognitive impairment.

13.103 The impact of delay in the justice system is more significant for children and cognitively impaired people for reasons such as:

- significant differences in memory processing and cognition of difficult questioning;[86]
- the stress of awaiting proceedings can cause children to experience complex mental health and behavioural problems such as nightmares, depression, an inability to concentrate, and in some cases self-harm or suicide attempts;[87]
- the burden of proceedings on a child or cognitively impaired adult victim-survivor's relationship with their family, community, peers, educational and other pursuits;[88]
- the inability for victim-survivors to discuss the matter, should they choose to, with a trusted support person for an extended period (while they are a witness)

82 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 2) rec 39.

83 Ibid Rec 39.

84 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) rec 23, Appendix 6 'Mandatory Closure of Courtroom'. The Steering Committee noted that such protections are 'particularly important in family violence proceedings involving sexual assault'.

85 Ibid.

86 For a discussion of the capacity of children, including cognitively impaired children, to give evidence see, eg, Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2020) ch 2.

87 Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (The Australasian Institute of Judicial Administration, Attorney-General's Department (Cth), CQUniversity College of Law and Queensland Centre for Domestic and Family Violence Research, August 2023) 111.

88 In relation to children, see ibid 112.

is disproportionately burdensome for children and those with cognitive impairments;[89] and

- for a child victim-survivor, a substantive delay may constitute a more significant proportion of their lifetime in comparison to an adult complainant.[90]

13.104 Given the disproportionate effect delay can have on children and people with cognitive impairments, the ALRC considers that civil processes should prioritise for hearing (and for any pre-recorded evidence hearing) matters involving children or people with a cognitive impairment who allege they have experienced sexual violence. Courts and tribunals should consider how best to implement this reform in light of their existing mechanisms for prioritising matters.

13.105 Pre-recording evidence can reduce some of the impact caused by delay and minimise stress and traumatisation associated with a trial. To enhance the benefits of pre-recorded evidence hearings, where available in civil processes, they should be conducted in a comfortable, accessible, private space and witnesses should be entitled to be accompanied by a support person or victim advocate. Pre-recording evidence may especially be valuable for a witness when it is not otherwise practicable to prioritise the particular proceeding for hearing.

13.106 As set out in **Chapter 9**, a pre-recorded evidence hearing is a hearing for a witness to record their evidence (including their evidence-in-chief, cross-examination, and any re-examination) without the jury present, at an earlier date than other witnesses in the proceedings. Pre-recorded evidence hearings are available in some Australian jurisdictions for child complainants and adults with a cognitive impairment in civil proceedings.[91] However, they are generally not available to all adult complainants.

## Flexible evidence measures

13.107 Flexible evidence measures of the kind dealt with in this section are often available in criminal proceedings to help reduce some of the stress, trauma and distress experienced by those giving evidence, and to assist people to give their best evidence. Flexible evidence measures may include, for example, recording evidence at trial, the use of a screen, giving evidence from a remote location, or having an animal companion while giving evidence.[92] The particular flexible measures to be adopted in a particular matter may largely be decided when determining the 'ground rules' for trial in a case management hearing.

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89 Pre-recording evidence may have benefits in this regard: Australasian Institute of Judicial Administration (n 86) 100.

90 New Zealand Law Commission (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, 2015) 63.

91 See, eg, *Evidence Act 1929* (SA) s 12AB. There are variations in eligibility between the Australian jurisdictions including variation in the definition of 'child' and the nature of the impairment for an eligible adult.

92 See **Chapter 10**.

13.108 The experience of distress and trauma when giving evidence is not confined to criminal proceedings. The ALRC therefore recommends that equivalent measures should be available in civil proceedings.

13.109 Submissions and consultees were generally supportive of flexible evidence measures being available for people who have experienced sexual violence in a range of civil proceedings, noting that this would create consistency between civil and criminal proceedings. Some stakeholders noted that existing procedures already provide for some of these measures.

13.110 Some stakeholders commented that some courts and tribunals would not be able to accommodate all of the flexible evidence measures listed in **Recommendation 46** due to their location, physical set up of the premises, or lack of resources. They observed that the introduction or expansion of flexible arrangements has an associated cost, and that there would need to be appropriate funding provided to make these arrangements available.

### *Establishing ground rules*

13.111 In criminal proceedings in some jurisdictions, 'ground rules' hearings are held, in which judges, counsel and other participants, such as intermediaries, discuss the needs of particular witnesses. As noted in **Chapter 10**, ground rules hearings can be used to plan adaptations to questioning, or to the conduct of the hearing, that may be necessary to facilitate a person giving their best evidence. The court may then make orders or give directions for how these needs should be met. **Recommendation 32** relates to ground rules hearings for criminal proceedings.

13.112 In civil court and tribunal proceedings, case management hearings are already routinely held. Case management hearings are an appropriate occasion in the context of civil proceedings when 'ground rules' could be established and set out in orders as appropriate. Stakeholders agreed that it should not ordinarily be necessary to hold a separate 'ground rules' hearing in civil proceedings, but noted that courts and tribunals may require additional funding in order to implement any ground rules that require the use of additional time or resources.

13.113 As identified in **Chapter 10**, a ground rules hearing may include consideration of, for example, the following topics:

- the manner and duration of questioning a witness;
- the use of communication aids for a witness;
- what can and cannot be put to the witness; and
- generally, any direction regarding the fair and efficient conduct of proceedings, or in the interests of justice, or that the court considers appropriate.

13.114 Further detail about issues that could be considered is provided by the *Multi-Jurisdictional Court Guide for the Intermediary Program: Intermediaries and*

*Ground Rules Hearings*, which has some examples of specific matters that may be covered under each of these topics at a ground rules hearing.[93]

13.115 Alongside the considerations listed above, the need for flexible arrangements, discussed in more detail below, should be considered at case management hearings. They are important mechanisms to reduce some of the stress, trauma and distress experienced by those giving evidence.

### *Recording evidence at trial*

13.116 Recording evidence given at trial enables the recorded evidence to be used at any re-trial, appeals, subsequent trials, or in other processes. Use of recorded evidence is intended to minimise the need for a person to retell their experience multiple times, thereby reducing the risk of trauma. Previous reports have recommended that recordings of evidence in trials be available for this reason.[94]

13.117 For example, legislation in the Australian Capital Territory requires evidence given in a criminal trial to be recorded if the witness consents, and empowers the court to order that the evidence be recorded even if the witness does not consent (taking into account the witness's wishes).[95] The recorded evidence is then admissible in subsequent related hearings, including civil proceedings, 'unless the court in the related proceedings otherwise orders'.[96] A similar provision should be enacted in each jurisdiction for recording of evidence in a civil hearing.

13.118 A witness who is giving evidence about sexual violence should automatically qualify for recording of their evidence, without requiring an application to be lodged for that purpose,[97] and without requiring the court to expressly declare the particular witness to be 'special' or 'vulnerable'.[98]

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93 Supreme Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Program: Intermediaries and Ground Rules Hearing* (2023) [5.4].

94 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (2017) rec 56; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 2) rec 39.

95 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69.

96 Ibid s 69(5), (6).

97 Cf *Evidence Act 1929* (SA) s 13C, which provides that a court 'may', on application by the prosecution, order that an audio-visual record be made of a vulnerable witness's evidence before the court (unless the witness is the alleged victim of a child sexual offence, in which case the court 'must' make such an order).

98 For example, a 'vulnerable witness' in the Northern Territory and a 'special witness' in Queensland are each defined to include complainants of a sexual offence matter: *Evidence Act 1939* (NT) s 21AB; *Evidence Act 1977* (Qld) s 21A. In comparison, a 'special witness' in Tasmania is defined as someone 'likely to suffer severe emotional trauma; or to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily': *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8.

13.119 The recording of evidence at trial may require resources to ensure that suitable technology is available in court to record the trial,[99] as well as training of court staff to use this technology.[100]

### *Specific courtroom measures*

13.120 Specific measures in the courtroom (commonly known as 'special measures') are used to help reduce some of the stress and distress a complainant can experience when giving evidence, which can help the complainant give their best evidence. The recommended reforms seek to ensure that specific measures are available and easily accessed by witnesses when giving evidence. These measures need to be applied in accordance with trauma-informed principles to be effective.

13.121 For criminal proceedings, the law in most states and territories enables a complainant to:

- give evidence in the courtroom using a screen or a one-way screen so that the complainant cannot see the accused person, but the accused person and jury can see the complainant;[101]
- give evidence from a remote location via AV link or closed-circuit television (CCTV) from a different room in the court precinct or from a location outside the court precinct;[102] and
- have a support person present when giving evidence.[103]

13.122 Additional arrangements in some states and territories include the use of animal companions when giving evidence; planning who should be seated in the complainant's direct line of vision; requiring the judge and barristers not to wear robes; requiring barristers to remain seated during cross-examination; and separate entrances and exits to the court room for the complainant and accused person.[104]

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99 See also Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 94) rec 57.

100 See **Chapter 7**.

101 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 47; *Criminal Procedure Act 1986* (NSW) s 294B(3)(b); *Evidence Act 1939* (NT) s 21A(2AB); *Evidence Act 1977* (Qld) s 21A(2)(a); *Evidence Act 1929* (SA) s 13A(2); *Criminal Procedure Act 2009* (Vic) ss 360(b), 364; *Evidence Act 1906* (WA) s 106N(4). Screens will be available in Tasmania from 31 January 2025: *Evidence (Children and Special Witnesses) Amendment Act 2024* (Tas).

102 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 68; *Criminal Procedure Act 1986* (NSW) s 294B(3); *Evidence Act 1939* (NT) ss 21A(2), 21B(2), 21C(1); *Evidence Act 1977* (Qld) s 21A(2)(c); *Evidence Act 1929* (SA) s 13A(2)(a); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2); *Criminal Procedure Act 2009* (Vic) s 360(a); *Evidence Act 1906* (WA) ss 106R(4), 106N.

103 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 49; *Criminal Procedure Act 1986* (NSW) s 294C; *Evidence Act 1939* (NT) s 21A(2AD)(a); *Evidence Act 1977* (Qld) s 21A(2)(d); *Evidence Act 1929* (SA) s 13A(2)(e); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2); *Criminal Procedure Act 2009* (Vic) s 360(c); *Evidence Act 1906* (WA) s 106R(4).

104 See, eg, *Criminal Procedure Act 2009* (Vic) s 360; *Criminal Procedure Act 1986* (NSW) s 294B(3).

13.123 In some jurisdictions specific measures are already available in both criminal and civil proceedings.[105] For example, in the Northern Territory, vulnerable witness provisions such as screens and support persons are available in both types of proceedings.[106] However, the availability of flexible evidence measures is inconsistent in civil proceedings across states and territories in terms of the types of proceedings in which they are available, which measures are available, and who can access them.

13.124 Submissions that discussed flexible arrangements generally supported their use in helping sexual offence complainants to give their best evidence.[107] One stakeholder did express concern that the use of screens in the courtroom may cause the jury to perceive the accused person in a prejudicial way. That stakeholder preferred the use of AV links or CCTV instead. In contrast, one submission expressed concern about complainants delivering evidence via AV link or CCTV as some research suggests that juries find evidence given in the court room to be more credible.[108]

### *Closed court*

13.125 The ALRC recommends that courts and tribunals have explicit discretion in civil proceedings to close the court when a person who alleges having experienced sexual violence gives evidence. Significant weight should be given to the potential for the person to be traumatised if they were to give evidence in open court or tribunal proceedings. The AHRC has recommended that particular civil proceedings be conducted in closed court when dealing with allegations of sexual harassment.[109]

13.126 The principle of 'open justice' requires that court proceedings generally be conducted publicly, as a fundamental attribute of a fair trial, and a fundamental rule of the common law.[110] However, the requirement is not absolute, and can be limited in exceptional circumstances.[111] As noted by Mortimer CJ, there can be tensions between principles of open justice and competing interests of personal privacy (especially in sexual harassment cases) that need to be balanced at a 'case-by-case level' and also a 'justice system level' to ensure fairness and avoid harm.[112]

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105 See, eg, *Criminal Procedure Act 1986* (NSW) ss 306ZA–306ZI; *Evidence Act 1977* (Qld) ss 21A, 21AAA.

106 *Evidence Act 1939* (NT) s 21A.

107 See, eg, Name withheld, *Submission 6*; S Filmer, *Submission 30*; Royal Australian and New Zealand College of Psychiatrists, *Submission 154*; Not published, *Submission 197*; Sexual Assault Services Victoria, *Submission 203*; Full Stop Australia, *Submission 214*; Centre for Innovative Justice, *Submission 216*.

108 K Seear, G Grant, S Mulcahy and A Farrugia, *Submission 177*.

109 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 2) rec 39.

110 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Interim Report No 127, 2015) [10.43]–[10.80].

111 Ibid.

112 The Hon Chief Justice Mortimer, 'Reflections on the Concept of "Open Justice"' (Seabrook Chambers Public Lecture, Melbourne Law School, 2 October 2024) [95].

13.127 For example, in criminal proceedings relating to sexual violence or family violence in the Australian Capital Territory, a person may apply for the court to be closed while a witness gives their evidence, and the court must consider the interests of justice, but must give 'paramount consideration' to the witness's preference.[113] In the Northern Territory the court 'is to be closed' in criminal cases involving sexual offences while evidence of a 'vulnerable witness' is being taken.[114] Vulnerable witnesses include children, people with cognitive impairment or intellectual disability, victims of sexual offences and domestic violence offences, and others 'whom a court considers to be vulnerable'.[115]

13.128 A related aspect of 'open justice' is that information about court proceedings should ordinarily be publicly available.[116] That aspect is similarly subject to limitations. For example, the Federal Court is empowered to order that information about particular proceedings not be made public if 'necessary to protect the safety of any person', or if 'necessary to avoid causing undue distress or embarrassment' in proceedings alleging a sexual offence.[117] The Federal Court has held that the concept of 'safety' in this context should be construed broadly, and that an adverse effect on the mental health of a person may be so serious as to threaten their safety, but that experiences of anxiety and depressive mood may not in themselves be sufficient to establish a threat to safety.[118]

13.129 Courts, in at least some circumstances, already have discretion to close civil proceedings during the giving of particular evidence.[119] Making it clear that this power exists in relation to witnesses who have experienced sexual violence should assist parties and courts in civil proceedings to turn their minds to whether it is appropriate to close the court for a particular witness.

13.130 There is a risk, if evidence regarding sexual violence is regularly excluded from public audiences, that the problem of sexual violence in our society remains hidden from view. However, the impact of the presence of a public audience on an individual witness may be significant, and excluding the public audience may significantly reduce the risk of trauma for that witness.

### *Indigenous Liaison Officers*

13.131 The ALRC recommends that courts and tribunals engage Indigenous Liaison Officers to assist courts to operate in culturally safer ways, and to assist First Nations

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113 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 73.

114 *Evidence Act 1939* (NT) s 21F.

115 Ibid s 21AB.

116 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 671, 674.

117 *Federal Court of Australia Act 1976* (Cth) s 37AG.

118 *Ferguson v Tasmanian Cricket Association (trading as Cricket Tasmania) (No 2)* (2022) 404 ALR 262, [12].

119 The Hon Justice Lee, 'Open Justice: A National Approach?' (Presentation, Piddington Society Conference, Melbourne Law School, 8 September 2024); Judicial College of Victoria, *Open Courts Bench Book* (online at 8 January 2025) 110–12; Judicial Commission of New South Wales, *Civil Trials Bench Book* (online at 8 January 2025) [1–0450].

people to engage with court proceedings, whether as a party, witness, or otherwise, in relation to matters in which sexual violence is a relevant issue. Dedicated resources and funding would need to be provided to courts and tribunals for this purpose.

13.132 Indigenous Liaison Officers are not ordinarily available in criminal courts. Some criminal courts have specialist programs for First Nations defendants, and those programs often incorporate roles similar to Indigenous Liaison Officers.[120] Currently, Indigenous Family Liaison Officers (IFLOs) are available in some registries of the Federal Circuit and Family Court of Australia. IFLOs are available to assist families understand and engage with court processes and can connect families with other legal and non-legal services.[121] IFLOs do not provide legal advice but they can:

- attend hearings to provide support;
- assist with accessing information and filing documents;
- connect people with services; and
- speak with community about court processes and the role of IFLOs (this extends to services and the legal profession).[122]

13.133 The IFLO program has not yet been formally evaluated, but the ALRC heard from a number of stakeholders that the IFLO program is working effectively and that matters involving IFLO assistance were on average resolved more quickly than matters that did not.[123] Building on this success, the benefits of liaison officers should be made available for First Nations litigants in a wide range of other civil processes.

## Interpreters

13.134 As detailed in **Chapter 10**, interpreters are essential in legal settings to ensure that First Nations people and people from culturally and linguistically diverse backgrounds can communicate their experience of sexual violence to legal practitioners, and when giving evidence. However, there is currently a national shortage of interpreters who specialise in interpreting in a legal setting.

13.135 A national shortage of appropriately trained interpreters has the same implications in civil processes as in criminal processes. Applicants and witnesses should be empowered to appropriately participate in justice processes. The ALRC therefore recommends that Australian, state, and territory governments provide

120 See, eg, Children's Court of New South Wales, 'Youth Koori Court' <https://childrenscourt.nsw.gov.au/childrens-court/criminal/koori-court.html>; Magistrates' Court of Victoria, 'Koori Court' <www.mcv.vic.gov.au/about/koori-court>; Queensland Courts, 'Murri Court' <www.courts.qld.gov.au/courts/murri-court>; Magistrates Court of Western Australia, 'Senior Aboriginal Liaison Officer's' <www.magistratescourt.wa.gov.au/S/senior_aboriginal_liaison_officers.aspx>; Legal Services Commission South Australia, 'The Nunga Court Division (Aboriginal Court Day)' <www.lsc.sa.gov.au/dsh/ch04s07.php>.

121 Federal Circuit and Family Court of Australia, 'Indigenous Family Liaison Officers' <www.fcfcoa.gov.au/fl/pubs/iflo-national>.

122 Ibid.

123 The Federal Circuit and Family Court of Australia indicated in correspondence that this analysis was based on a sample of cases only, and is not necessarily representative of a broader trend.

adequate funding and training to interpreting services, so that participants in civil processes who allege having experienced sexual violence and require an interpreter are provided with a trauma-informed, trained interpreter. In addition, all those in the legal system who work with interpreters, including legal practitioners, judicial officers, tribunal members, and court and tribunal staff, should engage in nationally consistent and ongoing training on best practices in working with interpreters in sexual violence matters specifically (see **Recommendation 11**).

## Intermediaries

13.136 Intermediaries play an important role in promoting fairness, by assisting the witness to understand what is being asked of them, and by assisting police, lawyers and the court to communicate effectively with the witness.[124]

13.137 As discussed in **Chapter 10**, the ALRC recommends that the law in the various jurisdictions should be made more consistent and should ensure that intermediaries are available to children and people who have communication difficulties in criminal matters. The intention is that, in all jurisdictions, complainants would be eligible to access an intermediary if they are a child or have a communication difficulty.

13.138 Some stakeholders expressed support for the provision of intermediaries for civil proceedings but noted that appropriate resources and funding would need to be available to provide this service for civil processes.

13.139 As this would be a new mechanism in civil proceedings it would be important to establish nationally consistent and ongoing education for judicial officers, tribunal members, and legal practitioners on working with intermediaries. This is particularly the case for those who do not have previous experience engaging with intermediaries. In addition, collaboration and professional development to enhance the work of intermediaries should be supported for the reasons set out in **Chapter 10**.

## Improper questioning

13.140 As noted in **Chapter 12**, cross-examination is a process through which a witness' credibility is tested, as well as the accuracy and reliability of their evidence. There is an inherent tension between the benefits of rigorously testing evidence on the one hand, and the benefits of protecting witnesses from trauma, and enabling witnesses to give their best evidence, on the other hand. This aspect of **Recommendation 46** seeks to address this tension.

13.141 All Australian jurisdictions have enacted restrictions to prohibit 'improper questioning' of witnesses in court during cross-examination in civil proceedings as

124 See **Chapter 10**.

well as criminal proceedings.[125] However, the way these restrictions are legislated differs between jurisdictions.

13.142 Provisions such as s 41 of the *Evidence Act 1995* (Cth) and s 21 of the *Evidence Act 1977* (Qld) provide protection for all witnesses, including a positive obligation on judges to intervene. However, not all jurisdictions have equivalent laws, and in any event, such provisions have been underutilised in practice.

13.143 As discussed in **Chapter 12**, alongside wider adoption of a provision equivalent to s 41 of the *Evidence Act 1995* (Cth), a culture shift is required to ensure the relevant provisions are implemented appropriately. Judicial education is a key way to ensure this shift occurs.

13.144 The ALRC considers that these recommended measures would make the process of cross-examination in civil proceedings less traumatic by requiring judicial intervention, harmonising how 'improper questions' are defined in legislation, enhancing judicial understanding of applicant and witness experiences, and encouraging a shift in cross-examination practices.

13.145 Tribunals are not bound by the rules of evidence.[126] Tribunals should therefore consider how best to implement the recommended measures within their operational framework. For example, appropriate measures for tribunals might include issuing practice directions and conducting training on improper questioning.

## Cross-examination by self-represented litigants

13.146 Cross-examination of a witness by a self-represented litigant about sexual violence carries a high risk of retraumatisation, whether the self-represented litigant is the person alleging sexual violence, or the person alleged to have used sexual violence.[127] As set out in **Chapter 12**, the extent to which personal cross-examination is prohibited in criminal proceedings varies between jurisdictions.

13.147 Provisions prohibiting personal cross examination by a self-represented litigant in civil proceedings are similarly inconsistent (or non-existent).

13.148 Stakeholders were generally supportive of this recommended measure, highlighting the harm that can be caused by an unrepresented litigant in cross-examination. Stakeholders noted that funding would be required to ensure an appropriate alternative questioner is available for civil processes.

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125 *Evidence Act 1995* (Cth) s 41; *Evidence Act 2011* (ACT) s 41; *Evidence Act 1995* (NSW) s 41; *Evidence Act 1939* (NT) s 21QB(4) Note 2; *Evidence (National Uniform Legislation) Act 2011* (NT) s 41(2); *Evidence Act 1977* (Qld) s 21; *Evidence Act 1929* (SA) s 25; *Evidence Act 2001* (Tas) s 41; *Evidence Act 2008* (Vic) s 41; *Evidence Act 1906* (WA) s 26.

126 See, eg, *Administrative Review Tribunal Act 2024* (Cth) s 52; *Fair Work Act 2009* (Cth) s 591. The *Evidence Act 1995* (Cth) applies to court proceedings only, not to tribunal proceedings: s 4.

127 See **Chapter 12**.

13.149 The ALRC therefore recommends that personal cross-examination by an unrepresented person of a witness be prohibited in all court and tribunal proceedings when there is an allegation of sexual violence between the self-represented person and a witness, and that funding be provided for a legal practitioner to conduct the cross-examination instead. Examples of existing provisions include s 102NA of the *Family Law Act 1975* (Cth), and ss 71–72 of the *Family Violence Protection Act 2008* (Vic). These provisions are underpinned by research findings that personal cross-examination tends to result in poor quality evidence, can be used to harass and intimidate, and that people who have experienced violence face significant challenges effectively cross-examining the person who used violence against them.[128]

13.150 Furthermore, a similar prohibition should apply against a self-represented litigant cross-examining any family member of a person who alleges sexual violence against the self-represented litigant.

13.151 The ALRC recommends greater consistency across civil jurisdictions in relation to who is protected under these provisions; which proceedings the protection extends to; who may appoint the alternate questioner; and who the alternate questioner may be. In addition, legal aid commissions should be required and resourced to fund and arrange alternate questioners.

## Admissibility of evidence

### *Sexual assault counselling communications*

13.152 In criminal matters, the leave of the court is usually required if an accused person seeks to adduce evidence regarding, or compel production of records of, any counselling sessions conducted with the complainant relating to the alleged sexual violence. In some jurisdictions, leave is similarly required if a party to civil proceedings seeks to adduce equivalent evidence, or compel production of equivalent records.[129] However, in some jurisdictions, leave is not required in civil proceedings.

13.153 For example, in the Northern Territory, leave is required in criminal proceedings only.[130] In New South Wales, Western Australia, and Tasmania, the court 'may direct' that particular evidence not be adduced, but there is no obligation on the party seeking to adduce the evidence to seek leave from the court.[131] In Commonwealth courts, leave is not required to adduce such evidence in criminal or civil proceedings.

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128 Jane Wangmann, Miranda Kaye and Tracey Booth, 'Addressing the Problem of Direct Cross-Examination in Australian Family Law Proceedings' 45(4) *University of New South Wales Law Journal* 1415, 1418–19.

129 See, eg, *Evidence Act 1977* (Qld) pt 2 div 2A; *Evidence Act 1929* (SA) pt 7 div 9; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt II div 2A.

130 *Evidence Act 1939* (NT) ss 56A, 56B.

131 *Evidence Act 1995* (NSW) s 126B; *Evidence Act 2001* (Tas) s 126B; *Evidence Act 1906* (WA) ss 20A–20F.

13.154 Confidential sexual assault counselling records may be of limited probative value in relation to whether alleged sexual violence in fact occurred. However, counselling records may be of greater relevance to the question of whether a person suffered harm, such as psychological injury, as a result of sexual violence. It is appropriate that a court in civil proceedings should have to turn its mind on each occasion to whether the likely probative value of the particular evidence outweighs the potential for trauma or other harm to the person who has participated in the counselling.

### *Evidence regarding sexual reputation and sexual history*

13.155 As set out in **Chapter 12**, all jurisdictions except the Northern Territory have imposed an absolute prohibition on the admission of evidence of a complainant's sexual reputation in criminal proceedings. Northern Territory laws restrict sexual reputation evidence in some circumstances, but do not impose an absolute prohibition.[132]

13.156 As noted in **Chapter 12**, the justification for these prohibitions is that evidence of sexual reputation is highly prejudicial and too far-removed from the facts in issue in a sexual offence proceeding to be sufficiently relevant or probative as to warrant admission as evidence. The same justification applies equivalently to civil proceedings.

13.157 The ALRC therefore recommends that evidence of the sexual reputation of a witness who alleges having experienced sexual violence should be inadmissible in civil court and tribunal proceedings. The ALRC considers that this would reduce unnecessary traumatisation of witnesses, and reduce the impact on civil proceedings of myths and misconceptions associated with sexual violence.

13.158 As summarised in **Chapter 12**, leave is ordinarily required in most jurisdictions in criminal proceedings to adduce evidence regarding the sexual history of the complainant. In contrast, leave is not ordinarily required to adduce equivalent evidence in civil proceedings.[133]

13.159 Evidence regarding a person's sexual history can in some cases be invasive, traumatic, and irrelevant to civil proceedings. In other cases, evidence about specific aspects of a person's sexual history may be directly relevant to the issues in a civil matter. It is appropriate that the court turn its mind on each occasion to the question of whether it is appropriate on balance for the evidence to be adduced in the civil proceeding. Accordingly, the ALRC recommends that leave should be required for sexual history evidence to be adduced in civil proceedings.

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132 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

133 See, eg, *Criminal Procedure Act 1986* (NSW) s 294CB; *Evidence Act 1977* (Qld) ss 103ZF, 103ZH, which apply in criminal proceedings only; *Evidence Act 1929* (SA) s 34L(1)(b), which applies in criminal proceedings only; *Evidence Act 2001* (Tas) s 194M; *Evidence Act 1906* (WA) s 36BC.

### *Expert evidence*

13.160 As detailed in **Chapter 8**, criminal law in most states and territories provides that expert evidence about the development and behaviour of children who have been victims of child sexual abuse is admissible in sexual assault trials. Equivalent provisions generally apply in civil proceedings.[134] Victorian legislation expressly provides for expert evidence about impacts of sexual violence on adults, but the relevant provision only applies in criminal proceedings, not in civil proceedings.[135]

13.161 There is no principled reason why expert evidence in civil proceedings should be admissible in relation to child victims and not adult victims. Myths and misconceptions are equally prevalent in relation to adults.[136] **Recommendation 23** is that expert evidence regarding the impact of sexual violence upon adult and child complainants should be admissible in criminal proceedings. **Recommendation 46** is that equivalent evidence should be admissible in civil proceedings.

13.162 In civil proceedings, juries are rarely used. Consequently, expert evidence in civil proceedings would predominantly be called for the benefit of a judge or tribunal member. While some judges and tribunal members are acquainted with the nature and impact of sexual violence on memory and responsive behaviour, it should not be presumed that all are. It is therefore important that this type of expert evidence is admissible and so can play an educative role. Further, as noted by a consultee, allowing for expert evidence to be given, tested, and adjudicated upon facilitates transparency.

13.163 This recommended reform would support consistency between states and territories and would reduce the influence of myths and misconceptions associated with sexual violence.

## Training and education

13.164 In **Chapter 7**, the ALRC makes several recommendations in the context of criminal justice to improve the education and training of judicial officers (magistrates, trial judges and appellate judges), legal practitioners, court staff and law students. As detailed in **Chapter 7**, this includes providing nationally consistent:

- **education** about myths and misconceptions (such as the impact of trauma on memory and responsive behaviour); and
- **training** about trauma-informed practices (such as best practice communication and engagement with complainants, provision of flexible

134 *Evidence Act 2011* (ACT) ss 79(2), 108C(2); *Evidence Act 1995* (NSW) ss 79(2), 108C(2); *Evidence (National Uniform Legislation) Act 2011* (NT) ss 79(2), 108C(2); *Evidence Act 1929* (SA) s 29C; *Evidence Act 2001* (Tas) ss 79(2), 108C(2); *Evidence Act 2008* (Vic) ss 79(2), 108C(2); *Evidence Act 1906* (WA) s 36BE. The *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld), which will introduce an equivalent provision, is not yet in force.

135 *Criminal Procedure Act 2009* (Vic) s 338.

136 **Chapter 8**.

arrangements, and practices which address the experiences and needs (including cultural needs) of groups who are disproportionately reflected in sexual violence statistics).

13.165 The need for ongoing training and education on these topics applies equally to the wide range of professionals involved in civil justice processes. The sections above on each of interpreters, intermediaries, and improper questioning further noted the potential value of training on these topics in the context of civil justice.

13.166 Submissions identified the lack of trauma-informed training for court and tribunal staff as a barrier to accessing justice and emphasised the need for better training in these spaces.[137] Some noted that trauma-informed practice training could include myths and misconceptions about sexual violence, the impacts of trauma, Aboriginal and Torres Strait Islander cultural safety, and sensitively responding and dealing with complaints.[138] Consultees were also supportive of more comprehensive training, though noted that this would require appropriate and ongoing funding.

13.167 In addition, the ALRC recommends that courts and tribunals should, where appropriate, publish a bench book relating to civil matters involving allegations of sexual violence. Bench books could include information on the appropriate conduct of proceedings, and relevant considerations for hearings and courtroom management. Like the National Domestic and Family Violence Bench Book, the sexual violence bench books could also summarise relevant social context like the nature and impact of sexual violence, myths and misconceptions, and specific considerations for particular population groups.[139] Another helpful example is the FWC's Sexual Harassment Disputes Benchbook.[140]

13.168 Bench books could provide a central resource for judicial and tribunal officers in matters involving sexual violence, improve consistency and promote best practice, and facilitate a more trauma-informed experience for parties and witnesses in matters involving sexual violence.

137 Name withheld, *Submission 95*; National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*; Legal Aid NT, *Submission 146*; WEstJustice, *Submission 180*; Circle Green Community Legal, *Submission 208*.

138 Name withheld, *Submission 95*; S Ailwood, R Loney-Howes, N Seuffert and C Sharp, *Submission 108*; Sexual Assault Services Victoria, *Submission 203*; Circle Green Community Legal, *Submission 208*.

139 Attorney-General's Department (Cth), Australasian Institute of Judicial Administration and The University of Melbourne, *National Domestic and Family Violence Bench Book* (2024).

140 Fair Work Commission, *Benchbook: Sexual Harassment Disputes* (1 October 2024).

## Other civil justice forums

**Recommendation 47**

Commonwealth, state, and territory complaint bodies and regulators (such as the Commonwealth Ombudsman, Australian Human Rights Commission and Fair Work Ombudsman), non-tribunal government services, and private mediators and arbitrators should review their processes to:

a. enhance trauma-informed practice;

b. avoid perpetuating or giving effect to myths and misconceptions about sexual violence;

c. train staff in trauma-informed practice (including cultural competence and cultural safety) and common myths and misconceptions about sexual violence; and

d. facilitate the communication needs of people who have experienced sexual violence.

13.169 As set out above, there are a broad range of civil proceedings in which a person who has experienced sexual violence might participate. These include processes overseen by complaint bodies and regulators, non-tribunal government services, and processes facilitated by private mediators and arbitrators.

13.170 No matter which justice pathway a person who has experienced sexual violence engages with, they should experience support, safety, and have their communication and cultural needs addressed. To facilitate this, all bodies and actors involved in the civil justice system should review their processes to determine how best to embed trauma-informed principles, to reduce the impact of myths and misconceptions about sexual violence, and to ensure staff receive education and training in trauma-informed practice.

13.171 In accordance with the range of measures contemplated in **Recommendation 46**, the reviews should consider making available ongoing:

- education about myths and misconceptions (such as the impact of trauma on memory and responsive behaviour); and
- training about trauma-informed practices (such as best practice communication and engagement with complainants, provision of flexible arrangements, and practices which address the experiences and needs (including cultural needs) of groups who are disproportionately reflected in sexual violence statistics or marginalised);
- measures to avoid or reduce delay; and

- appropriate access to interpreters, intermediaries, Indigenous Liaison Officers, support persons, animal companions, and other arrangements.

13.172 Similarly, complaint bodies and regulators, non-tribunal government services, and private mediators and arbitrators should consider adopting publicly available guidance to support their staff when conducting an investigation or a proceeding that involves people who have experienced sexual violence.

# 14. Sexual Harassment dealt with by the Sex Discrimination Act

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# Introduction

14.1 This chapter focuses on the provisions regarding sexual harassment in the *Sex Discrimination Act.* It should be read in conjunction with **Chapter 13**. As set out in that Chapter, the meaning of 'sexual harassment' is broad and includes many forms of sexual violence including suggestive comments, sending images, touching, and attempted or actual sexual assault. Existing prohibitions on sexual harassment in the *Sex Discrimination Act* are limited in their scope, and only apply in specified contexts, such as in a workplace or in an educational institution. The recommendations in this chapter seek to improve access to civil justice for people who have experienced sexual violence, by prohibiting sexual harassment in more contexts, and by enhancing civil justice pathways, including by enhancing the role of the Australian Human Rights Commission (AHRC) as regulator.

14.2 The chapter discusses four recommendations to improve sexual harassment provisions in the *Sex Discrimination Act*:

- **Recommendations 48** and **49** to expand the scope of the prohibition on sexual harassment by prohibiting sexual harassment when it occurs in a wider range of contexts than is currently the case; and
- **Recommendations 50** and **51** to clarify or expand the range of remedies a court may order to address sexual harassment.

14.3 These recommendations should be considered in conjunction with **Recommendations 52–55** in **Chapter 15**. **Chapter 15** summarises the prohibition on sexual harassment in the *Fair Work Act* and makes recommendations to improve the *Fair Work Act* regime for addressing sexual harassment. It identifies the benefits of the proposed regime for dealing with sexual harassment under the *Fair Work Act* and, by **Recommendation 55**, makes a provisional recommendation for the features of that regime to be mirrored in the regime of the *Sex Discrimination Act* for dealing with sexual harassment. Those important considerations are further discussed below in this chapter.

14.4 To provide context for the recommendations in this chapter, the following parts outline the historical development of sexual harassment provisions in the *Sex Discrimination Act*, the reforms made following the Respect@Work Report, and relevant provisions of the *Sex Discrimination Act.*

# Context

14.5 The *Sex Discrimination Act* contains prohibitions on discrimination, sexual harassment, sex-based harassment, work environments that are hostile on the basis of sex, and victimisation. These provisions are all relevant to the Act's objective to eliminate, so far as is possible, discrimination on the various grounds listed in the Act, and to achieve substantive equality between men and women.[1]

1 *Sex Discrimination Act 1984* (Cth) ss 3(b)–3(ca).

14.6 The *Sex Discrimination Act* initially contained a prohibition on sexual harassment that provided a cause of action (a basis for legal action) for individuals only. This meant that the person who experienced sexual harassment had to take legal action themselves if they wanted a legal remedy. The burden, including the financial cost, of pursuing a legal proceeding fell entirely upon the person who had experienced sexual harassment. As discussed in **Chapter 13**, the landmark Respect@Work Report led to important recent reforms, upon which the recommendations in this chapter and in **Chapter 15** seek to build. Those recent reforms, which included the introduction of a positive duty on employers and persons conducting a business or undertaking (PCBUs), recognise the importance of a systemic justice response and shared societal responsibility to prevent sexual harassment and achieve substantive equality.[2]

## History of sexual harassment prohibitions

14.7 Sexual harassment has for decades been recognised as a form of discrimination on the basis of sex in feminist legal theory.[3] Some early judicial decisions,[4] and tribunal decisions,[5] similarly categorised sexual harassment as discrimination. Furthermore, that approach has been adopted in international jurisprudence, including in relation to international treaties dealing with discrimination, which Australia has ratified.

14.8 In 1973, Australia ratified an International Labour Organization convention concerning discrimination in respect of employment and occupation.[6] This convention provided the basis for early sex discrimination legislation in New South Wales, South Australia, and Victoria.[7] In 1983, Australia ratified the *Convention on Elimination of All Forms of Discrimination against Women* (CEDAW), which requires parties to eliminate sex discrimination in 'any field'.[8]

14.9 In 1984 the Commonwealth *Sex Discrimination Act* came into effect, and Australia became the first jurisdiction in the world to use the term 'sexual harassment' in legislation to specifically describe this kind of prohibited conduct.[9] In 1986, the

2 For a discussion of the systemic causes of sexual harassment see Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' in *Law and the Quest for Gender Equality* (ANU Press, 2023) 117.

3 Catherine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press, 1979).

4 MacKinnon has identified, for example, *Corne and DeVane v Bausch and Lomb*, 389 F Supp 161 (Ariz, 1975) and *Miller v Bank of America*, 418 F Supp 233 (Cal, 1976): Catherine MacKinnon (n 3) 59.

5 *O'Callaghan v Loder* [1983] 3 NSWLR 89. See also Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) *Federal Law Review* 231, 235.

6 *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No 111 (entered into force 15 June 1960) ('ILO 111').

7 Castles, Hvala and Pender (n 5) 235.

8 *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1983) ('CEDAW') arts 1–2.

9 Chris Ronalds, 'Opening Address III' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 19.

Human Rights and Equal Opportunity Commission (now known as the AHRC) was established to deal with discrimination complaints.[10]

14.10 When the *Sex Discrimination Act* was originally enacted, sexual harassment was prohibited at work and in employment only. This limited scope corresponded with the scope of the relevant International Labour Organization convention, the scope of some articles of CEDAW concerning discrimination protections in employment and education, and the scope of discrimination laws in comparable jurisdictions.[11] It also reflected liberal feminist thinking at the time.[12]

14.11 The Federal Court of Australia (FCA) in 1988 confirmed the constitutional validity of the prohibition on sexual harassment against women in the *Sex Discrimination Act*.[13] This was an important clarification because CEDAW, the principal international convention underpinning the *Sex Discrimination Act*, does not contain an express prohibition on sexual harassment. The Court reasoned that sexual harassment is a form of discrimination against women on the basis of the objects of the *Sex Discrimination Act*, the evident relevance of a person's sex to the harassment experienced, and case law from other domestic jurisdictions. The CEDAW Committee has since confirmed that the obligation in CEDAW to eliminate discrimination in all its forms includes an obligation to eliminate gender-based violence.[14]

14.12 The FCA in 2007 held that particular provisions of the *Sex Discrimination Act* applied only to discrimination against women, and not against men or boys.[15] This resulted in amendments to the *Sex Discrimination Act* to expressly state that its provisions give effect to international obligations to eliminate discrimination under treaties such as the *International Covenant on Civil and Political Rights* (ICCPR),[16] not just CEDAW, such that men and boys are also protected from discrimination under the *Sex Discrimination Act*.[17] Men have since brought proceedings under the *Sex Discrimination Act* alleging sexual harassment.[18] Furthermore, in 2024 the FCA held that the prohibition on discrimination on the ground of gender identity in the *Sex Discrimination Act* is constitutionally valid on the basis of the anti-discrimination

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10 *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

11 Such as laws preceding the *Equality Act 2010* (UK) and *Title VII of the Civil Rights Act of 1964,* 42 USC.

12 Ann Genovese, 'A Radical Prequel: Historicising the Concept of Gendered Law in Australia' Thornton, *Sex Discrimination in Uncertain Times* (n 9) 67.

13 *Re Lynette Jane Aldridge v Grant Rodney Booth* [1988] FCA 170 [49]–[54].

14 Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence against women*, 11th sess, UN Doc A/47/38 (1992).

15 *AB v Registrar of Births, Deaths & Marriages* (2007) 162 FCR 528.

16 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 ('ICCPR').

17 *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth); Explanatory Memorandum, Sex and Age Discrimination Legislation Amendment Bill 2010 (Cth); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

18 See, eg, *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784; *Weller v Anderson* [2021] FCA 503.

obligations in the ICCPR.[19] At the time of this Report, the ALRC understands that matter is the subject of an appeal.

14.13 A key feature of the Act as initially enacted was its complaints-based approach to enforcing breaches of the sexual harassment prohibition. This framed sexual harassment as an individual or private matter, which not only failed to acknowledge the systemic nature of discrimination,[20] but relied on individuals to carry the burden of enforcing the prohibition on sexual harassment.[21] Thornton argued that the *Sex Discrimination Act* focused on formal equality (or equality of opportunity) such that the Act was ineffective in eliminating discrimination and providing substantive equality — or equality of result.[22] Recent reforms in response to the Respect@Work Report have brought about some change in this approach.[23]

## The positive duty and other Respect@Work reforms

14.14 In 2020, the AHRC published its Respect@Work Report. It found that, in terms of addressing workplace sexual harassment, the 'current legal and regulatory system is no longer fit for purpose'.[24] The main sign of this failure was how widespread workplace sexual harassment continued to be, and the low levels of reporting.

14.15 A significant recommendation for the *Sex Discrimination Act* in the Respect@Work Report was to introduce a positive duty for employers and PCBUs to eliminate, as far as possible, certain kinds of unlawful discrimination including workplace sexual harassment.[25] This recommendation aimed to reduce the need for individual complaints by shifting responsibility for dealing with sexual harassment to employers and PCBUs and the burden of enforcement to a regulator, and to transform workplace cultures.[26]

14.16 The Respect@Work Report led to the introduction of a positive duty in the *Sex Discrimination Act*,[27] and resulted in further reforms to the *Sex Discrimination Act* and *Australian Human Rights Commission Act*. Some examples include:

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19 *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960.

20 Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *UNSW Law Journal* 155, 156.

21 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 14.

22 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Law in Australia* (Oxford University Press, 1990) 15–18.

23 See **Chapter 13**.

24 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 21) 10.

25 Ibid rec 17.

26 Ibid 470–1. See also **Chapter 13**. For a discussion of the influence of workplace culture on sexual harassment see Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32(2) *Australian Journal of Labour Law* 219.

27 *Sex Discrimination Act 1984* (Cth) s 47C.

- enforcement powers for the AHRC to enforce the positive duty;
- providing the AHRC with new inquiry functions to investigate and report on systemic unlawful discrimination;
- introducing a prohibition on sex-based harassment (see below)*;*
- introducing a prohibition on workplaces that are hostile on the basis of sex;
- amending victimisation provisions to allow for civil claims by a person who is victimised for taking action about unlawful discrimination they have experienced;
- amending accessorial liability provisions such that a person can be held liable if they cause, instruct, induce, aid, or permit another person to commit sexual harassment specifically;
- expanding the scope of the prohibition on workplace sexual harassment so that more workers are protected; and
- amending the objectives of the *Sex Discrimination Act* to refer to 'substantive equality', as distinct from 'equality of opportunity'.[28]

## Sexual harassment provisions in the Sex Discrimination Act

14.17 Part II Division 3 of the *Sex Discrimination Act* deals with sexual harassment. This division proscribes sexual harassment in areas of activity including work; education; and the provision of goods, services, and facilities.[29] The kinds of conduct that may constitute 'sexual harassment' are:

- an unwelcome sexual advance;
- an unwelcome request for sexual favours; or
- other unwelcome conduct of a sexual nature.[30]

14.18 To constitute 'sexual harassment', the conduct must be carried out 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated, or intimidated'.[31] To determine whether a reasonable person would have anticipated offence, humiliation, or intimidation, all relevant circumstances must be taken into account, including the attributes of the person sexually harassed, the relationship between the person harassed and the person engaged in the conduct, and any other relevant circumstance.[32]

14.19 Other relevant provisions in Division 3 of the *Sex Discrimination Act* include the prohibition on harassment on the ground of sex, and the prohibition

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28 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 21) recs 16–27.
29 *Sex Discrimination Act 1984* (Cth) ss 28B–28L.
30 Ibid s 28A.
31 Ibid.
32 *Sex Discrimination Act 1984* (Cth) s 28A(1A); *Hughes v Hill* (2020) 277 FCR 231 [26].

on subjecting another person to a workplace environment that is hostile because of sex. Harassment on the ground of sex comprises unwelcome conduct of a demeaning nature that a reasonable person would anticipate would cause offence, humiliation, or intimidation.[33] Similarly, a workplace is hostile on the ground of sex if a reasonable person would anticipate the possibility of workplace conduct resulting in the workplace environment being offensive, intimidating, or humiliating.[34] Arguably, harassment on the ground of sex, or a hostile workplace on the ground of sex, could involve conduct that also constitutes sexual harassment, as well as a wide range of other conduct that is gender-based but not sexual in nature.

## Conduct 'of a sexual nature'

14.20 Whether there has been a sexual advance, request for sexual favours, or conduct of a sexual nature in a particular case is an objective question of fact.[35] The term 'conduct of a sexual nature' has been defined and interpreted broadly.

14.21 'Conduct of a sexual nature' is defined to include 'making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing'.[36] The scope of the phrase 'conduct of sexual nature' is of 'broad import' and 'should not be read down or confined by limits or restrictions which do not appear in the statute'.[37]

14.22 Conduct of a sexual nature has been found to include suggestive looks;[38] displaying sexually explicit objects;[39] sending suggestive messages and images;[40] making suggestive or intrusive comments or jokes;[41] propositions for dates and sex;[42] a person exposing themselves or touching themselves in front of another;[43] touching, hugging, kissing, or attempting to touch;[44] and attempted and actual sexual assault.[45] Sexual harassment can comprise a single incident,[46] or a series of incidents and ongoing conduct.

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33 *Sex Discrimination Act 1984* (Cth) s 28AA.
34 Ibid s 28M.
35 *Hughes v Hill* (2020) 277 FCR 231 [21]–[25].
36 *Sex Discrimination Act 1984* (Cth) s 28A(2).
37 *Taylor v August and Pemberton Pty Ltd* [2023] FCA 1313 [46].
38 *Poniatowska v Hickinbotham* [2009] FCA 680.
39 *Johanson v Michael Blackledge Meats* (2001) 163 FLR 58.
40 *Hughes v Hill* (2020) 277 FCR 231.
41 *San v Dirluck Pty Ltd & Anor* [2005] FMCA 750.
42 *Lee v Smith* [2007] FMCA 59.
43 *Hughes v Hill* (2020) 277 FCR 231.
44 *Zheng v Beamish* [2004] FMCA 61; *Keenan v Leighton Boral Amey NSW Pty Ltd* (2001) 163 FLR 58; *Kraus v Menzie* [2012] FCA 3.
45 *Ewin v Vergara (No 3)* (2013) 307 ALR 576 [25]; *Dye v Commonwealth Securities Ltd* [2012] FCA 242; *Lee v Smith* [2007] FMCA 59; *Wong v Su* [2001] FMCA 108; *Aldridge v Booth & Ors* (1986) EOC 92–177.
46 *Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* (1989) 20 FCR 217 [54] (French J).

## ‘Unwelcome’ conduct

14.23 Whether particular conduct was ‘unwelcome’ is a subjective test based on the perspective of the person harassed.[47] Courts have held ‘unwelcome’ to mean conduct that is unsolicited and undesirable,[48] conduct that may otherwise ‘vex and annoy’ a person,[49] or conduct that is ‘simply … disagreeable’.[50]

14.24 Courts have held that the intention of the person responsible for sexual harassment is not relevant,[51] nor is it necessary to prove that the person responsible had a sexual interest in the person they harassed.[52] The conduct of the person harassed may be relevant to assessing whether the sexual conduct complained of was unwelcome.[53]

## Offence, humiliation, or intimidation

14.25 Whether a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated, or intimidated is an objective test. A decision-maker must consider all relevant circumstances, including the circumstances listed in s 28A(1A) of the Act. The listed circumstances in effect recognise intersectional experiences of sexual harassment, for example by requiring the decision-maker to have regard to the sex, age, gender identity, religion, race, and any disabilities of the person harassed. The issue of intersectionality is further discussed in **Chapter 13**.

## Vicarious liability

14.26 When an agent or employee engages in sexual harassment against someone, the principal or employer may be found liable for the acts of harassment (vicariously liable). However, a principal or employer is not vicariously liable for harassment by an agent or employee if the principal or employer can demonstrate that they took all reasonable steps to prevent the sexual harassment.[54]

14.27 The vicarious liability provision provides greater systemic accountability for harassment. The provision gives an incentive to principals and employers to actively take steps to prevent sexual harassment. In this way, there is some conceptual overlap between vicarious liability and positive duties to eliminate harassment, although

47 A Full Court of the Federal Court of Australia observed that the parties did not challenge the primary judge’s conclusion on that issue in *Kraus v Menzie* [2012] FCA 3 [7].
48 *Aldridge v Booth & Ors* (1986) EOC 92–177 [4].
49 *Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* (1989) 20 FCR 217 [88].
50 *Ewin v Vergara (No 3)* (2013) 307 ALR 576 [27].
51 *Hughes v Hill* (2020) 277 FCR 231 [30]–[31].
52 *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784.
53 *Daley v Barrington* [2003] FMCA 93 [31].
54 *Sex Discrimination Act 1984* (Cth) s 106.

each type of provision operates quite differently in practice, including because the enforcement of the positive duty is not reliant on an individual complaint.[55]

## Scope of the prohibition

14.28 The prohibition on sexual harassment applies in areas of activity prescribed in ss 28B–28L of the *Sex Discrimination Act*. This includes areas such as: work, education, and the provision of goods, services, and facilities.

14.29 The area of 'work' is broadly defined and incorporates the concepts of a 'worker' and 'person conducting a business or undertaking' from work health and safety law, which covers volunteers, interns, and the self-employed.[56] People who are seeking employment or seeking to be a worker in a business or undertaking are also captured by s 28B of the *Sex Discrimination Act*.[57] For harassment to be considered to have occurred in the area of work does not require that the conduct took place on work premises, but rather that there be some relevant connection with a person's work.[58]

14.30 The prescribed areas of activity in the *Sex Discrimination Act* capture a range of sexual harassment but not in all areas of activity. For example, an interaction in a public domain like the street, unless the interaction involved the provision of goods or services or otherwise engaged one or other of the listed areas of activity, is not covered by the *Sex Discrimination Act*. The current scope of the sexual harassment prohibition is in tension with international obligations to eliminate sexual harassment in all areas of life. **Recommendation 48** below seeks to address this tension.

## The positive duty to eliminate sexual harassment

14.31 A key recommendation in the Respect@Work Report was to introduce a positive duty on employers and PCBUs to eliminate, so far as possible, various types of discrimination.

14.32 A positive duty on employers and PCBUs marks a shift in legal responsibility for addressing sexual harassment, requiring certain duty holders to take positive action to prevent sexual harassment, rather than requiring people who experience sexual harassment to make individual complaints. Additionally, these reforms

55 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 21) 470–1.

56 Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) [12].

57 The Act was also amended to include all state public sector workers. Smith points out that this is unique feature of the *Sex Discrimination Act* in comparison with other Commonwealth anti-discrimination laws: Belinda Smith, 'Respect@Work Amendments: A Positive Reframing of Australia's Sexual Harassment Laws' (2023) 36(2) *Australian Journal of Labour Law* 145, 155.

58 *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130 [70]; *Ewin v Vergara (No 3)* (2013) 307 ALR 576 [38].

give the AHRC a regulatory role it has never previously held.[59] By providing for a regulatory role that seeks to better ensure compliance, the reforms also helped to shift the burden of addressing sexual harassment away from the individual who has experienced sexual harassment, and to the state.[60]

14.33 The Respect@Work Report set out a number of connections between sexual harassment and other forms of discrimination.[61] Consequently, the positive duty in the *Sex Discrimination Act* applies not only to sexual harassment, but also to:

- sex discrimination in relation to work;
- harassment on the ground of sex connected to work;
- hostile workplace environments; and
- victimisation because of action taken about the above prohibited conduct.[62]

14.34 The positive duty requires employers and PCBUs to take reasonable and proportionate measures to prevent employers, PCBUs, employees, workers, and agents from sexually harassing another person in connection with work.[63] It also requires employers and PCBUs to protect their workers from sexual harassment from other people, such as customers, clients, and third-party workers.[64]

14.35 The positive duty does not give rise to an individual cause of action. The AHRC can take a range of actions to promote compliance with the positive duty. Only the AHRC has standing to seek that a court enforce the positive duty.[65] However, individuals can report to the AHRC (anonymously if they wish) potential non-compliance by any employer or PCBU with the positive duty.[66]

14.36 Before its introduction into the *Sex Discrimination Act*, a positive duty to prevent sexual harassment was introduced in Victorian law,[67] and in work health and safety laws.[68] Accordingly, there is some existing guidance on how to comply with such a positive duty from those jurisdictions. The ARHC and the Respect@Work Council have also developed guidance on how to comply with the positive duty in the *Sex Discrimination Act* (see below).

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59 *Australian Human Rights Commission Act 1986* (Cth) pt 2 div 4A. See also ibid pt 2 div 4B relating to systemic discrimination.

60 See **Chapter 13**.

61 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 21) 479.

62 *Sex Discrimination Act 1984* (Cth) s 47C.

63 Ibid.

64 Ibid.

65 *Australian Human Rights Commission Act 1986* (Cth) s 35J.

66 Australian Human Rights Commission, 'Positive Duty Form' <www.humanrights.gov.au/positive-duty-online-form-and-resources/positive-duty-form>.

67 *Equal Opportunity Act 2010* (Vic) s 15.

68 Safe Work Australia, *Code of Practice: Sexual and Gender-Based Harassment* (2023).

# The Australian Human Rights Commission

## Dealing with complaints from individuals

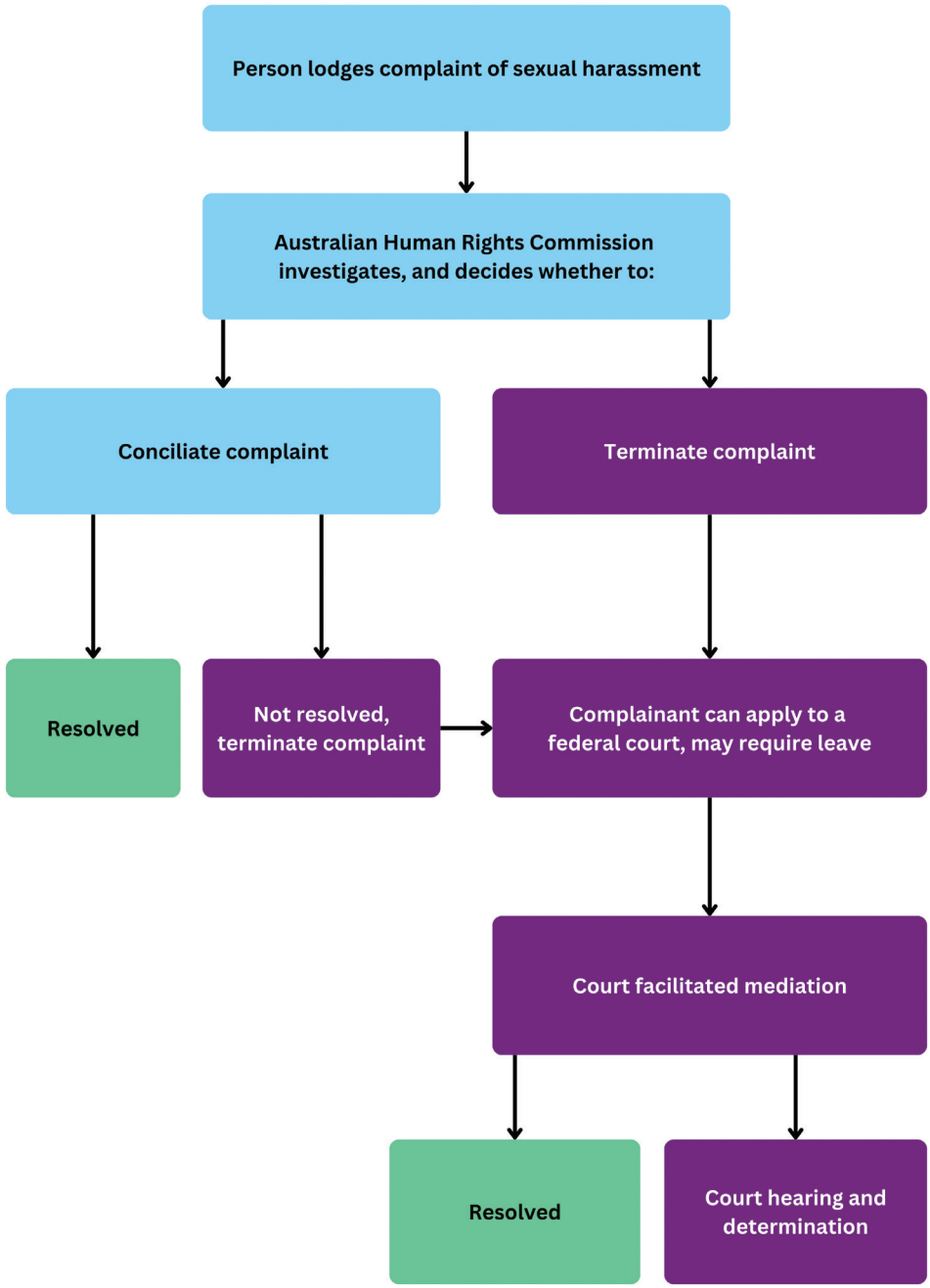
14.37 The AHRC has a range of functions.[69] These include inquiring into, and attempting to conciliate, complaints of discrimination. These functions effectively establish the AHRC as the 'gatekeeper' for sexual harassment complaints made under the *Sex Discrimination Act*, with all complaints being first dealt with by the AHRC before a court application can be made.[70]

14.38 **Figure 14.1** below sets out the individual complaint process in summary. More detail on the process is then contained in the subsequent paragraphs.

69 *Australian Human Rights Commission Act 1986* (Cth) s 11.

70 Dominique Allen, 'Breaking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 311–12.

***Figure 14.1: Individual complaint process***



14.39 When a person who experiences sexual harassment makes a complaint, the AHRC first investigates to determine whether to terminate the complaint, or attempt to conciliate the complaint.[71] If a complaint is not resolved at conciliation, or if the complaint is otherwise terminated, the complainant may be able to apply to the FCA or Federal Circuit and Family Court of Australia for orders.[72]

14.40 The *Australian Human Rights Commission Act* permits the AHRC to conduct conciliation as it sees fit.[73] This flexibility allows the Commission to provide an informal and responsive process that seeks to meet the needs and interests of the parties in a particular case. The AHRC provides information to parties about the law, including court decisions and example settlement terms, offers different ways to attend the conciliation, and arranges interpreters.[74] The AHRC has acknowledged the challenges of conciliating sexual harassment complaints, including power differences between parties, significant factual disputes, high levels of emotion, and risks of retraumatisation.[75]

14.41 Parties who participate in conciliation report high levels of satisfaction with the process.[76] The ALRC heard in consultations that the AHRC can support complex complaints on intersecting discrimination grounds in a comprehensive, supportive, and trauma-informed way. However, participants who provided feedback to the AHRC in a survey noted undue delay in accessing conciliation.

14.42 The AHRC has recently indicated that the average 'active' time it takes to finalise a discrimination complaint is around 8.7 months, and 72% of complaints are finalised within 12 months.[77] The AHRC indicated it is processing a legacy caseload of Covid-19-related complaints, an increase in the general number of complaints, as well as receiving complaints that are complex in nature.[78]

14.43 Submissions suggested the issue of delay detracts from the benefits the Commission can provide.[79] The ALRC heard that delay can be unnecessarily retraumatising, and does not reflect trauma-informed practice.[80] Delay can

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71 *Australian Human Rights Commission Act 1986* (Cth) s 46PF. A complaint can also be lodged by a union or by two or more people aggrieved by the same act: ibid s 46P.

72 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1).

73 Ibid s 46PK(1).

74 Jodie Davis and Arielle Markman, 'Behind Closed Doors: Approaches to Resolving Complaints of Sexual Harassment in Employment', *Australian Human Rights Commission* <https://humanrights.gov.au/our-work/complaint-information-service/publications/behind-closed-doors-approaches-resolving>.

75 Ibid.

76 Australian Human Rights Commission, *Annual Report 2023–24* (2024) 23.

77 Australian Human Rights Commission, *2023–24 Complaint Statistics* (2024) 5. A 'finalised' complaint is a complaint that has been closed by the AHRC, and includes complaints that have been conciliated successfully, conciliated unsuccessfully, terminated, or withdrawn by the complainant. The 'active' time calculation excludes times when a complaint is deferred at the request of a party, or as a result of a party's actions.

78 Australian Human Rights Commission, *Annual Report 2023–24* (n 76) 22.

79 See, eg, Circle Green Community Legal, *Submission 208*.

80 WEstjustice, *Submission 180*.

discourage people from making complaints,[81] and can result in people abandoning complaints.[82] Submissions reported that parties have been incentivised to resolve complaints directly (without the assistance of the AHRC) due to delay at the AHRC.[83] In many cases, direct and unsupported negotiation would not be a safe way to reach just outcomes for people who experience sexual harassment. Furthermore, delays in conducting conciliation and terminating complaints impacts the timeliness of any court application. **Chapter 4** further details the impact of delay on people who experience sexual violence.

14.44 A conciliation is successfully resolved if the parties agree on terms of settlement. There is flexibility in the terms that can be reached. Terms can include financial compensation and non-financial outcomes, as demonstrated in the below case study. The AHRC reports that 23% of conciliation outcomes include agreed measures that aim to prevent future discrimination.[84]

**Case study: Conciliation outcomes for workplace sexual harassment**[85]

A complainant alleged she was sexually harassed by her manager. The sexual harassment occurred after a work Christmas party at his home when she was intoxicated and unconscious. The manager was no longer employed in the same workplace at the time the complaint was lodged. Conciliation was conducted with the complainant and her employer.

The terms of agreement were that the company: pay the complainant $55,000; review its policies and offer the complainant an opportunity to comment on those policies; and pay for training for managers and human resources staff.

## The absence of a tribunal function for the AHRC

14.45 There is no intermediate step under the current regime between conciliation facilitated by the AHRC and any court determination.[86] The AHRC is not empowered to function as a tribunal and make a determination to resolve an application alleging a contravention of the prohibition on sexual harassment. In contrast, as outlined in **Chapter 15**, the statutory regime for dealing with sexual harassment under the

81 Ibid.
82 South-East Monash Legal Service Inc, *Submission 210*.
83 See, eg, Circle Green Community Legal, *Submission 208*.
84 Australian Human Rights Commission, *Annual Report 2023–24* (n 76) 21.
85 Ibid 25.
86 Between 1986 and 2000, the Australian Human Rights Commission was empowered to make findings of sexual harassment and to issue determinations accordingly. However, in 1995, the decision in *Brandy v HREOC* [1995] HCA 10 found that under the *Australian Constitution* the Commission's determinations could not be enforced like an order of a court and in 2000, the Australian Human Rights Commission had its determination functions removed.

*Fair Work Act* provides access to a tribunal — the Fair Work Commission (FWC) — as an intermediate step between conciliation and a proceeding in a court.

14.46 The ALRC considers that the intermediate step provided by the Fair Work Commission in the regime provided by the *Fair Work Act* to deal with sexual harassment is important and likely to improve both access to justice and just outcomes for people who have experienced sexual violence.[87]

14.47 The AHRC has recommended that it be given a tribunal function in order to provide a faster, less formal, and less costly adjudication of complaints than is possible in a court.[88]

14.48 As discussed in **Chapter 15**, **Recommendation 55** contemplates that the regime in the *Sex Discrimination Act* may be improved by the inclusion of a tribunal function for the AHRC in relation to complaints made about sexual harassment.

## Regulating the positive duty

14.49 As a consequence of the Respect@Work reforms, the AHRC regulates the positive duty on employers and PCBUs to eliminate sexual harassment and other forms of unlawful discrimination in connection with work. Under the *Australian Human Rights Commission Act*, the AHRC has functions to support compliance with the positive duty, including:

- inquiries it can initiate itself into whether the positive duty has been complied with;
- providing parties with recommendations on how to comply with the positive duty;
- issuing compliance notices specifying action that should be taken, or action to refrain from, to address compliance issues;
- enforcing compliance notices in court; and
- accepting enforceable undertakings.[89]

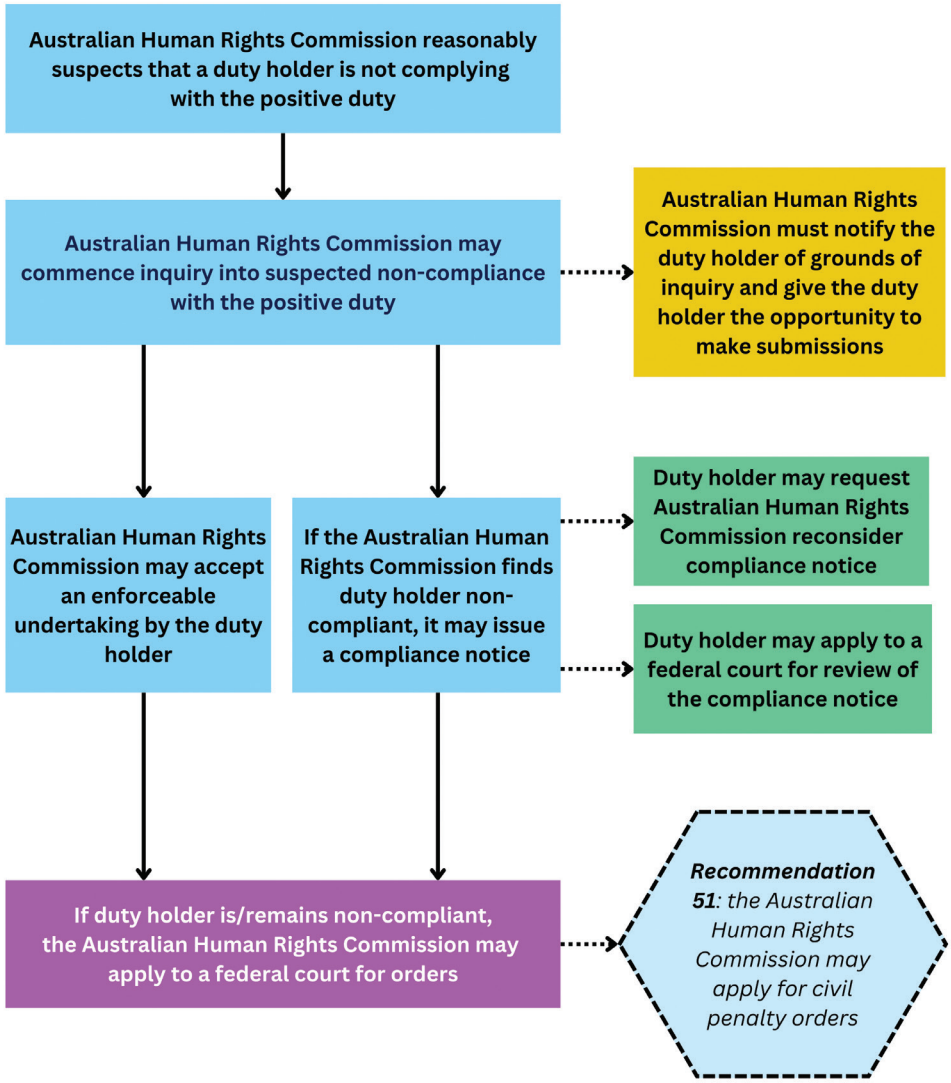
14.50 **Figure 14.2** below sets out in summary the process for compliance notices.

87 See **Chapter 15**.

88 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal* (Final Report, 2023) 87 Reforms 22 and 23.

89 *Australian Human Rights Commission Act 1986* (Cth) Div 4A of Pt 2.

***Figure 14.2: Compliance notice process***



14.51 The AHRC has argued that additional powers in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) could also be appropriately added, including seeking civil penalties for failure to comply with the positive duty.[90] The proposal that there be a capacity for the AHRC to pursue civil remedies, and for courts to impose civil penalties, is taken up by **Recommendation 51**.

14.52 The AHRC has power to inquire into any matter that may relate to systemic unlawful discrimination, including systemic sexual harassment.[91] The AHRC has power to obtain documents and examine witnesses for this purpose.[92] An inquiry may result in the publication of a report with recommendations to address systemic discrimination.

## Court proceedings

14.53 A person who has experienced sexual harassment can apply to a federal court upon receiving a termination notice from the AHRC.[93] In some cases, an applicant must seek leave to commence proceedings in a court.[94]

14.54 Parties are required to consider options for alternative dispute resolution (such as mediation) as early as is reasonably practicable in proceedings before the FCA, and the Court may 'help implement those options'.[95] A party may apply to a court for an order regarding mediation or arbitration.[96] Mediation is ordinarily ordered. The ALRC heard in consultations that mediation before the courts typically results in parties settling sexual harassment applications.

14.55 If a court is satisfied that there has been sexual harassment by a respondent, the court may make 'such orders … as it thinks fit', including an order:

- declaring that the respondent has committed sexual harassment, and directing the respondent not to repeat or continue the sexual harassment;
- requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
- requiring a respondent to employ or re-employ an applicant;
- requiring a respondent to pay damages by way of compensation for any loss or damage suffered;
- requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant; or

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90 Australian Human Rights Commission, 'Revitalising Australia's Commitment to Human Rights: Free & Equal' (n 88) 85–6.
91 *Australian Human Rights Commission Act 1986* (Cth) s 35L.
92 Ibid ss 21–26, 35N.
93 Ibid s 46PO(1).
94 Ibid s 46PO(3A).
95 See, eg, *Federal Court Rules 2011* (Cth) r 28.01.
96 Ibid r 28.02; *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021 (Cth)* r 23.01(1).

- declaring that it would be inappropriate for any further action to be taken in the matter.[97]

14.56 Accordingly, the courts have broad powers to make a wide range of orders in sexual harassment matters. **Recommendations 50** and **51** would clarify and extend the orders the court could make.

14.57 An academic analysis of court applications from 1984 until 2021 found that the number of sexual harassment matters under the *Sex Discrimination Act* proceeding to a final determination in court is low and in decline, noting that the vast majority settle prior to final hearing.[98] The amounts awarded in damages have been found to be generally insufficient to cover legal costs.[99]

## The potential for the Sex Discrimination Act to improve just outcomes

14.58 The ALRC considers that the Respect@Work Report was correct to regard the legal and regulatory system for dealing with workplace sexual harassment to no longer be fit for purpose. The Respect@Work Report identified that the then applicable complaints-based system which placed the 'heavy burden' of dealing with sexual harassment on the individual the subject of the harassment, was part of the problem.[100] The 'key' benefit of the imposition of the positive duty recommended by the report, and now implemented, was that it 'shifts the burden' away from individuals who experience sexual harassment.[101]

14.59 The 'heavy burden' on individuals that the Respect@Work Report spoke of is not confined to workplace sexual harassment. As discussed in **Chapter 13**, there are common barriers to engagement with all civil proceedings. Those barriers include lack of information, confusion, and the navigational issues experienced by individuals trying to engage with the civil justice system. They extend to the very significant organisational and legal cost burdens of bringing a complaint and conducting a proceeding.

14.60 Shifting those burdens from the individuals who experience sexual harassment to a regulator, and shifting some of the responsibility for dealing with sexual harassment from the individual to others with the capacity to eliminate it, is clearly part of the solution, as the Respect@Work Report recognised.

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97 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

98 Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (24 October 2022) 18–21. The study found just 193 sexual harassment matters were determined by a federal court during the 37-year period, and damages were awarded in 51% of those matters.

99 Ibid 15. See also Attorney General's Department (Cth), *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws* (Consultation Paper, 2023) 30.

100 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 21) 442.

101 Ibid 479.

14.61 The ALRC considers that the sexual harassment regime under the *Sex Discrimination Act* needs to be further shifted from a substantially complaints-based model to a substantially regulatory model. That is the best available means for dealing with the regime's most significant problem of non-engagement. For example, in 2021–22, some 1.7 million people reported that they had experienced sexual harassment,[102] yet the Australian Human Rights Commission only received 298 complaints of sexual harassment.[103]

14.62 The implementation of **Recommendation 1** will assist in reducing the information barrier to engagement. However, the ALRC takes the view that the process of shifting the regime of the *Sex Discrimination Act* so that it is no longer entirely reliant on a complaints-based model must continue if the opportunity to provide the benefits of that regime for people who have experienced sexual violence is to be realised.

14.63 **Chapter 15** discusses the regime under the *Fair Work Act* for dealing with sexual harassment. For example, the Fair Work Ombudsman (FWO) now has a regulatory role in respect of the prohibition on sexual harassment contained in the *Fair Work Act*.

14.64 Implementing **Recommendation 53** (discussed in **Chapter 15**) would see the regulatory role of the FWO being extended to compliance with a new positive duty in the *Fair Work Act*. This positive duty would be equivalent to the positive duty contained in the *Sex Discrimination Act*, which is discussed above. In addition, **Recommendation 55** contemplates that, subject to a review of the *Fair Work Act* regime in 24 months, those features of the *Fair Work Act* regime (as improved by the ALRC's recommendations), as well as the tribunal functions carried out by the Fair Work Commission, be reflected in the regime under the *Sex Discrimination Act* dealing with sexual harassment.

14.65 If **Recommendation 55** were implemented, the *Sex Discrimination Act* regime would move closer to being substantially underpinned by a regulatory model. A regulator would be in place with the capacity to improve compliance with both the prohibition on sexual harassment and the positive duty to eliminate sexual harassment. The regulator would have powers not only in relation to workplaces but across all areas of activity covered by the *Sex Discrimination Act*, which the ALRC recommends be extended (see **Recommendations 48** and **49**).

14.66 Extending the positive duty beyond the area of employment would, in respect of each of the areas of activity covered by the *Sex Discrimination Act* in which a positive duty can be effective, also shift responsibility for dealing with sexual harassment from the individual person to those entities more capable of preventing or eliminating sexual harassment in the area of activity in which they operate.

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102 Australian Bureau of Statistics, 'Sexual Violence: 2021–2022 Financial Year' <www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/2021-22>.

103 Australian Human Rights Commission, *2021–22 Complaint Statistics* (2022) 19.

14.67 The importance of providing for a tribunal for alleged breaches of the *Sex Discrimination Act,* with functions equivalent to those currently exercised by the Fair Work Commission, is also dealt with in **Chapter 15**. Accordingly, to understand the full extent of the reform of the *Sex Discrimination Act* the ALRC recommends, this chapter and its recommendations should be considered alongside **Chapter 15**.

### Resourcing regulators

14.68 The benefits of the regulatory roles given to the AHRC and to the FWO by the implementation of the recommendations made by the Respect@Work Report, as well as the benefit of the extended regulatory roles contemplated by the recommendations made in this Report, depend upon those regulators being properly resourced. The ALRC has not made specific recommendations about the funding of regulators. The extent to which relevant regulators may now or in the future require funding is not a matter the ALRC is in a position to properly assess. To be effective, regulators must be funded so that they are able to carry out their educative and investigative functions as well as their function of sufficiently promoting compliance by bringing or supporting proceedings to deal with non-compliance. Rather than being resourced to conduct occasional 'test cases', an effective regulator should be sufficiently resourced to pursue most meritorious claims of non-compliance.

## Expanding the scope of the sexual harassment prohibitions

**Recommendation 48**

The *Sex Discrimination Act 1984* (Cth) should be amended so that the prohibitions on sexual harassment (as defined in s 28A of the Act) apply beyond those areas of activity specified by ss 28B–28L of the Act to all areas of public activity.

**Recommendation 49**

The Australian Government should consider within 24 months of this Report whether, and how best, to amend the *Sex Discrimination Act 1984* (Cth) so that the prohibitions on sexual harassment apply universally.

14.69 Sexual harassment in any context is a form of sexual violence.[104] Sexual harassment in any context can be an affront to the dignity of the person harassed,

104 See generally Bronwyn Naylor, 'Equality Before the Law: Mission Impossible? A Review of the Australian Law Reform Commission's Report Equality Before the Law' (1997) 23 *Monash University Law Review* 423; Reg Graycar and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20(1) *Australian Feminist Law Journal* 23.

limit their ability to participate fully in public and private life, and negatively impact their community. A disproportionate number of people who experience sexual harassment have also typically experienced previous disadvantage because of their gender, race, language, culture, disability, or other attributes.[105] These people experience more difficulty accessing justice.[106]

14.70 Under the *Sex Discrimination Act*, sexual harassment is prohibited only in specified areas of activity. Consequently, a person who experiences sexual harassment may be denied access to justice under that Act if the harassment occurs in an area of activity not listed in the Act. However, sexual harassment occurs across all areas of life, not just in some areas of life that are currently covered by the law. For example, one person described their experience as follows:

> I viewed it as an inevitable part of life as a young female at the time. I experienced unwanted sexual attention and harassment in many areas of life — frequently in social settings and just going about everyday activities like walking down the street, with neighbours, in shops, on public transport etc.[107]

14.71 In light of the fundamental importance of the equality of all persons before the law, the *Sex Discrimination Act* should be amended so that access to justice does not depend on the context in which sexual harassment occurs.

14.72 Equality before the law is a principle of the rule of law,[108] and is protected under international human rights law.[109] Equality before the law means that every person has equal rights to be treated fairly under the law, to have equal rights in accessing the protections of the law, and the remedies it offers.

14.73 Equality, like many other common law rights and human rights, may be subject to limitations. Those limitations may be expressed as restricting the 'scope' of the right, or alternatively as an 'encroachment' on the right that must be justified.[110] Such rights should not be 'easily qualified or diluted', and should be 'treated with considerable respect in law making'.[111]

14.74 The ALRC is not satisfied that there is any principled reason to limit equality before the law by applying prohibitions on sexual harassment in specified areas of life only, rather than universally.

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105 See **Chapter 3**.

106 Sex Discrimination Commissioner (Cth), *Submission 168*; Maurice Blackburn Lawyers, *Submission 217*.

107 Quote from an individual who had experienced sexual harassment in K Fitz-Gibbon and S Vasil, *Submission 161*.

108 *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 [28] citing Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1908) and William Holdsworth, *A history of English law: Volume 10* (Sweet and Maxwell, 1938).

109 ICCPR arts 2, 16, 26; CEDAW arts 2, 3, 4, 15; CRPD arts 3, 4, 5, 12; CRC art 2; ICESCR art 2(2).

110 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) [2.56].

111 Ibid [2.58].

14.75 During consultations, the ALRC heard clear support for a universal prohibition on sexual harassment in principle. However, some stakeholders did not endorse a universal prohibition in practice, mainly for practical and operational reasons. Some potential challenges raised included enforcing a prohibition on sexual harassment in some contexts — for example, sexual harassment that occurs on the street or between family members. For the reasons stated below, the ALRC does not consider that those suggested impediments provide a persuasive basis for limiting the protection of the law. However, there are reasons, again later discussed, for adopting a two-staged approach. First, a prohibition on sexual harassment in all public activities should be enacted, and after a further review and subject to the outcome of that review, a single, universal prohibition on sexual harassment should be enacted.

14.76 Explanatory materials for the *Sex Discrimination Act* do not clearly explain why the Act prohibits sexual harassment in specified areas of life only. Australia's international obligations to eliminate sexual harassment, which underpin the *Sex Discrimination Act*, are broad and not confined to any specific areas of life. Relevant international obligations are broad enough to justify expanding the scope of existing prohibitions on sexual harassment in Australian laws.

14.77 Some existing prohibitions on discrimination and sexual harassment in Australian legislation are more expansive in scope than the existing prohibitions in the *Sex Discrimination Act*. For example, the *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*) prohibits racial discrimination in any 'field of public life'.[112] In addition, the *Anti-Discrimination Act 1991* (Qld) and the *Anti-Discrimination Act 1992* (NT) each prohibit sexual harassment universally across all areas of life.[113] The ALRC is not aware of any evidence that these laws have caused legal or practical difficulties.

## Not all sexual harassment is currently unlawful under the Sex Discrimination Act

14.78 Under the *Sex Discrimination Act*, sexual harassment is prohibited in specified areas of activity only.[114] This means that any sexual harassment that occurs in other areas of activity (not listed in the Act) are not unlawful under the Act. This excludes a large category of sexual harassment, for instance sexual harassment on the street. When sexual harassment has a tenuous connection to a listed area of activity, it may be more difficult for a person who has experienced sexual harassment to make a claim under the Act.

14.79 By limiting the prohibition on sexual harassment to prescribed areas of activity, the *Sex Discrimination Act* gives rise to the following issues:

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112 *Racial Discrimination Act 1975* (Cth) s 9.

113 *Anti-Discrimination Act 1991* (Qld) s 118; *Anti-Discrimination Act 1992* (NT) s 22.

114 The objects include to 'eliminate, so far as is possible, discrimination involving sexual harassment, and discrimination involving harassment on the ground of sex, in the workplace, in educational institutions and in other areas of public activity': *Sex Discrimination Act 1984* (Cth) s 3(c).

- people who have experienced sexual harassment in circumstances not prescribed in the Act are denied a just outcome under the Act;
- arbitrary distinctions are made between cases of prohibited sexual harassment, and other cases that may involve the same misconduct but, because of the context in which the conduct occurred, the conduct is not prohibited as sexual harassment; and
- increased complexity when cases raise 'boundary issues' — uncertainty whether a particular set of facts falls within one of the prescribed areas of activity in the Act — that require specialist legal advice or representation, increasing the cost and time involved in resolving a dispute.

14.80 The case study below compares two complaints of alleged sexual harassment that occurred between neighbours at home. One matter was decided based on Queensland law, under which sexual harassment is prohibited universally. The other matter was decided under the *Sex Discrimination Act*. The difference between the two cases illustrates the technical difficulty of making a sexual harassment complaint under the more restrictive provisions of the *Sex Discrimination Act.* It also illustrates that a complainant would need a specialised factual scenario (such as the neighbour's employment in telecommunications) to seek redress under the *Sex Discrimination Act* for sexual harassment from a neighbour at home. In the case of *Weir*, but for the unique circumstances of the matter, the applicants would not have been able to make an application alleging sexual harassment. Whether unusual facts such as these are made out in a particular case does not have any principled relationship to whether sexual harassment has, or has not, occurred and illustrates how the requirement in the *Sex Discrimination Act* to fall within a prescribed area of activity can produce arbitrary and unjust outcomes.

**Case study: Two cases of sexual harassment at home**

In ***Brosnahan v Ronoff*** **[2011] QCAT 436** a transgender woman alleged she was woken at night to a group of people yelling and pulling on her fence outside her home. The content of what was yelled, and the conduct carried out on her property was found to amount to sexual harassment and vilification on the grounds of gender identity. The Queensland Civil and Administrative Tribunal awarded $15,000 in compensation for sexual harassment and vilification.

In ***Weir v Telstra*** **[2023] FCAFC 196** an applicant couple made a complaint under the *Sex Discrimination Act* that their neighbour had sexually harassed them. The sexual harassment involved the neighbour sending death threats and pornographic material by email, and sharing the contact details of the couple online and stating they engaged in 'perverted sexual acts' with strangers. As a result, strangers arrived at the couple's house and contacted them by phone and email seeking to engage in sexual activities. The neighbour was an employee of Telstra and had obtained the couple's contact details because they were Telstra customers. Accordingly, the applicants sought leave to apply to court, alleging that the sexual harassment occurred in the course of providing a service, or in the course of performing a function under a Commonwealth law or program.[115] The trial judge refused to grant leave, finding the sexual harassment to be 'in the course of a private dispute between neighbours' and so not prohibited under the Act.[116] On appeal, the full Federal Court found the trial judge had erred in his reasoning and granted the appellants leave to apply to court alleging sexual harassment in the course of being provided a service, or in the course of performing a function under a Commonwealth law.

14.81 Similarly, in the Northern Territory case summarised below, certain incidents of sexual harassment were found unlawful, whereas related sexual harassment — by the same individual carrying out a sustained pattern of behaviour — was not unlawful because of the context in which it occurred. The arbitrary outcome of the case resulted in the Northern Territory Anti-Discrimination Commission questioning whether the legislative limitations 'remain[ed] relevant',[117] and the Government subsequently consulted on potential reforms to the *Anti-Discrimination Act 1992* (NT).[118] The Act was amended in 2023 to include a prohibition on sexual harassment that 'applies in all areas of life'.[119]

115 *Sex Discrimination Act 1984* (Cth) ss 28G, 28L.
116 *Weir v Telstra Corporation Limited* [2022] FCA 969 [46].
117 Northern Territory Anti-Discrimination Commission, *Annual Report 2015–16* 11.
118 Department of the Attorney-General and Justice, Northern Territory, *Modernisation of the Anti-Discrimination Act* (Discussion Paper, 2017) 18.
119 *Anti-Discrimination Act 1992* (NT) s 22; Explanatory Statement, Anti-Discrimination Amendment Bill 2022 (NT) cl 12.

**Case study: *Smyth v Northern Territory Treasury and Kerr* (2016) Northern Territory Anti-Discrimination Commission**

Mrs Smyth complained to the Northern Territory Anti-Discrimination Commission that her colleague Mr Kerr had sexually harassed her.

The alleged conduct included: sexualised verbal and written comments; Mr Kerr physically touching Mrs Smyth; Mr Kerr touching himself in front of Mrs Smyth; Mr Kerr appearing at Mrs Smyth's house naked; and frequent and invasive calls, texts, and emails. The conduct occurred at the workplace, via email and phone, and in Mrs Smyth's home.

The Commission found the conduct that occurred at work amounted to unlawful sexual harassment. In contrast, the conduct that occurred via email and phone and at Mrs Smyth's house did not constitute unlawful sexual harassment because of an insufficient connection with 'work' or other relevant area of activity in which sexual harassment was prohibited.

14.82 In contrast, the following case studies illustrate a range of circumstances in which complaints of sexual harassment in a 'private' context have been made under Queensland legislation that includes a universal prohibition on sexual harassment. These examples of sexual harassment would not be considered unlawful under the *Sex Discrimination Act* in its current form.

**Case study: Complaints of sexual harassment in a 'private' context made to the Queensland Human Rights Commission**

One complainant alleged she was sexually harassed by her neighbour by making inappropriate comments about her appearance, asking her why she did not 'like men like him', making grunting noises when she passed, and making explicit sexual comments while holding his crotch. The matter was not resolved by the Queensland Human Rights Commission in conciliation and was referred to the Queensland Civil and Administrative Tribunal.

Another complainant alleged she was raped by her school classmate in the home of her classmate. The matter was referred to the police along with a complaint to the Queensland Human Rights Commission. The complaint settled in conciliation resulting in compensation and an apology for the harm caused.

A third complainant had separated from her husband but they remained living in separate areas of the same house. The complainant alleged that a few months into the arrangement, she awoke to find her ex-husband sexually touching her. When she told him to stop, he raped her. The complaint proceeded to conciliation with the Queensland Human Rights Commission.

14.83 The current narrow scope of the prohibition in the *Sex Discrimination Act*, and the different areas of activity prescribed across the existing patchwork of anti-discrimination laws, may have contributed to the relatively low numbers of complaints made under the *Sex Discrimination Act*.

## The areas of activity in which sexual harassment is prohibited are not supported by a clear policy basis

14.84 The prescribed areas of activity in the *Sex Discrimination Act* do not reveal any clear or consistent policy basis for prohibiting sexual harassment only in those areas. The prescribed areas of activity are:

- employment, partnerships etc;
- occupational qualification bodies etc;
- registered organisations;
- employment agencies;
- educational institutions;
- the provision of goods, services, and facilities;
- accommodation;
- land;
- clubs; and
- Commonwealth laws and programs.[120]

14.85 The prohibitions on sex-based harassment apply in the same contexts as the prohibitions on sexual harassment. The prohibition on hostile workplaces on the basis of sex applies only in workplace contexts.[121] The prohibition on victimisation applies in all contexts covered by the *Sex Discrimination Act*.[122]

14.86 When first introduced in 1984, the sexual harassment prohibition only applied in two contexts: work and education. Explanatory material did not explain why these two areas were selected.[123] The ALRC heard during consultation that:

- the prevalence of sexual harassment in these areas was well accepted at the time;
- Australia's international obligations under CEDAW were interpreted at the time as applying only to areas of public activity; and
- Australia was influenced by existing laws in the United Kingdom and the United States of America, which focussed on equal opportunity at work.[124]

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120 *Sex Discrimination Act 1984* (Cth) ss 28B–28L.
121 Ibid s 28M.
122 Ibid s 47A.
123 Explanatory Memorandum, Sex Discrimination Bill 1983 (Cth) 1.
124 Such as predecessor to the *Equality Act 2010* (UK) and *Title VII of the Civil Rights Act of 1964* (USA).

14.87 The Act was amended in 1992 to include more areas of activity in which sexual harassment is prohibited.[125] Explanatory material indicated the amendments were to ensure sexual harassment provisions have 'the same operation as the current prohibitions against the other forms of discrimination'.[126] However, the differences between sexual harassment and other forms of discrimination may well mean that sexual harassment provisions should have a broader operation than provisions relating to other forms of discrimination. For example, sexual harassment provisions do not require that the person harassed must have been discriminated against in comparison to how other persons are treated. As noted above and discussed further below, both Queensland and Northern Territory legislation provide a broader operation for sexual harassment than for other forms of discrimination.

14.88 The objects of the *Sex Discrimination Act* suggest that a common feature of the listed areas of activity may be that they are somehow 'public' in nature.[127] However, most of the areas of activity have been described as 'quasi-public', and can be difficult to characterise as wholly public.[128] Moreover, there are many areas of public activity that are not included in the list, for example sexual harassment by a stranger in the street. In any event, characterising any particular area of activity as either 'public' or 'private' has become increasingly difficult, and less meaningful, especially as distinctions are blurred by private economies and online interactions.[129]

14.89 There are a number of areas of activity in which sexual harassment is prohibited in various state and territory laws but is not prohibited under the *Sex Discrimination Act*. In Queensland and the Northern Territory, sexual harassment is prohibited universally. The areas of activity covered from time to time in state and territory legislation have generally reflected a trend of initially listing a small number of areas of activity, and then subsequently expanding those areas.

14.90 It appears that the development and amendment of prescribed areas of activity in the *Sex Discrimination Act* reflected the circumstances of the times. More generally, Fredman has commented that variations in scope of anti-discrimination laws may be determined more by 'legal, historical, and cultural' factors than by fixed, common principles.[130]

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125 The additional areas of activity are: occupational qualification bodies; registered organisations; employment agencies; goods, services, and facilities; accommodation; land; clubs; and Commonwealth laws and programs: *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth).

126 Explanatory Memorandum, Sex Discrimination and Other Legislation Amendment Bill 1992 (Cth) 24–5.

127 The objects include the elimination of sexual harassment in 'the workplace, in educational institutions and in other areas of public activity': *Sex Discrimination Act 1984* (Cth) s 3(c).

128 Margaret Thornton and Trish Luker, 'The *Sex Discrimination Act* and Its Rocky Rite of Passage' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press) 25.

129 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) [2.1.4]; Correspondence from Margaret Thornton to the Australian Law Reform Commission, 30 September 2024; Letter from Karen O'Connell to the Australian Law Reform Commission, 23 October 2024.

130 Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2023) 232.

14.91 Circumstances have changed since the *Sex Discrimination Act* was introduced. The prevalence and impacts of sexual violence have been increasingly recognised in all areas of life. In addition, Australia's obligations under CEDAW have been interpreted as having broader application than articulated in the *Sex Discrimination Act*. Australia's international obligations are discussed in the following section.

## International obligations are sufficiently broad to justify expanding the scope of the prohibition on sexual harassment

14.92 CEDAW defines discrimination against women as any distinction, exclusion, or restriction on the basis of sex 'in the political, economic, social, cultural, civil or any other field'.[131] CEDAW requires state parties to take all appropriate measures to eliminate discrimination against women by any 'person, organisation, or enterprise'.[132]

14.93 Some consultees suggested that the various areas of activity specified in the *Sex Discrimination Act* reflected the structure of CEDAW, which identifies rights of women by reference to various areas of life. However, CEDAW outlines rights of women in several areas of life not specified in the *Sex Discrimination Act*, including in marriage and family life,[133] and the right to equality before the law (including equality in civil matters).[134]

14.94 The CEDAW Committee clarified in 1992 that the general prohibitions on discrimination in all areas of life (in art 2 and art 3 of CEDAW) are not limited in scope by other articles of CEDAW that contain more specific obligations relevant to particular areas of life.[135] Accordingly, state parties such as Australia

> may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.[136]

14.95 The CEDAW Committee has recommended that governments take measures to overcome 'all forms of gender-based violence, whether by public or private act'.[137] The Committee has further observed that:

- public and private spheres of human activity have traditionally been considered distinct, and regulated in different ways;
- women have often been assigned to the private or domestic sphere; and

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131 CEDAW art 1.
132 CEDAW art 2.
133 *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1983) art 15.
134 Ibid art 16.
135 Committee on the Elimination of Discrimination against Women, *General Recommendation No 9: Violence against women*, 11th sess, UN Doc A/47/38 (1992) [10].
136 Ibid [9].
137 Ibid [24].

- activities in the private sphere have been treated as inferior to activities in the public sphere.[138]

14.96 Related criticisms have been made regarding the *Sex Discrimination Act*.[139] For example, in practice, distinctions between 'public' and 'private' life commonly have the effect of overlooking women's private lives, where they often experience the most disadvantage. Most sexual violence occurs in private contexts.[140]

14.97 Applying a prohibition on sexual harassment in only specified areas of activity is inconsistent with Australia's obligations under international human rights law.

## Some existing prohibitions on sexual harassment and discrimination are already broader than in the Sex Discrimination Act

14.98 In Australia there are examples of laws that prohibit discrimination in more areas of activity than those currently prescribed in the *Sex Discrimination Act*. The ALRC is not aware of the broader scope of these prohibitions having given rise to any legal or practical difficulties in practice.

14.99 For example, the *Racial Discrimination Act* prohibits racial discrimination in all areas of 'public life'.[141] That Act also specifically prohibits discrimination in certain areas of public life, including employment, access to places and facilities, and in the provision of goods and services.[142] The Act indicates that these more specific provisions do not limit the scope of the general prohibition that applies in all areas of public life.[143]

14.100 The general prohibition in the *Racial Discrimination Act* appears to be based on the text of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), which specifically refers to 'public life'.[144] Accordingly, it has been held that the general prohibition in the *Racial Discrimination Act* should be interpreted consistently with ICERD.[145]

14.101 The *Anti-Discrimination Act 1991* (Qld) prohibits sexual harassment in all areas of life, including private life.[146] Explanatory materials accompanying the relevant Bill emphasised that it reflected a commitment to the spirit of the ICCPR and

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138 Committee on the Elimination of Discrimination against Women, *General Recommendation No 23: Political and public life*, UN Doc CEDAW/A/52/38 (3 August 2015) [8]–[11].

139 Thornton, *The Liberal Promise: Anti-Discrimination Law in Australia* (n 22) 102; Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18(4) *Journal of Law and Society* 448; Thornton and Luker (n 128) 31.

140 Australian Bureau of Statistics (n 102).

141 *Racial Discrimination Act 1975* (Cth) s 9(1).

142 Ibid ss 11–15.

143 Ibid s 9(4).

144 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1 ('ICERD').

145 *Wotton v Queensland (No 5)* [2016] FCA 1457 [516]–[517], [532].

146 *Anti-Discrimination Act 1991* (Qld) s 118.

sought to implement ICCPR obligations more so than other Australian jurisdictions had done.[147] The other anti-discrimination provisions of the Act apply only in relation to specific listed areas of life, but sexual harassment is prohibited regardless of the context in which it occurs.

14.102 The Northern Territory recently amended its anti-discrimination legislation to include a prohibition on sexual harassment in all areas of life.[148] Similar to the approach in Queensland, the Northern Territory legislation includes a list of areas of life in which other forms of discrimination are prohibited. However, explanatory material clarifies that the identified areas of life do not limit the scope of the prohibition on sexual harassment, which applies in all areas of life.[149]

### *Other reform initiatives have considered the scope of sexual harassment and discrimination prohibitions*

14.103 Various reform processes in Australia have considered extending the scope of sexual harassment and discrimination prohibitions.

14.104 The Law Reform Commission of Westen Australia recommended the areas of life in which sexual harassment is prohibited should be extended to correspond to the areas of life in which other discrimination is prohibited under the *Equal Opportunity Act 1984* (WA). The review also recommended that discrimination prohibitions should apply in all areas of public life.[150] It noted submissions that 'sexual harassment should not be tolerated in any area of life'.[151]

14.105 The New South Wales Law Reform Commission is reviewing the *Anti Discrimination Act 1977* (NSW) and considering whether the areas of life in which discrimination is prohibited require reform. A number of public submissions to the New South Wales Law Reform Commission support expanding the areas of life in which discrimination is prohibited. Some submissions support the sexual harassment prohibition being expanded to all areas of public life.[152] Some submissions support prohibiting discrimination and sexual harassment in all areas of life, not just public life.[153]

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147 Explanatory Notes, Anti-Discrimination Bill 1991 (Qld); Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3193, (Dean Wells, Attorney–General).

148 *Anti-Discrimination Act 1992* (NT) s 22.

149 Explanatory Statement, Anti-Discrimination Amendment Bill 2022 (NT) cl 12.

150 Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) rec 56.

151 Ibid rec 100, [5.1.2.1].

152 Positive Life NSW and HIV/AIDS Legal Centre, Submission No 60 to NSW Law Reform Commission*, Anti-Discrimination Act Review* (29 September 2023); Public Interest Advocacy Centre, Submission No 82 to NSW Law Reform Commission*, Anti-Discrimination Act Review* (13 October 2023).

153 Australian Lawyers for Human Rights, Submission No 62 to NSW Law Reform Commission*, Anti-Discrimination Act Review* (2023); Anonymous, Submission No 89 to NSW Law Reform Commission*, Anti-Discrimination Act Review* (23 October 2023).

14.106 There have been previous recommendations about the areas of life listed in the *Sex Discrimination Act.* These include:

- In 1994, the ALRC recommended the *Sex Discrimination Act* should contain a 'general prohibition of discrimination' in order to implement obligations under CEDAW, the ICCPR, and ICESCR.[154] A minority of Commissioners further supported that any legislated 'equality guarantee' should apply in the private sphere, as well as in the public sphere.
- In 2008 and then again in 2013, the Senate Standing Committee on Legal and Constitutional Affairs recommended that the *Sex Discrimination Act* should prohibit sex discrimination and sexual harassment in 'all areas of public life', modelled on the *Racial Discrimination Act*.[155]
- In 2011 the AHRC recommended that a consolidated Commonwealth anti-discrimination law should prohibit discrimination (including sexual harassment) in all areas of public life.[156] In 2020, the AHRC received submissions proposing an amendment to the *Sex Discrimination Act* to include a general prohibition on sexual harassment in all areas of public life.[157]

## Reasons for reform: improving access to just outcomes, and alignment with international obligations

14.107 Prohibiting sexual harassment in more contexts would be more consistent with Australia's international obligations. It would provide greater access to justice and facilitate more just outcomes for people experiencing sexual violence. It would reduce the extent of arbitrary distinctions between sexual harassment that is prohibited, and sexual harassment that is lawful simply because of the context in which it occurs. It would reduce the complexity of disputes to the extent it would no longer be necessary to demonstrate that the sexual harassment occurred in a relevant context.

14.108 In addition, if **Recommendation 55** were to be implemented, people who have experienced sexual harassment in any area of activity would gain access to a range of justice processes. This would include conciliation, tribunal hearings, and potentially the courts. Implementing **Recommendation 50** would also provide for a broader range of remedies.

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154 Australian Law Reform Commission, *Equality before the Law: Women's Equality*, (Report No 69 Part 2, 1994) rec 3.1.

155 Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) [7.44]; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (2008).

156 Australian Human Rights Commission, *Submission to Attorney-General's Department, Consolidation of Commonwealth Discrimination Law* (December 2011).

157 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 21) 467.

14.109 An expanded prohibition on sexual harassment would appropriately recognise the prevalence of sexual harassment in all areas of life. A universal prohibition on sexual harassment would provide a simple, legislative message that everyone is prohibited from sexually harassing anyone.

14.110 The recommended reform would better align the prohibition on sexual harassment in the *Sex Discrimination Act* with other areas of law, such as criminal law and tort law, which prohibit some forms of sexual harassment (for instance sexual assault) in any area of life, including private life. In practice, it may be more difficult to pursue a complaint and enforce any orders when harassment occurs in a private context. However, this is also true in relation to criminal and tort law, and does not appear to be a reason to restrict the scope of the law's application.

14.111 Expanding the scope of the prohibition on sexual harassment would mean that sexual harassment is prohibited in the *Sex Discrimination Act* in more contexts than discrimination is prohibited in the same Act. However, the scope of the prohibition on sexual harassment in the *Sex Discrimination Act* is already different from the scope of the prohibitions on discrimination in the same Act. For example, the prohibitions on discrimination are subject to a number of exceptions that do not apply to the prohibitions on sexual harassment.[158] In addition, it may be inappropriate to restrict prohibitions on sexual harassment based on the same areas of activity that apply to other types of discrimination. Thornton argues that other types of discrimination offer only very limited equality of opportunity.[159] Contemporary understandings of the prevalence and impacts of sexual harassment warrant a more holistic approach.

14.112 Any expansion in the scope of the prohibition on sexual harassment may present new operational challenges for the Australian Human Rights Commission and the courts. However, any expansion from a prohibition in 'all areas of public life' to a universal prohibition may not be onerous. In Queensland, the number of complaints handled by the Queensland Human Rights Commission (QHRC) for sexual harassment in 'private' areas of life is not particularly high. The QHRC informed the ALRC that between 2017 and 2024, about 6% of the sexual harassment complaints it handled related to what might be considered 'private' areas of life. This suggests that expanding the scope of the prohibition in the *Sex Discrimination Act* would not result in an overwhelming number of complaints.

## Implementing an expanded prohibition on sexual harassment

14.113 There was broad consensus among consultees that the areas of activity in the *Sex Discrimination Act* should be expanded, at least so that the prohibition applies to all areas of public life. The resistance expressed by some consultees to the prospect of the prohibition applying universally was not, in the ALRC's view,

158 *Sex Discrimination Act 1984* (Cth) pt II, div 4. For example, accommodation provided solely for students of one sex (s 34(2)), or an insurer reasonably discriminating based on actuarial or statistical data relating to the client's sex (s 41(1)).

159 Thornton, *The Liberal Promise: Anti-Discrimination Law in Australia* (n 22) 142.

persuasive. However, the absence of a broad consensus is a concern. The absence of broad consensus regarding universal application should not undermine the broadly agreed step that now should be taken to expand the prohibition on sexual harassment to all areas of public activity.

14.114 The ALRC therefore proposes a two-staged approach. The first stage would involve implementing **Recommendation 48**. That would result in sexual harassment being prohibited across all areas of public activity.

14.115 The boundary of legislative application should be clear. Accordingly, in any amending legislation which implements **Recommendation 48**, careful consideration should be given to defining the term 'all areas of public activity'. That definition could include all of the areas of activity currently covered by the *Sex Discrimination Act* and any other area of human interaction in which, by reason of the nature of the place, context, or relations between the persons interacting, the area of interaction has a dominant public character.

14.116 The second stage, in which the prohibition would be expanded further to universal application as contemplated by **Recommendation 49**, should be considered in 24 months' time. That further time can be used to build a broad consensus for universal application. Both the reasons given here as to why universal application has merit, as well as further consultation, may help to achieve that objective. Furthermore, consideration should be given to the possibility of any constitutional impediments to universal application, although the ALRC is not aware of any apparent impediments, and does not expect that there are any such impediments.

14.117 The 24-month timeframe has been chosen to align with the review contemplated by **Recommendation 55**. That recommendation contemplates that, within 24 months and upon a successful review of the regime recently created in the *Fair Work Act* to deal with sexual harassment, the regime in that Act be replicated in sectors beyond the workplace sector and possibly universally.

14.118 The ALRC considers that such a review would be an important juncture at which the full potential benefit of shifting the burden from the individual to the state can be better realised. The realisation of that benefit has a relevant, though not a determinative, connection to the question of whether or not the scope of the prohibition on sexual harassment in the *Sex Discrimination Act* should extend beyond all areas of public activity and apply universally. For that reason as well, the ALRC considers the two-staged approach is the better approach.

14.119 If the first stage were to be implemented, but not the second stage, such that sexual harassment were prohibited in all areas of public life indefinitely, there is a risk that an arbitrary distinction between 'public' and 'private' life would become entrenched in the legislation and that Australia would remain non-compliant with its international obligations.

## Expanding and clarifying a broad range of remedies

**Recommendation 50**

The remedies available under the *Australian Human Rights Commission Act 1986* (Cth) for addressing a contravention of the prohibition on sexual harassment in the *Sex Discrimination Act 1984* (Cth) should be clarified or extended to include the capacity for the court to make orders where appropriate:

a. restraining a respondent from engaging in particular conduct (such as approaching the applicant, or attending a particular place);

b. requiring a respondent to take part in a program of counselling, training, mediation, rehabilitation, or assessment;

c. requiring a respondent, conducting the business or undertaking in which the sexual harassment has occurred, to take corrective action to prevent further sexual harassment in the business or undertaking; and

d. requiring a respondent to pay a civil penalty in relation to a breach of a prohibition on sexual harassment in the *Sex Discrimination Act 1984* (Cth).

14.120 **Recommendation 50** aims to facilitate a greater number of just outcomes for people who have experienced sexual harassment and who have instituted court proceedings relying on the *Sex Discrimination Act*, by providing for a wide range of remedies that might meet a person's justice needs.

14.121 It is necessary to clarify the remedies currently provided for in the *Australian Human Rights Commission Act* to facilitate courts making orders that can help to prevent or deter sexual violence from re-occurring. Further, there is merit in aligning the remedies for a contravention of the prohibition on sexual harassment in the *Sex Discrimination Act* with the capacity of a court to impose a civil penalty under the *Fair Work Act* for an equivalent contravention of the law.

## Why remedies which prevent or deter have utility

14.122 Civil remedies can do more than compensate for loss. They can and often do have the objective of preventing or deterring future contraventions of the law.

There are many examples of statutory remedies available in civil proceedings which have the objective of deterring or preventing future contraventions of the law.[160]

14.123 People who take legal action in relation to sexual violence often say that they are motivated by a desire to ensure the sexual harassment stops occurring.[161] Their justice needs are capable of being addressed by orders designed to prevent further contraventions of the law. Such orders will often usefully supplement compensatory orders. This is particularly so in circumstances where many persons who have engaged in sexual harassment are either impecunious or resistant to complying with orders to pay compensation. In those circumstances, non-pecuniary orders may provide the only practical relief available to an applicant.

14.124 The desirability of these kinds of orders for applicants has been confirmed in consultations. The ALRC heard in consultations that settlement terms reached in sexual harassment conciliation conferences and other forms of negotiation often include measures to be taken by the respondent (whether an individual or an entity) to prevent further sexual harassment.[162]

14.125 Requiring an organisation to take corrective action to prevent sexual harassment would also align with the existing positive duty on employers and PCBUs to take reasonable measures to eliminate sexual harassment[163] and with existing vicarious liability provisions.[164]

14.126 However, the ALRC heard in consultations that the major impediments to participation in counselling, training, mediation, or rehabilitation programs are program availability, wait lists, and funding.[165] Further, there is some evidence that

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160 For example, other pieces of Commonwealth legislation provide for civil remedies to: disclose or publish particular information (eg *Competition and Consumer Act 2010* (Cth) s 86C; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA; *Corporations Act 2001* (Cth) s 1101B); refrain from particular activities, such as carrying on a business (eg *Corporations Act 2001* (Cth) s 1101B); perform community service (eg *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA; *Competition and Consumer Act 2010* (Cth) s 86C); and establish a compliance, education, or training program for employees or other persons to ensure their awareness of relevant responsibilities (eg *Australian Securities and Investments Commission Act 2001* (Cth) s 12GLA). The measures listed in **Recommendation 50** can be found in other legislation as well. For example, orders restraining a respondent from approaching the applicant, or from attending a particular location, or requiring a respondent to attend or participate in counselling, training, mediation, rehabilitation, or assessment, are routinely made under state and territory civil justice family violence legislation, and under the *Family Law Act 1975* (Cth).

161 See, eg, inTouch Women's Legal Centre, *Submission 204*; Centre for Innovative Justice, *Submission 216*.

162 See also Australian Human Rights Commission, *Annual Report 2023–24* (n 76); Dominique Allen, *Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria* (Monash University, 2019) 9; Australian Human Rights Commission, *2023–24 Complaint Statistics* (n 77) 21.

163 See, eg, *Sex Discrimination Act 1984* (Cth) s 47C.

164 See, eg, ibid s 106; *Fair Work Act 2009* (Cth) s 527E.

165 Magistrates' Court of Victoria, 'Magistrates' Court of Victoria Statement Regarding the Court Mandated Counselling Order Program (CMCOP)' (1 May 2024) <www.mcv.vic.gov.au/news-and-resources/news/magistrates-court-victoria-statement-regarding-court-mandated-counselling>.

programs are more effective when voluntary, rather than as a result of a court order. Evidence on how effective these programs are is also generally still contested.[166]

14.127 Civil penalty orders are orders made with the objective of deterring and preventing further contraventions.[167] Those orders are available to be made under the *Fair Work Act* where a contravention of the prohibition on sexual harassment is established. There is no reason why the utility of civil penalty orders available under the *Fair Work Act* should be denied to people the subject of precisely the same wrongdoing but who have instituted their proceeding under the *Sex Discrimination Act*. It would be more just to align the available remedies under the two Acts.

## Resolving uncertainty

14.128 As set out above, a court is empowered under the *Australian Human Rights Commission Act* to make such orders 'as it thinks fit' if satisfied that an anti-discrimination law has been breached (including if sexual harassment has occurred).[168] The legislation lists a number of inclusive examples of the kind of orders that can be made. Some of the example orders focus on addressing damage or loss caused by the discrimination.[169] Other types of orders seek to prevent or deter future discrimination, such as a direction by a court 'not to repeat or continue' the discrimination.[170]

14.129 It seems sufficiently clear that the power given to courts by the *Australian Human Rights Commission Act* to make orders extends to the making of orders that have the objective of deterring or preventing further contravening conduct. The broad language of the power conferred ('any order it thinks fit') and the fact that an order with that objective is exemplified in s 46PO (a direction 'not to repeat or continue' the discrimination), make that apparent.

14.130 However, the availability of orders such as the first three kinds of orders listed in **Recommendation 50** would be better understood by both litigants, their legal representatives, and the court if the availability of those kind of orders was made clearer by including them as examples of orders that can be made under s 46PO.

14.131 In relation to civil penalty orders, the position is likely different. Despite the broad language of s 46PO, the provision does not expressly refer to the availability of civil penalties, nor does the provision state (as legislation ordinarily does) the maximum pecuniary penalty that may be imposed. These factors suggest that

166 Centre for Innovative Justice and RMIT, *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (March 2015) 36–7; Donna Chung et al, *Improved Accountability: The Role of Perpetrator Intervention Systems* (Research Report, Issue 20, ANROWS, June 2020); Body Safety Australia, *Submission 4*; Australian Psychological Society, *Submission 106*.

167 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482.

168 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).

169 See, eg, ibid s 46PO(4)(b).

170 Ibid s 46PO(4)(a).

the broad conferral of the power to make orders was not intended to include the imposition of civil penalties. Accordingly, s 46PO of the *Australian Human Rights Commission Act* should expressly provide for civil penalties in relation to unlawful discrimination constituted by sexual harassment.

## Penalties for breach of the positive duty

**Recommendation 51**

The *Australian Human Rights Commission Act 1986* (Cth) should be amended such that a person found to have contravened the positive duty in s 47C of the *Sex Discrimination Act 1984* (Cth) may be ordered to pay a civil penalty.

### The 'top of the regulatory pyramid' is currently unavailable for serious breaches

14.132 The elements of the existing positive duty in the *Sex Discrimination Act* on employers and PCBUs to take reasonable and proportionate measures to eliminate sexual harassment (and certain other conduct) are summarised above. Under **Recommendation 53** (discussed in **Chapter 15**), an equivalent positive duty would be introduced to the *Fair Work Act*.

14.133 The AHRC's functions in relation to the positive duty in the *Sex Discrimination Act* include inquiring into compliance with the positive duty, ensuring compliance with the positive duty, and doing anything incidental or conducive to performing those functions.[171]

14.134 The AHRC may inquire into a duty holder's compliance with the positive duty if it 'reasonably suspects that the person is not complying'.[172] The AHRC has power to obtain information and documents and to examine witnesses. Penalties may be imposed on a person who fails or refuses to provide information or documents, or to answer questions.[173]

14.135 The AHRC is not expressly empowered to seek civil penalties for breach of the positive duty. Instead, if as a result of an inquiry the Commission finds that a person is not complying with the positive duty, it may:

- make recommendations to prevent 'a repetition or continuation of the failure to comply';[174]

171 Ibid s 35A.
172 Ibid s 35B.
173 Ibid ss 21–26, 35D.
174 Ibid s 35E(b).

- give a compliance notice specifying action that the person must take, or refrain from taking, to address the failure;[175] or
- accept and enforce undertakings relating to compliance.[176]

14.136 If the AHRC considers that a person has not complied with a compliance notice it has issued, it may apply to a federal court for an order directing a person to comply with a compliance notice, and for 'any other order that the court considers appropriate'.[177] Accordingly, in the absence of an express civil penalty provision, there may not be significant incentive for a respondent to comply with a compliance notice from the AHRC — the most likely consequence of non-compliance with the notice is merely a court order to comply.

14.137 If the AHRC considers that a person has breached an enforceable undertaking, it may apply to the FCA for orders, including: an order directing the person to comply with the undertaking; 'any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach'; or 'any other order that the court considers appropriate'.[178]

14.138 In addition, the AHRC has a function to inquire into 'systemic discrimination', being unlawful discrimination that 'affects a class or group of persons' and is 'continuous, repetitive or forms a pattern'.[179] The AHRC may report on any inquiry it undertakes, either to the Minister or publicly.[180] This function is not directly related to the positive duty to eliminate sexual harassment, but in practice there may be overlap between situations in which questions arise regarding compliance with the positive duty, and regarding systemic discrimination.

14.139 The AHRC has described its inability to seek civil penalties for breach of the positive duty as a significant gap in its regulatory toolbox.[181] The AHRC argues that its current powers are better suited to circumstances situated 'lower' on the 'regulatory pyramid'[182] — such as capacity-building for respondents with some willingness to comply with the law — and are not suited to the 'top' of the pyramid — unwilling respondents, committing serious or repeated breaches of the law.

14.140 In contrast, under the *Fair Work Act*, the FWO can seek civil penalties in relation to a breach of the prohibition on sexual harassment in connection with work,

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175 Ibid s 35F.

176 Ibid s 35K. The relevant powers are set out in more detail in pt 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

177 *Australian Human Rights Commission Act 1986* (Cth) s 35J.

178 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 115; *Australian Human Rights Commission Act 1986* (Cth) s 35K.

179 *Australian Human Rights Commission Act 1986* (Cth) s 35L.

180 Ibid s 35Q.

181 Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 134.

182 For a discussion of the 'regulatory pyramid', see, eg, Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) 76–7 [2.60]–[2.61]; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

as well as breaches of many other provisions.[183] As noted above, the *Fair Work Act* does not currently contain a positive duty to eliminate sexual harassment, but see **Recommendation 53** (discussed in **Chapter 15**).

## Reasons for reform

14.141 **Recommendation 51** seeks to increase the incentive for employers and PCBUs to take measures to prevent sexual harassment in connection with work. Conversely, the Recommendation seeks to deter employers and PCBUs who might otherwise, for one reason or another, breach the duty to take measures to prevent sexual harassment.

14.142 The recommended reform would place greater responsibility on employers and PCBUs to address sexual harassment in connection with work, and on the state to enforce that responsibility, rather than placing responsibility on individual applicants to take legal action. A person who has experienced sexual violence in connection with work might (for a wide range of understandable reasons)[184] choose not to take legal action themselves. The recommended reform would enable the AHRC to take more effective legal action against an employer or PCBU in appropriate cases, making a just outcome more likely.

14.143 Implementing **Recommendation 51** would increase the incentive for an employer or PCBU to comply with any compliance notice issued by the AHRC. The consequence of non-compliance with a compliance notice could be a civil penalty, rather than a mere court order for compliance.

14.144 If a positive duty were introduced in the *Fair Work Act* in accordance with **Recommendation 53**, a civil penalty would be available for breach of the duty. It would be appropriate for an equivalent penalty to be available for breach of the equivalent duty in the *Sex Discrimination Act*.

14.145 The AHRC is supportive of a civil penalty being available for breach of the positive duty. The AHRC queried whether a threshold requirement for a civil penalty, such as 'serious or repeated' breaches of the positive duty, ought to be enacted. In the ALRC's view, it is preferable to leave it up to the discretion of the AHRC, and of the court, to determine the particular cases in which it is appropriate to seek and order payment of a civil penalty.

183 *Fair Work Act 2009* (Cth) Pt 3–5A, s 539.
184 See **Chapter 3**.

# 15. Sexual Harassment dealt with by the Fair Work Act

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## Introduction

15.1 This chapter focuses on the sexual harassment provisions in the *Fair Work Act.* It should be read in conjunction with **Chapter 13**, which introduces sexual harassment law, and **Chapter 14**, which deals with the sexual harassment regime provided for in the *Sex Discrimination Act.*

15.2 The *Fair Work Act* is the principal Commonwealth Act regulating workplaces. As a result of recommendations in the Respect@Work Report,[1] the Act was recently amended to provide additional justice pathways for people who have experienced work-related sexual harassment. Those recent amendments have improved access to justice by beginning to shift the burden of the conduct of legal proceedings from

1 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020).

the individual who has experienced sexual harassment to the state.[2] However, there is room for further improvement. Legal costs remain a substantial barrier to access and that barrier can be better addressed, as it has been under the *Sex Discrimination Act*. The compliance role of the Fair Work Ombudsman (FWO) could be enhanced and be extended to a new positive duty to eliminate sexual harassment in the *Fair Work Act*. The range of available remedies would benefit from being made clearer. Further, consideration should be given to replicating the regime for dealing with sexual harassment provided for in the *Fair Work Act* to sectors beyond the workplace sector and, in particular, to all of the areas of activity covered by the *Sex Discrimination Act*.

15.3 This chapter contains the following recommendations to improve access to justice under the *Fair Work Act* by reducing barriers to access, supporting enforcement, and better responding to the justice needs of people who have experienced sexual harassment:

- **Recommendation 52** would amend the *Fair Work Act* to make it more likely that a successful applicant could recover some of their legal costs in sexual harassment matters.
- **Recommendation 53**, without increasing existing obligations on employers and persons conducting a business or undertaking (PCBUs), would introduce a positive duty to prevent sexual harassment into the *Fair Work Act,* equivalent to the obligation in s 47C of the *Sex Discrimination Act*.
- **Recommendation 54** would clarify that the broad range of remedies a court can order to address sexual harassment includes orders that prevent or deter further sexual harassment.
- **Recommendation 55** proposes that, subject to a positive review of the sexual harassment regime under the *Fair Work Act*, that regime (as improved by the implementation of **Recommendations 52**, **53**, and **54**) be extended to other sectors beyond the workplace sector, and to all of the areas of activity covered by the *Sex Discrimination Act* (as extended by the implementation of **Recommendations 48** and **49**).

## Context

15.4 The dedicated sexual harassment provisions in the *Fair Work Act* came into effect in two tranches, in September 2021 and in March 2023.[3] These provisions were partly modelled on the Act's anti-bullying jurisdiction, as well as certain sexual harassment provisions in the *Sex Discrimination Act*. The definition of 'sexually harass' in the *Fair Work Act* adopts the equivalent definition in the *Sex Discrimination Act*.[4] As discussed in **Chapter 14**, the definition of sexual

2 See **Chapter 13** and **Chapter 14**.
3 *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth); *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) sch 1 pt 8 div 1.
4 *Fair Work Act 2009* (Cth) s 12.

harassment in the *Sex Discrimination Act* covers a broad range of conduct, from suggestive looks and comments, to physical touching and sexual assault.

## Before the Respect@Work reforms

15.5 Before recent reforms were implemented, protections against sexual harassment in the *Fair Work Act* included:

- General protection claims because of discrimination.[5] For example, an employee could make a claim for work-related sexual harassment as a form of sex discrimination.
- An application for a stop bullying order.[6] For example, an employee could make a claim for bullying that included sexual harassment, and could apply to the Fair Work Commission (FWC) for a stop bullying order.
- General protection claims for exercising a workplace right.[7] For example, an employee could make a claim against their employer for any adverse action taken against the employee because the employee made a complaint to the FWO about bullying that included sexual harassment.
- An application alleging unfair dismissal or unlawful termination.[8] For example, an employee who felt compelled to resign because their employer did not respond appropriately to alleged sexual harassment might be able to establish that they were constructively, and unfairly, dismissed.

15.6 Each of these justice pathways remains in force under the *Fair Work Act* and available to people who have experienced sexual harassment, in addition to the more recently introduced sexual harassment provisions. However, the Respect@Work Report described significant uncertainty and complexity in the application of these provisions in the context of alleged sexual harassment.[9] In addition, the ALRC understands that the provisions are infrequently used.

## The Respect@Work reforms

15.7 The *Fair Work Act* was amended in 2021, and again in 2023, in response to recommendations made in the Australian Human Rights Commission's (AHRC) Respect@Work Report.[10] The Respect@Work Report noted that the Act did not expressly prohibit work-related sexual harassment. Some existing provisions of the

5 Ibid ss 351, 772.
6 Ibid pt 6–4B.
7 Ibid s 340.
8 Ibid pt 3–2, s 772.
9 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 1) 514–32.
10 *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth); *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) sch 1 pt 8 div 1.

*Fair Work Act* were relevant to sexual harassment, but the Act did not explicitly refer to sexual harassment, resulting in uncertainty and confusion.[11]

15.8 The implementation of the Respect@Work Report reforms resulted in the *Fair Work Act* expressly prohibiting sexual harassment in work-related settings. This established a range of possible justice outcomes for individuals, including 'stop sexual harassment orders', as well as other relief available through conciliation or an agreed arbitration conducted by the FWC. Additionally, the reforms provide for court applications to address non-compliance with the prohibition on sexual harassment or to enforce a stop sexual harassment order and orders made in an agreed arbitration. The FWO has been given power to promote compliance with the prohibition on sexual harassment, including by commencing proceedings in court. Each of these new justice pathways is discussed in more detail below.

15.9 Other changes include clarifying that sexual harassment by a worker is a 'valid reason' for that worker to be dismissed from work,[12] and is a type of 'serious misconduct' that can result in summary, or immediate, dismissal.[13]

## Sexual harassment provisions in the Fair Work Act

15.10 As discussed above, Part 3–5A of the *Fair Work Act* now includes:

- an express prohibition on sexual harassment, including liability of employers and PCBUs for acts of harassment by an employee or agent (vicarious liability); and
- powers for the FWC to 'deal with' sexual harassment disputes.

15.11 The sexual harassment provisions apply to a broad category of 'workers', including contractors and volunteers for example, and not just 'national system employees' who are the only category of worker protected under many other *Fair Work Act* provisions.[14]

15.12 A person alleging sexual harassment must first apply to the FWC rather than a court, unless the person is seeking an interim injunction, which only a court can order. Ordinarily, a person can apply to a federal court for relief only after the FWC has certified that all reasonable attempts to resolve the dispute have been made.[15]

15.13 If the FWO is involved in a matter, the process can be different. The FWO may investigate a suspected breach of the sexual harassment prohibition. If the FWO is satisfied that there are sufficient grounds, it may apply directly to a court for relief, rather than applying to the FWC in the first instance.

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11 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 1) 514.
12 *Fair Work Act 2009* (Cth) s 387 (legislative note).
13 *Fair Work Regulations 2009* (Cth) reg 1.07(2)(c).
14 Fair Work Commission, *Benchbook: Sexual Harassment Disputes* (1 October 2024) 34.
15 *Fair Work Act 2009* (Cth) s 527T.

15.14 An application to a court must be made within six years from the date of the last sexual harassment incident.[16] The FWO is discussed in more detail below.

## The prohibition on work-related sexual harassment

15.15 The *Fair Work Act* prohibits sexual harassment, in connection with work, of a person who is:

- a worker in a business or undertaking;
- seeking to become a worker in a business or undertaking; or
- conducting a business or undertaking.[17]

15.16 As discussed above, the term 'sexually harass' is defined in the *Fair Work Act* to have the same meaning as in the *Sex Discrimination Act.*[18]

15.17 A breach of the sexual harassment prohibition in the *Fair Work Act* can give rise to remedies, including orders to pay a civil penalty.[19] In contrast, civil penalties are not available for a breach of equivalent prohibitions in the *Sex Discrimination Act* (but see **Recommendation 50**).

15.18 A person may be held vicariously liable for a breach by their employee or agent, unless the person can demonstrate they took all reasonable steps to prevent the sexual harassment.[20] The relevant provision is modelled on the corresponding *Sex Discrimination Act* provision.[21] Vicarious liability is further discussed below in relation to **Recommendation 53**.

15.19 In its submission, the FWO stated it was investigating suspected contraventions of the prohibition on sexual harassment.[22]

## Dealing with sexual harassment disputes and proceedings

15.20 A person who experiences work-related sexual harassment can apply to the FWC. An application may seek either or both of a 'stop sexual harassment order' or for the FWC to 'otherwise deal with the dispute'.[23] There are different processes that are applicable depending on the nature of the application made.

15.21 If a stop sexual harassment order is sought, that aspect of the application can proceed to be determined by the FWC without any conciliation (although it can

16 Ibid s 544. See also Fair Work Ombudsman, *Submission 219*.
17 *Fair Work Act 2009* (Cth) s 527D(1).
18 Ibid s 12; *Sex Discrimination Act 1984* (Cth) s 28A. See further **Chapter 14**.
19 *Fair Work Act 2009* (Cth) s 527D, pt 4–1.
20 Ibid 527E.
21 *Sex Discrimination Act 1984* (Cth) s 106; Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) [142]; *Fair Work Act 2009* (Cth) s 527E.
22 Fair Work Ombudsman, *Submission 219*.
23 *Fair Work Act 2009* (Cth) s 527F.

be conciliated by a Member or by a staff member of the FWC). It will be dealt with formally in a hearing or less formally in a determinative conference.[24]

15.22 The FWC must start to deal with the application within 14 days of it being made.[25]

15.23 The FWC may make any order it considers appropriate (other than a payment) to prevent the applicant from being sexually harassed, if it is satisfied that:

- there has been sexual harassment; and
- there is a risk that the person will continue to be sexually harassed by the respondent.[26]

15.24 The FWC can make a range of orders about circumstances in the workplace to prevent the individual being sexually harassed by a respondent. Potential orders could include (but are not limited to) orders requiring an employer or PCBU to:

- relocate or dismiss the person found to have sexually harassed the applicant;
- introduce or implement a workplace sexual harassment policy;
- deliver sexual harassment training or other appropriate training;
- make changes to rostering arrangements; or
- make changes to reporting processes.[27]

15.25 If the application asks the FWC to 'otherwise deal with the dispute', that aspect of the dispute (and potentially also any application for a stop sexual harassment order) will proceed to a conference where a Member of the FWC will conciliate and may make recommendations or express opinions.[28] The dispute may be resolved, including by the FWC making orders by consent.

15.26 The FWC Benchbook contains a range of outcomes that could be negotiated by the parties during conciliation, including:

- changes in work arrangements such as lines of reporting;
- apologies;
- a reference or statement of service;
- commitments by the employer or PCBU to investigate a complaint or engage a third-party investigator, provide training to staff, review or update policies, improve reporting processes, or conduct safety risk assessments;
- sharing of information; and
- the applicant withdrawing the original complaint.[29]

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24 Fair Work Commission, *Benchbook: Sexual Harassment Disputes* (1 October 2024) (n 14) 26, 79.
25 *Fair Work Act 2009* (Cth) s 527J(2).
26 Ibid s 527J(1). See also Belinda Smith, 'Respect@Work Amendments: A Positive Reframing of Australia's Sexual Harassment Laws' (2023) 36(2) *Australian Journal of Labour Law* 145, 159.
27 Fair Work Commission, *Benchbook: Sexual Harassment Disputes* (1 October 2024) (n 14) 73.
28 *Fair Work Act 2009* (Cth) s 592.
29 Fair Work Commission, *Benchbook: Sexual Harassment Disputes* (1 October 2024) (n 14) 107–8.

15.27 The ALRC heard that, like complaints under the *Sex Discrimination Act*, most applications alleging sexual harassment under the *Fair Work Act* settle by negotiation.[30]

15.28 If the dispute is not resolved, and if at least one applicant and one respondent agree to arbitration, the FWC may conduct an arbitration of the dispute and make orders determining the dispute as between those parties.[31]

15.29 Arbitration can be carried out as a determinative conference or hearing. A determinative conference is less formal than a hearing and is typically attended by only the parties involved in the dispute. A hearing is a more formal process that can involve more individuals, including witnesses. A hearing is a public process unless otherwise ordered.[32]

15.30 At arbitration, the FWC may make any orders it considers appropriate,[33] including one or more of the following orders:

- an order to pay compensation;
- an order to pay an amount for lost remuneration; or
- an order that requires a person to perform any reasonable act, or carry out any reasonable course of conduct, to redress loss or damage suffered by the applicant.[34]

15.31 In addition, the FWC may express an opinion: that a respondent sexually harassed an applicant; that a respondent is vicariously liable for the sexual harassment; or that it would be inappropriate for further action to be taken in the matter.[35]

15.32 Either an order to stop sexual harassment or orders made at an agreed arbitration may, with the permission of a full bench of the FWC, be appealed to a full bench of the FWC.[36]

15.33 Applications may also be made to a court for a range of orders in relation to sexual harassment.

15.34 A person entitled to apply to the FWC for relief cannot apply for relief from a court in relation to a contravention of the prohibition of sexual harassment, unless:

- the FWC has certified that all reasonable attempts to resolve the dispute (other than by arbitration) have been unsuccessful, or are unlikely to be successful; or
- the application seeks interim relief from the court.[37]

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30 See also ibid 107.
31 *Fair Work Act 2009* (Cth) s 527S.
32 Fair Work Commission, *Benchbook: Sexual Harassment Disputes* (1 October 2024) (n 14) 81.
33 *Fair Work Act 2009* (Cth) s 595(3).
34 Ibid s 527S(3)(a).
35 Ibid s 527S(3)(b).
36 Ibid s 604.
37 Ibid ss 527R, 527T.

15.35 This effectively means that if a matter is not resolved and no arbitration is agreed to before the FWC, an applicant can make an application to a court. Additionally, an application may be made to a court to enforce a stop sexual harassment order or an arbitration order made by the FWC.[38]

15.36 Courts with jurisdiction to hear applications regarding sexual harassment include the Federal Court of Australia, the Federal Circuit and Family Court of Australia (Division 2), and, for breaches of a stop sexual harassment order, an eligible state or territory court.[39]

15.37 Unions and the FWO have standing for applications alleging a breach of the prohibition on sexual harassment, or breach of a stop sexual harassment order. However, only an individual can apply to enforce an arbitration order.[40] Only the FWO can apply directly to a court (without any prior application to the FWC) for alleged breaches of the sexual harassment prohibition.[41]

15.38 Both the Federal Court of Australia and the Federal Circuit and Family Court of Australia provide mediation services through a Registrar of the court.[42]

15.39 A federal court can make any order it considers appropriate if satisfied that a person has breached, or proposes to breach, a civil remedy provision.[43] Potential orders include (but are not limited to) orders:

- granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a breach;
- awarding compensation for loss that a person has suffered because of the breach;
- reinstating a person; and
- requiring a person to comply, either wholly or partly, with a notice (other than an infringement notice) given to the person by a Fair Work Inspector or the FWO.[44]

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38 Ibid s 539.
39 Ibid.
40 Ibid.
41 Fair Work Ombudsman, *Submission 219*. Only a person who is entitled to apply to the FWC is required to obtain a certificate from the FWC before applying to a court: *Fair Work Act 2009* (Cth) s 527T(1). Only an aggrieved person or industrial association (and not the FWO) is entitled to apply to the FWC: s 527F(2). The FWO has standing to apply for court orders: ss 539(2), 682(1 (d).
42 Federal Court of Australia, 'Mediation' <www.fedcourt.gov.au/services/ADR/mediation>; Federal Circuit and Family Court of Australia, 'General Federal Law: Mediation' <www.fcfcoa.gov.au/gfl/mediation>.
43 *Fair Work Act 2009* (Cth) s 545(1).
44 Ibid s 545(2).

15.40 A court may order a person to pay a penalty that the court considers appropriate if the court is satisfied that the person has breached a civil remedy provision.[45] The maximum amount of any penalty for various types of breach is set out in the *Fair Work Act*.[46]

15.41 A court may order a party to pay legal costs incurred by another party only if the court is satisfied that the party:

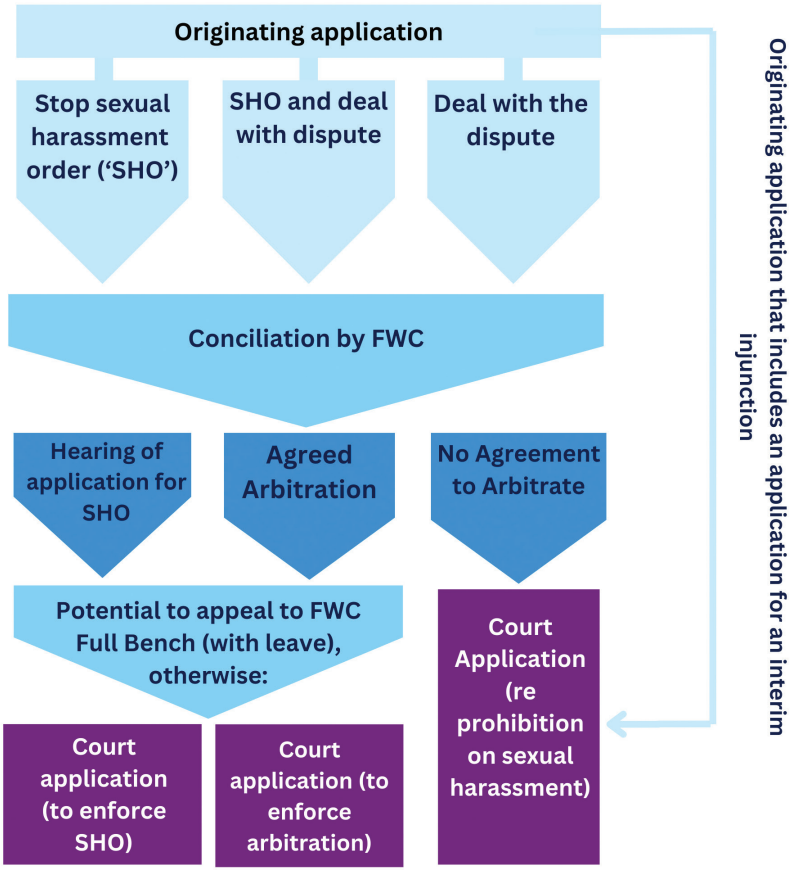
- instituted proceedings vexatiously or without reasonable cause;
- carried out unreasonable acts or omissions that caused the other party to incur the costs; or
- unreasonably refused to participate in a matter before the FWC and that same matter is before the court.[47]

15.42 **Recommendation 52** would amend the *Fair Work Act* such that applicants successfully alleging sexual harassment would be more likely to be awarded costs.

15.43 **Figure 15.1** below summarises in visual form the various processes of the FWC and court pathways in relation to sexual harassment-related applications.

45 Ibid s 546.
46 Ibid s 539.
47 Ibid s 570.

***Figure 15.1: Fair Work Commission processes for sexual harassment***




## *The role of the FWO as a regulator*

15.44 The FWO is the national workplace relations regulator and has a range of functions, including:

- promoting and monitoring compliance with the *Fair Work Act*;
- inquiring into and investigating any act or practice that may be contrary to the *Fair Work Act*;
- commencing proceedings in court or making applications to the FWC to enforce the *Fair Work Act*; and
- representing employees who are, or may become, a party to proceedings in a court or in a matter before the FWC if the FWO considers that representation will promote compliance with the *Fair Work Act*.[48]

48 For complete list of functions of the FWO, see ibid s 682.

15.45 To exercise its functions, the FWO has a range of powers it can exercise through its Fair Work Inspectors. For example, a Fair Work Inspector may enter premises, require records and documents to be produced, notify parties of a breach and specify required action, and accept enforceable undertakings.[49]

15.46 The FWO's policy is to commence court proceedings or apply to the FWC only if there is sufficient evidence and it would be in the public interest.[50] In determining whether it would be in the public interest to litigate, the FWO typically considers a range of factors, including: the nature and seriousness of the allegations; relevant characteristics of the persons involved; the impact of the alleged conduct; the anticipated deterrent effect of litigation; and maintaining the integrity of the Fair Work system.[51] The FWO current priority sectors (in relation to compliance generally) are aged care services, agriculture, building and construction, disability support services, fast food restaurants and cafes, large corporations, and universities.[52]

## Recovering legal costs

**Recommendation 52**

Section 570 of the *Fair Work Act 2009* (Cth) should be amended for sexual harassment proceedings, such that it is equivalent to s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth), which is the provision that applies to the recovery of legal costs in sexual harassment proceedings under the *Sex Discrimination Act 1984* (Cth).

### Summary of reasons

15.47 **Recommendation 52** seeks to improve access to justice for people who have experienced work-related sexual harassment. Implementing **Recommendation 52** would increase the likelihood that an applicant who is successful in their sexual harassment claim would recover some or all of their legal costs from the respondent.

15.48 The amount that a successful applicant is awarded for sexual harassment can sometimes be less than the legal fees they incur. This disparity can act as a disincentive for individuals to make an application. The disparity also reduces the incentive for legal practitioners to offer no-win, no-fee cost arrangements. **Recommendation 52** seeks to address these disincentives and improve access to justice.

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49 Ibid pt 5–2 div 3.
50 Fair Work Ombudsman, 'Compliance and Enforcement Policy' (January 2025) 16.
51 Ibid.
52 Fair Work Ombudsman, 'Our Priorities' <www.fairwork.gov.au/about-us/our-role-and-purpose/our-priorities>.

15.49 Implementing this Recommendation would also align the costs regime for a sexual harassment proceeding under the *Fair Work Act* with the costs regime applicable for contraventions of the *Sex Discrimination Act*.

## Context and key problems

15.50 As summarised above, in proceedings under the *Fair Work Act* before the courts, each party ordinarily pays their own legal costs. This is often described as a 'no costs' jurisdiction.

15.51 During consultations, the ALRC heard that the low likelihood of receiving any payment for legal costs from the respondent in a successful matter can mean that it is not financially viable to make an application regarding sexual harassment. The applicant's legal costs are often higher than any awarded amount. Conversely, if an applicant were at risk of having to pay some or all of the respondent's legal costs in the event that their application was unsuccessful, this would deter many applicants from taking legal action.

15.52 These financial considerations not only act as barriers to individuals making applications, but also impact their ability to access legal representation.[53] Similarly, during a recent consultation process relating to legal costs, the Attorney-General's Department heard a range of concerns that the 'no costs' model in the *Fair Work Act* would not facilitate access to justice for applicants in discrimination matters.[54]

15.53 Further, some survey results suggest that many applicants in sexual harassment matters may be mainly motivated to pursue non-monetary orders.[55] In particular, some non-monetary orders may be pursued in the hope that they will have broader impacts and prevent future sexual harassment. For example, non-monetary orders can include an employer being required to facilitate training for their staff, or to improve mechanisms for reporting sexual harassment. If an applicant cannot recover their legal costs or offset those costs through the compensation awarded, the applicant will be out-of-pocket, even if the application is successful.

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53 Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (24 October 2022) 15. See also Australian Discrimination Law Experts Group, Submission to Attorney-General's Department (Cth), *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws 2023* (13 April 2023); Australian Human Rights Commission, Submission to Attorney-General's Department (Cth), *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws 2023* (13 April 2023); Circle Green, Submission to Attorney-General's Department (Cth), *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws 2023* (13 April 2023); Grata Fund and Public Interest Advocacy Centre, Joint Submission to the Attorney-General's Department (Cth), *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws 2022* (14 April 2023); Maurice Blackburn Lawyers, Submission to Attorney-General's Department (Cth), *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws 2023* (13 April 2023).

54 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 2023, 8148 (Mark Dreyfus).

55 Thornton, Pender and Castles (n 53) 87.

15.54 Work-related sexual harassment often arises out of power imbalances between those involved.[56] Any power imbalance may affect whether and how any formal complaint or application is made about the sexual harassment, and how any justice processes are conducted. In addition, respondents are likely to have access to greater resources than an individual applicant, particularly when the respondent is a corporate entity or an institution. Some organisations have suggested that, especially when there is little chance of the respondent being required to pay the applicant's legal costs, respondents can prolong legal proceedings as a strategic means of 'exhausting' the applicant.[57]

## *A 'modified equal access' costs protection provision*

15.55 The costs provision in the *Australian Human Rights Commission Act*, which governs court applications in relation to sexual harassment under the *Sex Discrimination Act* and other discrimination, was similarly identified as creating a disincentive to applications regarding breaches of anti-discrimination laws. Under that Act, courts had discretion to order that costs 'follow the event', such that an unsuccessful party might be ordered to pay some or all of the legal costs of the other party.[58] The risk that an applicant would be required to pay some or all of a successful respondent's legal costs reportedly acted as a significant barrier to court applications.[59] The *Australian Human Rights Commission Act* was amended with effect from October 2024 to introduce a 'modified equal access cost protection provision'[60] for all proceedings under Commonwealth anti-discrimination law. That costs regime was expressly preferred over a 'no costs' regime of the kind that operated under the *Fair Work Act*.[61]

15.56 The new provision prevents a court from ordering an applicant to pay a respondent's legal costs, unless:

- the applicant has instituted the proceedings vexatiously or without reasonable cause;
- the applicant's unreasonable conduct caused the other party to incur costs; or
- where the respondent is successful in the proceedings, the respondent does not have a significant power advantage over the applicant, and does not have significant financial or other resources relative to the applicant.[62]

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56 Anita Raj, Nicole Johns and Rupa Jose, 'Gender Parity at Work and Its Association with Workplace Sexual Harassment' (2020) 68(6) *Workplace Health and Safety* 279.

57 Grata Fund and Public Interest Advocacy Centre (n 53) 10; Australian Council of Trade Unions, Submission to the Attorney-General's Department (Cth)*, Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws 2022* (14 April 2023) 7.

58 *Australian Human Rights Commission Act 1986* (Cth) s 46PSA (as in force prior to 2 October 2024).

59 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 1) 507; Thornton, Pender and Castles (n 53) 14.

60 The phrase 'modified "equal access" approach' was used in the Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) [4].

61 Ibid.

62 *Australian Human Rights Commission Act 1986* (Cth) s 46PSA.

15.57 The effect of the new provision is that if an applicant is unsuccessful, each party will ordinarily pay their own legal costs. However, if an applicant is successful, the court must order the respondent to pay the applicant's costs (except for any costs incurred by an applicant's unreasonable conduct).[63]

15.58 The Attorney-General's Department (Cth) explained that an 'equal access cost model'

> is weighted more in favour of applicants and overcoming barriers to them proceeding to court with discrimination matters, it is referred to as an 'asymmetrical cost model' — though as advocates have pointed out, individual applicants seeking to enforce their rights in discrimination law often face significant challenges (including power disparities), and so some term this model an 'equal access cost model', as it seeks to level the playing field for applicants.[64]

15.59 The 'modification' to the 'equal access cost model' reflected in the new provision in the *Australian Human Rights Commission Act* is that an applicant may be ordered to pay for a respondent's legal costs if the respondent is successful, does not have a significant power advantage over the applicant, and does not have significant financial or other resources relative to the applicant.[65] This modification reflected concerns that small businesses and organisations might be unfairly left with the cost of successfully responding to a discrimination allegation.[66]

15.60 The main justifications given for introducing the 'modified equal access' cost protection provision were to address cost barriers that discouraged individuals from commencing proceedings under the *Sex Discrimination Act*, and that made it financially harder to access legal representation.[67] In particular, in the case of sexual harassment proceedings, the fear of an adverse costs order was noted as a significant deterrent.

## Reasons for recommendation

15.61 Implementing **Recommendation 52** for sexual harassment applications under the *Fair Work Act* would provide greater access to justice for people who experience work-related sexual harassment, by diminishing the cost barriers associated with commencing proceedings under the existing 'no costs' regime in the *Fair Work Act*.

15.62 The recommended provision would provide appropriate protection for both applicants and respondents against orders to pay another party's costs. Successful

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63 Ibid.

64 Attorney General's Department (Cth), *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws* (Consultation Paper, 2023) 28.

65 *Australian Human Rights Commission Act 1986* (Cth) s 46PSA.

66 Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 33 of 2023–24, 27 November 2023) 7.

67 Attorney General's Department (Cth) (n 64) 29; Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 1) 507.

applicants would ordinarily recover their legal costs from the respondent. Given that legal costs currently commonly outweigh any monetary compensation awarded, this would improve access to justice for applicants. Respondents would ordinarily pay their own legal costs if the applicant is unsuccessful, which is the same as the current position under the *Fair Work Act*. In addition, a respondent may benefit from an order that an applicant pay the costs of the respondent, where the respondent does not enjoy a power advantage over the applicant, does not have significant resources relative to the applicant, and the respondent has been successful.

15.63 Amending the *Fair Work Act* to include the recommended provision for legal costs in sexual harassment proceedings would improve consistency between sexual harassment proceedings under the *Fair Work Act* and the *Sex Discrimination Act*. The ALRC heard in consultations that navigating between the *Fair Work Act* and the *Sex Discrimination Act* can be a challenge — a consistent approach to costs across both Acts would improve navigability.[68]

15.64 Most stakeholders supported incorporating the recommended costs protection provision. Some stakeholders were concerned about inconsistency within the *Fair Work Act* if proceedings regarding sexual harassment were subject to different rules on costs than other proceedings under that Act. For example, there were concerns about which costs rules would apply if an application alleged both sexual harassment and other misconduct. The ALRC considers that this is an issue that can be resolved as the law is applied. Courts have long had to grapple with the issue of different costs rules applying for different issues in a single proceeding.

## Introducing a positive duty in the Fair Work Act

**Recommendation 53**

The *Fair Work Act 2009* (Cth) should be amended to include a provision (equivalent to that contained in the *Sex Discrimination Act 1984* (Cth)) imposing a positive duty on an employer, or a person conducting a business or undertaking, to take reasonable and proportionate measures to eliminate, as far as possible, the sexual harassment of workers. A person who breaches the positive duty should be liable for payment of a civil penalty.

### Summary of reasons

15.65 **Recommendation 53** aims to support the FWO, a well-established regulator, to ensure that workplaces take reasonable and proportionate measures to eliminate sexual harassment.

68 Correspondence from Margaret Thornton to the Australian Law Reform Commission, 30 September 2024.

15.66 The *Fair Work Act* does not contain a positive duty on employers to eliminate sexual harassment or other discriminatory conduct in the workplace. In contrast, the *Sex Discrimination Act* and workplace health and safety (WHS) laws do contain positive duties, including on employers and PCBUs.

15.67 **Recommendation 53** seeks to align Australian law with international obligations, by placing greater responsibility on the government and other stakeholders with capacity to eliminate sexual harassment to do so, rather than placing the responsibility on people who have experienced sexual violence.

15.68 **Recommendation 53** also seeks to build on the implementation of the Respect@Work Report recommendations, and to establish mutually reinforcing duties across different pieces of legislation.

15.69 **Recommendation 53** would avoid the potential for different regulators to pursue related misconduct. By facilitating the capacity of the FWO to address compliance with the prohibition of sexual harassment as well as the positive duty to eliminate sexual harassment, only a single investigation and a single legal proceeding will be required; where, currently, two investigations and two proceedings may be required.

15.70 The recommendation to introduce a positive duty in the *Fair Work Act* is not intended to impose any greater burden on employers or PCBUs than what is already required under the positive duty in the *Sex Discrimination Act*. The reform would avoid the potential burden of an employer or PCBU being exposed to multiple investigations and legal proceedings in relation to similar alleged misconduct.

## Context and reasons for recommendation

15.71 As outlined in **Chapter 14**, the *Sex Discrimination Act* contains a positive duty on employers and PCBUs to take reasonable and proportionate measures to eliminate sexual harassment (and certain other misconduct) as far as possible.[69] The AHRC has power to promote compliance with the positive duty including by conducting inquiries, issuing and enforcing compliance notices, and accepting enforceable undertakings.[70] The AHRC was given a regulatory function in circumstances where there was already a regulator in the field: the FWO.

15.72 While the FWO has a regulatory role in enforcing compliance with the prohibition on sexual harassment in the workplace sector, it has no regulatory role in relation to the positive duty to eliminate sexual harassment. That is because the *Fair Work Act* does not contain any such positive duty. Accordingly, the FWO does not have any powers as regulator to proactively investigate or enforce compliance with any positive duty regarding sexual harassment. Instead, that function has been left to the AHRC.

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69 *Sex Discrimination Act 1984* (Cth) s 47C.
70 *Australian Human Rights Commission Act 1986* (Cth) div 4A pt 2.

15.73 If a worker is sexually harassed in connection with their work, it is reasonably likely that questions will arise whether the employer or PCBU has taken reasonable measures to prevent sexual harassment. Currently, if a worker complains to the FWO about sexual harassment, and the FWO forms a preliminary view that the employer may not have taken reasonable measures to prevent sexual harassment, the FWO has power to take action in relation to the complaint (including potential vicarious liability of the employer), but needs to refer to the AHRC any concerns regarding potential breaches of the positive duty in the *Sex Discrimination Act*. Having two different regulators simultaneously investigating and potentially taking action in relation to essentially the same conduct is inefficient, and not trauma-informed, because the person experiencing sexual harassment needs to interact with multiple government agencies and re-tell their story multiple times. This also exposes the employer or PCBU to multiple investigations and potentially multiple proceedings that deal with similar allegations of misconduct.

15.74 The ALRC is aware of an existing referral protocol between regulator agencies. Accordingly, upon becoming aware of any matter raising questions relevant to a positive duty, the FWO could refer the entire matter (including the complaint regarding breach of the prohibition on sexual harassment) to the AHRC. The ALRC heard in consultations that while there have been attempts to improve coordination between agencies, referrals remain rare. In any event, referrals are less efficient and trauma-informed than if the original investigating body, that has usually been selected by the person experiencing sexual harassment, were to have power to address all matters, including the underlying causes of sexual harassment in a work-related setting.

15.75 The FWO is a well-established regulator in the field of work. The FWO was established in 2009 (replacing its predecessor, the Workplace Ombudsman). It has responsibility for overseeing compliance generally by employers and other duty holders, and holds institutional knowledge regarding the sector.[71] The FWO has multiple offices in every state and territory in Australia, employs hundreds of inspectors, and has established a team of specialist inspectors for sexual harassment matters.[72] It is likely that the FWO will become aware of employers and PCBUs that may not be complying with an applicable positive duty.

15.76 Introducing a positive duty into the *Fair Work Act* would empower the FWO to enforce the duty as a regulator. Both the AHRC and the FWO supported the reform.

15.77 The positive duty should be a civil remedy provision, such that civil penalties are payable for breach. Pecuniary penalties are an important deterrence measure. In particular, if a duty holder has failed or refused to comply with a compliance notice or enforceable undertaking, it is important for a pecuniary penalty to be

71 Fair Work Ombudsman, 'Australia's Industrial Relations Timeline' <www.fairwork.gov.au/about-us/workplace-laws/fair-work-system/australias-industrial-relations-timeline>.

72 Fair Work Ombudsman, *Submission 219*.

available, rather than simply an order for compliance with the notice or undertaking.[73] **Recommendation 51** is that a civil penalty similarly be available to better enforce the positive duty under the *Sex Discrimination Act*.

15.78 Some stakeholders expressed concern that a new positive duty in the *Fair Work Act* would in some respects duplicate existing duties under other laws. However, there is already significant duplication under the various laws, and the ALRC is not aware of any evidence that existing duplication has led to any concrete problems. It is the enforcement of multiple existing laws dealing with different aspects of the same misconduct that is more likely to cause difficulties due to multiple investigations and multiple proceedings.

15.79 If the recommended reform were implemented, given their support for the proposal, it can be expected that the FWO and the AHRC will liaise to coordinate their respective regulator activities, and to discuss best practice.

15.80 Some stakeholders emphasised that differences between the existing positive duties in the *Sex Discrimination Act* and in WHS laws have caused some confusion and complication for duty holders in particular. However, what is recommended by the ALRC is that the existing duty in the *Sex Discrimination Act* effectively be replicated in the *Fair Work Act*, such that the reform would not alter the existing burden on employers and PCBUs. There should be no resulting confusion. Rather, the potential for confusion caused by two regulators dealing with the same or similar allegations of misconduct would be avoided.

## Clarifying remedies under the Fair Work Act

**Recommendation 54**

The remedies available under the *Fair Work Act 2009* (Cth) for a breach of the prohibition on sexual harassment should be clarified or extended to include capacity for a court or the Fair Work Commission (in arbitration or when making a stop sexual harassment order) to make orders, where appropriate:

a. restraining a respondent from engaging in particular conduct (such as approaching the applicant, or attending a particular place);

b. requiring a respondent to take part in a program of counselling, training, mediation, rehabilitation, or assessment; and

c. requiring a respondent, conducting the business or undertaking in which the sexual harassment has occurred, to take corrective action to prevent further sexual harassment in the business or undertaking.

73 See **Chapter 14**.

## Summary of reasons

15.81 **Recommendation 54** aims to facilitate just outcomes in proceedings under the *Fair Work Act* for people who have experienced sexual violence by clarifying that remedies which may assist to prevent or deter further sexual harassment are available.

15.82 The reasons in **Chapter 14** in support of clarifying the range of remedies available in proceedings under the *Sex Discrimination Act* apply equivalently to **Recommendation 54**. Those remedies reflect just outcomes identified by people who have experienced sexual violence.[74]

15.83 Implementing **Recommendation 54** would ensure that the recommended remedies would be available whether a person seeks a stop sexual harassment order, orders at arbitration, or orders from a court. If **Recommendation 50** were implemented, then **Recommendation 54** would enhance consistency between the *Fair Work Act* and the *Sex Discrimination Act.*

## Reasons for the recommendation

15.84 A common justice need reported by people who have experienced sexual violence is to prevent and deter further sexual violence.[75] The example remedies listed in this Recommendation seek to illustrate how that justice need might be met in civil legal proceedings.

15.85 A wide range of remedies are available under the *Fair Work Act* for people who have experienced sexual harassment. For example, if a person applies for a stop sexual harassment order, the FWC may make 'any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the aggrieved person from being sexually harassed'.[76] If the parties agree to a sexual harassment dispute being arbitrated, the FWC may make orders for payment of compensation, payment of an amount for lost remuneration, and orders requiring a person to 'perform any reasonable act, or carry out any reasonable course of conduct, to redress loss or damage'.[77] If a person applies to a federal court, the court may make 'any order the court considers appropriate', including an injunction, compensation, reinstatement, payment of a pecuniary (monetary) penalty, or requiring a person to comply with a notice from an inspector or the FWO.[78]

15.86 It appears from the broad wording of the remedy provisions that the types of orders listed in **Recommendation 54** are already available under the remedy

74 See, eg, Hildur Fjóla Antonsdóttir, 'Compensation as a Means to Justice? Sexual Violence Survivors' Views on the Tort Law Option in Iceland' (2020) 28(3) *Feminist Legal Studies* 277, 279; Robyn Holder and Kathleen Daly, 'Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors' (2018) 24(1) *International Review of Victimology* 25.

75 See **Chapter 2**.

76 *Fair Work Act 2009* (Cth) s 527J.

77 Ibid s 527S(3).

78 Ibid ss 545–546.

provisions of the *Fair Work Act*. However, these types of orders are not expressly provided for in the *Fair Work Act*. Accordingly, judges, FWC members, FWC staff, lawyers, and parties may not turn their mind to the availability of such orders when determining or seeking remedies. Furthermore, there may be some uncertainty as to the scope of available orders. For example, people may not assume, in the absence of express provision, that an order for a respondent to attend counselling would properly be categorised as an order 'to prevent the aggrieved person from being sexually harassed' as part of a stop sexual harassment order.

15.87 For those reasons, it would be preferrable if the types of orders specified in **Recommendation 54** were expressly referred to in the remedy provision of the *Fair Work Act* dealing with the orders available for addressing sexual harassment.

## Addressing sexual harassment beyond workplaces

**Recommendation 55**

The Australian Government should, within 24 months of this Report, conduct a review of the operation of the regime in the *Fair Work Act 2009* (Cth) addressing sexual harassment.

Subject to the outcome of that review, a regime incorporating tribunal, court, and regulatory processes like those provided for in the *Fair Work Act 2009* (Cth) should be made available in other sectors (for example, in the higher education sector) or across all areas of activity in which sexual harassment is prohibited in the *Sex Discrimination Act 1984* (Cth).

### Summary of reasons

15.88 **Recommendation 55** contemplates future reform subject to a further review. The proposed reform is conditional upon a positive review of the operation of the sexual harassment regime in the *Fair Work Act*.

15.89 Recent reforms have introduced new sexual harassment provisions (including enforcement processes) in the *Fair Work Act*. The reforms appear promising, but have not yet been reviewed for their effectiveness. Implementing **Recommendation 55** would involve conducting a review in 24 months' time. In that review, consideration would be given to whether the core components of the Fair Work regime for addressing sexual violence should be replicated so as to extend the benefits of that regime beyond workplaces, including into all areas of activity covered by the *Sex Discrimination Act*.

## The benefits of the Fair Work regime

15.90 The core components of the Fair Work regime for addressing sexual violence are outlined above. It is instructive to return to them in order to consider the beneficial contribution that regime may be expected to make in relation to improving justice outcomes for people who have experienced sexual harassment.

15.91 Although the regime for addressing work-related sexual harassment is largely new and untested, there is good reason to think that the current regime (when supplemented with the improvements recommended in this chapter), has significant utility.

15.92 The regime prohibits sexual harassment and, if **Recommendation 53** is implemented, the regime will impose a positive duty on employers and PCBUs to eliminate sexual harassment. Vicarious liability for sexual harassment is also imposed on employers.

15.93 The regime should improve access to justice for people who have experienced sexual harassment related to their work. It should do that because it should better provide clear, quick, cheap and accessible pathways to the resolution of complaints of sexual harassment.

15.94 The FWC is required to start dealing with applications for stop sexual harassment orders within 14 days of such an application being made.[79] The ALRC understands that conciliation before the FWC is currently available within six weeks. Legal representation before the FWC is allowed only if permitted by the Commission.[80] The processes before the FWC are far more informal and less legally complex than those of a court, making self-representation far more practicable. That is partly because of the assistance to self-represented persons the FWC provides,[81] and the capacity of unions to assist their members to bring and conduct complaints.[82]

15.95 The availability of a tribunal as an alternative to court proceedings is likely to substantially improve access to justice for many people. That tribunal — the FWC — is available to conduct an agreed arbitration as an alternative to litigants undertaking what would likely be a far more costly and complex court proceeding.

15.96 The regime empowers the FWC to provide a wide range of remedies, including remedies that can help prevent and deter further sexual harassment.

15.97 Under the Fair Work regime, the burden of bringing legal proceedings to enforce compliance and the responsibility for addressing sexual harassment could increasingly be shifted away from individual complainants. Legal cost and other

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79 Ibid s 527J(2).

80 Ibid s 596.

81 See, eg, Fair Work Commission, 'How We Deal with Sexual Harassment Cases' <www.fwc.gov.au/issues-we-help/sexual-harassment/how-we-deal-sexual-harassment-cases>.

82 See, eg, Fair Work Commission, 'Who Can Make a Sexual Harassment Application' <www.fwc.gov.au/issues-we-help/sexual-harassment/who-can-make-sexual-harassment-application>.

burdens of conducting proceedings to enforce compliance with the positive duty to eliminate sexual harassment would be with the FWO. The positive duty will help to shift responsibility for dealing with sexual harassment from the individual to employers and PCBUs. The legal costs and other burdens of enforcing compliance with the prohibition on sexual harassment could be very substantially shifted from the individual to the FWO if that regulator were sufficiently resourced to shoulder that burden. That burden could also be shared by unions, who have standing to institute legal proceedings on behalf of their members.

15.98 Compliance measures may be expected to be enhanced because the FWO has a range of powers including entering premises, requiring records and documents, as well as the capacity to issue compliance notices and receive enforceable undertakings from non-compliant persons and organisations.

15.99 A 'modified equal access costs protection provision' (see **Recommendation 52**) would provide greater access for individual complaints to the courts. In relation to applications brought before the federal courts, further mediation by a registrar is available.

15.100 The courts have wide powers to grant relief, including orders that can prevent or deter future sexual harassment and orders that enforce compliance with orders made by the FWC.

15.101 Those features of the Fair Work regime may be expected to improve access to justice and justice outcomes for those people who experience sexual harassment related to their work. That is so for two key reasons, each of which is relevant to the problem of non-engagement. First, the tribunal processes and functions should improve accessibility for individual claimants. Secondly, the regime would be less reliant on individual complaints. The potential for the regime to be effective would be enhanced by employers and PCBUs complying with the positive duty, assisted by the FWO's promotion of compliance. Furthermore, there would be engagement with the prohibition of sexual harassment through the FWO's responsibility to promote compliance, including by instituting or supporting court proceedings.

## Extending the benefits to areas beyond workplaces

15.102 The Respect@Work Report identified that laws providing for individual complaints and proceedings are not effective in addressing or preventing sexual harassment. It recommended placing greater responsibility on relevant government agencies and workplace duty holders to address and prevent sexual harassment. The reforms that resulted apply in relation to sexual harassment in the context of a person's work only. Accordingly, a person who experiences sexual harassment without sufficient connection to their work does not have access to the same justice pathways, such as recourse to a regulator, a tribunal, or a court under Commonwealth

law. Recent surveys have identified sectors outside of work in Australia, such as universities, in which rates of sexual harassment are particularly high.[83]

15.103 People who experience sexual harassment in areas of activity other than work should have access to the same range of justice options and pathways as are available for work-related sexual harassment, unless there are good reasons why the benefit of the law should be denied to them. Equality before the law and equal access to the protection of the law are important components of the rule of law and should not be denied without good reason.[84] Organisations and regulators should have similar responsibilities to prevent sexual harassment, regardless of the sector in which it occurs.

15.104 Expanding justice processes and the regulatory regime beyond work-related sexual harassment to other sectors would help to prevent sexual harassment and improve access to justice and just outcomes for people who have experienced sexual harassment.

15.105 Providing equivalent justice processes in response to sexual harassment across multiple sectors would be more consistent with Australia's international human rights law obligations to prevent sexual harassment and ensure effective remedies for harm. Under international law, states have an obligation to prevent sexual harassment in any context.[85] The scope of laws and justice processes giving effect to this international obligation should not be confined to any one area of activity.[86]

15.106 Some stakeholders suggested the AHRC should be given more functions and resourcing to take on an expanded regulator and tribunal role for sexual harassment in all contexts.[87] Similarly, it has been proposed that a positive duty be implemented across all discrimination Acts with stronger regulatory powers provided to the AHRC.[88]

15.107 Some of the components of the Fair Work regime discussed above (including its recommended components) already exist under the regime provided for by the *Sex Discrimination Act* in relation to sexual harassment in the area of employment that that Act covers. The components of the *Sex Discrimination Act* regime for addressing sexual harassment were outlined in **Chapter 14**.

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83 Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Harassment at Australian Universities* (August 2017).

84 See **Chapter 1**.

85 See **Chapter 14**.

86 See, eg, Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 1) 72; Committee on the Elimination of Discrimination against Women, *General Recommendation No 35: Gender-based violence against women, updating general recommendation No. 19*, UN Doc CEDAW/C/GC/35 (26 July 2017).

87 Thornton, Pender and Castles (n 53) 96.

88 Australian Human Rights Commission, *Revitalising Australia's Commitment to Human Rights: Free & Equal* (Final Report, 2023) 23.

15.108 The beneficial features of the Fair Work regime for addressing sexual harassment that do not exist under the *Sex Discrimination Act* are, broadly:

- there is currently no capacity under the *Sex Discrimination Act* to engage with a relatively quick, cheap, and accessible tribunal for urgent relief, such as a stop sexual harassment order;
- there is currently no capacity under the *Sex Discrimination Act* for an agreed arbitration conducted by an accessible tribunal; and
- there is currently no regulator with power to take the burden of enforcing compliance with the prohibitions on sexual harassment in the *Sex Discrimination Act*.[89]

15.109 The review contemplated by this Recommendation should consider whether, and if so, how, each of those 'missing' components could be brought into the *Sex Discrimination Act* regime addressing sexual harassment. The feasibility of giving the AHRC tribunal functions equivalent to those exercised by the FWC in relation to sexual harassment should be considered. If those functions and powers are validly being exercised by the FWC as a tribunal (and the ALRC considers that they are),[90] there would appear to be no constitutional impediment on the same functions and powers being exercised by any other tribunal established by the Commonwealth Parliament, including the AHRC.

15.110 If the AHRC were to be given a tribunal function, it may be appropriate that its regulatory role in relation to the positive duty instead be conferred upon a different statutory body. For example, a new single regulator could operate across all of the areas of activities in which sexual harassment is prohibited under the *Sex Discrimination Act*. Its regulatory functions could deal with compliance with both the prohibitions on sexual harassment as well as the positive duty to eliminate sexual

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89 *Sex Discrimination Act 1984* (Cth) s 47C(2)(b).

90 Given the High Court's decision in *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, the question of whether the FWC would be invalidly exercising judicial power in performing these functions was likely considered at the time that these functions were introduced via the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). The explanatory materials are not of assistance in this regard. In determining whether a function is an exercise of judicial power or arbitral power, the authorities state that the analysis must be a 'multi-factorial examination of various characteristics of the power conferred and of the body in which the power is reposed': *One Tree Community Service Inc v United Workers' Union* (2021) 284 FCR 489, [57]. As to the FWC's function of conducting a consent arbitration, the authorities are clear that a consent arbitration is not an exercise of judicial power: see *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; *One Tree Community Service Inc v United Workers' Union* (2021) 284 FCR 489. As to the FWC's function of making stop sexual harassment orders, the better view is that this is not the exercise of judicial power because the order involves the creation of a new right rather than the determination of existing rights, and because the order is not enforceable by the FWC — in circumstances where a stop sexual harassment order is contravened, a separate application must be made under pt 4–1 of the *Fair Work Act 2009* (Cth) to a Ch III court for determination — see *Re Ranger Uranium Mines Proprietary Limited and Others; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656; *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

harassment in so far as that duty is extended beyond the area of employment under the *Sex Discrimination Ac*t.

15.111 The review should further consider whether any features of WHS regimes, and obligations under the International Labour Organization's *Violence and Harassment Convention*, should be better reflected in the sexual harassment regime.[91] The *Violence and Harassment Convention* had not been ratified at the time the Respect@Work Report was published.[92] Australia having now ratified the Convention, a holistic review of anti-discrimination laws, workplace laws, and workplace health and safety laws may be appropriate to ensure Australia is meeting its obligations,[93] and to clarify how these duties overlap and operate together.[94]

15.112 As is contemplated by **Recommendation 49**, it would be timely for the review to also consider whether the prohibitions on sexual harassment in the *Sex Discrimination Act* should apply universally. The ALRC does not suggest that a positive duty to eliminate sexual harassment should apply in private areas of activity, nor would it be appropriate for a regulator to exercise powers beyond activities in the public sphere.

91 International Labour Organization, *Violence and Harassment Convention, 2019 (No. 190)*.

92 International Labour Organization, 'Australia Ratifies Convention No. 190 on Violence and Harassment at Work and Convention No. 138 on Minimum Age' <www.ilo.org/resource/news/australia-ratifies-convention-no-190-violence-and-harassment-work-and>.

93 Lisa Heap, 'Preventing Gender-based Violence and Harassment at Work: A Study of the Potential of New Regulatory Approaches' (PhD Thesis, RMIT University, 2023) 179–80, 182–3.

94 Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32(2) *Australian Journal of Labour Law* 219, 246–7.

# 16. Improving Victims of Crime Schemes

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## Introduction

16.1 This chapter contains recommendations for reform to victims of crime schemes (sometimes referred to as either a victims of crime financial assistance scheme or a criminal injuries compensation scheme) as a justice option for people who have

experienced sexual violence. The state and territory legislation establishing these schemes frequently uses the phrase 'victims of crime', which is reflected in the title of this chapter. In the remainder of this chapter, the shorthand phrase 'the Schemes' is used instead.

16.2 As discussed in **Chapter 2**, experiencing sexual violence can profoundly affect a person's physical and psychological wellbeing, and can limit their ability to learn, work, and engage with their community. Financial assistance, or compensation, can be a life changing and tangible way for governments to assist people who have experienced sexual violence to access the supports they need and to have their experience acknowledged.[1]

16.3 The ALRC anticipates that the Schemes have significant potential as a justice pathway for people who have experienced sexual violence and can support a person's recovery from sexual violence. The limitations of other justice options, including the lack of accessibility (discussed throughout this Report), make it imperative that the Schemes (which are generally more accessible) provide appropriate support, and respond to the experiences and needs of people who have experienced sexual violence.

16.4 This chapter contains recommendations that reflect these important principles. These recommendations also promote greater consistency between the various Schemes.

16.5 This chapter includes the following recommendations:

- **Recommendation 56**, to improve access to the Schemes by removing or amending requirements that may particularly disadvantage people who have experienced sexual violence; and
- **Recommendation 57**, for schemes to review specified features of their operations in relation to all offences, not just sexual violence.

16.6 Broadly, there are two types of scheme in Australia (discussed in more detail below):

- **Financial Assistance Schemes** tend to reimburse expenses incurred (up to a certain amount) and provide for a lump sum 'special payment' or 'recognition payment' that is calculated by reference to the seriousness of the offence. They also provide access to counselling, and connection to other support services. The schemes in the Australian Capital Territory, New South Wales, Queensland, and Victoria in particular tend to fall within this category.
- **Criminal Injuries Compensation Schemes** operate based on tortious principles, and (subject to a monetary cap) tend to reimburse actual expenses already incurred; sometimes cover anticipated future expenses; and provide compensation for injuries suffered (non-economic loss such as bodily injury

1 Robyn Holder and Kathleen Daly, 'Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors' (2018) 24(1) *International Review of Victimology* 25, 35.

and pain and suffering). In particular, the schemes in South Australia, Western Australia, and Tasmania exhibit more of these features.

16.7 Not all schemes neatly fit within one of these types of scheme. For example, the Northern Territory legislation provides for financial assistance for some categories of offences, and compensation for injuries sustained as a result of other offences. Financial assistance is available in relation to a number of sexual offences.

## What we heard from people who have experienced sexual violence

16.8 The ALRC heard varied experiences with the Schemes from people who have experienced sexual violence. Some people identified positive experiences such as quick and simple processes, significant payments, and access to supports.[2]

16.9 Some people felt that their experience of sexual violence was acknowledged or recognised through the process.[3] One submission noted, for example:

> I found the experience to be emotionally demanding on one hand and yet, fulfilling on the other. The process of remembering the abuse triggered by telling the story and gathering evidence was difficult and disruptive to my day to day life. But, the act of speaking out about the assault and taking legal action was an act of self validation. It was fulfilling in my need to stand up and take action to receive some acknowledgement from the state of the suffering and be counted as a victim-survivor.[4]

16.10 Some people identified negative experiences. They found the Schemes 'demanding', 'traumatising', 'invasive', 'tedious', and 'complex'.[5] Some noted that evidentiary burdens were difficult to satisfy,[6] and some experienced a lack of communication about the process.[7] For example, one submission stated:

> The process was incredibly traumatising and invasive … there were many times I felt inadvertently victim-blamed. … Looking back, if I had to go through this entire process again, I would not.[8]

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2 See, eg, Not published, *Submission 31*; O Camera, *Submission 71*; P Brennan, *Submission 87*.

3 See, eg, Name withheld, *Submission 6*; Name withheld, *Submission 43*; Not published, *Submission 173*.

4 Name withheld, *Submission 43*.

5 See, eg, A Williams, *Submission 19*; S Filmer, *Submission 30*; Name withheld, *Submission 43*; Name withheld, *Submission 95*; A McIntosh, *Submission 131*; Not published, *Submission 176*.

6 See, eg, Not published, *Submission 35*; Name withheld, *Submission 43*; Name withheld, *Submission 77*; A McIntosh, *Submission 131*.

7 See, eg, Name withheld, *Submission 77*; A McIntosh, *Submission 131*; Name withheld, *Submission 162*.

8 A McIntosh, *Submission 131*.

16.11 Some people were disappointed with the amount of financial assistance awarded,[9] and felt it did not adequately reflect their experience of sexual violence or its impact:[10]

> I feel the compensation payout I received did not reflect the long lasting impacts the crime would have on my well being and my career.[11]

16.12 Submissions identified a general lack of awareness about the existence of the Schemes:[12]

> I don't think a lot of victims of sexual violence, particularly within the context of an intimate relationship, are aware of their entitlement to compensation. Therapeutic supports are very expensive, yet they can be essential to the recovery process. Victims of sexual violence might be missing out on vital supports because they are unaware of free services and cannot afford to pay for private services.[13]

16.13 Submissions suggested that the Schemes could be improved by simplifying the application process,[14] extending time limits,[15] increasing the amounts awarded,[16] and making schemes more trauma-informed.[17]

## Reform for sexual violence and other matters

16.14 The Terms of Reference direct the ALRC to focus on sexual violence. The ALRC has therefore focused on how best to reform the Schemes to address the needs of people who have experienced sexual violence. The ALRC recognises that the Schemes are available in relation to a wide range of offences beyond sexual violence, and that scheme operators seek to fairly distribute a necessarily limited pool of available funds between successful applicants. The ALRC has not been asked to assess the merits of implementing reforms that are expected to benefit people who have experienced sexual violence, relative to the merits of implementing reforms that would be expected to benefit other groups of potential applicants. Any such assessment would travel well outside the Inquiry's Terms of Reference.

16.15 Nevertheless, reforms such as those in **Recommendation 56** may similarly benefit victims of crimes other than sexual violence. State and territory governments

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9 See, eg, A Williams, *Submission 19*; S Filmer, *Submission 30*; Not published, *Submission 44*; A McIntosh, *Submission 131*; Not published, *Submission 176*.

10 See, eg, A Williams, *Submission 19*; S Filmer, *Submission 30*; Not published, *Submission 173*; Not published, *Submission 176*.

11 S Filmer, *Submission 30*.

12 See, eg, Not published, *Submission 97*; Name withheld, *Submission 136*; Not published, *Submission 171*; Not published, *Submission 173*.

13 Name withheld, *Submission 136*.

14 See, eg, S Filmer, *Submission 30*; Not published, *Submission 35*.

15 See, eg, Not published, *Submission 44*; Name withheld, *Submission 95*.

16 See, eg, A Williams, *Submission 19*; S Filmer, *Submission 30*; Not published, *Submission 44*; P Brennan, *Submission 87*.

17 See, eg, S Filmer, *Submission 30*. See also National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 105*.

should consider whether the reforms contemplated in **Recommendation 56** should be applied in relation to all applicants, or to particular applicants who may be similarly disadvantaged, whether or not they have experienced sexual violence. State and territory governments should consider in particular whether the reforms should be implemented for applicants alleging family and domestic violence.

16.16 The features of the Schemes addressed by **Recommendation 56** are, for the reasons discussed above, likely to be particularly significant for applicants who have experienced sexual violence, as compared to many or most other categories of applicants. Given that the focus of this Inquiry is on people who have experienced sexual violence, it is appropriate that **Recommendation 56** contemplates reform in respect of applications relating to sexual offences, irrespective of whether more general reform is implemented for applications relating to other offences.

16.17 In contrast, the measures or processes dealt with by **Recommendation 57** are problematic for applicants who have experienced sexual violence, but not in a way that justifies bespoke reform. Nor, given the Terms of Reference, is there a justification for the ALRC recommending reform which would travel well beyond sexual violence. Accordingly, **Recommendation 57** does not recommend immediate reform but recommends that the matters dealt with be the subject of further review and consideration.

16.18 In developing recommendations for reform in relation to sexual violence matters specifically, the ALRC has reflected on requirements imposed by the Schemes that may particularly disadvantage people who have experienced sexual violence. Certain requirements may particularly disadvantage people who have experienced sexual violence because:

- For a range of understandable reasons, people who experience sexual violence often do not disclose or report that violence to anybody else, including police, doctors, or other support workers.[18] Reasons may include:
  - facing barriers to reporting (discussed in **Chapter 3**);
  - feelings of confusion, guilt, or self-blaming;
  - fear of the person responsible for the harm, of potential repercussions of reporting, and of not being believed; and
  - not recognising the experience as constituting sexual violence.[19]
- People who experience sexual violence may take much longer than victims of other crimes to disclose or report the offence.[20] The Child Sexual Abuse

18 See **Chapter 3**.
19 Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (2017) 4.
20 See **Chapter 3**.

Royal Commission found that on average it took 23.9 years for participants to disclose abuse.[21]

- Experiences of sexual violence are inherently traumatic and often impact a person's wellbeing and livelihood (as discussed in **Chapter 2**). These impacts reduce the ability of those who have experienced sexual violence to access legal processes which are complex, costly, time consuming, and expensive. Further, being required to 'relive' the violence by telling others what happened can cause further trauma and can impact the person's recovery from trauma.
- People who use sexual violence are usually known to the person who experiences the violence (as discussed in **Chapter 2**). Consequently, applicants who have experienced sexual violence often have ongoing safety concerns, for example if the person using violence can locate the applicant relatively easily, because they know where the applicant lives, works, or otherwise spends time.
- Some groups of people experience sexual violence at a higher rate and with greater impact than other groups (see **Chapter 2**) and may be additionally disadvantaged in various ways by the requirements imposed by the Schemes. Groups which are disproportionately reflected in sexual violence statistics include First Nations women, women with a disability, older women, LGBTQIA+ people, migrant and refugee women, sex workers, and women who have been incarcerated.

## The Schemes present a significant opportunity to expand access to justice

16.19 The Schemes are an important justice pathway for people who have experienced sexual violence. The National Plan highlights the importance of governments supporting recovery and healing to ensure people who have experienced sexual violence are well supported in all aspects of their daily lives through trauma-informed, culturally safe, and accessible services that support long-term recovery from violence.[22] The Schemes can form part of a person's recovery from sexual violence,[23] and have the potential to meet a range of needs and interests:[24] survival needs, through medical care, counselling, and other services; and justice interests through the recognition necessary to heal from sexual violence.[25] For many applicants, assistance from a Scheme might be the only formal recognition they receive of the sexual violence and its impact on them.[26] Applications

21 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 4* (2017) 30.

22 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 86–7.

23 Victims Legal Services (Victoria), *Submission 188*.

24 Kathleen Daly, 'Sexual Violence and Victims' Justice Interests' in Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge, 2017) 108, 113–14.

25 Holder and Daly (n 1) 40.

26 Clayton Utz Pro Bono Practice, *Submission 183*.

relating to domestic and sexual violence make up a large proportion of applications for financial assistance and compensation.[27] Accordingly, the Schemes present an opportunity, through reform, to further support the justice needs of people who have experienced sexual violence.

16.20 The Schemes have several advantages over criminal justice responses and other civil justice responses for people who have experienced sexual violence, including:

- Most people who have experienced sexual violence choose not to engage with the criminal justice system and low numbers report the violence to authorities, especially police (see **Chapter 2**). In addition, those who do engage with the criminal justice system experience high rates of attrition, such that a justice outcome is not achieved through the criminal justice pathway.[28]
- Other civil litigation options, such as tort law, may be expensive, adversarial, and retraumatising.[29]
- The Schemes may better meet the justice needs of people who have experienced violence. For example, the Schemes generally seek to acknowledge harm and assist with recovery, rather than to punish the person who has used violence. Many people who have experienced sexual violence say they primarily seek acknowledgement and recovery.
- The processes conducted by the Schemes generally require no interaction between the person harmed and the person who harmed them.
- Most schemes apply a lower standard of proof than criminal proceedings. The lower standard of proof may assist to address the concerns of some applicants that they may not be believed within the justice system.
- Many people can make an application to the Schemes on their own and at low cost. Consequently, it can be a lot more affordable to apply to one of the Schemes than to start other civil proceedings. While some people are able to make an application without assistance, others require the support of a lawyer to navigate the application or review process. Some schemes provide that applicants can recoup some legal costs associated with making

27 See, eg, ACT Human Rights Commission, *Annual Report 2022–23* (2023) 51; Department of Communities and Justice (NSW), *2023–24 Annual Report: Volume 1 – Performance and Activities* (2023) 101; KPMG, *Review of the Financial Assistance Scheme: Prepared for Victim Assist Queensland, Department of Justice and Attorney-General* (Final Report, 2024) 41; Victims of Crime Assistance Tribunal (Vic), *Annual Report 2023–2024* (2024) 42; Office of Criminal Injuries Compensation, Department of Justice (WA), *Annual Report 2022–23* (2023) 13, 22.

28 See **Chapter 2** and **Chapter 5** for a more detailed discussion of attrition.

29 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending — Pathways to Better Outcomes for Victims, Offenders and the Community* (2014) 92; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 223 [11.16]–[11.20].

an application or place limitations on legal fees,[30] and some states provide government-funded legal assistance related to the scheme.[31]

- Any remedy awarded by a scheme is implemented relatively quickly after a decision is made. For example, if an applicant is awarded financial assistance, the applicant can expect the state to pay promptly. In contrast, a respondent in a civil claim may not have sufficient funds to pay any amount awarded, or may be uncooperative and refuse to pay, leaving the applicant with the option of seeking to enforce the civil order. However, delay in the assessment of claims has been identified as a problematic aspect of several of the Schemes.[32]

16.21 The Schemes have the potential to make a substantial difference to a significant number of people who have experienced sexual violence. It is important for people who have experienced sexual violence to have access to a range of options to meet their justice needs. Some people may not be able or willing to engage with other justice pathways such as the criminal justice system, restorative justice, or other civil justice pathways. The ALRC therefore recommends expanding access to the Schemes, and improving sexual violence response outcomes, by removing or amending requirements that particularly disadvantage people who have experienced sexual violence.

16.22 The ALRC further recommends that the Schemes review their processes and requirements to:

- make processes more trauma-informed and safe;
- provide for more suitable awards;
- enhance mechanisms that help recognise and acknowledge the offending experienced and its impact; and
- remove requirements that are not justified and that cause disadvantage.

## Background: the Schemes across Australia

16.23 All states and territories in Australia provide some form of financial support to victims of crime. The Schemes were initially conceived as subsidiary schemes within the criminal justice system, and as alternatives to inadequate civil compensation systems.[33] Importantly, the Schemes generally do not award equivalent amounts to

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30 See, eg, *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 96; *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) reg 12; *Victims of Crime Assistance Act 2009* (Qld) s 38(2); *Victims of Crime Act 2001* (SA) s 25; *Victims of Crime (Statutory Compensation) Regulations 2019* (SA) sch 2; *Victims of Crime Assistance Act 1976* (Tas) s 4(2)(e); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 25, 39.

31 See, eg, Victims of Crime Victoria, 'Victims Legal Service' <www.victimsofcrime.vic.gov.au/victims-legal-service>.

32 See, eg, Aboriginal Family Legal Services (WA), *Submission 40*; Women's Legal Service Victoria, *Submission 207*; Robyn Holder et al, *Project Assisting Victims' Experience and Recovery (PAVER) Review* (Final Report, Australian National University, February 2021) xvii.

33 Holder et al (n 32) 9; Ian Freckelton, 'Compensation for Victims of Crime' in Marijke Malsch and Hendrik Kaptein (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Taylor & Francis Group, 2004) 32.

what an applicant might receive in successful civil law litigation. Rather, the Schemes generally provide applicants with some publicly funded relief, whether or not the person who committed the offence is held accountable or liable.

16.24 The Schemes are not designed to provide 'perfect justice', nor to supplant the criminal justice system or civil compensation claims (such as tort law or sexual harassment legislation). Rather, the Schemes are designed to provide a quick, cheap, and accessible form of justice. The fact-finding processes used are undemanding in comparison to legal proceedings. Witnesses are not generally called or examined to test the evidence put forward. The Schemes utilise evidentiary presumptions, some of which are discussed below.

16.25 Since the 1990s, the Schemes have undergone many reviews and amendments.[34] Consequently, the Schemes now differ in:

- how they operate — schemes can operate 'administratively' or 'judicially'; and
- their purpose — schemes can aim to 'compensate' applicants or instead, provide applicants with 'financial assistance'.

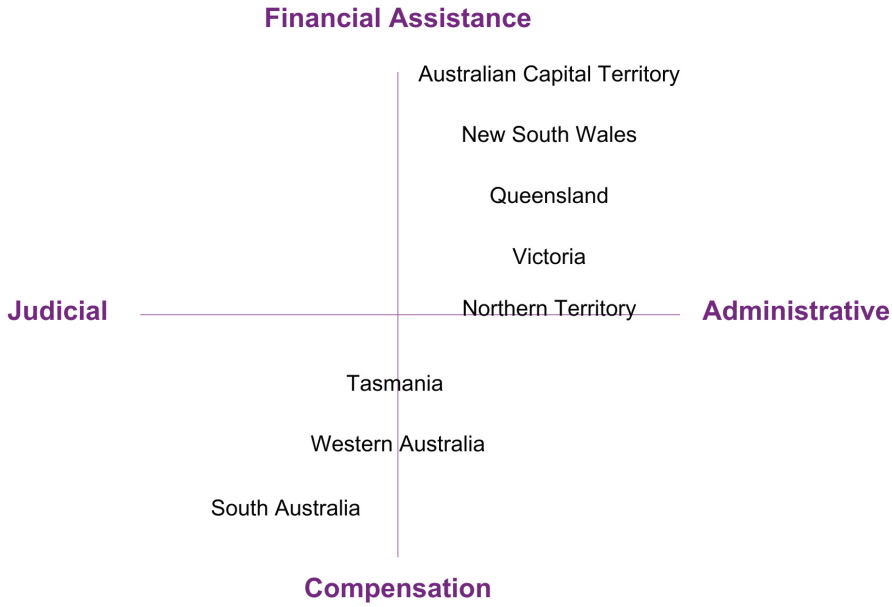
16.26 These disparate changes in the various states and territories have resulted in 'remarkably disuniform' legislation, and award amounts that vary widely.[35] These differences are discussed more below.

16.27 **Figure 16.1** below seeks to illustrate the diversity of the Schemes. The Schemes are placed on a spectrum to indicate the extent to which they are judicial or administrative in nature, and the extent to which they provide for either compensation or financial assistance. The placement of the Schemes on this diagram is not intended to be precise, but rather to give a general idea about the nature of the Schemes and the differences between them.

34 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Final Report, 2018) ch 2. See also Department of the Attorney-General and Justice (NT), *Victims of Crime Reform* (Discussion Paper, November 2018); Department of Justice (NSW), *Statutory Review: Victims Rights and Support Act 2013* (2018); Department of Justice (WA), *Report on the Findings of the Review of the Criminal Injuries Compensation Scheme in Western Australia* (2019); Holder et al (n 32); Department of Communities and Justice (NSW), *Statutory Review of the Victims Rights and Support Act 2013* (Background Paper, 2022); Legal Affairs and Safety Committee, Parliament of Queensland, *Inquiry into Support Provided to Victims of Crime* (Report No 48, 2023); KPMG (n 27).

35 Ian Freckelton, 'Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed' in Chris Sumner et al (eds), *International Victimology: Selected Papers from the 8th International Symposium* (Australian Institute of Criminology, 1996) 241, 241.

***Figure 16.1: The general nature of the Schemes***




16.28 In Australia, the trend among the Schemes is a move away from operating as compensation schemes, and towards financial assistance schemes. While both types of scheme aim to promote recovery for the applicant, they are different in emphasis.

16.29 Subject to financial caps on the maximum amounts that can be awarded, compensation schemes broadly aim to place the applicant in the position they were in before the crime occurred. Based upon the logic of tort law, these schemes provide payment for economic losses (medical expenses, counselling, loss of income etc) and non-economic losses (pain and suffering).[36] Compensation schemes are often more generous in the amounts paid but are procedurally more complex and demanding, and are often slower and less accessible for most applicants, leading to inequalities of funds distribution.[37] Across Australia, most schemes started out operating as compensation schemes but now only the Northern Territory, South Australia, Tasmania, and Western Australia retain compensation-based elements.

16.30 Most of the Schemes now operate as financial assistance schemes. Subject to financial caps, financial assistance schemes aim to assist recovery from an offence by providing resources to assist applicants to meet their basic needs and to receive the recognition necessary to move on. Because financial assistance schemes do

36 Holder et al (n 32) 9.
37 Ibid 9–10.

not aim to put the applicant in the position they were in before the crime occurred,[38] they usually provide for a lower payment amount, but may be easier for applicants to access, and so help a larger number of people, and more diverse range of people. Financial assistance payments generally have two components: reimbursement for particular expenses (such as counselling, medical care, and specific financial losses) and a capped 'special' or 'recognition' payment that recognises the seriousness of the offence.[39] Some schemes provide access to funded counselling services, rather than merely reimbursing counselling expenses.[40]

16.31 All schemes in Australia are administrative, at least in the first instance, rather than judicial. Victoria is the most recent jurisdiction to transition to an administrative scheme.[41] In administrative schemes, 'decision-makers' or 'assessors' review applications, decide whether they satisfy the legislative requirements, and approve financial assistance allocations.[42] In 'quasi-judicial' schemes, assessors usually review and approve applications, but applicants can request a formal hearing or assessors can require it.[43] For example, in South Australia applicants must be represented by a lawyer, an application is initially made to the Crown Solicitor, and if the matter is not settled by agreement, then the applicant can apply to a court for compensation.[44]

16.32 Most schemes are supplemented by victims of crime support agencies that can provide information to potential applicants, assist them with application forms, advise them about their application's progress, and facilitate payments and other outcomes.

16.33 While the details and operations of the various schemes differ in some areas, many of the underlying issues addressed in the respective pieces of applicable legislation are the same. Legislative schemes generally specify eligibility criteria, require evidence of an offence or injury, set time limits on applications, provide for various types of awards, set minimum and maximum award amounts, and set out circumstances in which a payment of assistance might be refused or reduced. These elements can vary between jurisdictions.

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38 Ibid 15.

39 Ibid.

40 See, eg, *Victims of Crime Assistance Act 2006* (NT) pt 3.

41 Explanatory Memorandum, Victims of Crime (Financial Assistance Scheme) Bill 2022 1; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic). The Victorian scheme was previously facilitated by the Victims of Crime Assistance Tribunal: *Victims of Crime Assistance Act 1996* (Vic) pt 3.

42 See, eg, *Victims of Crime Assistance Act 2009* (Qld) ss 62, 78; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 28, 30.

43 See, eg, *Criminal Injuries Compensation Act 2003* (WA) ss 18, 19, 24, 25; *Victims of Crime Assistance Act 1976* (Tas) ss 7(4)–(5).

44 Victims of Crime South Australia, 'State-Funded Compensation' <www.voc.sa.gov.au/after-court/compensation/state-funded-compensation>; *Victims of Crime Act 2001* (SA) ss 18(3), (5).

## Improving access to the Schemes

**Recommendation 56**

Each state and territory victims of crime scheme should, where necessary, be amended in relation to sexual violence matters to:

a. extend time limits for applications to be at least 10 years from the date of the most recent act of violence for which assistance is sought, and provide a discretion to accept applications made outside the time limit based on a low threshold;

b. remove any requirement for an applicant to have disclosed the violence to another person, or to have formally reported or cooperated with authorities, as a condition of receiving financial assistance or as a basis for any reduction in the financial assistance provided, and not use non-reporting as determinative of, or necessarily essential to, the assessment of whether the violence occurred;

c. remove requirements to prove injury as a condition of making a recognition payment, and provide access to a recognition payment as an alternative to proving injury in order to obtain a compensation payment. Injury should be presumed in relation to medical, counselling, and related expenses;

d. not notify the person alleged to have used sexual violence that an application has been made, or that a financial assistance payment has been made, where the applicant has a genuine belief of a risk of harm to the applicant or to a person associated with the applicant;

e. not reduce any payment on the basis that the person alleged to have used sexual violence may benefit, and instead use other measures to safeguard payments made to an applicant; and

f. introduce recognition statements and recognition meetings.

### Summary of reasons for Recommendation 56

16.34 **Recommendation 56** aims to:

- ensure that people who have experienced sexual violence are not disproportionately disadvantaged by features of the Schemes by reason of some of the well-established consequences of sexual violence;
- reflect a more trauma-informed approach, thereby improving access to the Schemes for people who have experienced sexual violence — for example, improving applicant safety by not ordinarily notifying the person alleged to have used violence about applications;

- remove from the Schemes elements that particularly disadvantage people who have experienced sexual violence — for example, by removing eligibility requirements to report the offence to police, given how common it is not to report sexual violence;
- simplify the application process, and prioritise and recognise the needs of people who have experienced sexual violence in the application and decision-making process; and
- enhance the support and recognition that the Schemes provide for people who have experienced sexual violence.

16.35 The reforms contemplated by **Recommendation 56** relate to specific accommodations for people who have experienced sexual violence, as distinct from applicants to the Schemes for other offence types.

16.36 The ALRC notes that in some states and territories various aspects of **Recommendation 56** are already in place, either in legislation or in practice. The ALRC recommends that these aspects should be mandated in legislation, rather than merely implemented in practice, in order to promote greater consistency and enforceability of these measures over time in each jurisdiction.

16.37 The ALRC also notes that the recommendations are uniformly made across all Schemes. When implementing the suggested reforms, each state and territory will need to consider any particular features of its scheme which may require adjustment in order to avoid any inconsistency in the overall operation of the Scheme.

## Time limits to submit applications should be extended or removed

16.38 The ALRC recommends that the Schemes should, where necessary, be amended in relation to sexual violence matters to provide that the time limit to make any application is at least ten years.

### *Context*

16.39 The Schemes commonly require that applications are made within specified time limits. Most jurisdictions have a three-year time limit for applications.[45] Applicants have three years from when the act of violence occurred, or from when they turned

45 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 32; *Victims of Crime Assistance Act 2009* (Qld) s 54; *Victims of Crime Act 2001* (SA) s 18(2); *Victims of Crime Assistance Act 1976* (Tas) s 7(1A); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 23, 24; *Criminal Injuries Compensation Act 2003* (WA) s 9.

18 years old, to make an application depending on the jurisdiction.[46] New South Wales legislation has a two-year time limit.[47] In 2023, the Northern Territory removed time limits for all applications on the basis that 'there are often circumstances that justify … accepting a late application, for example, applications involving … sexual assault'; in addition, 'the extension of time process causes delay'.[48]

16.40 All jurisdictions, except New South Wales, include a discretion for decision-makers to accept applications after the time limit.[49] The criteria for accepting a late application may be that it is 'just to do so' or 'appropriate and desirable' based on consideration of relevant factors.[50] Tasmania has a threshold of 'special circumstance'.[51] Some schemes expressly provide for bespoke time limits for people who have experienced sexual violence. In Victoria and New South Wales, the time limit is 10 years for applications related to family violence and sexual violence.[52] In Victoria, Tasmania, and New South Wales, recognising that most people take a long time to disclose child sexual abuse, there is no time limit for applications that relate to sexual abuse where the person who experienced the sexual violence was under 18 years of age at the time.[53] **Recommendation 56** is not intended to suggest that schemes with no time limit in place for particular types of application should introduce a time limit. Instead, other schemes should consider whether it may be appropriate to remove time limits in such circumstances.

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46 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 32; *Victims of Crime Assistance Act 2009* (Qld) s 54; *Victims of Crime Act 2001* (SA) s 18(2); *Victims of Crime Assistance Act 1976* (Tas) s 7(1A); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 23, 24; *Criminal Injuries Compensation Act 2003* (WA) s 9. In some jurisdictions, if the applicant was a child at the time the act of violence occurred, the time limit starts from the day they turn 18: *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 32(1)(c); *Victims of Crime Assistance Act 2009* (Qld) s 51(1)(c); *Victims of Crime Assistance Act 1976* (Tas) s 7(1B); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 23(2).

47 *Victims Rights and Support Act 2013* (NSW) s 40(1).

48 Explanatory Statement, Victims of Crime Assistance Amendment Bill 2023 (NT) 4. See, also *Victims of Crime Assistance Act 2006* (NT) ss 26(2), 31.

49 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 32(2); *Victims of Crime Assistance Act 2009* (Qld) s 54(2); *Victims of Crime Act 2001* (SA) s 18(7); *Victims of Crime Assistance Act 1976* (Tas) s 7(1C); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 24; *Criminal Injuries Compensation Act 2003* (WA) s 9(2). See also *Victims Rights and Support Act 2013* (NSW) s 40.

50 See, eg, *Criminal Injuries Compensation Act 2003* (WA) s 9(2); *Victims of Crime Assistance Act 2009* (Qld) s 54(2).

51 *Victims of Crime Assistance Act 1976* (Tas) s 7(1C). See, also Victims Assistance Unit, Department of Justice (Tas), 'Application and Information for Extension of Time Applications: Victims of Crime Assistance Act 1976'.

52 *Victims Rights and Support Act 2013* (NSW) s 40(5); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 23(4). In New South Wales, this only applies to recognition payments: *Victims Rights and Support Act 2013* (NSW) s 40(5).

53 *Victims Rights and Support Act 2013* (NSW) s 40(7); *Victims of Crime Assistance Act 1976* (Tas) s 7(1D); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 23(3).

### *What we heard*

16.41 The appropriateness of time limits has recently been considered in a number of reports and reviews. Findings have generally suggested that time limits either be extended or removed for certain 'classes' of victims.[54]

16.42 Stakeholders in this Inquiry submitted that time limits disproportionately affect people who have experienced sexual violence. The Law Council of Australia described time limits as a key issue likely to affect people experiencing sexual violence.[55] One stakeholder identified a range of barriers that might prevent a person from making an application within the time limits, such as:

- the time needed to deal with trauma and more immediate needs;
- lack of access or support to engage with the Schemes due to the person's location, controlling domestic partner, or imprisonment;
- cultural sensitivities; and
- a lack of awareness about the Schemes.[56]

16.43 Some stakeholders supported the removal of time limits altogether,[57] for example noting that there are 'unique circumstances that make arbitrary timeframes for applications … inappropriate for victim-survivors of sexual offences'.[58] While the Federation of Community Legal Centres supported extending time limits for the Schemes generally, it submitted that there should not be any time limit imposed for applications relating to sexual violence specifically.[59]

16.44 One submission stated:

> While I am grateful for the compensation I received, the experience highlighted some of the limitations within the current system. The restriction that precluded compensation for incidents that happened outside a certain time period felt particularly unjust, as the impact of the crime on the victim-survivor can be significant regardless. The eligibility criteria based on the dates of the incidents further limited access to compensation, underscoring the need for more inclusive and flexible regulations.[60]

16.45 The ALRC heard from some stakeholders that assessors often accept applications after the time limit.[61] The Australian Capital Territory Victims of Crime Commissioner told the ALRC that they have adopted a practice of presuming

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54 Victorian Law Reform Commission (n 34) rec 71; Victorian Law Reform Commission (n 29) 223 rec 37; Legal Affairs and Safety Committee, Parliament of Queensland (n 34) 27 rec 17; KPMG (n 27) 96 rec 9; Centre for Innovative Justice (n 29) 91. See also, Department of the Attorney-General and Justice (NT) (n 34) 41.

55 Law Council of Australia, *Submission 215*.

56 WA Family and Domestic Violence Legal Workers Network, *Submission 170*.

57 See, eg, Women's Legal Service NSW, *Submission 205*; Women's Legal Service Victoria, *Submission 207*; Federation of Community Legal Centres (Vic), *Submission 213*.

58 Women's Legal Service Victoria, *Submission 207*.

59 Federation of Community Legal Centres (Vic), *Submission 213*.

60 Name withheld, *Submission 95*.

61 See, eg, Aboriginal Family Legal Services (WA), *Submission 40*.

reasonable grounds to extend time for sexual violence applications given the 'well-established impacts of sexual offending and sensitivities in relation to reporting'.[62] Short time limits have been criticised for creating barriers for some applicants (including applicants who have experienced sexual violence) who may take longer to identify, disclose, or report an offence.[63]

### *Time limits should be fair*

16.46 Time limits should be fair and just. To be so, a time limit will need to balance competing interests and provide for some measure of flexibility.

16.47 Time limits imposed on legal applications generally seek to balance competing rights and interests. Ordinarily, applicants require some time in order to organise themselves and bring a legal application. However, a respondent to a legal application may be prejudiced by delay in bringing an application. For example, it may be more difficult for the respondent to refute the application, if memories and other forms of evidence have deteriorated over time. Time limits also reflect a public interest in bringing litigation to finality within a reasonable time.[64]

16.48 These competing interests are neatly illustrated in the threefold test that applies in federal civil litigation when a court is considering whether to extend time for an application: whether the applicant has an arguable case; whether the applicant has some excuse or reason for delay in bringing the application; and whether there is a risk of prejudice to the respondent due to the passing of time.[65]

16.49 In the context of the Schemes, not all of these considerations have the same relevance. For example, there is no 'respondent' to the application other than the state itself. Nevertheless, the state may be prejudiced in determining the application, for example if it is more difficult to clarify the available evidence due to the passing of time.

16.50 A fair and just time limit has to take into account the interest of an applicant in being provided with sufficient time to apply. But what is sufficient will vary between one individual and the next. Because it is not practicable to make individual assessments, time limits will normally be set by reference to an assessment of what is ordinarily sufficient time for an applicant to apply for the particular kind of process or relief in question.

16.51 To accommodate a case which for some reason is out of the ordinary, it is fair and just that there be some flexibility and that will usually be provided by the exercise of a discretion to accept an application after the designated time limit.

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62 Correspondence from ACT Victims of Crime Commissioner to Australian Law Reform Commission, 14 October 2024.

63 Victorian Law Reform Commission (n 34) 59 [5.80].

64 The Hon AM Gleeson AC QC, *Finality* (Speech, Sir Maurice Byers Lecture, 10 April 2013).

65 *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344, 349–50; *SZTRY v Minister for Immigration and Border Protection* [2015] FCAFC 86 [6]; *Jarvis-Lavery v Commissioner of Taxation* [2023] FCA 1382 [9].

16.52 The ALRC takes the view that in relation to time limits for applications made to the Schemes, the state has a legitimate interest in there being finality to its potential financial exposure to a claim and also to the potential for disputation in relation to any claim made, including because, as time passes, assessing claims generally becomes more difficult. This supports the conclusion that a time limit is justified.

16.53 However, setting a time limit by reference to the time ordinarily sufficient for a person who is an average applicant across all categories of offences, will not always be fair. It will not be fair where there is a cohort of potential applicants whose circumstances are likely to require more time than that required by the average applicant across all categories. The existence of a significant cohort of applicants who may require more time justifies a time limit being set by reference to the time which will be ordinarily sufficient for an average applicant within that cohort. Flexibility through a discretion should then be provided to accommodate a case which is out of the ordinary from the case of the average applicant for that cohort.

16.54 A further consideration should be taken into account when setting a time limit. Time limits can unfairly impede access to the Schemes. Sometimes, a time limit will be perceived as fixed or too hard to shift. People may not know they are able to request an extension or what is required to do so.[66] Further, as the Aboriginal Family Legal Service WA noted, even where assessors are lenient with the time limit, the requirement to provide reasons and submissions for an extension is 'another significant hurdle to overcome'.[67]

16.55 For that reason, time limits should not be overly reliant on the discretion to extend time as a measure for ensuring fairness.

16.56 Lastly, it must be recognised that because identifying what is sufficient time for the ordinary or average applicant to make an application is fraught with difficulty, there will always be a degree of arbitrariness in the time limit set.

### *Why the recommended time limit is fair*

16.57 Applicants who have been the subject of sexual offending are a significant cohort of applicants to the Schemes. For example, in Victoria in 2023–24 of the 9,964 applications lodged with the Victims of Crime Assistance Tribunal, 1,624 were in respect of sex offences.[68]

16.58 Applicants alleging sexual offences are also a distinct cohort in relation to time limits because one of the likely consequences of sexual offending upon a person is that, for the reasons given below, the person will tend to need more time to make an application than an applicant who has been the subject of many or most offences not involving sexual violence.

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66 See, eg, Aboriginal Family Legal Services (WA), *Submission 40*.
67 Ibid.
68 Victims of Crime Assistance Tribunal (Vic) (n 27) 42.

16.59 Those applicants who have been the subject of sexual offending are a significant and distinct cohort and their presence justifies a bespoke assessment of the appropriate time limit for that cohort. So much has been recognised by the Victorian and New South Wales schemes where the time limit for that cohort has been set at 10 years.

16.60 It is well accepted that the trauma experienced by people who have experienced sexual violence, together with the sensitivities and other barriers to engagement that they face in dealing with and disclosing the crime that has afflicted them, results in many or most of those persons needing more time to both recognise and deal with the consequences of those crimes.[69]

16.61 The ALRC is not in a position to make its own assessment of what additional time the average person who has experienced sexual violence may need to make an application for financial assistance. In recommending a 10-year time limit, the ALRC has adopted the conclusion reached by the Victorian and New South Wales schemes, in the expectation that the matters and the interests which should be taken into account in setting a fair and just time limit have been taken into account in the assessment made by those schemes.

16.62 As stated, a fair and just time limit will accommodate the fact that within the cohort in question there will be variability from the ordinary time which may be regarded as sufficient. There is likely variability of that kind in a cohort of people who have experienced sexual violence. That is because people within that cohort may be particularly disadvantaged by time limits due to additional barriers they face by virtue of belonging to specific population groups.

16.63 For example, some groups are unable or reluctant to engage with authorities generally, let alone about such a sensitive personal matter as sexual violence. Affected groups are likely to include First Nations people, people from culturally and linguistically diverse backgrounds, people with a disability, LGBTQIA+ people, people living in closed environments, and children.[70]

16.64 Accordingly, there should be a discretion to accept applications made outside of the bespoke time limit for applications made in relation to sexual offences. The threshold should be low. An explanation providing the reason why 10 years was not enough time to apply, should suffice. The reasonableness of the explanation should not be affected by reference to what a reasonable person may have done, but its reasonableness should only be assessed by reference to the particular circumstances of the applicant including the harm and trauma suffered by the applicant.

16.65 A 10-year time limit, at a minimum, from when the violence occurred would be a more appropriate and realistic timeframe for people who have experienced sexual

69 See **Chapter 3**. See also Victorian Law Reform Commission (n 29) 223 [10.56]–[10.59].
70 See **Chapter 3**.

violence to apply for financial assistance. This time limit would align with existing provisions in New South Wales and Victoria.[71]

16.66 The lack of any discretion in the New South Wales scheme is inappropriate considering the diverse experiences of people who have experienced sexual violence.[72] Similarly, the threshold of 'special circumstance' in Tasmania, which requires applicants to provide a reason that is 'unusual, uncommon or exceptional' to justify an extension,[73] is unreasonably high. There are many common reasons that a person may not disclose or report, or may delay disclosure or reporting.[74]

16.67 As stated above, any time limit and the requirement to provide reasons can still act as a barrier and deterrent for potential applicants. Therefore, it is important that the availability of extensions, and the low threshold for extending the time limit, is communicated clearly to potential applicants.

## Applicants should not be required to report to authorities

16.68 The ALRC recommends that the Schemes should, where necessary, remove any requirement for people who have experienced sexual violence to have reported to authorities or services.

### *Context*

16.69 Victims of crime schemes generally require that applicants report to police or other authorities in order to receive an award. However, most people who experience sexual violence do not report to police, nor engage with other authorities.[75]

16.70 Requirements to report to authorities take one or both of the following forms:

- a determinative, or necessarily essential, evidentiary requirement to satisfy the decision-maker that an act of violence occurred;
- a condition of eligibility providing grounds for refusal of an application or reduction in the amount of any award payment.

16.71 All victim of crime schemes require that applications include some form of evidence to support the claim that an act of violence occurred. The law in New South Wales effectively requires that the evidence include a report to police.[76]

16.72 In most jurisdictions, an award may be refused or reduced if there was no police report. In some jurisdictions, certain 'classes' of victims (including people who have experienced sexual violence) may rely on a report made to another authority,

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71 *Victims Rights and Support Act 2013* (NSW) s 40(5); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 23(4).
72 Clayton Utz Pro Bono Practice, *Submission 183*.
73 Victims Assistance Unit, Department of Justice (Tas) (n 51) 1.
74 See **Chapter 3**.
75 See **Chapter 3**.
76 See, eg, *Victims Rights and Support Act 2013* (NSW) s 39.

such as a government agency, doctor, or social worker.[77] In the Australian Capital Territory, the Northern Territory, Queensland, South Australia, and Victoria, not reporting to police (or, in some cases, other authorities) can lead to an application being refused unless there is an appropriate reason, special circumstance, or the applicant is in a 'special category'.[78] Applicants who are not able to produce a police report may be required to provide reasons.[79]

### *What we heard*

16.73 Several stakeholders argued that requiring applicants to report to authorities is inappropriate in the context of sexual violence.[80]

16.74 The ALRC heard from stakeholders that any general requirements to report to police should not apply to victims of sexual violence.[81] Stakeholders noted that there are many reasons why a person chooses not to report sexual violence, and that people should not be penalised for a failure to do so.[82] ANROWS noted that 'cumbersome evidentiary requirements', like reporting to police, can deter people from applying to the Schemes.[83]

### *Why the requirements are problematic*

16.75 As an evidentiary requirement, deeming evidence of a report to authorities to be determinative or a necessarily weighty consideration, is an erroneous approach to fact-finding. No fair fact-finding exercise should be conducted on that basis. Such an approach will inevitably lead to unjust results. A decision-maker needs to be satisfied that the violence occurred. But a valid exercise of assessing whether or not a crime occurred would allow the fact-finder to weigh the probative value of the non-reporting against all of the other available evidence probative of whether the crime occurred, as well as allow the fact-finder to take into account any evidence explaining why there was no reporting to authorities.

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77 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 31; *Victims Rights and Support Act 2013* (NSW) s 39; *Victims of Crime Assistance Act 2009* (Qld) s 81.

78 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 31(2)(d); *Victims of Crime Assistance Act 2006* (NT) ss 43(b)–(c); *Victims of Crime Assistance Act 2009* (Qld) s 81; *Victims of Crime Act 2001* (SA) s 20(7)(a); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 31(2). In Tasmania and Western Australia a failure to report to police may constitute a failure to assist police which can subsequently result in a refusal of financial assistance: *Victims of Crime Assistance Act 1976* (Tas) s 5(3A); *Criminal Injuries Compensation Act 2003* (WA) s 38.

79 See, eg, *Victims of Crime Assistance Act 2006* (NT) s 32(1)(c). See also, Victoria where this requirement applies if the applicant is not in a special report category: *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 22(1)(e).

80 See, eg, Clayton Utz Pro Bono Practice, *Submission 183*; Women's Legal Service Victoria, *Submission 207*.

81 See, eg, Legal Aid NT, *Submission 146*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Women's Legal Service Victoria, *Submission 207*; Federation of Community Legal Centres (Vic), *Submission 213*.

82 See, eg, Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Women's Legal Service Victoria, *Submission 207*; Federation of Community Legal Centres (Vic), *Submission 213*.

83 Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*.

16.76 Treating evidence of non-reporting as determinative of whether or not a crime occurred may lead to unfair and nonsensical outcomes. For example, an applicant who claims to have been sexually assaulted who did not report to police will be disbelieved despite producing a video footage of the assault and three eyewitnesses. Similarly, deeming non-reporting to have significant weight despite the fact that there is no basis to reject a valid explanation given for the non-reporting, may skew the fact-finding process towards unfairness.

16.77 In the context of the Schemes, practicality requires that the fact-finding process be conducted without the formality or rigour of even the most summary of legal processes. However, the process must nevertheless be fair. There is no justification for using an inflexible evidentiary presumption capable of giving rise to substantial unfairness and absurdity.

16.78 Nor should a failure to report to authorities be used as a basis for disqualification. That is also an inflexible rule. The rationale for it is not clearly apparent. It may be based on the policy that a person who does not report and thus does not assist the authorities is undeserving of being assisted. But even if that policy can be justified, an inflexible rule such as that will likely result in unfairness.

### *The rationale for the recommendation*

16.79 The reporting requirements are particularly problematic for people who have experienced sexual offending. Most people who have experienced sexual violence do not report to police, and more likely to seek informal support, rather than formal support from an organisation.[84]

16.80 People who experience sexual violence face many barriers to reporting, and there are many valid reasons people may not want to report their experiences of sexual violence.[85] Those reasons should be taken into account in any fair fact-finding process and if they were, would tend to either diminish or negate the weight that ought fairly be given to non-reporting in any assessment of whether or not sexual offending had occurred. Furthermore, those reasons deny the legitimacy of an inflexible policy that disqualifies access to relief on the basis that the applicant for relief is somehow undeserving.

16.81 As earlier stated, applicants who have experienced sexual violence are a significant and distinct cohort. Their significance and their distinctiveness because of the particular common consequences of the crimes afflicted upon them, deserve special attention.

16.82 Even if the reporting requirements variously imposed by the Schemes could be justified in respect of most categories of applicant, they give rise to particular disadvantage and unfairness to applicants who have experienced sexual offending. Those requirements should be removed.

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84 See related data in **Chapter 3**.
85 See **Chapter 3**.

## Applicants should not be required to cooperate with authorities

16.83 The ALRC recommends that the Schemes should, where necessary, be amended in relation to sexual violence matters to remove the requirement for an applicant to have cooperated with authorities when considering whether to refuse or reduce an award.

### *Context*

16.84 The Schemes generally require that applicants cooperate with police or other authorities to receive an award. In all jurisdictions, failure to provide 'reasonable' assistance to authorities, to investigate or prosecute the matter, can result in no award or a reduced award.[86] In most jurisdictions, an 'unreasonable' failure to cooperate leads to mandatory refusal of the award.[87]

16.85 Some jurisdictions include exceptions. For example, in Victoria the requirement to provide reasonable assistance does not apply if the decision-maker considers there were special circumstances or if the applicant is in a special reporting category.[88] Queensland legislation states that the requirement does not apply if a person had a reasonable excuse. In deciding whether the person had a reasonable excuse, the assessor must have regard to, among other things, whether the act of violence involves a sexual offence.[89]

### *Why the requirement is problematic*

16.86 The requirement to cooperate with authorities may not be problematic if there were a reasonable policy justification for it. The rationale for the requirement is not necessarily clear. A discernible policy rationale for denying (or reducing) a financial award on the basis of non-cooperation with authorities, appears to be that a person who does not cooperate should be regarded as not deserving of assistance or full assistance.

16.87 The reasonableness of such a policy is questionable because it deems a person to be undeserving or less deserving based on a single criterion. A fair assessment of whether a person is deserving of assistance would take into account

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86 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 45(1)(e); *Victims Rights and Support Act 2013* (NSW) s 44(1)(e); *Victims of Crime Assistance Act 2006* (NT) s 43(d); *Victims of Crime Assistance Act 2009* (Qld) ss 82(1)–(3); *Victims of Crime Act 2001* (SA) s 20(7); *Victims of Crime Assistance Act 1976* (Tas) s 5(3A); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 31(a)(ii); *Criminal Injuries Compensation Act 2003* (WA) s 38.

87 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 45(1)(e); *Victims of Crime Assistance Act 2006* (NT) s 43(d); *Victims of Crime Act 2001* (SA) s 20(7); *Victims of Crime Assistance Act 1976* (Tas) s 5(3A); *Criminal Injuries Compensation Act 2003* (WA) s 38. In New South Wales it is a consideration for decision-makers when determining where or not to approve financial assistance, and the amount of assistance that should be given: *Victims Rights and Support Act 2013* (NSW) s 44(1)(e).

88 *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 31(2)(a)(ii), (b). Who is included in the 'special reporting category' has not yet been set out in delegated legislation.

89 *Victims of Crime Assistance Act 2009* (Qld) s 82(3)(c).

a range of criteria, as well as take into account whether there is a reasonable basis for that person's failure to cooperate.

### *The rationale for the recommendation*

16.88 The requirement to cooperate with authorities may be particularly problematic for people who have experienced sexual violence, for similar reasons to those discussed above.

16.89 There are many reasons people who have experienced sexual violence may not 'cooperate' with authorities. For example, people who have experienced sexual violence may: be scared to make a formal statement because of potential repercussions; be unwilling to encounter the person who harmed them; or may have more general reasons for not wanting to engage in any part of the criminal justice process.[90] Requirements to cooperate with authorities may impact the safety and wellbeing of people who have experienced sexual violence and have a negative impact on their recovery.[91]

16.90 There is no basis for presuming that this cohort of applicants are undeserving of being provided assistance. To the contrary, the appropriate presumption to make is that any 'failure' to cooperate is likely to be explained by one or other, or a combination of, the barriers to engagement. That presumption, and the problematic rationale for the requirement, justifies the removal of the requirement to cooperate with authorities, including in those states or territories where the requirement is qualified by exceptions.

## Applicants should not be required to prove injury

16.91 The ALRC recommends that the Schemes should, where necessary, be amended in relation to sexual violence matters such that applicants do not need to provide evidence of injury in order to receive a recognition payment. Further, in compensation-based schemes, applicants should be able to elect to receive a recognition payment to avoid the need to prove injury to obtain a compensation payment. Injury should be presumed in relation to payment of medical, counselling, and related expenses.

### *Legislative context*

16.92 In most jurisdictions, applicants are required to demonstrate that they sustained an injury as a result of the act of violence, in order to qualify for any kind of assistance. For example, in some jurisdictions an 'act of violence' is defined as an act that has resulted in an injury,[92] and 'victim' is typically defined as a person

90 See **Chapter 3**. See also Victorian Law Reform Commission (n 34) 400 [15.58]–[15.61].

91 See, eg, **Chapter 3**. See also Victorian Law Reform Commission (n 34) 407 [15.101].

92 See, eg, *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 7(1)(a); *Victims Rights and Support Act 2013* (NSW) s 19(1)(c); *Victims of Crime Assistance Act 2009* (Qld) s 25(1)(b); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 3(1).

who is injured or has 'suffered harm' as a result.[93] In order to receive any payment under those schemes, a person must be found to be a victim of an act of violence.[94] Consequently, applicants are required to demonstrate an injury, for example by producing a medical report from the time the crime was committed,[95] or by undergoing an assessment of injury as part of the application process. Some schemes confer power on decision-makers to seek information from health practitioners, or to require applicants to undergo an examination.[96] The medical report or assessment typically details the nature and extent of the injury. Application forms seek evidence of injury at the earliest stages of the process.[97]

16.93 In other schemes, a person is deemed to be victim of an act of violence if the person fits within a category set out in relevant regulations, whether or not the person has demonstrated any injury.[98] For example, under Northern Territory legislation, various sexual violence offences are categorised as a 'compensable violent act'. Consequently, an applicant may be entitled to receive an award 'regardless of whether the person suffers an injury … as a direct result' of the sexual violence.[99] In addition, the new Victorian scheme provides that regulations may provide for categories of victims of crime that are 'taken … to have suffered an injury as a result of, or in connection with, an act of violence without having to provide any evidence of that injury'.[100] Regulations have recently been published for the new Victorian scheme, but do not currently provide for any categories of victims of crime under the relevant section.

16.94 To the extent that schemes are based on a 'financial assistance' model, they typically do not require evidence of injury in order to qualify for a 'recognition payment' or 'special assistance payment'. Rather, the amount of any such payment is generally

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93 See, eg, *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 11; *Victims of Crime Assistance Act 2009* (Qld) s 5(1).

94 *Victims Rights and Support Act 2013* (NSW) s 23; *Victims of Crime Assistance Act 2009* (Qld) ss 21, 37; *Victims of Crime Assistance Act 1976* (Tas) s 4(1).

95 See, eg, *Victims Rights and Support Act 2013* (NSW) s 39(2)(b)(ii).

96 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 39; *Victims of Crime Assistance Act 2009* (Qld) s 74; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 22; *Criminal Injuries Compensation Act 2003* (WA) ss 19, 20.

97 See, eg, Victims of Crime Commissioner (ACT), 'Guide to Completing a Financial Assistance Application (Primary Victim)' 4; *Victims Rights and Support Act 2013* (NSW) s 39; Victim Assist Queensland, 'Provide Information about Your Injuries' <https://www.qld.gov.au/law/crime-and-police/victims-and-witnesses-of-crime/financial-assistance/making-claim/providing-information-about-your-injuries>; *Victims of Crime (Statutory Compensation) Regulations 2019* (SA) regs 1, 8; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 22(1)(b); Office of Criminal Injuries Compensation (WA), 'Criminal Injuries Compensation eCourts Portal Application User Guide' 20–1.

98 *Victims of Crime Assistance Act 2006* (NT) s 9(1)(a); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 9(4).

99 *Victims of Crime Assistance Act 2006* (NT) s 9(1)(a). This provision was not included in the Bill as introduced to Parliament: Victims of Crime Assistance Bill 2006 (NT). The Explanatory Statement for the Bill provides no explanation for the provision: Explanatory Statement, Victims of Crime Assistance Bill 2006 (NT). The provision was evidently inserted between the Bill entering Parliament and being passed by Parliament.

100 *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 12.

determined by reference to the nature of the crime committed. Accordingly, evidence of any injury is not relevant for that purpose. However, in some schemes, evidence of the severity of any injury can qualify the applicant for a higher payment amount.[101] For example in Queensland, an applicant who has 'suffered a very serious injury' as a result of any offence can be awarded the highest amount provided for under the scheme.[102]

16.95 In contrast, to the extent that schemes are based on a 'compensation' model, awards are specifically for any injury and any other loss suffered.[103] Evidence of an injury is therefore an integral part of the application and determination process in compensation-based schemes, particularly in relation to the amount of any award.

16.96 All schemes provide in some way for reimbursement of medical and other treatment costs arising from the crime.[104] Evidence to support an application for reimbursement need not include a report on the nature of any injury, but rather an invoice or similar evidence of the provision of the treatment and the associated cost. Those aspects of the Schemes are not the focus of **Recommendation 56**.

### *What we heard*

16.97 Submissions to this Inquiry and previous reports have emphasised that people who have experienced sexual violence can face multiple challenges to providing evidence of injury, such as cost,[105] limited access to services,[106] or the risk of further traumatisation by obtaining the evidence through a forensic physical or psychological evaluation.[107] As a result, people who have experienced sexual violence may have no or minimal evidence available to prove injury. In addition, people who have experienced sexual violence may be disincentivised from applying or continuing with an application for assistance by the prospect of an examination to assess their injuries, for fear of retraumatisation.

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101 *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) reg 8; *Victims of Crime Assistance Act 2009* (Qld) sch 2, cl 1; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 11(2); *Victims of Crime (Financial Assistance Scheme) Regulations 2024* (Vic) sch 1. See also Holder et al (n 32) 32.

102 *Victims of Crime Assistance Act 2009* (Qld) sch 2.

103 *Victims of Crime Act 2001* (SA) ss 17(1), 20(1)(a); *Victims of Crime Assistance Act 1976* (Tas) s 4(2); *Criminal Injuries Compensation Act 2003* (WA) pt 2 div 2.

104 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 27; *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) reg 7; *Victims Rights and Support Act 2013* (NSW) s 30; *Victims Rights and Support Regulation 2019* (NSW) reg 10; *Victims of Crime Assistance Act 2006* (NT) s 10(5); *Victims of Crime Assistance Act 2009* (Qld) s 42; *Victims of Crime Assistance Act 1976* (Tas) s 4(2)(b); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 10(2); *Criminal Injuries Compensation Act 2003* (WA) s 6(2). Reimbursement is implicitly available under the South Australian legislation: *Victims of Crime Act 2001* (SA) s 17(5).

105 See, eg WA Family and Domestic Violence Legal Workers Network, *Submission 170*. See also Victorian Law Reform Commission (n 34) 355 [14.60].

106 See, eg, WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Not published, *Submission 197*.

107 See, eg, Mid North Coast Legal Centre, *Submission 116*; Clayton Utz Pro Bono Practice, *Submission 183*; Not published, *Submission 197*; Federation of Community Legal Centres (Vic), *Submission 213*.

16.98 Stakeholders noted that requirements to provide evidence prevent people accessing support from schemes.[108] They reiterated that the harms of sexual violence are widely recognised, that obtaining evidence can be retraumatising, and that the requirements impose undue burdens on marginalised applicants who have the greatest difficulty accessing services.[109] Requirements to obtain evidence of injury can also deter applications. One stakeholder submitted that some people have chosen not to pursue compensation because of the evidence requirements.[110]

16.99 The ALRC heard from stakeholders across jurisdictions that requirements to provide evidence of injury in cases of sexual violence should be removed.[111] For example, as emphasised by Clayton Utz, the harms associated with sexual violence are well known:

> it should be self-evident that an act of sexual abuse is inherently harmful — to suggest otherwise is both offensive to victim survivors and out of step with community standards.[112]

16.100 Submissions from people who have experienced sexual violence stated that obtaining evidence of their injury was difficult, retraumatising, and invasive.[113]

### *Why requirements to prove injury are problematic in the context of sexual violence*

16.101 People who have experienced sexual violence are particularly disadvantaged by requirements to produce evidence of injury, because they are less likely than victims of other crimes to be able to produce evidence of their injuries. People who experience sexual violence in particular face a range of barriers in disclosing violence or seeking support.[114]

16.102 The Victorian Law Reform Commission (VLRC) recommended that victims of sexual offences should be exempt from providing evidence of injury, on the basis of: significant support in submissions; the significant harm suffered by victims of sexual assault; the significant barriers to collecting evidence of sexual assault including shame and fear of retaliation; and low rates of reporting sexual violence to police and other services.[115] The VLRC similarly recommended that victims of family violence should not need to provide evidence of injury, but that victims of all other

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108 See, eg, WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Not published, *Submission 197*; Women's Legal Service Victoria, *Submission 207*.

109 WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Clayton Utz Pro Bono Practice, *Submission 183*; Not published, *Submission 197*; Women's Legal Service Victoria, *Submission 207*.

110 Not published, *Submission 197*.

111 Mid North Coast Legal Centre, *Submission 116*; WA Family and Domestic Violence Legal Workers Network, *Submission 170*; Clayton Utz Pro Bono Practice, *Submission 183*; Not published, *Submission 197*; Women's Legal Service Victoria, *Submission 207*; Federation of Community Legal Centres (Vic), *Submission 213*.

112 Clayton Utz Pro Bono Practice, *Submission 183*.

113 S Filmer, *Submission 30*; A McIntosh, *Submission 131*; Not published, *Submission 176*.

114 See **Chapter 3**.

115 Victorian Law Reform Commission (n 34) rec 31, 270–2 [12.234]–[12.246].

crimes should be required to provide evidence, because 'the basis upon which injury might be deemed for victims of other crimes is less clear'.[116]

### *How the recommendation seeks to address the problem*

16.103 **Recommendation 56** recognises the challenges that people who have experienced sexual violence face in producing evidence of injury. Implementing **Recommendation 56** would remove blanket requirements to provide evidence of injury to apply for an award. It would remove requirements to prove injury as a condition of receiving a recognition payment. Proof of injury is not necessary because recognition payments are based on the nature of the offence. Injury should be presumed. Injury should also be presumed when an applicant seeks to access counselling or other treatment, or to be reimbursed for expenses incurred in relation to past treatment.

16.104 There are strong arguments to suggest that a level of harm should be presumed in sexual violence matters. Sexual violence can have serious and long-lasting impacts on a person's physical and psychological health and wellbeing.[117]

16.105 The ALRC recognises that, to the extent that schemes reflect a compensation model, it may not be practicable to remove requirements to provide evidence of injury. However, as noted above, Northern Territory legislation illustrates one method by which it is possible to remove requirements for evidence of injury. The Northern Territory legislation provides for 'compensation' payments for most offences, but provides for payments calculated by reference to particular acts of violence for some offences, including sexual violence. The introduction of a 'recognition payment' option within schemes otherwise providing for compensation could enable applicants to receive a payment in relation to sexual violence without providing evidence of injury. The prospect of 'recognition payments' more generally is addressed under **Recommendation 57** below. The applicant should be able to choose whether to apply for a recognition payment or a compensation payment, but should not be entitled to receive both types of payment. The amount of any recognition payment should be sufficiently high such that applicants are not disadvantaged by choosing a recognition payment, rather than a compensation payment.

16.106 Another potential benefit of implementing **Recommendation 56** is that it may reduce the amount of time and cost needed to process and assess applications for awards. There should be less need to request, wait for, and review medical and psychological reports.

116 Ibid 272 [12.247].
117 See **Chapter 2**.

## The person alleged to have used sexual violence should not be notified where there is a safety risk

16.107 The ALRC recommends that the Schemes should, where necessary, be amended in relation to sexual violence matters such that the person alleged to have used sexual violence is not to be notified of an application, and restitution is not to be sought from the person alleged to have used sexual violence, where the applicant has a genuine belief that notification or restitution would pose a risk to the safety of the applicant or a person associated with the applicant.

### *What we heard*

16.108 The ALRC heard that in sexual violence matters, notifying a person alleged to have used sexual violence of an application, or seeking restitution from them, can cause the applicant to be concerned about their safety.[118] Further, the risk that the person alleged to have used sexual violence may be notified may also deter a person who has experienced sexual violence from making an application to a scheme.[119] The risk of notification may cause a prospective applicant to feel that they lack control over a key aspect of the process. As one submission stated,

> many of our clients live in ongoing fear of partners who have committed extreme sexual and family violence against them. For some of our clients, the mere risk that restitution may occur is sufficient for them to either decide not to make an application or repay compensation paid to them.[120]

16.109 A submission to the VLRC's Review of the *Victims of Crime Assistance Act 1996* (Vic) also observed that notification of persons alleged to have used sexual violence can facilitate 'another avenue through which people who use violence can manipulate systems to harm and control their victims'.[121]

### *Legislative context*

16.110 Under each of the Schemes, an applicant faces the risk that the person who used sexual violence will be notified that the applicant has applied to the scheme, or received payment of an award. Applicants do not currently have a right to 'veto' notification in any jurisdiction.

16.111 In South Australia, it is mandatory for the person alleged to have used sexual violence to be notified when an application is made to the court (unless the person is unknown or the court grants an exemption to that requirement).[122]

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118 Clayton Utz Pro Bono Practice, *Submission 183*; Women's Legal Service NSW, *Submission 205*.

119 Clayton Utz Pro Bono Practice, *Submission 183*; Women's Legal Service NSW, *Submission 205*.

120 Clayton Utz Pro Bono Practice, *Submission 183*.

121 Victorian Law Reform Commission (n 34) 79 [5.226], citing a submission by the South Metropolitan Integrated Family Violence Executive.

122 *Victims of Crime Act 2001* (SA) ss 18–19. The respondent is not to be joined as a party (and therefore notified) if the claimant is a child or other person not of full legal capacity, where it is proposed to settle the claim by agreement and an application is made to a court in respect of that agreement: ibid s 18(4a).

In Western Australia, the decision-maker has discretion to notify any interested person if an application is made,[123] and must contact the responder if the CEO of the relevant department applies for the person alleged to have used sexual violence to reimburse the State for any compensation awarded.[124] In the Northern Territory the Director of the Crime Victims Services Unit has discretion to notify the person alleged to have used sexual violence when an application is made,[125] as well as when an application is decided.[126] The Director also has a discretion to seek restitution from the person alleged to have used sexual violence.[127] In New South Wales, Queensland, and Tasmania, the person alleged to have used violence is only notified if the state seeks to recover payment from them.[128] In the Australian Capital Territory, the decision-maker must assess the risks associated with seeking recovery from the person alleged to have used sexual violence, and consult with the person who received assistance by written notice, before giving the person alleged to have used sexual violence a notice of restitution.[129] In the new Victorian legislation, the administrator of the scheme can only recover payment if the applicant assigns them the right to do so, and the administrator can choose not to take or continue the action because of risk to the safety of any person, if there is no reasonable prospect of success, or in any other relevant circumstances.[130]

### *Why the Recommendation is appropriate*

16.112 **Recommendation 56** would reduce a significant deterrent for people who have experienced sexual violence and would better support them to access the Schemes safely. In sexual violence matters, a person alleged to have used sexual violence should not be notified, and restitution should not be sought, where the applicant holds a genuine belief that notifying the respondent of the application or seeking restitution from them would pose a risk to the safety of the applicant or to a person associated with the applicant (for example, a child of the applicant).

16.113 Alternatively, the Schemes could require that the applicant's belief regarding the safety risk be 'reasonable'. However, if the Schemes were to notify a person alleged to have used sexual violence contrary to a subjectively held belief of the applicant about a risk to their safety, there will likely be some trauma experienced by the applicant, whether or not the applicant's belief is reasonably held. Further, any such 'reasonableness' requirement would likely be unduly onerous on applicants, and would involve additional testing of evidence and fact-finding that would further delay the processing of applications.

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123 *Criminal Injuries Compensation Act 2003* (WA) s 19(1)(b).
124 Ibid ss 49–51.
125 *Victims of Crime Assistance Act 2006* (NT) s 33(2).
126 Ibid s 44(5).
127 Ibid s 55B(2).
128 *Victims Rights and Support Act 2013* (NSW) ss 59–61; *Victims of Crime Assistance Act 2009* (Qld) s 115; *Victims of Crime Assistance Act 1976* (Tas) s 7A. In Tasmania, the Commissioner is required to order recovery of the award if the person is convicted: ibid s 7A.
129 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 72, 73.
130 *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 42.

16.114 Implementing **Recommendation 56** would reflect a more trauma-informed and victim-centred approach. It would prioritise the perspectives and needs of people who have experienced sexual violence. This would also align better with the fundamental goals of the Schemes, which include acknowledging individual experiences and supporting recovery.

16.115 Several submissions and consultees expressed support for reform of notification mechanisms.[131] For example, Women's Legal Service NSW noted that safety concerns 'should not be a barrier' to accessing support.[132]

16.116 The recommended reform would not impinge on the rights of the person alleged to have used sexual violence. The findings of the Schemes relate to the payment of awards only, and do not equate to a finding of guilt against the person alleged to have used sexual violence. A person alleged to have used sexual violence who is not notified of an application to a scheme could not be pursued for any payment of restitution to the state.

## Payments should not be reduced on grounds that a person alleged to have used sexual violence may benefit

16.117 The ALRC recommends that the Schemes should, where necessary, be amended in relation to sexual violence matters such that payments are not reduced on the grounds that a person alleged to have used sexual violence may benefit. Instead, other measures should be utilised to safeguard payments to an applicant.

### *Context*

16.118 Legislation in most states and territories does not provide for an award to be refused or reduced on the basis that a person alleged to have used sexual violence may benefit from the award. However, in the Northern Territory and Western Australia, if there is a relationship or connection between the applicant and person alleged to have used sexual violence, such that any award is likely to benefit the person alleged to have used sexual violence, the award may be reduced (in the Northen Territory) or refused (in Western Australia).[133] In New South Wales, when deciding who to make the payment to, the Commissioner must have regard to the likelihood the person alleged to have used sexual violence may receive the benefit.[134] No such provision has been included in the new Victorian scheme.[135]

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131 See, eg, Clayton Utz Pro Bono Practice, *Submission 183*; Women's Legal Service NSW, *Submission 205*.

132 Women's Legal Service NSW, *Submission 205*.

133 *Victims of Crime Assistance Act 2006* (NT) s 41(1)(d); *Criminal Injuries Compensation Act 2003* (WA) s 36.

134 *Victims Rights and Support Act 2013* (NSW) s 46(2).

135 This followed a finding by the VLRC that 'perpetrator benefit should not be a factor in deciding whether or not to award a recovery payment': Victorian Law Reform Commission (n 34) 415–6 [15.158]–[15.158].

### *Why the requirement is problematic*

16.119 The ALRC discerns that the policy rationale behind reducing or refusing an award where there is a relationship between the applicant and the person alleged to have used sexual violence, is that the person alleged to have used sexual violence should not get the benefit of any financial assistance which is intended for the applicant.

16.120 Satisfying the policy's objective by those means may defeat or adversely affect the primary objective of the Schemes of providing financial assistance to victims of crime, in order to help them recover from the harms suffered.

16.121 The ALRC has, with the New South Wales Law Reform Commission (NSWLRC), previously recommended in the context of family violence that compensation claims should not be 'excluded on the basis that the offender might benefit from the claim'.[136] Instead, the ALRC recommended that 'other measures should be adopted' to ensure that persons alleged to have used sexual violence do not access the award.[137] The VLRC has similarly previously recommended that government should consider other ways (such as requiring that funds be held on trust) to safeguard the award payment to ensure the applicant is able to benefit from the award.[138]

### *The rationale for the recommendation*

16.122 The previous recommendation made by the ALRC related to applicants who had experienced family violence, rather than sexual violence. The arguments in support of the policy being changed for applicants who have experienced family violence apply similarly to applicants who have experienced sexual offending.

16.123 The ALRC, NSWLRC, and VLRC have previously highlighted stakeholder concerns that such provisions have a disproportionate impact on victims of family violence.[139] The Women's Legal Service Victoria and Domestic Violence Victoria, in their submission to the VLRC, stated that 'victims should not be excluded, blamed, disadvantaged or penalised where they continue to "manage complex relational circumstances" with a perpetrator'.[140]

16.124 As noted in **Chapter 2**, a very significant proportion of sexual violence occurs in the context of other family and domestic violence and therefore it occurs

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136 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, 2010) rec 29–5.

137 Ibid.

138 For example, the VLRC recommended that where it was determined that an 'alleged perpetrator is likely to benefit', the scheme decision-maker may decide that certain types of financial assistance can be held in trust and administered by a case manager: Victorian Law Reform Commission (n 34) rec 79.

139 Australian Law Reform Commission and New South Wales Law Reform Commission (n 136) 1393–95 [29.185]–[29.190]; Victorian Law Reform Commission (n 34) 405–6 [15.89]–[15.92].

140 Victorian Law Reform Commission (n 34) 406 [15.91].

in circumstances where there is a relationship or connection between the applicant and the person alleged to have used violence. Relative to many or most other categories of applicant, the policy has a disproportionate impact on people who have experienced sexual violence, which would limit their ability to recover from harm.

16.125 **Recommendation 56** recognises that many people who have experienced sexual violence navigate complex, ongoing relationships with family members, former partners and friends, including those who have engaged in sexual violence against them. Removing provisions that permit awards to be reduced or refused on the basis of an ongoing relationship or connection would acknowledge that all applicants need support to recover from harm and no applicant should be penalised or blamed in the absence of a valid justification.

## Recognition meetings and recognition statements should be available

16.126 The ALRC recommends that the Schemes should, where necessary, be amended in relation to sexual violence matters to provide for recognition meetings and recognition statements.

### *What we heard*

16.127 Many people who have experienced sexual violence say they 'want their story to be heard but do not want to engage with the criminal justice system at all'.[141] Some say they want more than to be believed by someone that the violence occurred; instead they want 'official acknowledgement that the crime occurred and of its profound impact on their life'.[142] The criminal justice system often cannot facilitate this:

> … victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative.[143]

16.128 Some submissions and consultations in this Inquiry supported introducing mechanisms that provide for recognition.[144] The Federation of Community Legal Centres (Vic) advocated for victim conferences to be conducted by a suitably qualified and authoritative person, victim-centred, trauma-informed, and viewed by

141 Victorian Law Reform Commission (n 29) 215 [10.8].

142 Haley Clark, '"What Is the Justice System Willing to Offer?": Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 (September) *Family Matters: Australian Institute of Family Studies* 28, 32.

143 Judith Lewis Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence against Women* 571, 574.

144 See, eg, Women's Legal Service Victoria, *Submission 207*; Federation of Community Legal Centres (Vic), *Submission 213*.

the state with appropriate importance.[145] The Federation noted that these elements are important to ensure the process is meaningful and beneficial.[146]

### *Context*

16.129 In December 2024, following a recommendation by the VLRC, the Victorian Financial Assistance Scheme made available for the first time dedicated recognition meetings and recognition statements.[147] Prior to this, no scheme expressly provided for victims to receive recognition in the form of a dedicated meeting or statement. In various schemes, some form of recognition was in effect provided through judicial hearings, written statements of reasons, and certain types of assistance, such as recognition payments. As one stakeholder described:

> The Magistrate spoke directly to me, telling me that she believed I had been a victim of crime and expressed her regret for the sexual and domestic violence my ex-husband had perpetrated against me. I found this to be the most affirming and healing aspect of the disclosure process.[148]

16.130 The Schemes routinely engage with victims of crime on behalf of the state, such that they are well placed to provide formal recognition of harm. However, the administrative nature of most schemes means that there is currently limited opportunity for applicants to have their voices heard and acknowledged.

16.131 Dedicated recognition meetings have been successfully held in Australia in the context of child sexual violence. The Child Sexual Abuse Royal Commission conducted private sessions in which people who experienced sexual violence as children had an opportunity to describe to a Commissioner the experience of sexual violence and its impact on their lives.[149] Participants reflected that in the sessions they felt like they were being taken seriously, and that their experiences mattered and were valued.[150] These private sessions were described as a 'unique truth telling process unlike any other in the criminal or civil justice system',[151] and a 'powerful healing experience'.[152]

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145 See, eg, Federation of Community Legal Centres (Vic), *Submission 213*.

146 Ibid.

147 *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 40, 41. The Queensland Government recently supported in principle a recommendation from the Queensland Legal Affairs and Safety Committee that the Government 'investigate developing a 'victim recognition statement' or 'victim recognition meeting': Queensland Government, *Response to Inquiry into Support Provided to Victims of Crime* (August 2023) 7.

148 Name withheld, *Submission 136*.

149 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 5* (2017) 33–34.

150 Ibid 33.

151 Victorian Law Reform Commission (n 37) 184 [10.36], citing Carolyn Ford, 'Commission of Care' (2018) 92(1/2) *Law Institute Journal* 20.

152 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 149) 34.

### *Recognition meetings*

16.132 Dedicated recognition meetings would respond to the justice needs identified above by providing a forum for people who have experienced sexual violence to discuss how the crime has affected them, and to have this formally acknowledged. To ensure no further harm is caused by the recognition meeting itself, it should be meaningful and offered in a way 'that does not trivialise the process'.[153] Accordingly, it is important that recognition meetings are appropriately resourced, provided in a trauma-informed manner, and 'conducted only by suitably qualified persons of sufficient standing and authority'.[154]

16.133 The ALRC endorses the model recommended by the VLRC in its Review of the *Victims of Crime Assistance Act 1996* (Vic). The VLRC recommended that:

> 13 The proposed Act should provide that all eligible victims are entitled to request, and to have, a private victim conference with the scheme decision maker or a deputy decision maker.
>
> 14 The proposed Act should provide that:
>
> (a) the purpose of a victim conference is to provide a respectful forum for victims to be acknowledged and heard, and for the impacts of the criminal act on the victim to be properly acknowledged by the scheme decision maker on behalf of the state, and that the purpose is not to determine any application, or the amount of any award
>
> (b) victim conferences must be held in private, and only persons who are authorised by the scheme decision maker may be present during the victim conference
>
> (c) victim conferences should be conducted in a trauma-informed way that aims to affirm victims' experiences, while minimising interactions or processes that could increase victims' trauma, including in deciding the time, place, structure or format of the conference
>
> (d) victim conferences should be conducted in a culturally appropriate safe space, with sufficient flexibility for victims to share their story, with victims provided the opportunity to:
>
> (i) discuss the impacts of the crime
>
> (ii) read aloud a Victim Impact Statement or other written statement
>
> (iii) have a support person/s present
>
> (iv) be represented by a legal representative
>
> (v) at victims' request, have a single victim conference with multiple victims in attendance.

153 Victorian Law Reform Commission (n 29) 224 [10.64].
154 Victorian Law Reform Commission (n 34) 177 [9.56].

> 15 The proposed Act should provide that:
>
> (a) victims participating in a victim conference are not giving evidence
>
> (b) statements made and documents produced at a victim conference are not admissible in evidence in any civil or criminal proceedings, except as expressly provided for in the Act.[155]

16.134 The VLRC's recommendation includes important elements that would support successful recognition meetings. It enables people who have experienced sexual violence to have a voice and receive validation, acknowledgement, and vindication. It ensures that the applicant's privacy is respected, and these hearings are conducted in a safe environment, as well as in a way that is culturally appropriate. It takes other trauma-informed approaches by ensuring the process is supported and people have options in relation to how they participate. The VLRC's recommendation has been adopted into the new Victorian Financial Assistance Scheme.[156]

### *Recognition statements*

16.135 Written recognition statements can be an important mechanism for people who have experienced sexual violence to receive validation and vindication. Providing written recognition statements would recognise that people who have experienced sexual violence have diverse needs and not all would want to, or be able to, participate in a recognition meeting.

16.136 The ALRC agrees with the VLRC's recommendation that statements should be tailored to an applicant's individual experiences and acknowledge them as a victim of crime, express the state's condolences, and include a personalised acknowledgement of the effects of the crime on that person.[157] The ALRC also heard in consultation that some victims of crime emphasised that written statements should be delivered in hard copy, as well as electronically, to maximise their impact and significance for applicants.

16.137 The ALRC recognises that providing for recognition statements and meetings, in particular, would be resource intensive for the Schemes. Providing avenues for people who have experienced sexual violence to have their diverse justice needs met is vital. Making sure this is done in a considered and trauma-informed way is equally important. Appropriate resourcing and funding should therefore be provided to the Schemes to provide recognition meetings and recognition statements in an appropriate form.

## *How the recommendation would meet justice needs*

16.138 Having an opportunity to convey meaningfully an experience of sexual violence with an official who hears and accepts the account may meet at least two key justice needs identified in **Chapter 2** — validation (including recognition and

155 Ibid recs 13–15.
156 *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 41.
157 Victorian Law Reform Commission (n 34) 194 [10.103], recs 11–12.

acknowledgement); and vindication. Professor Daly has observed that validation can come from authorities acknowledging the seriousness of the experience and the harm caused, and vindication can come from authorities affirming that the act was wrong.[158] Given many people do not want to engage with the criminal justice system, it is important that there are alternative systems available in which people can be heard, can explain what has happened and how it has affected them, and can receive formal acknowledgment and affirmation.[159]

16.139 Dedicated recognition meetings and recognition statements, along with restorative justice processes, would fill a gap in justice responses to sexual violence by providing a safe and supportive forum for truth-telling processes to take place.[160] As explained by one stakeholder:

> Receiving recognition and acknowledgement of their victimisation can be a critical step towards healing for many victim-survivors — particularly if charges were not pursued by police and they otherwise did not have their 'day in court'.[161]

16.140 Victims of some other crimes may be more likely to have their 'day in court' or receive some other form of recognition of wrongdoing. In addition, victims of other crimes may not have the same justice needs for validation and vindication as people who have experienced sexual violence. Consequently, it would be justifiable to provide for recognition meetings and recognition statements for applicants who have experienced sexual violence as a priority. Governments should consider whether recognition statements and recognition meetings may also be appropriate for people who have experienced certain other crimes. However, the ALRC recognises that recognition meetings and recognition statements can be time-consuming, cause delay, and involve significant resources. Consequently, there may be merit in a Scheme providing a recognition statement in place of a recognition meeting, or restricting the type or number of applicants who are offered a recognition meeting or recognition statement to those applicants with greatest need.

158 Daly (n 24) 116–18.
159 Victorian Law Reform Commission (n 29) 224 [10.63].
160 Restorative justice processes would also provide a place for truth-telling to occur. See **Chapters 17** and **18** for further discussion.
161 Women's Legal Service Victoria, *Submission 207*.

# Further review of the Schemes

**Recommendation 57**

Each state and territory government should conduct a review of its victims of crime scheme to consider the following (where applicable) in relation to all applications (including, but not limited to, sexual violence matters):

a. ensuring that the process is victim-centred and trauma-informed, including by:
   i. ensuring that decision-makers are appropriately trained;
   ii. reducing complexity of the application process; and
   iii. reducing the time taken to process applications;

b. setting out guiding principles for the operation of the scheme;

c. with the assistance and oversight of the Standing Council of Attorneys-General, providing equality of access across all victims of crime schemes and providing for more equitable and consistent awards of compensation or financial assistance across all jurisdictions;

d. applying the standard of proof that 'on the balance of probabilities' the wrongdoing occurred, rather than any higher standard;

e. prohibiting any criminal activity by the applicant being used as a ground for refusal or reduction of an award, and ensuring that any discretion to refuse or reduce an award by reason of any contributory conduct is not misused;

f. on request, requiring decision-makers to provide written reasons for decisions; and

g. recognition payments.

## Summary of reasons for Recommendation 57

16.141 This section focuses on requirements or processes that, in the ALRC's view, and largely by reference to their likely impact on applicants who have experienced sexual violence, seem ripe for reform in relation to all applicants. The reforms discussed in this part aim to strengthen the Schemes generally, and to make processes more accessible, trauma-informed, and victim-centred.

16.142 The ALRC recommends that the Schemes review their practices in light of **Recommendation 57** and consider whether and how best to implement the reforms suggested.

## Ensuring that the process of obtaining financial assistance is victim-centred and trauma-informed, including reducing complexity of the application process, and reducing the time taken to process applications

### *Context*

16.143 The ALRC heard that the process of applying to the Schemes was difficult and traumatising and that the expectation of such difficulties can deter people who have experienced sexual violence from applying. The ALRC also heard that poor experiences in other justice systems, such as the criminal law or violence protection orders, acted as a barrier for some people in accessing the Schemes.[162]

16.144 The process of applying to the Schemes can be especially traumatic for those who have experienced sexual violence. Some decision-makers may not fully appreciate the particular impacts of sexual violence.[163] Myths and misconceptions about sexual violence can cause real harm in the operation of victims of crime schemes.[164] Retelling an experience of sexual violence, often repeatedly to multiple people at different stages of the process under the Schemes, can further compound the trauma of sexual violence.[165] The ALRC heard that some prospective applicants have chosen not to pursue a claim because they would be required to disclose their experience to a health professional.[166] In schemes with hearings, the process can make applicants feel like they are on trial.[167] One submission stated:

> As a victim survivor I applied for the Victims of crime compensation after the offender was convicted. My experience with applying for compensation was extremely frustrating, tiring and yet again re-traumatising. I had to undertake a Psychiatric assessment which was required to assess the impacts of the crime, this was gruelling and invasive. I found it hard to understand why I had to go through that process when the offender had been found guilty of the crime.[168]

16.145 Procedural complexity is present in many of the Schemes, despite being set up to be accessible and streamlined. The ALRC heard that there can be a significant amount of administration necessary to prepare an application, and that applicants have reported 'the arduous, confusing and stressful nature of these processes'.[169] The Aboriginal Family Legal Services (WA) told us that the online application portal in Western Australia was neither 'user friendly' nor was it possible to 'do it yourself' as suggested on the website.[170] Some schemes require records from multiple services

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162 Ibid.
163 Sexual Assault Services Victoria, *Submission 203*.
164 Robyn Holder and Kathleen Daly, 'State Payments to Victims of Violent Crime: Discretion and Bias in Awards for Sexual Offences' (2019) 59(5) *British Journal of Criminology* 1099, 1115–16.
165 Women's Legal Service Victoria, *Submission 207*.
166 Not published, *Submission 197*.
167 Women's Legal Service Victoria, *Submission 207*.
168 S Filmer, *Submission 30*.
169 Sexual Assault Services Victoria, *Submission 203*.
170 Aboriginal Family Legal Services (WA), *Submission 40*.

to prove one injury.[171] The ALRC heard that marginalised applicants and those in rural or remote areas often have the greatest difficulty in following procedural requirements of the Schemes because they cannot access health services to obtain reports to verify injury.[172] This has a significant impact on those who have experienced sexual violence:

> We know from direct observation that, while such a hearing might seem straightforward to tribunal members and lawyers, they can be incredibly stressful for victim survivors. In one matter that SASVic had permission to observe, a young person attending VCAT could barely speak, such was her distress at having her initial application rejected and then having to re-live her trauma in a formal environment.[173]

16.146 Legal advice and representation can reportedly assist applicants to understand, access, and navigate the complexity of the Schemes.[174] However, scheme websites reportedly do not always advise applicants how to obtain legal assistance.[175]

16.147 Provision of publicly funded legal assistance and accessibility of private representation for applicants in the Schemes is patchy. In Victoria, a publicly funded Victims Legal Service, provided by a range of Community Legal Centres and by Victoria Legal Aid, is available to all victims of crime.[176] In other jurisdictions, a contribution towards an applicant's legal fees can be recouped in some circumstances;[177] legal fees may also be capped.[178] There are some private practitioners who specialise in this field (on a remunerated or pro-bono basis) and assistance may also be provided by First Nations family violence prevention legal services, generalist Community Legal Centres, and legal aid commissions. The ALRC heard repeatedly that public funding is not adequate to meet demand for legal services for criminal injury and other compensation schemes.[179] There is an acute lack of legal assistance for the Schemes, particularly in regional and remote locations.[180]

16.148 Delay in obtaining an outcome under the Schemes can have particularly damaging impacts on those who have experienced sexual violence because it can hinder their recovery. The ALRC heard reports of significant delays in obtaining

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171 Clayton Utz Pro Bono Practice, *Submission 183*.
172 Not published, *Submission 197*.
173 Sexual Assault Services Victoria, *Submission 203*.
174 Clayton Utz Pro Bono Practice, *Submission 183*.
175 Aboriginal Family Legal Services (WA), *Submission 40*.
176 Victims of Crime Victoria (n 31).
177 See, eg, *Victims of Crime Assistance Act 2009* (Qld) s 38(2); *Victims of Crime Assistance Act 1976* (Tas) s 4(2)(e).
178 See, eg, *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 96; *Victims of Crime Act 2001* (SA) s 25; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 25, 39.
179 See, eg, Aboriginal Family Legal Services (WA), *Submission 40*; Clayton Utz Pro Bono Practice, *Submission 183*; Women's Legal Service Victoria, *Submission 207*.
180 Aboriginal Family Legal Services (WA), *Submission 40*.

outcomes across several of the Schemes.[181] The Centre for Women's Safety and Wellbeing told the ALRC that delay can have profound and harmful impacts on those who have experienced sexual violence in particular. [182]

### *Addressing the problem*

16.149 The ALRC recommends that state and territory governments conduct a review of the Schemes to understand how best to reduce complexity and delay, and to make their processes more victim-centred and trauma-informed.

16.150 A victim-centred process is one that puts 'the rights, wishes, needs, safety, dignity and well-being of the victim/survivor at the centre' of a process concerning sexual violence.[183] Of all justice avenues available to those who have experienced sexual violence, the Schemes have the potential to be the most victim-centred: they exist to support the recovery of applicants and do not need to balance the interests of those who use and experience sexual violence. Being victim-centred should therefore be core business for the Schemes.

16.151 There are many ways that a victim-centred approach could be achieved. Each approach involves listening to applicants and prospective applicants and understanding their justice interests, and each approach is characterised by openness, receptivity, attentiveness and responsiveness to their needs.[184] Approaches could include establishing lived-experience advisory committees, ensuring application forms and processes are navigable, dedicating staff to conducting research and evaluations, conducting training for decision-makers and lawyers about topics such as the nature of sexual violence, and establishing practice groups. Decision-making practices and adopting a 'beneficial approach' can directly impact an applicant's experience of the scheme.[185]

16.152 In addition, the Schemes should be reviewed to ensure their processes are trauma-informed. Trauma-informed practice has four key aspects: safety, trustworthiness, transparency, and empowerment.[186] Accordingly, schemes should be reviewed by asking how they might be made safer, how they might better foster transparency and trusting relationships, and how applicants might be empowered to exercise greater agency.

16.153 Some submissions suggested reducing the procedural complexity of the Schemes.[187] The Aboriginal Family Legal Services (WA) recommended increasing

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181 See, eg, S Filmer, *Submission 30*; Aboriginal Family Legal Services (WA), *Submission 40*; Name withheld, *Submission 57*; Centre for Women's Safety and Wellbeing, *Submission 193*; Women's Legal Service Victoria, *Submission 207*.

182 Centre for Women's Safety and Wellbeing, *Submission 193*.

183 Inter-Agency Standing Committee, *IASC Definition & Principles of a Victim/Survivor Centered Approach* (6 June 2023).

184 Sarah Ailwood et al, 'Beyond Women's Voices: Towards a Victim-Centred Theory of Listening in Law Reform on Violence Against Women' (2023) 31 *Feminist Legal Studies* 217, 237.

185 Clayton Utz Pro Bono Practice, *Submission 183*.

186 See **Chapter 1.**

187 See, eg, S Filmer, *Submission 30*.

funding for services that provide a unique service model.[188] Several submissions suggested there was a need to improve funding for legal advice for applicants to victims of crime schemes.[189] For First Nations people who have experienced sexual violence, legal assistance should be culturally safe and trauma-informed.[190] The establishment of the Independent Legal Services as part of Safe, Informed, and Supported Services (**Recommendation 1**) would assist by providing clients with initial advice about their potential rights under the Schemes.

16.154 Another way of reducing procedural complexity may be by reducing the extent to which the Schemes rely on judicial, adversarial, or hearing-based processes. The adversarial nature of hearing processes may be problematic and the ALRC heard that there was significant administration in preparing victims of crime applications and that 'victim survivors have reported the arduous, confusing and stressful nature of these processes'.[191] South Australia currently has a more 'judicial' process than other schemes and may particularly benefit from review.

16.155 Timeliness is especially important for applicants who have experienced sexual violence in order to assist the process of recovery. There are potentially many ways to improve timeliness of scheme operations, including provision of adequate resourcing to enable schemes to process applications promptly. Reducing procedural complexity may improve timeliness, as may case management approaches. Provision of legal assistance to applicants may assist with reducing the time taken to obtain an outcome.[192]

## Setting out guiding principles for the operation of the scheme

16.156 The recently enacted *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) includes guiding principles to which decisions must have regard when taking action under the Act.[193] While guiding principles are not included in the legislation of other states and territories, their objects or purposes provisions refer to helping victims recover, and recognising or acknowledging injuries and impacts.[194]

16.157 The ALRC heard that while the Schemes are theoretically beneficial in nature, they are not always construed or interpreted in that way.[195] As previously noted by the ALRC and NSWLRC, guiding principles 'can perform an important

188 Aboriginal Family Legal Services (WA), *Submission 40*.
189 See, eg, Ibid; Women's Legal Service Victoria, *Submission 207*.
190 Aboriginal Family Legal Services (WA), *Submission 40*.
191 Sexual Assault Services Victoria, *Submission 203*.
192 Aboriginal Family Legal Services (WA), *Submission 40*.
193 *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 6.
194 See, eg, *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 6; *Victims of Crime Assistance Act 2006* (NT) s 3; *Victims of Crime Assistance Act 2009* (Qld) s 3; *Victims of Crime Act 2001* (SA) s 3.
195 Clayton Utz Pro Bono Practice, *Submission 183*.

symbolic and educative role in the application and interpretation of the law, as well as in the general community'.[196]

16.158 The ALRC therefore considers that the introduction of guiding principles in all Schemes would help to centre victims in the decision-making process, make decision-making more trauma-informed, and promote consistent and beneficial interpretation of the legislation.

16.159 The guiding principles introduced in Victoria include that:

- the Act and the scheme are intended to support the wellbeing and dignity of victims of crime;
- victims should be protected from further trauma, intimidation or distress;
- the needs of victims of crime, including their safety and wellbeing, are of paramount importance; and
- the needs of individual victims of crime may vary.

16.160 The Victorian guiding principles also include promotion of cultural safety for First Nations peoples.

## Making accessibility and award amounts equitable

### *Context*

16.161 The Schemes across Australia vary in two particularly significant ways. First, some schemes are much more accessible than others. For example, administrative schemes assessing applications on the balance of probabilities without requiring proof of injury are generally much more accessible than more quasi-judicial schemes that require the accused person to have been found guilty of the offence as well as proof of injury. Secondly, the amounts of the various awards available under the Schemes vary greatly across jurisdictions. To some extent, the inconsistency between award amounts may reflect the differences in accessibility and purposes between schemes — for example, whether the scheme aims to 'compensate' victims of crime for past harm, or instead seeks to provide 'financial assistance' to recognise peoples experiences of violence and to help meet recovery needs.

16.162 It is difficult to justify these significant differences between schemes across the various states and territories. The fact that an offence has occurred in one jurisdiction rather than another does not alter the impact the offence has on

196 Australian Law Reform Commission and New South Wales Law Reform Commission (n 136) 1180 [25.199]. The Report went on to say at 1180–1 [25.299] that while 'much more is required to change culture, such statements [of guiding principles] provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and a benchmark against which to assess the implementation of the law and procedure'.

the person who has experienced sexual violence, nor is it relevant to the person's recovery needs. As emphasised by Clayton Utz,

> it is perverse that Australians who have experienced similar acts of violence are disadvantaged by the location of the violence.[197]

16.163 **Table 16.1** below sets out the current minimum and maximum award amounts provided for in Victims of Crime Schemes in each state and territory.

***Table 16.1: Current maximum and minimum award amounts across jurisdictions***

| | ACT[198] | NSW[199] | NT[200] | Qld[201] | SA[202] | Tas[203] | Vic[204] | WA[205] |
|---|---|---|---|---|---|---|---|---|
| Maximum amount for primary victims | $64,123 | $50,000 | $40,000 | $120,500 | $100,000 (indexed) | $30,000 ($50,00 for two or more related acts) | $80,000 ($85,000 for series of related criminal acts) | $75,000 ($150,000 for multiple offences by the same offences) |
| Maximum 'recognition' or 'special assistance' payment | $33,664 | $15,000 | $40,000 | $15,000 | N/A | N/A | $20,000 ($25,000 for related acts) | N/A |
| Minimum 'recognition' or 'special assistance' payment | $1,280 | $1,500 | $10,000 | $3,000 | N/A | N/A | $260 ($325, for related acts) | N/A |

## *Addressing the inequity*

16.164 The ALRC recommends that state and territory governments, through a forum such as the Standing Council of Attorneys-General, review the existing disharmony in accessibility and payment amounts available in the Schemes, with a view to providing equal access, and to ensuring that amounts are adequate, and that successful applicants across Australia receive award amounts that are equitable. As an indicator of equality of access, and of equality of available award amounts,

197 Clayton Utz Pro Bono Practice, *Submission 183*.
198 *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) regs 5(1), 8.
199 *Victims Rights and Support Act 2013* (NSW) s 26; *Victims Rights and Support Regulation 2019* (NSW) regs 10, 14.
200 *Victims of Crime Assistance Act 2006* (NT) s 38; *Victims of Crime Assistance Regulations 2007* (NT) sch 1.
201 *Victims of Crime Assistance Act 2009* (Qld) s 38, sch 2 cl 2.
202 *Victims of Crime Act 2001* (SA) s 20(3).
203 *Victims of Crime Assistance Regulations 2021* (Tas) reg 4(2).
204 *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 10(1); *Victims of Crime (Financial Assistance Scheme) Regulations 2024* (Vic) reg 7.
205 *Criminal Injuries Compensation Act 2003* (WA) ss 31, 33.

the per capita funding in each state and territory for the Schemes should be roughly equivalent. The Australian Government could, if necessary, provide funding to particular states and territories to enhance the relative equity of the Schemes.

16.165 When considering what might be an appropriate award amount, the recommended review should consider (amongst other things) the amounts available under the National Redress Scheme and the observations made in the case of *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 (*Richardson*):

- The maximum award amount under the National Redress Scheme arising out of the Child Sexual Abuse Royal Commission is $150,000.[206] This amount is significantly higher than the maximum amount that can be awarded by the highest-paying victim of crime scheme (the maximum amount in Queensland is $120,000). The lowest-paying victim of crime scheme in Tasmania awards up to only $30,000, just 20% of the maximum amount under the National Redress Scheme.
- In the matter of *Richardson*, a Full Court of the Federal Court found that the amount of general damages regularly awarded in civil sexual harassment matters had not 'absorbed the increases evident in awards in other fields of litigation'.[207] The Full Court observed that 'the community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct'.[208] The Full Court found the ordered amount of general damages to be 'manifestly inadequate'.[209] It increased the amount of general damages to more than 550% of the amount initially ordered, namely from $18,000 to $100,000.[210]

16.166 Victims of crime schemes do not award 'general damages' or use the same categories recognised under civil law. Nevertheless, the Court's judgment in *Richardson* is pertinent in considering whether the amounts awarded under victims of crime schemes reflect the community's increased appreciation of the hurt, humiliation, and distress that can be caused by sexual violence. The amounts awarded by the Schemes do not appear to have reflected the increased community awareness and expectations reflected in payment amounts in other justice pathways. As one person who has experienced sexual violence submitted:

> I lost that [$31,000] plus more in expenses (moving from my home as it was now a crime scene, new car for anonymity, loss of income, medical expenses, travel expenses to appointments, etc), aside from all of that there is the issue of psychological harm. There is no realistic way to put a number on that, but the current caps are pitiful and are borderline insulting. However, had I have been raped in a school, or a Church, I would be entitled to at least 5 times the maximum limit, simply because where I was raped. I think a sense of uniformity

206 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 16.
207 *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 [117].
208 Ibid.
209 Ibid [118].
210 Ibid.

> and equity across compensation schemes, based on the crime itself, makes far more sense. It shouldn't be dependent on where a crime takes place.[211]

16.167 Furthermore, the Aboriginal Family Legal Service WA submitted:

> It is our perspective that the current maximum compensation amount is inadequate for sexual offences, particularly in circumstances where multiple offences occurred over a period of time, often with very serious and debilitating consequences, usually incorporated into experience of serious and pervasive family and domestic violence. The $150,000 total amount is trifling in comparison to some possible common law claims, which are dependent on having the money to run them, which leads to inequity within the community.[212]

16.168 The ALRC heard from a number of consultees that the amount of damages being agreed in some civil law proceedings relating to sexual violence can be much higher again, especially when the respondent wants to prevent the matter from becoming public.

16.169 Increasing the minimum and maximum amounts available under victims of crime schemes for people who have experienced sexual violence would better reflect the community's increased appreciation for the many serious negative effects of sexual violence on a person's life. In addition, setting more consistent minimum and maximum award amounts across jurisdictions, aligned with more consistent accessibility of the Schemes, would increase equity between people experiencing sexual violence around Australia.

## Applying the standard of proof that 'on the balance of probabilities' the wrongdoing occurred, rather than any higher standard

### *Context*

16.170 To provide assistance the various Schemes require that the relevant decision-maker is satisfied that the relevant offence (and any other relevant facts such as injury) occurred. The standard of proof varies between jurisdictions. In the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Tasmania, and Victoria, the assessor must be satisfied on the balance of probabilities.[213] South Australia and Western Australia take different approaches to the evidentiary standard:

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211 A Williams, *Submission 19*.

212 Aboriginal Family Legal Services (WA), *Submission 40*.

213 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 43; *Victims Rights and Support Act 2013* (NSW) s 39; *Victims of Crime Assistance Act 2009* (Qld) s 78; *Victims of Crime Assistance Act 1976* (Tas) s 5(2); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 28. In the Northern Territory the standard of proof is not expressly provided for in the legislation, however in practice a balance of probabilities standard is adopted: Department of the Attorney-General and Justice (NT) (n 34) 13.

- In South Australia, the relevant offence is generally required to be proved beyond reasonable doubt in a court.[214] Other facts relevant to the application need to be proved on the balance of probabilities.[215] The legislation also provides the Attorney-General with discretion to make ex gratia payments in specified circumstances.[216]
- In Western Australia, the offence must generally be 'proved'.[217] A 'proved offence' is one 'of which a person has been convicted' and that necessarily means that the offence was proved beyond reasonable doubt.[218] However, the legislation allows for applications to be made for 'alleged offences' in specified circumstances such as the accused person being unfit to stand trial or where a charge is not determined.[219]

### *Why the balance of probabilities is the appropriate standard*

16.171 Requiring an offence to be proved beyond reasonable doubt is an inappropriate standard of proof to apply in any factual assessment to be made in a victims of crime scheme. The 'beyond reasonable doubt' standard is a demanding and onerous standard justifiably utilised in criminal proceedings in order to provide the defendant a fair trial given the gravity of the allegations faced by a defendant in such a proceeding. That standard of proof is not justified as a measure for providing a respondent a fair trial in a civil proceeding. It is clearly not justifiable as a necessary measure to provide a fair process to either applicant or the state in a process under a victims of crime scheme.

16.172 Stakeholders were generally supportive of the balance of probabilities as the standard of proof for the Schemes.[220] The ALRC heard that precluding people who have experienced sexual violence from receiving compensation if an accused person has not been convicted imposes a significant barrier.[221] Given that most people do not report sexual violence,[222] and that there are high rates of attrition and low rates of conviction for sexual violence,[223] requiring that the act of violence be proved beyond reasonable doubt may be particularly difficult for people who have experienced sexual violence. That standard of proof is not appropriate for any fact finding at all in the Schemes.

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214 *Victims of Crime Act 2001* (SA) s 22(2)(i). The offence may also be admitted in related statutory proceedings, or reasonably inferred from admissions in such proceedings: ibid s 22(2)(a)(ii).
215 *Victims of Crime Act 2001* (SA) ss 22(1)–(2).
216 Ibid s 27(4).
217 *Criminal Injuries Compensation Act 2003* (WA) s 12.
218 Ibid s 3 (definition of 'proved offence').
219 Ibid ss 13–17.
220 See, eg, Full Stop Australia, *Submission 214*.
221 Ibid.
222 See **Chapter 2**.
223 See **Chapter 2** and **Chapter 5**.

## Prohibiting consideration of contributory conduct and criminal activity

### *Context*

16.173 Each of the Schemes permits (or requires) the decision-maker to consider whether the applicant's conduct contributed to the harm they suffered as a result of the alleged offence ('contributory conduct'),[224] when determining whether to refuse or reduce an award. For example, in New South Wales, South Australia, the Australian Capital Territory, and the Northern Territory, a decision-maker may consider whether the applicant failed to take reasonable steps to mitigate the extent of any injury.[225] Reasonable steps for an applicant may include seeking medical treatment or counselling.[226]

16.174 Similarly, almost all schemes permit (or require) the decision-maker to consider whether the applicant was engaged in criminal activity at the time of the incident when determining whether to refuse or reduce an award.[227] In some jurisdictions, the criminal activity provisions and the contributory conduct provisions are combined. Some jurisdictions also allow for consideration of an applicant's criminal history.[228]

16.175 Contributory conduct and criminal conduct may be taken into account in two ways: first, in deciding whether the applicant should receive an award at all; and secondly, in deciding whether the amount of any award should be reduced. The way these factors are taken into account differs between jurisdictions.

16.176 The potential impact of these provisions is twofold. First, the effect of the provisions may be that an award in a particular matter is refused or reduced. Secondly, the provisions may create a barrier to accessing justice, because victims of crime (and especially people who have experienced sexual violence) may be reluctant to engage with a justice mechanism that may conclude that the applicant

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224 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 47(1)(d), (2)(c); *Victims Rights and Support Act 2013* (NSW) ss 44(1)(a), (f); *Victims of Crime Assistance Act 2006* (NT) ss 41(1)(a), (c); *Victims of Crime Assistance Act 2009* (Qld) s 85(2)(a); *Victims of Crime Act 2001* (SA) s 20(4)(a); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 5(3), 33(a); *Criminal Injuries Compensation Act 2003* (WA) s 41(a).

225 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 47(3)(d); *Victims Rights and Support Act 2013* (NSW) s 44(1)(f); *Victims of Crime Assistance Act 2006* (NT) s 41(1)(c); *Victims of Crime Act 2001* (SA) s 20(8). Victoria, Queensland, Western Australia and Tasmania do not explicitly include this provision as a consideration for decision-makers.

226 See, eg, *Victims Rights and Support Act 2013* (NSW) s 44(1)(f); *Victims of Crime Assistance Act 2006* (NT) s 41(1)(c); *Victims of Crime Act 2001* (SA) s 20(8).

227 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 45(1)(c); *Victims Rights and Support Act 2013* (NSW) s 44(1)(a); *Victims of Crime Assistance Act 2006* (NT) s 41(1)(a); *Victims of Crime Assistance Act 2009* (Qld) s 80(1); *Victims of Crime Act 2001* (SA) s 20(5); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 33(a); *Criminal Injuries Compensation Act 2003* (WA) s 39.

228 *Victims Rights and Support Act 2013* (NSW) s 44(1)(a); *Victims of Crime Assistance Act 2006* (NT) s 41(1)(a); *Victims of Crime Assistance Act 2009* (Qld) ss 80(1)(b), (2)–(3); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 33(a).

is (at least partly) at fault for the offence or consequent harm, or is undeserving of assistance.

### *Why considering contributory conduct and criminal activity is unfair*

16.177 The policy rationale for mandated consideration of an applicant's character or criminal activity has been described as ensuring that state-funded assistance for victims of crime is limited to those who are perceived to be 'deserving' of recognition and sympathy.[229] These limitations on the Schemes reflect attitudes that only 'genuine' and 'innocent' victims of crime who have been harmed through no fault of their own should receive assistance.[230]

16.178 If this is the policy rationale, it is in tension with the fundamental objective of the Schemes: to assist victims of crime to recover from harm. Whether an applicant is sufficiently deserving should not be determined by reference to a single criterion. Furthermore, denying those applicants an award is in effect a kind of 'second punishment' for any criminal activity. A fundamental principle of the criminal justice system is that a person should not be punished twice for the same wrongdoing.[231] Accordingly, the policy rationale does not appear defensible in principle.

16.179 The policy rationale for mandated consideration of any 'contributory' conduct appears to be a matter of attributing 'fault' for harm. It has long been considered to be against the public interest for a person to receive an award if they contributed to their injuries.[232] The policy rationale may be defensible, but the breadth of the provisions in the Schemes gives rise to a risk of misuse, against which the Schemes should safeguard, by way of policy guidelines or similar measures.

16.180 Professors Seear and Fraser have noted that some schemes allow *any* aspect of a victim of crime's life to be considered 'contributory'.[233] In other schemes, there is no guidance on how much weight to give relevant considerations. Accordingly, decision-makers have considerable scope to decide what is 'relevant' and 'problematic' in making an award.[234] Consequently, decisions made under the Schemes may reflect a lack of understanding of the nature of particular offences, as well as myths and misconceptions about how ideal victims of crime should behave.

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229 Victorian Law Reform Commission (n 34) 395 [15.32].

230 Freckelton (n 33) 57–8.

231 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Interim Report No 127, 2015) 251–2 [8.415]–[8.510]; *Pearce v The Queen* (1998) 194 CLR 610, [54], [89].

232 Kate Seear, Jamie Walvisch and Liza J Miller, 'Reconsidering the Role of the Victim in Criminal Injuries Compensation' in Becky Batagol, Kate Seear and Jamie Walvisch (eds), *The Feminist Legislation Project* (Routledge, 2024) 159, 161.

233 Kate Seear and Suzanne Fraser, 'The Addict as Victim: Producing the "Problem" of Addiction in Australian Victims of Crime Compensation Laws' (2014) 25(5) *International Journal of Drug Policy* 826, 833.

234 Ibid 830.

One stakeholder submitted that they had concerns about

> the refusal of compensation for clients if they have engaged in criminal behaviour, in circumstances where that behaviour constitutes minor breaches of the law or summary matters for which they are not charged. Examples include: claimants disclosing that they were using illegal drugs prior to a sexual assault, which were supplied to them by the perpetrator of the sexual assault …[235]

16.181 Such myths may harm some victims of sexual violence more than others, including First Nations people, sex workers, and those who use drugs and alcohol.[236]

16.182 Some stakeholders expressed concern about the operation of such provisions.[237] The ALRC heard one example of a young person who was in possession of drugs at the time the sexual violence occurred, such that their application was almost refused. The ALRC heard general support from stakeholders for reform of this issue.

16.183 In the context of sexual violence specifically, no conduct of a person should be considered to 'contribute' to sexual violence against that person. Regardless of any potentially criminal conduct by a person who has experienced sexual violence, the person will have suffered harm by virtue of the sexual violence, which is not diminished in any way by any potentially criminal conduct. Provisions that require scrutiny of applicant conduct to assess whether a person who has experienced sexual violence contributed to their own harm arguably sit in tension with the fundamental purposes of the Schemes, which include repairing harm and enabling recovery.[238]

## On request, requiring decision-makers to provide written reasons for decisions

16.184 Availability of written reasons for decisions differs between states and territories. Decision-makers and assessors can be required to provide reasons for their decision to grant an award,[239] reduce an award,[240] or refuse an award,[241] depending on the jurisdiction.[242]

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235 Aboriginal Family Legal Services (WA), *Submission 40*.

236 For a discussion regarding drug alcohol addiction, see, eg, Seear and Fraser (n 233) 833.

237 See, eg, Aboriginal Family Legal Services (WA), *Submission 40*; K Seear, G Grant, S Mulcahy and A Farrugia, *Submission 177*.

238 See, eg, for a discussion of drugs and alcohol: Seear, Walvisch and Miller (n 232) 165.

239 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 46(3); *Victims Rights and Support Act 2013* (NSW) s 43(5); *Victims of Crime Assistance Act 2009* (Qld) s 90; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 35; *Criminal Injuries Compensation Act 2003* (WA) s 27(1).

240 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 46(2)(d), (3); *Victims of Crime Assistance Act 2006* (NT) s 44.

241 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 45; *Criminal Injuries Compensation Act 2003* (WA) s 27(2); *Victims of Crime Assistance Act 2006* (NT) s 44.

242 *Victims Rights and Support Act 2013* (NSW) s 43(5); *Victims of Crime Assistance Act 2006* (NT) ss 44(4), 45; *Victims of Crime Assistance Act 2009* (Qld) s 91; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 35; *Criminal Injuries Compensation Act 2003* (WA) s 27.

16.185 In the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, and Victoria, decision-makers are required to provide reasons once a decision is reached.[243] In Western Australia, if an award is made, reasons are required only on request, but if an award is refused, reasons are required whether requested or not.[244]

16.186 Written reasons help to facilitate transparency, enable applicants to understand the decision and why it was made, and enable an applicant to exercise any right of review. Importantly for people who have experienced sexual violence, written reasons can act as a source of acknowledgement and validation. In the absence of other forms of validation, not providing written reasons 'fails to make victims feel that the harm caused to them is acknowledged'.[245]

16.187 In the ALRC's preliminary view, all schemes should, at the least, provide written reasons on request. Consideration should be given to whether providing written reasons to all applicants may delay the overall process and lead to the inappropriate use by decision-makers of pro forma reasons. Schemes could provide written reasons in cases where an award has been refused or reduced, regardless of any request, and could otherwise provide reasons on request.

## Provide for recognition payments

16.188 The ALRC heard from people who have experienced sexual violence that a key justice need is to feel validated and vindicated.[246] This may be achieved by way of recognition or acknowledgement and can be expressed through symbolic and material forms of reparation, such as financial assistance.

16.189 Along with reimbursements and payments for practical assistance like counselling, the four 'financial assistance' jurisdictions (Australian Capital Territory, New South Wales, Queensland, and Victoria) provide for lump-sum payments that are referred to as 'special [financial] assistance',[247] or 'recognition' payments.[248] Notably, the Northern Territory legislation provides for both 'compensable injuries' and 'compensable violent acts' (sexual violence is a compensable violent act).[249]

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243 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 46; *Victims Rights and Support Act 2013* (NSW) s 43; *Victims of Crime Assistance Act 2006* (NT) s 45; *Victims of Crime Assistance Act 2009* (Qld) ss 90–91; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 35.

244 *Criminal Injuries Compensation Act 2003* (WA) s 27.

245 Victorian Law Reform Commission (n 34) 189 [10.71], citing submission by Darebin Community Legal Centre.

246 See **Chapter 2**.

247 *Victims of Crime Assistance Act 2009* (Qld) s 39(h); *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 11.

248 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 28; *Victims Rights and Support Act 2013* (NSW) s 36.

249 *Victims of Crime Assistance Act 2006* (NT) s 7.

16.190 The purpose of 'special' or 'recognition' payments differs slightly between financial assistance jurisdictions, but is generally to recognise the injuries,[250] or trauma,[251] suffered by the victim of crime, and 'to assist victims in their recovery from acts of violence'.[252] These payments are generally allocated based on categories of offences.[253] Offences categorised as more serious are entitled to a higher award. In some jurisdictions, depending on how serious the injury is or aggravating circumstances, applicants can be 'uplifted' into higher offence categories, which qualify for a higher award.[254] The maximum (and minimum) amounts are different between jurisdictions — in the Australian Capital Territory the highest amount available is $33,664 while in New South Wales it is $15,000.[255]

16.191 As noted by Holder and Daly, for some people who have experienced sexual violence, the amount of the award they received from a victims of crime scheme was 'incommensurable with the harms' suffered by the individual.[256] This sentiment was further reflected in a submission to this Inquiry:

> I thought the recognition payment would provide me with some comfort that it was recognised that I had been assaulted. It helped, but it didn't take away the pain.[257]

16.192 However, Holder and Daly also found that, for some people who have experienced sexual violence, receiving a special assistance payment was an acknowledgement and recognition of their experience,[258] and was valued as help 'towards practical matters that arose in consequence of the victimisation'.[259] Holder and Daly found that allocating payments by reference to the type of alleged offence rather than the injury or harm better aligns with the 'meanings survivors [of sexual assault] ascribe to the money'.[260] They noted that this is because

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250 *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(b).

251 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 28; *Victims Rights and Support Act 2013* (NSW) s 34.

252 *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 5(b).

253 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 28(2)(b); *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) reg 8; *Victims Rights and Support Act 2013* (NSW) s 35; *Victims Rights and Support Regulation 2019* (NSW) reg 14; *Victims of Crime Assistance Act 2009* (Qld) s 39(h), sch 2; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 11; *Victims of Crime (Financial Assistance Scheme) Regulations 2024* (Vic) sch 1.

254 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 28; *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) reg 8; *Victims of Crime Assistance Act 2009* (Qld) sch 2 cl 1; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 11(2); *Victims of Crime (Financial Assistance Scheme) Regulations 2024* (Vic) sch 1. Following the PAVER Review, legislation has been passed, but has not yet commenced, in the ACT to remove circumstances of aggravation as part of the application for a recognition payment: Explanatory Statement, Victims of Crime (Financial Assistance) Amendment Bill 2024 (ACT) 2; *Victims of Crime (Financial Assistance) Amendment Act 2024* (ACT) s 5.

255 *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) reg 8; *Victims Rights and Support Regulation 2019* (NSW) reg 14(a).

256 Holder and Daly (n 1) 31.

257 Name withheld, *Submission 6*.

258 Holder and Daly (n 1) 27.

259 Holder et al (n 32) 113.

260 Holder and Daly (n 1) 31.

> survivors are able to see the recognition payment as reflecting a societal-based assessment of 'seriousness' connected to the nature of the wrong as a violation.[261]

16.193 The ALRC recognises that providing for 'recognition payments', based on acts of violence, may pose additional challenges for compensation schemes. However, as noted above in relation to what the Northern Territory scheme refers to as a 'compensable violent act', a compensation scheme can also provide for recognition-based payments.

261 Ibid.

# 17. Introduction to Restorative Justice

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## Introduction

> It's time to boldly reimagine how responses to sexual violence could look.[1]

17.1 People who have experienced sexual violence have varied justice needs. Not everyone wants to follow the same justice pathway, but everyone wants access to meaningful options. There is also a vast unmet need for just outcomes for sexual violence that is not reported or dealt with in the formal justice system. Restorative justice can increase access to justice, filling the 'justice gap' for sexual offences and providing an option to supplement other available options.[2] As we discuss in **Chapter 18**, restorative justice can interact with the justice system and can also operate independently of it.

17.2 In this chapter, we explain what restorative justice is and how it works. We explain that access to restorative justice for sexual violence is inconsistent across Australia. We provide an overview of the support we heard for restorative justice, and what recent inquiries, reports, and research have said about the need for it.

17.3 A strong case has been made for restorative justice and in **Chapter 18** we recommend making it available nationally. But some people have concerns about using it for sexual violence. Our recommendations in **Chapter 18** focus on reducing the risks and increasing the benefits of restorative justice for sexual violence.

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1 Sisters Inside Inc, *Submission 100*.

2 Marie Keenan and Estelle Zinsstag, *Sexual Violence and Restorative Justice* (Oxford University Press, 2022) 1–5, 299–324. However, this is only the case if it is done safely and well, and adequately resourced: ibid 302. See also Kathleen Daly, *Conventional and Innovative Justice Responses to Sexual Violence* (ACSSA Issues No 12, Australian Centre for the Study of Sexual Assault, 2011) 26–7; Meredith Rossner and Helen Taylor, 'The Transformative Potential of Restorative Justice: What the Mainstream Can Learn from the Margins' (2024) 7 *Annual Review of Criminology* 357, 11–12.

## What is restorative justice?

> I just really felt like it was my process, not a process that I was being put through. And that made all the difference.[3]

17.4 Restorative justice brings together people affected by violence so they can discuss the harm that has been done and try to repair it. Restorative justice can take different forms, including a facilitated exchange of letters, or facilitated face-to-face or online meetings. It is carefully supported by trained professionals. Often the person responsible and the person harmed are the main participants, but they must participate voluntarily.[4] The professionals supporting the process screen participants to check that they are eligible and suitable.[5]

17.5 Actions that contribute to repairing the harm may be included in an 'outcome agreement' — a person responsible might agree to participate in a treatment program,[6] stay away from the person harmed or others (for example, children), pay compensation, or do a combination of these.

17.6 A starting point for restorative justice is that participants agree on central facts and the person responsible accepts some responsibility for their behaviour. Its focus on repairing harm, rather than resolving disputes, makes it different from mediation and conciliation.[7]

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3 A person who experienced sexual violence and who took part in a restorative justice process in New York, quoted in 'Restorative Justice Can Deliver Powerful Outcomes for Victims of Sexual Assault' (Directed by Anna Kelsey-Sugg and Suzie Miller, ABC Radio National, 14 August 2024).

4 See generally Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 12–16. For a description of varying restorative justice processes: *Restorative Justice Service Policy* (Corrective Services NSW, 28 November 2024) 7–10.

5 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 200 [9.81]–[9.82]; and see, eg, *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines* (ACT) sch [3], [7]; 'Restorative Justice Service Policy' (n 4) 6–7 [3.3].

6 As we discuss in **Chapter 18**, taking part in a treatment program may also be an eligibility requirement for participation in restorative justice.

7 Traci Keys, *Workplace Sexual Harassment and Harm: 2019 Churchill Fellowship to Increase Effective and Supportive Options for Women Experiencing Sexual Harassment in the Workplace* (Winston Churchill Memorial Trust Report, 2024) 25; Shirley Jülich et al, 'Restorative Justice Responses to Sexual Violence: Perspectives and Experiences of Participating Persons Responsible and Persons Harmed' (2024) 19(7) Victims & Offenders 1424, 1428, 1430; Women's Safety and Justice Taskforce, Hear Her Voice: Report Two (vol 1, 2022) 385.

## Nationally, access to restorative justice for sexual violence is limited

> It's really important to have initiatives where survivors and victims are put in the forefront and at the moment, there's nothing like that offered …[8]

17.7 Restorative justice for sexual offences involving adults is available as part of the justice system in the Australian Capital Territory, Queensland, and to a limited extent, New South Wales and Victoria. Only the Australian Capital Territory has dedicated restorative justice legislation.[9] Restorative justice may also be available independently of the justice system through community-based providers.[10]

17.8 Restorative justice principles are widely used in justice responses to offending by children and young people, but with the exception of South Australia and Queensland, they are used less frequently for sexual offences involving children and young people.

17.9 We outline the availability of restorative justice across Australia in **Appendix E**.

17.10 In 2013, an agreement was reached on national guidelines for restorative justice for criminal offences.[11] The guidelines were designed to promote a consistent approach among different states and territories, but they excluded sexual and family violence offences.[12]

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8 Kat Khan (a person who experienced sexual violence who participated in a restorative justice process and who now runs a restorative justice service), quoted in Alexandria Utting, 'Crime Victims Face Perpetrators as Part of Pilot Restorative Justice Program in Queensland Jails', *ABC News/Stateline* (online, 9 October 2024) <https://amp.abc.net.au/article/104445106>.

9 *Crimes (Restorative Justice) Act 2004* (ACT).

10 For example, 'Open Circle', based in the Centre for Innovative Justice at RMIT in Victoria: Centre for Innovative Justice, *Submission 94*; and 'Transforming Justice Australia', which provides a national service: Transforming Justice Australia, *Submission 185*.

11 Standing Council on Law and Justice, *Guidelines for Restorative Justice Processes in Criminal Cases* (2013).

12 Ibid 1, points 5, 6. The guidelines are no longer accessible online. They are discussed in Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending - Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, 2014) 38–9.

# Nationally, there is strong support for restorative justice

## There is support for restorative justice being widely available

> I'm presently exploring restorative justice processes for myself, which is giving me hope, voice and purpose.[13]

> I did the restorative justice conference and it changed my life. What happened in that room – I felt it instantly. When I talk about it, I can still feel the shift that happened … [my brother's murderer] wasn't my obsession anymore.[14]

17.11 Some people who have experienced sexual violence describe taking part in restorative justice as transformative and even lifesaving.[15] They found it empowering to tell the person responsible how the violence affected them. Some want an opportunity to ask the person who harmed them questions.[16]

17.12 Many people who have experienced sexual violence told us that restorative justice had helped them, or that it should be more widely available.[17] Many other people we heard from supported making restorative justice an option.[18]

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13 Chris Coombes in Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

14 Debbie McGrath, *Consultation 83*. Debbie McGrath's participation in restorative justice related to the murder of her brother rather than sexual violence. However, she has worked as a sexual assault counsellor and says that restorative justice should be more widely available, including for sexual violence.

15 Bebe Loff, Bronwyn Naylor and Liz Bishop, *A Community-Based Survivor-Victim Focussed Restorative Justice: A Pilot* (Report, 2019) 30, 31, 44; Utting, (n 8).

16 Utting, (n 8); Victorian Law Reform Commission (n 5) 192. See also Lisa Mary Armstrong, 'Is Restorative Justice an Effective Approach in Responding to Children and Young People Who Sexually Harm?' (2021) 10(4) *Laws* 86, 7; Siobhan Lawler, Hayley Boxall and Christopher Dowling, *Restorative Justice Conferencing for Domestic and Family Violence and Sexual Violence: Evaluation of Phase Three of the ACT Restorative Justice Scheme* (2023) 11.

17 Name withheld, *Submission 95*; D Erlich and N Meyer, *Submission 115*; A McIntosh, *Submission 131*; J Crous, *Submission 141*; Not published, *Submission 142*; C Oddie, *Submission 145*; Not published, *Submission 151*; Not published, *Submission 155*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Violet Co Legal & Consulting, *Submission 220*.

18 Queensland Sexual Assault Network, *Submission 70*; Parkerville Children and Youth Care, *Submission 91*; Australian Psychological Society, *Submission 106*; Victim Support ACT, *Submission 112* ; Australian Lawyers Alliance, *Submission 113*; E Garcia-Dolnik, L Klein, and S Loiselle, *Submission 114*; Victoria Legal Aid, *Submission 119*; Commissioner for Children and Young People WA, *Submission 130*; A McIntosh, *Submission 131*; Not Published, *Submission 134*; National Legal Aid, *Submission 144*; Legal Aid NT, *Submission 146*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Not published, *Submission 155*; Embolden, *Submission 156*; Community Restorative Centre, *Submission 166*; Women's and Children's Health Network (SA), *Submission 175*; Jesuit Social Services, *Submission 190*; Centre for Women's Safety and Wellbeing, *Submission 193*; Sexual Assault Services Victoria, *Submission 203*; Law Council of Australia, *Submission 215*. We also heard support from 'The Oceania Community' of restorative justice practitioners and researchers; the courts; and some sexual assault service providers.

## Recent inquiries, reports, and research support offering restorative justice

17.13 Reports listed in our terms of reference,[19] as well as other recent reports and research,[20] support improving access to restorative justice. Restorative justice has been positively evaluated, including in cases involving sexual violence.[21]

19 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, *Current and Proposed Sexual Consent Laws in Australia* 105 [5.47], rec 9; Attorney-General's Department (Cth), *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–27* (Meeting of Attorneys-General, August 2022) 11 [3.1]; Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 62–5; Kate Fitz-Gibbon et al, *National Plan Stakeholder Consultation Final Report* (2022) 48, 170; Alison Campbell et al, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future* (Australian Human Rights Commission, 2020) 101, 103, 236, 237; Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 63, rec 13; Women's Safety and Justice Taskforce (n 7) recs 89–92; Victorian Law Reform Commission (n 5) recs 28–36.

20 See, eg, Victims of Crime Commissioner (Vic), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (November 2023) rec 46; KPMG and Centre for Innovative Justice, RMIT, *'This Is My Story. It's Your Case, But It's My Story': Interview Study* (NSW Bureau of Crime Statistics and Research, July 2023) rec 13; Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Support Provided to Victims of Crime* (No 48, 57th Parliament, May 2023) rec 9; Australian Productivity Commission, *Australia's Prison Dilemma* (Research Paper, October 2021) 4, 73, 78, 79, 82; Meredith Rossner et al, *Adult Restorative Justice Conferencing in Queensland: Research on Best Practice and Expansion* (Department of Attorney General and Justice (Qld), 2024) 40–41; Lawler, Boxall and Dowling (n 16) 9–13; Paul Gavin et al, 'Restorative Justice in Cases of Sexual Violence: Current and Future Directions in the UK' (2023) 26(4) *Contemporary Justice Review* 393, 393–4, 400–404.

21 See, eg, Bolitho and Freeman (n 4) 7–8, 31–2, 53, 61; Kathleen Daly, 'Conferences and Gendered Violence: Practices, Politics, and Evidence' in Inga Vanfraechem and Estelle Zinsstag (eds), *Conferencing and Restorative Justice: International Practices and Perspectives* (Oxford University Press, 2012) ch 8, 117, 117; Mary P Koss, 'The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes' (2014) 29(9) *Journal of Interpersonal Violence* 1623, 1623, 1641–7, 1651, 1654–5; Natalie Hadar and Tali Gal, 'Survivors' Paths Toward Forgiveness in Restorative Justice Following Sexual Violence' (2023) 50(6) *Criminal Justice and Behaviour* 911, 912; New Zealand Government, Ministry of Justice, *Restorative Justice Evidence Brief* (April 2016) 1, 3–4, 7–8; Keenan and Zinsstag (n 2) 123–33; Lawler, Boxall and Dowling (n 16) 9–12; Loff, Naylor and Bishop (n 15) 51–2; Jülich et al (n 7). See Rossner and Taylor (n 2) 4–5 discussing evidence of the positive impact of restorative justice as a practice but without a focus on sexual violence. Keenan and Zinsstag caution that the sample size for most sexual violence restorative justice evaluations is small, and how success is measured varies: Keenan and Zinsstag (n 2) 123. A literature review published in 2021 concluded there is an absence of rigorous published evaluations of restorative justice programs for sexual and family violence offences: Daye Gang et al, 'A Call for Evaluation of Restorative Justice Programs' (2021) 22(1) *Trauma, Violence, & Abuse* 186. However, its eligibility criteria included that 'the program being evaluated used restorative justice methods for sexual or family violence offences and these offences constituted at least 75% of cases': ibid 186. In our view, this is too narrow, given restorative justice providers like the Australian Capital Territory's Restorative Justice Unit deal with a mix of offences and have robust safety protections for sexual offence cases. We note as well that the date range for the literature reviewed is now five years old, excluding recent evaluations: ibid. The review has also been critiqued by Daly: Kathleen Daly, *Remaking Justice after Sexual Violence: Essays in Conventional, Restorative, and Innovative Justice* (Eleven, 2022) 342–3.

## Restorative justice can provide accountability

> I was just blaming myself a lot for what happened rather than blaming him … I honestly had a very big weight lifted off me after the [restorative justice conference] because I … didn't see it as my fault anymore.[22]

17.14 As discussed in **Chapter 1**, the concept of 'accountability' can mean different things to different people. In restorative justice, it can include the person responsible for harm:

- admitting to the harm they caused;
- taking responsibility for the harm they caused;
- listening to what they are told about the harm and acknowledging its effects;
- getting help to address the underlying causes of their behaviour; and
- taking action to repair the harm.[23]

17.15 Achieving accountability as part of restorative justice is a process that can take time.[24] It requires expert and therapeutic support, especially when sexual violence is involved.[25]

17.16 Research suggests that restorative justice gives people who are responsible for harm more opportunities to be accountable than traditional justice pathways.[26] The different forms of accountability offered can be especially important for people who have experienced sexual violence.[27] An evaluation of restorative justice for sexual offences and family violence in the Australian Capital Territory heard that restorative justice 'provided a unique mechanism for persons harmed to have a variety of justice needs met'.[28] This could be the case even where the insight demonstrated by the person responsible and their willingness or capacity to be accountable for their

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22 Person harmed by sexual violence who participated in a restorative justice conference in the Australian Capital Territory, quoted in Lawler, Boxall and Dowling (n 16) 11.

23 See generally William R Wood and Masahiro Suzuki, 'Getting to Accountability in Restorative Justice' (2024) 19(7) *Victims & Offenders* 1400. See also Koss (n 21) 1642.

24 Victorian Law Reform Commission (n 5) 198 [9.72]–[9.73]. See also Wood and Suzuki (n 23) 1401, 1415–16.

25 Loff, Naylor and Bishop (n 15) 45; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations, 2nd ed, 2020) 72; Keenan and Zinsstag (n 2) 269–71; Victorian Law Reform Commission (n 5) 200 [9.81]–[9.82], 206 [9.127]–[9.128]; Rossner et al (n 20) 29, 37, 39–44, rec 9.

26 Daly (n 21) 310; Wood and Suzuki (n 23) 1416; Jülich et al (n 7) 1431–2, 1436–42, 1444; Victorian Law Reform Commission (n 5) 199 [9.74]–[9.76].

27 A McIntosh, *Submission 131*; J Crous, *Submission 141*; Violet Co Legal & Consulting, *Submission 220*. Herman's research suggests that many people who have experienced sexual violence are more concerned about the rehabilitation, rather than punishment, of the person responsible: Judith Herman, *Truth and Repair: How Trauma Survivors Envision Justice* (Basic Books, 2023) 110. Other justice needs may include to feel safe and supported, to have a voice, to have their experiences heard and validated, to have influence over decisions about their case, and to be able to move on from the harm and its effects: see, eg, Lawler, Boxall and Dowling (n 16) 8–9, 92–6; Gavin et al (n 20) 395; Koss (n 21) 1627, 1644, 1652.

28 Lawler, Boxall and Dowling (n 16) 9.

actions varied.[29] Overall, the evaluation found that participating in restorative justice had a positive impact on the attitudes and behaviours of people responsible for harm.[30]

17.17 In Queensland, the Women's Safety and Justice Taskforce concluded that restorative justice 'processes provide the possibility for more victim-oriented outcomes that [also] achieve accountability for the offender.'[31]

## The risks of restorative justice need to be carefully managed

17.18 Although we found strong support for restorative justice, there are some people who have concerns about making it available for sexual violence.[32]

17.19 Those who oppose using restorative justice for sexual violence point out:

- In the past, our society ignored or minimised the harm caused by sexual violence. Sexual violence has often been treated as a private matter that does not concern public authorities or the criminal justice system. Promoting access to restorative justice could send a message that we still do not take sexual violence seriously.[33]
- Many people responsible for sexual violence know the person they harmed and exercise power over them. There is a risk these dynamics will continue in a process that involves the person responsible for violence as a participant.[34]

17.20 These are legitimate concerns and for this reason, support for restorative justice for sexual offences is usually premised on it having strong safeguards and being done well.[35]

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29 Ibid 12, 97–8; see also Jülich et al (n 7).

30 Lawler, Boxall and Dowling (n 16) 12.

31 Women's Safety and Justice Taskforce (n 7) 394.

32 Older Women's Network NSW, *Submission 153*; Name withheld, *Submission 162*; Full Stop Australia, *Submission 214*. However, the Older Women's Network said that restorative justice could have benefits 'if carried out with sensitivity and full regard for the needs of the victim'. Full Stop Australia also expressed cautious support, while noting the risks.

33 Women's Safety and Justice Taskforce (n 7) 393–4; Victorian Law Reform Commission (n 5) 195 [9.51]–[9.53]; Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (2023) 22 (Dr Rachel Burgin); 31–2 (Kathleen Maltzahn). In the Australian Capital Territory, some agencies are reluctant to refer sexual or family violence cases to restorative justice because of 'perceptions that RJ "privatised" responses to sexual violence', and 'a small number' have argued that restorative justice is 'a "soft" option for perpetrators of [domestic or family violence] and sexual violence': Lawler, Boxall and Dowling (n 16) 10.

34 Women's Safety and Justice Taskforce (n 7) 393; Victorian Law Reform Commission (n 5) 194–5. See Hadar and Gal (n 21) 912, 915; Corrine Marsland and Clare Farmer, 'Restorative Justice for Adult Offenders in South Australia: Judicial Perspectives and Insights' (2024) 27(2–3) *Contemporary Justice Review* 91, 5–6.

35 See, eg, J Rose, *Submission 111*; Victoria Legal Aid, *Submission 119*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Women's Safety and Justice Taskforce (n 7) 385; Victorian Law Reform Commission (n 5) 196; Marsland and Farmer (n 34) 6; Gavin et al (n 20) 402; Rossner and Taylor (n 2) 12–13.

17.21 We accept that doing restorative justice well can be resource-intensive and that doing it poorly risks harming participants, including people who have already been traumatised by their experience of sexual violence. We also accept that restorative justice, if done well, may be especially effective for cases involving sexual violence, including because its flexibility 'is better able to empower [people who have experienced sexual violence, and to] give them a voice, and cater to their specific needs'.[36]

17.22 In **Chapter 18** we discuss how to ensure the risks of restorative justice are managed carefully and everyone who wants to access this option can do so safely.

36 Marsland and Farmer (n 34) 6.

# 18. Building Restorative Justice Frameworks

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## Introduction

18.1 In **Chapter 17**, we explained what restorative justice is and how it operates. We considered the strong case for making restorative justice widely available as an option in response to sexual violence, but noted concerns about its risks.

18.2 Even with these risks, restorative justice offers powerful potential to give control and a voice back to people who have experienced sexual violence. It can hold people who are responsible for sexual violence to account and connect them with treatment and other services. By acknowledging and responding to systemic

features of sexual violence, such as the myths that surround it, restorative justice may contribute to wider social change.[1]

18.3 Our recommendations build on the important work already done by people with lived experience of sexual violence, researchers, practitioners, and past inquiries, to explain how to achieve the benefits of restorative justice for sexual violence while managing the risks. Our focus is on:

- establishing and harmonising frameworks for providing restorative justice and making sure that everyone in Australia can access it for sexual offences;
- dealing with issues that are controversial, such as children and young people's access to restorative justice for sexual violence; and
- emphasising the need for adequate resourcing.

1 Kathleen Daly, *Remaking Justice after Sexual Violence: Essays in Conventional, Restorative, and Innovative Justice* (Eleven, 2022) 273; Meredith Rossner and Helen Taylor, 'The Transformative Potential of Restorative Justice: What the Mainstream Can Learn from the Margins' (2024) 7 *Annual Review of Criminology* 357, 357, 358–60, 362–4, 367–9; 'Restorative Justice Can Deliver Powerful Outcomes for Victims of Sexual Assault' (Directed by Anna Kelsey-Sugg and Suzie Miller, ABC Radio National, 14 August 2024). See also Meredith Rossner et al, *Adult Restorative Justice Conferencing in Queensland: Research on Best Practice and Expansion* (Department of Attorney-General and Justice (Qld), 2024) 1.

## Making restorative justice work for sexual violence cases, nationally

**Recommendation 58**

The Commonwealth, states, and territories should, where necessary, adopt, or review and amend, legislation to make restorative justice for sexual violence widely available.

**Recommendation 59**

Restorative justice legislation should provide clarity about:

a. its aims, which should include:
   i. empowering people who have been harmed and responding flexibly to their needs;
   ii. respecting all participants and ensuring their safety; and
   iii. repairing harm;

b. the voluntary nature of restorative justice — no one is under any obligation to participate;

c. the confidentiality of the restorative justice process and limits on confidentiality;

d. its availability in cases involving children and young people, and the additional screening and supports that must be provided in these cases;

e. the relationship between restorative justice and other justice processes, including:
   i. when and how matters that are the subject of criminal charges can be referred for restorative justice, and how restorative justice outcomes may influence criminal justice outcomes in these cases (**Recommendation 60**);
   ii. recognition that restorative justice can happen independently of other justice processes;

f. the obligation on providers of restorative justice for sexual violence to work within national guidelines (**Recommendation 61**); and

g. the bodies responsible for oversight of restorative justice (**Recommendation 62**).

**Recommendation 60**

Restorative justice legislation should specify that restorative justice is available:

a. where a person who has experienced sexual violence has not reported the violence to the police;

b. where a person who has experienced sexual violence has reported to police, but there were insufficient grounds to file charges or the prosecution was discontinued, subject to safeguards to ensure the charging and prosecution process is fair and transparent;

c. during criminal proceedings as part of the accused person being referred to a diversionary program that provides for a restorative justice process;

d. after a guilty plea or conviction and before sentencing; and

e. at any time after sentencing, including as part of parole proceedings.

**Recommendation 61**

The Australian Government, together with state and territory governments, should develop national guidelines for the safe delivery of restorative justice for sexual violence, drawing on the guidelines used in the Australian Capital Territory, New Zealand; and in Victoria for family violence.

The national guidelines should be developed with input from people who have experienced sexual violence, sexual violence services, Aboriginal Community Controlled Organisations, community organisations (including those representing groups who are disproportionately reflected in sexual violence statistics), and restorative justice researchers and providers.

**Recommendation 62**

The Commonwealth, states, and territories should ensure designated bodies are responsible in each jurisdiction for providing oversight of restorative justice, including consistent implementation of the national guidelines (**Recommendation 61**). The oversight bodies should include First Nations representatives and representatives from groups who are disproportionately reflected in sexual violence statistics.

The Commonwealth oversight body should:

a. establish and publish national training standards;

b. establish and publish national accreditation criteria; and

c. provide national coordination and support national information sharing, knowledge building networks, and communities of practice.

The Commonwealth, state, and territory oversight bodies should:

d. establish and manage complaints processes in their jurisdiction;

e. ensure transparency and accountability in relation to the funding of restorative justice; and

f. evaluate programs and collect and publish data to provide transparency and inform program and policy development. How programs are evaluated, and data is collected and published, should be consistent with principles of Indigenous data sovereignty.

**Recommendation 63**

The Australian, state, and territory governments should jointly provide funding to support First Nations communities to design, build, and deliver accredited restorative justice programs for First Nations people.

First Nations people should be free to access restorative justice at any restorative justice service.

**Recommendation 64**

The Australian, state, and territory governments should make sure restorative justice is well resourced and supported by 'wrap around' services, including therapeutic treatment programs for people responsible for sexual violence.

18.4 People who have experienced sexual violence have justice needs that are often not met, including the need to have control and a voice in the process. Restorative justice can sometimes meet these needs. But access to restorative justice for sexual violence and its quality differs across Australia. For restorative justice to safely meet

justice needs and be seen as a valid justice pathway, it must be legislated, high quality, and accessible.

18.5 The recommendations will help make sure:

- restorative justice is legislated, and supported by national guidelines, with important safety protections built in;
- restorative justice is done well and is accessible, regardless of where people live;
- there is clarity about how restorative justice can interact with other justice processes and influence criminal justice outcomes; and
- restorative justice can respond flexibly to the needs of people who have experienced sexual violence.

## Restorative justice should be a legislated justice option

18.6 Legislation should regulate restorative justice delivery. This will help make sure restorative justice is well-governed, supporting its safety and quality.[2] It will increase the visibility of restorative justice and present it as a legitimate and meaningful response to sexual violence and other crimes.[3] It will establish the 'relative weight' of restorative justice compared with criminal justice processes, and make it more accessible.[4]

18.7 The benefits of legislation were recognised in the Australian Capital Territory, where a legislative framework was adopted to support 'accountability and transparency in [restorative justice] decision-making, process and outcomes'.[5] In Queensland, the Women's Safety and Justice Taskforce (WSJT) found that the lack of a clear legal framework for restorative justice has led to unclear policy goals, and uncertainty about how restorative justice works and interacts with the criminal justice system.[6]

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2 Correspondence from Dr Lois Peeler AM to the ALRC, 7 November 2024; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 207 [9.136]. See also Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending - Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, 2014) 40.

3 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) 385, 394–5; Rossner et al (n 1) 25; Tali Gal, 'Setting Standards for Child-Inclusive Restorative Justice' [2021] *Family Court Review* [XIII] 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3709992>.

4 Bebe Loff, Bronwyn Naylor and Liz Bishop, *A Community-Based Survivor-Victim Focussed Restorative Justice: A Pilot* (Report, 2019) 51. The Centre for Innovative Justice told us that 'the lack of [a] legislative framework in Victoria and nationally acts as a barrier to individuals currently trying to access restorative justice … and to a justice system that genuinely wants to see better options for survivors of sexual violence': Centre for Innovative Justice, *Submission 94*.

5 These benefits of a statutory framework were set out in Department of Justice and Community Safety (ACT), *Restorative Justice Options for the ACT* (Issues Paper, 2003) 17 [9.3].

6 Women's Safety and Justice Taskforce (n 3) 395. See also Rossner et al (n 1) 25.

18.8 Making restorative justice widely available through legislation would expand justice options for people who have experienced sexual violence. It would provide a pathway that can respond to diverse justice needs, including for participation, voice, validation, and vindication.[7]

18.9 But as we touched on in **Chapter 17**, restorative justice can sometimes be viewed as a 'soft option' for responding to sexual violence.[8] This may be because restorative justice does not have the open court processes usually involved in criminal trials or result in traditional punishment, such as a prison sentence. To avoid sending a signal that sexual offences are less serious or less worthy of public censure than other crimes, a legislative framework for restorative justice should only be available for sexual offences if it is also available for other offences.[9]

18.10 Some people who have experienced sexual violence, and the Domestic, Family and Sexual Violence Commissioner, Micaela Cronin, cautioned against making the introduction of restorative justice legislation dependent on it applying to all offences, not just sexual offences. They viewed this approach as creating a barrier to accessing restorative justice for people who have experienced sexual violence.[10] But in our view, the danger of creating a justice pathway that only applies to sexual offences outweighs the potential benefits of such a pathway. In the Australian Capital Territory, restorative justice legislation applies to all offences.[11] Sexual violence inquiries in Queensland and Victoria recommended the adoption of restorative justice legislation that applies to all criminal offences.[12]

18.11 Although restorative justice may not be appropriate or desirable for many people who experience sexual violence,[13] they should know it is available and be able to get independent legal advice about what it will mean if they participate in

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7 Loff, Naylor and Bishop (n 4) 1–2, citing Daly (2017) and, eg, Centre for Innovative Justice, *Submission 94*; Several members of the Inquiry Expert Advisory Group and others, *Submission 165*; Violet Co Legal & Consulting, *Submission 220*; Correspondence from Dr Lois Peeler AM to the ALRC (n 2).

8 See our discussion of the risks of restorative justice in **Chapter 17**; Siobhan Lawler, Hayley Boxall and Christopher Dowling, *Restorative Justice Conferencing for Domestic and Family Violence and Sexual Violence: Evaluation of Phase Three of the ACT Restorative Justice Scheme* (Australian Institute of Criminology, 2023) 10, 123–4, rec 3; Loff, Naylor and Bishop (n 4) 3.

9 Full Stop Australia, *Submission 214*; Victorian Law Reform Commission (n 2) 206 [9.131].

10 Correspondence from Domestic, Family and Sexual Violence Commissioner, Micaela Cronin to the ALRC, 10 December 2024.

11 A phased approach was adopted, with restorative justice initially available only for young people and less serious offences. It has been available for adults and other serious offences since 2016, and for sexual and family violence since 2018: Lawler, Boxall and Dowling (n 8) 8.

12 In Queensland, the recommendation relates to adult restorative justice, with separate recommendations for the improvement of restorative justice for children and young people: Women's Safety and Justice Taskforce (n 3) recs 89 (youth restorative justice), 91 (legislation for adult restorative justice); Victorian Law Reform Commission (n 2) rec 28. The Victorian Law Reform Commission previously recommended that restorative justice should be available for all indictable offences: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2016) rec 32.

13 Victorian Law Reform Commission (n 2) 184 [9.4].

it (**Chapters 3** and **6**).[14] We heard it is important for people who have experienced sexual violence to be fully informed about what restorative justice is, and the potential consequences of participating in it. We discuss some of these consequences below, when we talk about confidentiality, and the relationship between restorative justice and other justice processes.

## The Commonwealth, state and territory governments should each adopt their own restorative justice legislation

18.12 Under Australia's federal system, the states and territories are responsible for most justice-related matters within their jurisdictions. The ALRC is recommending that states and territories each adopt their own restorative justice legislation. These legislative frameworks can be tailored to local conditions but would have some important common provisions.

18.13 Our recommendation avoids cutting across reforms that are already underway. **Appendix E** shows the different starting points for restorative justice delivery in each jurisdiction. All jurisdictions practise restorative justice in some form, but only the Australian Capital Territory has a comprehensive legislated framework for restorative justice. The Australian Capital Territory is currently conducting reviews of its legislation and how it operates for family and sexual violence.[15] In Queensland, work is being done to expand access to restorative justice, with special safeguards for sexual offences, following WSJT recommendations.[16] In Victoria, work is underway to implement a Victorian Law Reform Commission (VLRC) recommendation for restorative justice legislation, including sexual offences.[17]

18.14 Another benefit of states and territories adopting their own legislation for restorative justice is that it allows them to tailor their legislation to their local context. They can build on the services and restorative justice expertise they have. They can adjust their legislation based on their government structure, local community needs, and resources.

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14 Centre for Innovative Justice, *Submission 94*; Correspondence from Dr Lois Peeler AM to the ALRC (n 2).

15 Shane Rattenbury MLA, 'Boost for Restorative Justice in the ACT' (Media Release, 15 July 2024).

16 Sentencing Advisory Council (Qld), *Sentencing of Sexual Assault and Rape: The Ripple Effect* (Consultation Paper - Issues and Questions, March 2024) 70; Rossner et al (n 1) ix–xi. The Women's Safety and Justice Taskforce recommended a comprehensive framework for the provision of restorative justice. It said there should be a pilot for restorative justice for sexual offences, which should have additional safeguards: Women's Safety and Justice Taskforce (n 3) 395, recs 90, 91, 92.

17 Victorian Law Reform Commission (n 2) recs 28–36. See also Department of Justice and Community Safety (Vic), 'Victorian Law Reform Commission Report on Improving the Justice System Response to Sexual Offences - Government Response' <www.justice.vic.gov.au/justice-system/laws-and-regulation/victorian-law-reform-commission-report-on-improving-the-justice>.

18.15 While we considered model legislation, there were too many disadvantages to this:

- Developing and implementing model legislation in all states and territories would be a long and complicated process, especially given their different starting points.
- Even if model legislation were implemented, states and territories would start to apply and amend the legislation in different ways. Consistency across states and territories would be unlikely to persist.
- As discussed, a national process to adopt model laws would cut across law reform processes already underway in some jurisdictions.
- Model legislation may not suit existing service systems and the community culture in each state and territory.

18.16 To support equal access and consistently high standards, each jurisdiction's legislation should have the key features set out in our recommendations. The Commonwealth government should also adopt restorative justice legislation for Commonwealth Criminal Code offences.[18]

18.17 The Australian Capital Territory's legislation has been positively evaluated.[19] It is a useful starting point for other states, the Northern Territory, and the Commonwealth. But as indicated by the title of its founding Act (the *Crimes (Restorative Justice) Act 2004* (ACT)), it is closely tied to the criminal justice system. Here we recommend that restorative justice be available both to supplement criminal and civil processes, and independently of other justice processes.

18.18 In amending and introducing new legislation, each jurisdiction should consider:

- our recommendations;
- recommendations from the Australian Capital Territory reviews, which are considering how to increase restorative justice referrals and reduce delay in accessing restorative justice;[20]
- work already done towards developing Queensland and Victoria's legislation; and
- any relevant recommendations in the forthcoming Victims of Crime Commissioner inquiry in Western Australia.[21]

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18 In relation to sexual offences, these include offences against United Nations personnel, internet and carriage service offences, and trafficking offences: see, eg, *Commonwealth Criminal Code Act 1995* (Cth) s 71.8 'unlawful sexual penetration', s 71.12 'threatening to commit other offences, s 474.17A 'using a carriage service to transmit sexual material without consent'.

19 Lawler, Boxall and Dowling (n 8).

20 Shane Rattenbury MLA, 'Boost for Restorative Justice in the ACT' (Media Release, 15 July 2024). See also Lawler, Boxall and Dowling (n 8).

21 See Office of the Commissioner for Victims of Crime, Department of Justice (WA), *Alternatives to Criminal Justice Responses* (Discussion Paper 4, Improving Experiences for Victim Survivors: Review of Criminal Justice System Responses to Sexual Offending, 2023) 8–10.

18.19 To also support equal access and consistently high standards, the ALRC recommends national guidelines and a national oversight body that works in partnership with oversight bodies in each state and territory, as we discuss below.

18.20 An approach broadly in line with the one set out here was supported by some members of our Expert Advisory Group,[22] and other submissions to our inquiry.[23]

## The aims and other key features of restorative justice legislation

18.21 At a minimum, the legislated aims of restorative justice should include:

- empowering people who have been harmed and responding flexibly to their needs;
- respecting all participants and ensuring their safety; and
- repairing harm.

These aims capture the key elements outlined in the 'objects' section of the Australian Capital Territory's restorative justice legislation.[24]

### *An approach centred on the person who has experienced sexual violence*

18.22 Many people and organisations we heard from stressed the importance of empowering people who have experienced sexual violence.[25] Some spoke about the need for an approach that centres the person who has experienced sexual violence.[26] Research and many reports have highlighted that the needs of the person harmed must be the focus of restorative justice.[27] This is why the ALRC proposes that empowering people who have been harmed should be a legislated aim of restorative justice processes.

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22 '[W]here not otherwise available, the States and Territories should fund, develop and implement restorative justice programs that are "effective", with "clear outcomes" and which "respect the agency of victim-survivors"': Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

23 For example, the Australian Lawyers Alliance recommended 'that the ALRC urges the Federal Government to … ensure that restorative justice is enshrined in the relevant legislation, including creating a right for victim survivors to be informed about restorative justice options and to ensure victim survivors have legal support during these processes; and … encourage State and Territory Governments through the Standing Council of Attorneys-General to undertake the above courses of action': Australian Lawyers Alliance, *Submission 113*.

24 *Crimes (Restorative Justice) Act 2004* (ACT) s 6.

25 See, eg, Uniting Church in Australia Queensland Synod, *Submission 11*; Australian Lawyers Alliance, *Submission 113*; E Garcia-Dolnik, L Klein, and S Loiselle, *Submission 114*; Commissioner for Children and Young People WA, *Submission 130*.

26 See, eg, Queensland Sexual Assault Network, *Submission 70*; Victoria Legal Aid, *Submission 119*; Centre for Women's Safety and Wellbeing, *Submission 193*; Sexual Assault Services Victoria, *Submission 203*.

27 See, eg, Paul Gavin et al, 'Restorative Justice in Cases of Sexual Violence: Current and Future Directions in the UK' (2023) 26(4) *Contemporary Justice Review* 393, 393, 400–3; Explanatory Statement, Crimes (Restorative Justice) Bill 2004 (ACT) 2–3; Centre for Innovative Justice (n 2) 20–21, 23; Women's Safety and Justice Taskforce (n 3) rec 91; Victorian Law Reform Commission (n 2) 199 [9.77]–[9.79], rec 28(c); Gal (n 3) 7–8, 20.

### Flexible delivery

18.23 Restorative justice legislation should recognise the benefits of flexible delivery in response to the needs of people who have experienced sexual violence. This will help preserve the transformative potential of restorative justice.[28] Restorative justice can respond to the individual needs and wishes of people who have experienced sexual violence and cater to diverse contexts and communities.[29] Legislative support for flexible delivery will allow community restorative justice providers that have developed expertise to continue operating, although they will need to be accredited.[30]

### Respect and safety

18.24 Respecting all participants and ensuring their safety is another key restorative justice principle. If people are not safe, healing from violence and trauma cannot begin, and there is a risk of causing more harm. Trauma theorists recognise that establishing safety is necessary to respond effectively to trauma.[31] Safety considerations should recognise the particular risks associated with sexual violence, including the widespread tendency in our society to minimise its harms, and how people responsible for sexual violence can make subtle use of power and control.[32] Eligibility and suitability assessments, and careful preparation for restorative justice exchanges, can contribute to making the process safe. In some cases, the person responsible for sexual violence may need to complete a treatment program before being able to participate.[33] Past reports, and practice guidelines in the Australian Capital Territory, New Zealand, and in Victoria for family violence, describe how restorative justice can be provided safely.[34]

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28 See Daye Gang, Maggie Kirkman and Bebe Loff, '"Obviously It's for the Victim to Decide": Restorative Justice for Sexual and Family Violence from the Perspective of Second-Wave Anti-Rape Activists' (2024) 30(12–13) *Violence Against Women* 3187, 3199–3200; Rossner and Taylor (n 1) 358, 362–4.

29 As one stakeholder told us, 'funding and service delivery must be meaningful and be able to be delivered at a local level that takes into account not only differences between States and Territories but the differences and the individual needs of communities and people within those communities': Correspondence from a stakeholder to the ALRC, 16 December 2024.

30 Victorian Law Reform Commission (n 2) 210 [9.156], rec 35.

31 Marie Keenan and Estelle Zinsstag, *Sexual Violence and Restorative Justice* (Oxford University Press, 2022) 4. See also Blue Knot Foundation, *Trauma-Informed Services* <https://professionals.blueknot.org.au/resources/trauma-informed-services/>.

32 Women's Safety and Justice Taskforce (n 3) 393–5.

33 For example, in New South Wales, people sentenced to a term of imprisonment for a sexual offence are usually required to successfully complete a 'sex offender behaviour change' program before any communication with the person harmed: *Restorative Justice Service Policy* (Corrective Services NSW, 28 November 2024) 18. See also Lawler, Boxall and Dowling (n 8) 10.

34 See, eg, Victorian Law Reform Commission (n 2) 199–204 [9.80]–[9.116]; *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT); Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (June 2013); Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence: Framework* (2017).

### *Repairing harm*

18.25 A distinctive aim of restorative justice, when compared with most other justice processes, is that it is designed to repair and help people move on from harm.[35] 'Harms' in this context are broad and can include the short and long-term effects of trauma, and damage to relationships and communities, as well as individuals. Another benefit of restorative justice for sexual offences is that it recognises and tries to challenge social contexts that minimise sexual violence and its effects.[36]

### *Voluntary participation*

18.26 Restorative justice relies on voluntary participation — legislation should make this clear. The dignity and agency of participants can only be respected, and past harms repaired, if everyone has a choice to participate. Researchers, practitioners, and restorative justice supporters all agree that restorative justice needs to be voluntary to work.[37]

## Confidentiality

> Making the process confidential … supports its integrity and effectiveness for the participants, while also ensuring the legal rights of all parties are maintained.[38]

18.27 We heard from restorative justice providers that the success of restorative justice depends on participants being able to speak freely. Usually, participants want to know that what they say is, and will stay, confidential and will not be admissible in legal proceedings.[39] An exception to this is outcome agreements, which may be provided to or required by sentencing courts and other justice agencies if they refer a matter to restorative justice.

18.28 Broad confidentiality provisions in restorative justice legislation will improve access to this option, allowing defence lawyers 'to advise clients to participate in restorative justice with the confidence that their … rights will be protected'.[40] Also, participation in restorative justice should not be admissible in court as evidence of guilt.[41] But some limits on confidentiality are necessary to manage risks — for

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35 As the Centre for Innovative Justice points out, it focuses 'on the harm and its effects rather than the crime and punishment': Centre for Innovative Justice, *Submission 94*.

36 See Daly (n 1) 273; Rossner and Taylor (n 1) 367–9.

37 See, eg, United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations, 2nd ed, 2020) 4; Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 292. Voluntary participation is necessary to make sure restorative justice avoids relationships of domination: see John Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 *British Journal of Criminology* 563, 565–6.

38 Centre for Innovative Justice, *Submission 94*.

39 See, eg, ibid. See also Centre for Innovative Justice (n 2) 65–6.

40 Victoria Legal Aid, *Submission 119*.

41 Economic and Social Council, *Basic principles on the use of restorative justice programmes in criminal matters* UN Doc E/RES/2002/12 (24 July 2002) Annex, II, para 8; *Crimes (Restorative Justice) Act 2004* (ACT) 20(1); Victorian Law Reform Commission (n 2) 205 [9.122].

example, if someone discloses during restorative justice that they are planning to harm themselves or others.

18.29 There are different approaches to setting the limits on confidentiality in restorative justice. The 2013 national guidelines on restorative justice (which do not, however, cover sexual offences — **Chapter 17**), say confidentiality does not apply and the content of a restorative justice process may be admissible in court where there is 'an actual or potential threat to a participant's safety'.[42]

18.30 In the Australian Capital Territory, statements made by a person responsible for sexual violence during restorative justice are not admissible in court for less serious offences but may be admissible for serious offences.[43] If something is said during restorative justice about a proposed future offence, the statement may be used in later legal proceedings related to the offence.[44]

18.31 In Queensland, actions or statements — including admissions — made during restorative justice are not admissible in legal proceedings except:

- with the parties' consent;
- if required by law; or
- 'where there are reasonable grounds to believe disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property'.[45]

18.32 In Victoria, the VLRC recommended that the content of restorative justice conversations should be confidential and inadmissible in court except with the consent of the parties; if required by law; or if there is 'an immediate risk of harm to a person'.[46]

18.33 Confidentiality provisions should be as broad as possible to support meaningful participation while also keeping restorative justice participants and the community safe. The content of restorative justice communications should be confidential and inadmissible in court unless:

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42 'All discussions that occur within a Restorative Justice process: a) are confidential, unless: i. Participants agree to their disclosure; ii. disclosure is required by law; and/or iii. such discussions reveal an actual or potential threat to a Participant's safety; and b) may not be used in any subsequent legal process, excluding those circumstances outlined above': Standing Council on Law and Justice, *Guidelines for Restorative Justice Processes in Criminal Cases* (2013) 3 [21].

43 'Less serious' offences are punishable by imprisonment for 10 years or less: *Crimes (Restorative Justice) Act 2004* (ACT) s 12.

44 Ibid ss 59, 60.

45 *Dispute Resolution Centres Act 1990* (Qld) ss 36(4), (5), (6), 37(2)(c), (f). The legislation refers to 'mediation', which in practice includes restorative justice conferencing. In Queensland and elsewhere, broader confidentiality provisions have applied to restorative justice for children and young people for some time. See, eg, Queensland Law Society, *Queensland Opposition's Policies on Youth Criminals Will Not Fix Youth Crime* (Media Statement, 2024); *Children, Youth and Families Act 2005* (Vic) s 415(9)–(10): youth justice proceedings are confidential and must not be disclosed without the court's leave or the parties' consent.

46 Victorian Law Reform Commission (n 2) 205 [9.120]. Several Legal Aid agencies told us they supported this approach.

- the participants agree to disclosure;
- disclosure is required under other laws; or
- there is an immediate risk of harm to a person.

18.34 Providing that confidentiality does not apply where there is a risk of harm to a person that is 'immediate' sets a limit on confidentiality that is narrower than the test in the national guidelines. It recognises that restorative justice is about moving on from harm; it is not a 'quasi-investigative' process.[47]

18.35 This approach does not preclude criminal prosecutions or civil proceedings for alleged offences that were discussed during restorative justice.[48] For example, a person who experienced sexual violence but did not initially report it could choose to report after participating in restorative justice.[49] But the prosecution, or plaintiff in civil proceedings, could not refer to actions or statements made during restorative justice to support their case. This encourages participants in restorative justice to communicate openly but does not prevent the use of other justice processes to hold someone accountable if there is independent evidence they have committed an offence.

18.36 People who have experienced sexual violence would be able to talk about their experience of violence, separately from the communications that happened during restorative justice.

18.37 De-identified data could be collected and restorative justice evaluated. Confidentiality protections should not be used to hide how often restorative justice is used for sexual violence, or to prevent transparency in how restorative justice is operating.[50]

## Children and young people

> Young people are uniquely vulnerable, but that does not mean they are without agency … their wishes should be taken into consideration …
>
> If a young person wishes to go through a formal justice system process they should be supported … however, this should not be the only option.[51]

47 Centre for Innovative Justice (n 2) 66.

48 This is consistent with the approach recommended in Victorian Law Reform Commission (n 2) 205 [9.122].

49 We heard from several people and organisations who said this is important: see, eg, Centre for Innovative Justice, *Submission 94*.

50 This is important because research suggests that non-disclosure agreements are often used in cases of workplace sexual harassment, making it difficult to understand the true nature and scale of the problem of workplace sexual harassment: Regina Featherstone and Sharon Bargon, *Let's Talk about Confidentiality: NDA Use in Sexual Harassment Settlements since the Respect@Work Report* (Sydney Law School Research Report, University of Sydney, March 2024) 1–2.

51 D Villafaña, *Submission 182*.

18.38 Restorative justice is widely used in the youth justice system, which places greater emphasis on rehabilitation and addressing the underlying causes of offending than criminal justice responses to adult offending.[52] But aside from in Queensland and South Australia, access to restorative justice for sexual offences committed by children and young people is currently limited (**Appendix E**). Restorative justice should be accessible consistently for these offences, including:

- cases involving harmful sexual behaviours, where both the person responsible and the person harmed are children or young people; and
- other youth sexual offences, where the person responsible is a child or young person but the person harmed is an adult.

18.39 Restorative justice should also be available where the person responsible is an adult and the person harmed is a child or young person. However, restorative justice will rarely be suitable in these cases, as we discuss further below.

18.40 The Australian Human Rights Commission (AHRC) has recommended resourcing to make restorative justice conferencing available for children and young people across Australia.[53] The National Plan to End Violence against Women and Children 2022–2023 says restorative justice should 'be available where appropriate to young people and children who have experienced violence'.[54]

18.41 Access to restorative justice is especially urgent for First Nations children and young people. This is because they:

- come into contact with the criminal justice system too often;[55] and
- 'have experienced disproportionate levels of institutional violence at the hands of police, corrections and the Australian legal system'.[56]

18.42 The United Nations Committee on the Rights of the Child encourages all states to 'support indigenous peoples to design and implement traditional restorative justice systems' that consider the needs of indigenous children and are consistent with their rights.[57] Improving access to restorative justice for children and young people who use harmful sexual behaviours or are responsible for sexual violence

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52 See, eg, Sentencing Advisory Council (Vic), *Sentencing Principles, Purposes, Factors* <www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors>; *Youth Justice Act 2024* (Vic) ss 16(c), 18, 19(b)–(c).

53 Australian Human Rights Commission, *'Help Way Earlier!' How Australia Can Transform Child Justice to Improve Safety and Wellbeing* (Report, 2024) rec 13.

54 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 64.

55 Chris Cunneen, Sophie Russell and Melanie Schwartz, 'Principles in Diversion of Aboriginal and Torres Strait Islander Young People from the Criminal Jurisdiction' (2020) 33(2) *Current Issues in Criminal Justice* 170, 170–1.

56 The National Plan makes this point with reference to Aboriginal and Torres Strait Islander communities generally: Department of Social Services (Cth) (n 54) 63.

57 Committee on the Rights of the Child, *General Comment No 11: Indigenous children and their rights under the convention*, UN Doc CRC/C/GC/11 (12 February 2009) 17 [75]; Cunneen, Russell and Schwartz (n 55) 174. See also M Sotiri, L Schetzer and A Kerr, *Children, Youth Justice and Alternatives to Incarceration in Australia* (Discussion Paper, Justice Reform Initiative, 2024) 39.

would help meet Target 11 of the National Agreement on Closing the Gap.[58] We discuss supporting First Nations groups to design, build, and deliver restorative justice further below.

18.43 In line with the emphasis on rehabilitation in justice responses to children and young people, there is widespread support for improving the accessibility of restorative justice for youth sexual offences.[59] Support is especially strong in relation to harmful sexual behaviour cases.[60] Chanel Contos, the founder and CEO of 'Teach Us Consent', has urged parliament to make restorative justice available in these cases, arguing it is 'just devastating that the police and the criminal justice system is the only option for these young people'.[61]

18.44 Research suggests that children and young people are likely to grow out of this kind of offending.[62] There are some concerns about involving children and young people in restorative justice because they may not have the necessary emotional, cognitive, and communication skills.[63] However, resources are available on how to do restorative justice well where participants are young.[64] Associate Professor Bolitho, an experienced restorative justice practitioner and researcher, told us restorative justice processes can be adjusted to meet the needs of young people, as well as people who are neurodivergent. She emphasised that restorative justice 'is not about the words per se, it is about connection'.[65]

18.45 Separately, there are concerns that some youth restorative justice programs do not adequately centre or protect the needs of children or young people who

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58 Target 11 aims to reduce the number of Aboriginal and Torres Strait Islander young people in detention by 30 percent by 2031: Department of Prime Minister and Cabinet (Cth), 'Closing the Gap—Targets and Outcomes' <www.closingthegap.gov.au/national-agreement/targets>. A Queensland review found unequal access to restorative justice for First Nations children by comparison with other children and said this should be addressed: Queensland Family and Child Commission, *Restorative Justice Conferencing in Queensland: A Desktop Comparison of Interjurisdictional Legislation and Practice, Synopsis of Evaluations, and Statistical Picture of Restorative Justice Conferencing in Queensland* (June 2023) 23. See also Centre for Innovative Justice (n 2) 69.

59 See Sotiri, Schetzer and Kerr (n 57) 38–9.

60 See, eg, E Garcia-Dolnik, L Klein, and S Loiselle, *Submission 114*; Commissioner for Children and Young People WA, *Submission 130*; Jesuit Social Services, *Submission 190*; Youth Law Australia, *Submission 195*; Victorian Law Reform Commission (n 2) 201 [9.94]–[9.95], 202 [9.97]–[9.98].

61 Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, *Current and Proposed Sexual Consent Laws in Australia,* 25 July 2023, 15 (Chanel Contos).

62 Lisa Mary Armstrong, 'Is Restorative Justice an Effective Approach in Responding to Children and Young People Who Sexually Harm?' (2021) 10(4) *Laws* 86, 3; Commissioner for Children and Young People WA, *Submission 130*.

63 William R Wood and Masahiro Suzuki, 'Getting to Accountability in Restorative Justice' (2024) 19(7) *Victims & Offenders* 1400, 1400, 1413. See also Rossner and Taylor (n 1) 362; Women's Safety and Justice Taskforce (n 3) 392; Victorian Law Reform Commission (n 2) 201 [9.89].

64 Nicholas Burnett and Margaret Thosborne, *Restorative Practice and Special Needs: A Practical Guide to Working Restoratively with Young People* (Jessica King Publishers, 2015); Tali Gal, *Child Victims and Restorative Justice: A Needs-Rights Model* (Oxford University Press, 2011).

65 Correspondence from Associate Professor Jane Bolitho to the ALRC, 12 November 2024.

have experienced sexual violence.[66] In Queensland, the WSJT recommended an independent review of youth justice conferencing to identify ways to improve it to better meet the needs of all children and young people participating in restorative justice for sexual offences.[67]

18.46 Restorative justice for sexual offences involving children and young people should not be ruled out. Instead, there need to be extra safeguards to protect them.[68] Safeguards should include specialised screening, and independent support from experts.[69] Both the child or young person responsible for the harmful sexual behaviour and the child or young person harmed should be screened and supported.[70] Screening and support would protect children and young people from being pressured to participate and make sure they are able to take part safely and in a meaningful way.[71] The experts providing support could work closely with restorative justice facilitators to design a safe process that meets the needs of the children or young people involved.

18.47 Where children or young people are the victims of sexual abuse by adults, there are additional concerns about their involvement in restorative justice. Because of the large differences in power that can be exploited,[72] it is unlikely that restorative justice will be appropriate in sexual abuse cases where the victim is still a child or young person.[73] Even so, research and past inquiries support allowing children and young people who have been sexually abused to participate in restorative justice with the adult responsible if they wish to, as long as there are robust safeguards in place.[74]

18.48 The ALRC considers this is the right approach as it avoids arbitrary limits on who can participate, such as limits based on age. It also recognises that circumstances of offending can vary considerably. For example, a statutory offence may be committed by a young adult against another young person, where the age gap is small. Children and young people have different rates of development, so assessing suitability for restorative justice on a case-by-case basis rather than

66 See, eg, Women's Safety and Justice Taskforce (n 3) 389, 394; see also Gal (n 3) 4, 6, 8–9.

67 Women's Safety and Justice Taskforce (n 3) rec 89.

68 Gal (n 3) 10, 20–24; Jesuit Social Services, *Submission 190*. The National Plan to End Violence against Women and Children 2022–2023 says that restorative justice for young people and children 'must be delivered by trained specialist services skilled in trauma-informed restorative justice processes': Department of Social Services (Cth) (n 54) 64.

69 Gal (n 3) 24–5.

70 Victorian Law Reform Commission (n 2) 201 [9.94]–[9.95], 202 [9.100], rec 29(d).

71 The flexibility of restorative justice processes can also be used to make sure people are not ruled out only because they find conversational processes challenging. For example, they could be supported to develop scripts to refer to or speak from: see Wood and Suzuki (n 63) 16; Gal (n 3) 11–14.

72 Victorian Law Reform Commission (n 2) 201 [9.89].

73 Some people told us it is never appropriate: see, eg, Victorian Aboriginal Legal Service, *Submission 198*; Full Stop Australia, *Submission 214*.

74 Women's Safety and Justice Taskforce (n 3) rec 89; Victorian Law Reform Commission (n 2) 201 [9.94]–[9.95], rec 29(d); Gal (n 3); Brunilda Pali et al, *Practical Guide: Implementing Restorative Justice with Children* (Guide, European Union, August 2018) 102–11.

solely on their age allows for a tailored response.[75] Our recommended approach also reinforces an important restorative justice feature — its flexible nature — which allows it to adapt to meet the unique needs of the people involved. As with restorative justice responses to harmful sexual behaviour, safeguards should include expert screening and ongoing specialised support.[76]

## The relationship between restorative justice and other justice processes

> For this … pathway to be meaningful, it must not be governed by legal gatekeepers ...[77]

18.49 Restorative justice should be an option that supplements other justice pathways. A decision to participate in restorative justice should not prevent a person who has been harmed from using other justice options.

### Restorative justice should be available even if the harm has not been reported

18.50 Restorative justice should also be available without engaging in any other justice processes.[78] This will give people who have experienced sexual violence control over what processes they participate in and the ability to choose their own justice pathways.

18.51 Under the Australian Capital Territory's legislation, referrals to restorative justice are not available unless the person harmed has reported the matter to police.[79] This approach is too narrow:

- Given most people who have experienced sexual violence do not report to police (see **Chapter 3**), requiring a report would prevent many people from having access to restorative justice.
- Allowing restorative justice engagement without a police report could better meet the justice needs of people who have experienced sexual violence. Some people may want to focus on explaining how the violence affected them rather than seeking punishment of the person responsible. Many say that they

75 Victorian Law Reform Commission (n 2) 201 [9.92]–[9.95]. In the Australian Capital Territory, children under ten years old cannot participate in restorative justice, although they can be represented by a related adult: *Crimes (Restorative Justice) Act 2004* (ACT) ss 17(1)(b)–(2).

76 Gal (n 3).

77 Chris Coombes in Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

78 Women's Safety and Justice Taskforce (n 3) 394; Victorian Law Reform Commission (n 2) rec 31.

79 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 63. See also *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT) sch pt 4.

do not want the person responsible to go to jail but they want that person to acknowledge that what they did was wrong.[80]

- Allowing restorative justice engagement without a police report would ensure that current community restorative justice providers are brought within the legislative frameworks and guidelines the ALRC is recommending, to make sure they operate safely and well.

18.52 We heard strong support for making restorative justice available without a police report.[81] The Australian Capital Territory's Sexual Assault Prevention and Response Program Steering Committee and the VLRC made recommendations in line with this approach.[82] It is an approach that is supported in the literature on restorative justice for sexual violence.[83]

## The relationship between criminal justice and restorative justice

18.53 For restorative justice to work effectively as a justice option, it needs to be clear how restorative justice and criminal justice interact. This section discusses how restorative justice and criminal justice interact. It is summarised in **Table 18.1** at the end of this chapter.

18.54 People who have experienced sexual violence can only make informed choices about their justice options if they understand how they relate to other options. People responsible for sexual violence also need to be clear about what participating in restorative justice involves and if it will affect their legal rights and interests.[84] Criminal justice professionals will only make referrals to restorative justice if they understand when to refer cases and what it means for the criminal justice process.[85] Without referrals from criminal justice professionals, restorative justice will not be a meaningful option for some people who may want to consider it.[86]

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80 See, eg, Victorian Law Reform Commission (n 2) 193 [9.40]–[9.42].

81 See, eg, Centre for Innovative Justice, *Submission 94*; Victim Support ACT, *Submission 112*; J Crous, *Submission 141*; Transforming Justice Australia, *Submission 185*.

82 Sexual Assault Prevention and Response Steering Committee (ACT) (n 79) 63, rec 13; Victorian Law Reform Commission (n 2) 208 [9.142]–[9.143], rec 31(a).

83 See, eg, Gang, Kirkman and Loff (n 28) 3203–5; Centre for Innovative Justice (n 2) 56; Daly (n 1) 293.

84 Open Circle told us that while they receive referrals from people who have experienced sexual violence and counsellor advocates at Centres Against Sexual Assault across Victoria, 'a restorative justice process frequently cannot take place because of uncertainty about how the process may interact with criminal justice processes'. Uncertainties include if information disclosed by the victim survivor will be confidential, or the effect of the process on the legal rights of the person responsible: Centre for Innovative Justice, *Submission 94*.

85 See Corrine Marsland and Clare Farmer, 'Restorative Justice for Adult Offenders in South Australia: Judicial Perspectives and Insights' (2024) 27(2–3) *Contemporary Justice Review* 91, 98, 110–111; Centre for Innovative Justice, *Submission 94*.

86 For a detailed account of how referrals at various stages of a criminal justice process can be managed safely and transparently, see Centre for Innovative Justice (n 2) 52–64.

## *Restorative justice following a report to police*

### *Where there are insufficient grounds to file or lay charges, or a prosecution has been discontinued*

18.55 Prosecution agencies should be able to tell people who have experienced sexual violence about the option of restorative justice following a report if there are insufficient grounds to file or lay charges, or if a prosecution is discontinued. But the availability of restorative justice should not influence charging or prosecution decisions.[87] See **Chapter 5**.

### *Where a criminal trial is underway*

18.56 There are different views about making restorative justice available after charges have been filed or laid and before a guilty plea or finding.[88]

18.57 It may be difficult to provide restorative justice safely if a criminal process is underway. The ACT Victims of Crime Commissioner told us that

> requiring a plea or finding of guilt before referral is an important protection for victim-survivors and broader community safety …
>
> This approach curtails the ability of the perpetrator to coerce the victim-survivor into discontinuing their participation in the criminal investigation or prosecution of serious sexual violence offences and it ensures serious sexual violence offences are not diverted away from investigation and prosecution.[89]

18.58 The conditions for successful restorative justice are also likely to be undermined if the participants are taking part in a criminal trial at the same time.[90] Restorative justice requires the person responsible to accept responsibility for the harm, but accepting full responsibility can take time and the restorative process can help achieve this.[91] This may be impossible if participants are involved in a trial in which the accused person has pleaded not guilty.

18.59 In the Australian Capital Territory, restorative justice is not available during criminal proceedings for serious sexual offences.[92] It is only available in exceptional

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87 *Crimes (Restorative Justice) Act 2004* (ACT) s 7; Women's Safety and Justice Taskforce (n 3) 394; Victorian Law Reform Commission (n 2) 208 [9.144].

88 See, eg, Traci Keys, *Workplace Sexual Harassment and Harm: 2019 Churchill Fellowship to Increase Effective and Supportive Options for Women Experiencing Sexual Harassment in the Workplace* (Winston Churchill Memorial Trust Report, 2024) 40–41; Centre for Innovative Justice (n 2) 58–9 [2].

89 However, the Commissioner noted that this approach can 'mean that victim-survivors who do not want to engage with the criminal justice process are then precluded from the option of [restorative justice]': Correspondence from ACT Victims of Crime Commissioner to ALRC, 23 December 2024.

90 Centre for Innovative Justice (n 2) 58–9. See also Victorian Law Reform Commission (n 2) 209 [9.148].

91 Department of Justice and Regulation (Vic) (n 34) 7.

92 *Crimes (Restorative Justice) Act 2004* (ACT) s 16(4). Serious sexual offences are punishable by a term of imprisonment of more than ten years: ibid 12.

circumstances for less serious sexual offences.[93] Limiting the availability of restorative justice in this way was considered necessary to emphasise 'the seriousness of sexual and family violence offences'.[94] The 'exceptional circumstances' requirement does not apply to other offences.[95] However, as mentioned earlier, an inquiry into the operation of restorative justice for sexual offences in the Australian Capital Territory has recommended the government 'explore options to appropriately expand access to restorative justice processes'.[96]

18.60 The ALRC heard from many people who supported making restorative justice available throughout a criminal justice process. It was implicit in what most said that this would be limited to cases where prosecution is not in the public interest. This might be because the person responsible is a child or young person, or the person who has experienced sexual violence does not want the prosecution to proceed. In these circumstances, there was support for allowing matters to be diverted to a restorative justice process.[97]

18.61 But it is important that restorative justice is not used inappropriately to divert offences from the criminal justice system.[98] In Queensland, the WSJT supported using restorative justice instead of the criminal justice system when a criminal prosecution is not appropriate — for example, in responses to offending by children or young people, or where there is not enough evidence to prosecute. But the WSJT stressed that the option of restorative justice should not affect decisions about criminal justice processes.[99]

18.62 To make restorative justice as accessible as possible, while making sure that sexual offences are not diverted inappropriately, it should be possible to divert sexual offences to restorative justice if:

- it is what the person who has been harmed wants;
- the prosecution is not in the public interest; and
- the other conditions for safe restorative justice, such as voluntary participation, are satisfied.[100]

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93 *Crimes (Restorative Justice) Act 2004* (ACT) ss 16(1), 27(5), 33(2). See also *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT) sch pt 3.

94 *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT) sch pt 7.1.

95 Ibid sch pt 2.

96 Sexual Assault Prevention and Response Steering Committee (ACT) (n 79) 63, rec 13.

97 Some restorative justice providers we spoke to were also supportive, eg, Centre for Innovative Justice, *Submission 94*; Community Restorative Centre, *Submission 166*.

98 One person who had experienced sexual violence told us they were worried about police inappropriately diverting sexual violence matters to restorative justice. See generally Centre for Innovative Justice (n 2) 35; Marsland and Farmer (n 85) 95; Daly (n 1) 214–15; Keenan and Zinsstag (n 31) 14.

99 Women's Safety and Justice Taskforce (n 3) 394.

100 Although the Women's Safety and Justice Taskforce cautioned against inappropriate diversions of sexual offences to restorative justice, it supported the availability of restorative justice where diversion from a criminal justice prosecution or sentence would otherwise be appropriate: ibid.

18.63 Ordinarily, however, the option of commencing restorative justice, and any restorative justice processes that have been started, should be put on hold once criminal charges are filed and a prosecution is underway.[101]

### *Following a guilty plea or finding*

18.64 Restorative justice should be available following a guilty plea or finding and before sentencing. Sentencing should be deferred to allow for the restorative justice process to take place.

18.65 Sentencing courts should be required to consider the restorative justice outcome but have a discretion about whether it reduces the severity of the sentence, and if so, to what extent. This provides some incentive for the person responsible to participate in restorative justice.[102] Courts in the Australian Capital Territory, Queensland, and New Zealand can already take participation in restorative justice into account in sentencing.[103] However, sentencing courts should not increase a sentence because a person who has been convicted of an offence chose not to participate in restorative justice or stopped taking part.[104] As discussed earlier, voluntary participation is an important feature of restorative justice.

18.66 It is widely accepted that restorative justice should be available after sentencing.[105] There are benefits of restorative justice participation, even at this stage of the criminal process. A restorative justice advocate told us about the transformative effects of a restorative justice process that she participated in while the person who murdered her brother was in prison. We also heard from a person who had experienced sexual violence who participated in a restorative justice process after the person responsible had been in prison for some years. The person who had experienced sexual violence suggested the restorative justice worked well and was safely run.

18.67 In New South Wales, the Department of Communities and Justice (Corrective Services) facilitates restorative justice. But currently participation in restorative justice is not considered in parole decisions in New South Wales.[106] Parole boards should be required to consider a restorative justice outcome but should not be required to grant or change parole conditions. As with restorative justice before

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101 Correspondence from Associate Professor Jane Bolitho to the ALRC (n 65).

102 Victorian Law Reform Commission (n 2) 209 [9.151].

103 *Crimes (Sentencing) Act 2005* (ACT) s 33(1); *Crimes (Restorative Justice) Act 2004* (ACT) s 53(e); *Sentencing Act 2002* (NZ) ss 8(j), 10. In Queensland, 'it is a matter for the [referring agency]' how restorative justice affects criminal charges: Queensland Government, *Restorative Justice for Adults Who Have Caused Harm* <www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/offender>. See also Rossner et al (n 1) 16.

104 This is the current position in the ACT: *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(h); *Crimes (Restorative Justice) Act 2004* (ACT) ss 25(f)(ii), 53(e)(ii); Victorian Law Reform Commission (n 2) 209 [9.153].

105 See, eg, Centre for Innovative Justice, *Submission 94*.

106 'Restorative Justice Service Policy' (n 33) 19 [6.1].

sentencing, this provides some incentive for the person responsible to participate in restorative justice.

### The relationship between civil justice and restorative justice

18.68 Restorative justice legislation should enable access to restorative justice via multiple pathways, including civil justice pathways. We note:

- Restorative elements in responses to sexual harassment should be developed further. People who have experienced sexual harassment should be able to choose a restorative justice pathway as an option.[107]
- Civil procedure rules often encourage mediation or other alternative dispute resolution procedures. Referrals to restorative justice processes could be accommodated through changes to these rules. Restorative justice is already available in some civil jurisdictions that deal with other kinds of offending. For example, restorative justice can be used for breaches of some environmental protection laws, with outcomes contained in legally enforceable undertakings.[108]
- There is an opportunity for restorative justice elements to be used in financial assistance schemes. For example, see our earlier discussion of 'recognition meetings' (**Chapter 16**).

## National guidelines

18.69 As we mentioned in **Chapter 17**, and earlier in our discussion of confidentiality, in 2013, an agreement was reached on national guidelines for restorative justice for criminal offences. The agreement was designed to promote a consistent approach among different states and territories but it excluded sexual and family violence offences.[109]

18.70 To reinforce the aims and principles in restorative justice legislation and support consistent access to high-quality restorative justice for sexual violence, the Australian Government, together with state and territory governments, should develop national guidelines for restorative justice for sexual violence. The guidelines should apply to all providers of restorative justice for sexual violence, including community and First Nations providers. They should be developed with input from people who have experienced sexual violence, sexual assault services,

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107 See Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 511, rec 27; Victorian Law Reform Commission (n 2) 191 [9.31]–[9.32].

108 NSW Government, Office of Environment and Heritage, *Guidelines for Enforceable Undertakings* (2018) 1; *Biodiversity Conservation Act 2016* (NSW) s 13.27(2).

109 Standing Council on Law and Justice (n 42). As we noted in **Chapter 17**, the guidelines are not available online. They are discussed in: Centre for Innovative Justice (n 2) 38–9. During the consultation process for the guidelines, some organisations expressed support for the development of additional guidelines for sexual and family violence cases: see, eg, Aboriginal Legal Service of Western Australia (Inc.), Submission on National Guidelines or Principles for Restorative Justice Programs & Processes for Criminal Matters, *National Justice CEOs Group Standing Committee of Attorneys-General* (September 2011) 8–9.

Aboriginal Community Controlled Organisations, community organisations (including those representing groups who are disproportionately reflected in sexual violence statistics), and restorative justice researchers and providers. The guidelines should be informed by research showing what is required to provide safe and high-quality restorative justice for sexual violence.[110]

18.71 National guidelines would describe what is required for best practice provision of restorative justice for sexual violence in more detail than is usually covered by legislation.[111] We heard strong support for national guidelines to ensure that restorative justice for sexual violence is done well and provided safely.[112]

18.72 There are good examples that could be used as a starting point for developing national guidelines. The Australian Capital Territory and New Zealand have restorative justice guidelines for sexual and family violence offences.[113] Victoria has guidance on restorative justice for family violence.[114] Each of these resources draw on extensive consultation and practice experience.

18.73 The Australian Capital Territory Guidelines provide a background to the Territory's legislated scheme and how the rights of participants are safeguarded.[115] They describe how eligibility for restorative justice is determined; the restorative justice process for sexual or family violence offences; and quality assurance measures.[116] The process description includes extensive detail about the special issues that family and sexual offences raise. It explains how the restorative justice service screens for and manages risks, vulnerabilities, and power imbalances in these cases, and how it secures the physical and psychological safety of participants.[117] The guidelines also discuss how outcome agreements are reached, what they might contain, and how they are monitored.[118]

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110 See our earlier discussion of the aims that should be included in restorative justice legislation, and, eg, Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I—II* (2017) 185.

111 See generally Economic and Social Council, *Basic principles on the use of restorative justice programmes in criminal matters* UN Doc E/RES/2002/12 (24 July 2002) Annex III para 12; Centre for Innovative Justice (n 2) 37; *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT) sch pt 2; Braithwaite (n 37).

112 See, eg, Correspondence from the Oceania Community – Restorative Practice for Sexual Harm to the ALRC, 23 September 2024.

113 *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT); Ministry of Justice (NZ) (n 34).

114 Department of Justice and Regulation (Vic) (n 34).

115 *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT) sch pts 1–3.

116 Ibid sch pts 3–14.

117 Ibid sch pts 7.2–14.

118 Ibid sch pts 9–12.

18.74 New Zealand's 'Restorative Justice Standards for Sexual Offending Cases' cover similar ground.[119] They 'recognise the additional safeguards and processes needed when dealing with sexual offending cases', focusing on how to 'maximise the chances of healing for all parties, and minimise the chance of the process itself … causing harm'.[120] As well as considering the psychological needs of participants, the standards address 'the psychological components of the harming behaviour, its impact on surrounding community … and the impact of cultural beliefs about sexual violence'.[121]

18.75 The national guidelines the ALRC is proposing should include guiding principles for the practice of restorative justice for sexual offences. This will help support a common understanding of best practice and how to achieve it. The VLRC set out eight guiding principles. Some are the same as the aims or key features that the ALRC recommends should be included in restorative justice legislation. However, what the principles involve and how they apply in sexual violence cases may need to be explained in more detail in the national guidelines. The principles identified by the VLRC are: voluntary participation; accountability; the needs of the person harmed take priority; safety and respect; confidentiality; transparency; an integrated justice response (meaning that 'other criminal and civil justice options are available, as well as therapeutic treatment programs'); and clear governance.[122]

## Oversight of restorative justice

18.76 Restorative justice oversight is critical to:

- support safety and consistently high standards;[123] and
- ensure that the community has confidence that restorative justice is being used appropriately.[124]

18.77 At the national level, to promote access to restorative justice, and consistent standards and implementation of the national guidelines, a high profile, independent

119 Ministry of Justice (NZ) (n 34). New Zealand has separate standards for family violence. A recent review recommended that the family violence practice standards be revised and simplified: Ministry of Justice (NZ), *Restorative Justice Review* (Findings Report, July 2023) 6, 27, rec 9. The review recommended professional development to increase facilitator capability in cases involving family violence and sexual offending dynamics: ibid 26, rec 7. It did not comment on the sexual offending standards.

120 Ministry of Justice (NZ) (n 34) 4.

121 Ibid.

122 Victorian Law Reform Commission (n 2) 197. Some contributors to our inquiry said the guiding principles recommended by the Victorian Law Reform Commission should be adopted in their jurisdiction: see, eg, Uniting Church in Australia Queensland Synod, *Submission 11*; Victoria Legal Aid, *Submission 119*.

123 Victorian Law Reform Commission (n 2) 210 [9.157]. See also United Nations Office on Drugs and Crime (n 37) 103–4.

124 Centre for Innovative Justice (n 2) 41.

body should manage restorative justice oversight.[125] This would give visibility to restorative justice for sexual offences and ensure transparency in how it is operating. An oversight body would give people who have experienced sexual violence confidence that restorative justice is a safe and credible option. It would support continuous improvement and knowledge sharing among restorative justice providers across the country.

18.78 Existing agencies such as the Domestic, Family and Sexual Violence Commission or the AHRC may be suitable bodies to provide national oversight of restorative justice for sexual offences.[126] Any expansion in the role of existing agencies would need to be appropriately funded, as we discuss below.

18.79 The national body should establish and publish training standards and accreditation criteria to support consistent standards among restorative justice workers and consistently high-quality restorative justice service delivery.[127] Accreditation criteria could include such things as demonstrated compliance with the national guidelines (**Recommendation 61**), completion of training requirements, and participation in professional development for restorative justice convenors.[128]

18.80 There is some tension between the value of flexibility in restorative justice delivery, and oversight and implementation of national guidelines, training standards, and accreditation requirements.[129] Different restorative justice services operate around Australia and work in diverse contexts. They should be able to build on their strengths and local expertise. The oversight bodies we recommend will need to balance a strong focus on safety and trauma-informed practices with support for services to operate flexibly. Restorative justice should empower individual participants, especially people who have experienced sexual violence, and the communities in which they live.

18.81 The Centre for Innovative Justice recommended that restorative justice units within each justice department across all states and territories act as oversight bodies.[130] In the Australian Capital Territory, Queensland, and Victoria, justice departments already provide oversight for restorative justice. Justice departments also provide oversight for restorative justice for children and young people.

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125 United Nations Office on Drugs and Crime (n 37) 103–4. Associate Professor Bolitho suggested that an existing professional body, such as the Resolution Institute, could work in partnership with the oversight body we are recommending: Correspondence from Associate Professor Jane Bolitho to the ALRC (n 65).

126 The Australian Human Rights Commission has said it is 'well placed to facilitate' restorative responses to sexual harassment: Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (n 107) 513.

127 Council of Europe, *Recommendation Concerning Restorative Justice in Criminal Matters*, CM/Rec 2018 8 [54]; Keenan (n 37) 296; Victorian Law Reform Commission (n 2) 204 [9.112]–[9.115].

128 See United Nations Office on Drugs and Crime (n 37) 61–2, 103.

129 We heard this from many restorative justice providers. See generally Rossner and Taylor (n 1); Braithwaite (n 37).

130 Centre for Innovative Justice (n 2) 41.

18.82 Ideally, independent agencies should be primarily responsible for oversight, although they may be supported and resourced by justice departments. Like the national body, this would give restorative justice visibility and support accessibility. Where Victims of Crime Commissioners or Commissions exist, they could be well-placed to fulfil this role. In Victoria, the VLRC recommended the creation of a Commission for Sexual Safety, which it said should have an oversight role for restorative justice.[131]

18.83 The oversight bodies should be responsible for a range of areas that would support access to restorative justice and its safety and quality, including:

- establishing and managing complaints processes;
- ensuring transparency and accountability in relation to the funding of restorative justice; and
- evaluating programs and collecting data, in a way that is consistent with principles of Indigenous data sovereignty, to inform improved program and policy development.

18.84 To ensure that restorative justice responses meet the needs of everyone in the community, all oversight bodies should include First Nations representatives and representatives from other groups who are disproportionately reflected in sexual violence statistics.

18.85 The ALRC has not recommended that the oversight bodies should be responsible for monitoring restorative justice outcome agreements. Not all restorative justice processes result in outcome agreements. Even so, where participants do agree on actions to support the process and repair the harm that has been done, thought should be given to how to make sure the agreement is honoured. Courts could monitor outcome agreements where restorative justice happens as part of a pre-sentence diversionary process.[132] Oversight and evaluation of restorative justice should include data on how consistently agreements are honoured.[133] This is important to protect the integrity of the process and promote confidence in it.

18.86 Other data that is collected, and the measures used to evaluate restorative justice for sexual violence, should be consistent and informed by research on the aims of restorative justice.[134] This will allow for effective comparative analysis and will provide insights to how restorative justice is working and how it can be improved.

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131 Victorian Law Reform Commission (n 2) 210 [9.157]–[9.158], recs 36, 90.

132 See ibid 210 [9.154]–[9.155].

133 United Nations Office on Drugs and Crime (n 37) 104.

134 See our discussion of 'accountability' in **Chapter 17**, and the methodology set out in Siobhan Lawler, *Restorative Justice Conferencing for Domestic and Family Violence and Sexual Violence: Evaluation of Phase Three of the ACT Restorative Justice Scheme* 8–9. See generally Keenan and Zinsstag (n 31) 14–17.

## Supporting First Nations communities to use restorative justice where it is their choice

> 'Giving voice' takes into account Social and Emotional Wellbeing and can assist the healing of someone who has been harmed, and contribute to healing and potentially create awareness of that harm by the other party to come to a mutual agreement 'to cause no further harm', or in our Aboriginal way 'finish business'.[135]

18.87 Restorative justice 'can provide a culturally safe and trauma-informed approach which empowers victim-survivors to seek support and justice without further harm'.[136] But it is important that restorative justice does not become another 'colonial project' imposed on First Nations communities.[137]

18.88 To make sure this does not happen, First Nations communities should be funded to design, build, and deliver their own accredited restorative justice programs for First Nations peoples. We heard widespread support for this.[138]

18.89 Research suggests that First Nations communities want to develop their own restorative justice processes, and these processes will work better and be supported if First Nations communities have ownership of them.[139] This may include using different ideas and language, and drawing on different traditions.[140]

18.90 Dr Hannah McGlade, a human rights lawyer and academic, has researched Aboriginal restorative justice processes used in Canada.[141] She noted concerns that

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135 Correspondence from Dr Lois Peeler AM to the ALRC (n 2). Dr Lois Peeler is Elder in Residence at Worawa Aboriginal College, Victoria, and project lead of 'Lotjpadhan', a restorative justice pilot program funded by the Victorian Government's Koorie Justice Unit.

136 Victorian Aboriginal Legal Service, *Submission 198*. See also Violet Co Legal & Consulting, *Submission 220*. Note that the Victorian Aboriginal Legal Service did not support restorative justice where an adult used sexual violence against a child or young person.

137 Tauri (criticising the use of restorative justice in New Zealand) quoted in Daly (n 1) 2; Rossner et al (n 1) 47.

138 See, eg, Uniting Church in Australia Queensland Synod, *Submission 11*; Sisters Inside Inc, *Submission 100*; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 149*; Several members of the Inquiry Expert Advisory Group and others, *Submission 65*; Victorian Aboriginal Legal Service, *Submission 198*; Violet Co Legal & Consulting, *Submission 220*; Correspondence from the Oceania Community – Restorative Practice for Sexual Harm to the ALRC (n 112). See also Victorian Law Reform Commission (n 2) rec 30.

139 Rossner et al (n 1) 45–9. See also Harry Blagg, Nicole Bluett-Boyd and Emma Williams, *Innovative Models in Addressing Violence against Indigenous Women* (ANROWS State of Knowledge Paper, Landscapes No 8, 2015) 6–8. See generally Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (2020) 101, 103, 236; Sotiri, Schetzer and Kerr (n 57) 39–40; *National Agreement on Closing the Gap* (2020) [6], [7]; Rossner and Taylor (n 1) 365–7.

140 Correspondence from Associate Professor Jane Bolitho to the ALRC (n 65). See also Luke Pearson, *What Is a Makarrata? The Yolngu Word Is More than a Synonym for Treaty* (ABC RN, 10 August 2017) <www.abc.net.au/news/2017-08-10/makarrata-explainer-yolngu-word-more-than-synonym-for-treaty/8790452>.

141 Hannah McGlade, 'New Solutions to Enduring Problems: The Task of Restoring Justice to Victims and Communities' (2010) 7(16) *Indigenous Law Bulletin* 8.

restorative justice reforms had not addressed the 'silencing of victims' or the ongoing power imbalances within communities that had experienced years of oppression. But she found that these processes were still seen by women who had experienced sexual violence as better options than standard criminal justice responses.[142]

## What could restorative justice for First Nations communities look like?

18.91 We heard strong support for 'self-determined approaches' to restorative justice, 'linked to cultural, language and community needs' and 'led by First Nations communities'.[143]

18.92 First Nations groups who supported making restorative justice available emphasised it should be:

- 'place-based';
- 'Aboriginal designed and led';
- well-funded, on an ongoing basis;
- supported by well-funded, place-based services, including therapeutic treatment programs, to support both the person who has experienced sexual violence and the person responsible.[144]

18.93 Sisters Inside strongly support transformative justice models that 'use similar processes to [some] forms of restorative justice'.[145] But Sisters Inside view transformative justice models as different in two ways:

- they are separate from the 'criminal punishment system'; and
- as well as addressing specific harms, they also 'transform the wider community culture and treat the root causes of violence'.[146]

18.94 Bolitho told us that transforming the wider culture is now a focus for many community restorative justice providers.[147] The model that the ALRC is proposing also accommodates the option for restorative processes that are separate from the criminal justice system, as long as restorative justice can happen safely and reflects the voluntary choice of the person harmed not to report. The criminal justice system remains available to any person who wishes to report sexual violence, regardless of their background.

18.95 Although restorative justice should be a well-resourced and managed option for First Nations peoples, some First Nations communities may choose not to

142 Ibid.
143 Full Stop Australia, *Submission 214*.
144 See, eg, Aboriginal Legal Rights Movement, *Submission 172*; Victorian Aboriginal Legal Service, *Submission 198*; Correspondence from Dr Lois Peeler AM to the ALRC (n 2). See also Rossner et al (n 1) 45–9.
145 Sisters Inside Inc, *Submission 100*.
146 Ibid.
147 Correspondence from Associate Professor Jane Bolitho to the ALRC (n 65).

develop programs. Some First Nations people may prefer to access restorative justice through a different restorative justice service, even if a First Nations designed service is available. This option should be available.[148] All restorative justice services should be culturally safe and cater to the needs of groups who are disproportionately reflected in sexual violence statistics.[149]

## Resourcing

18.96 Restorative justice research highlights that without adequate resourcing, it is impossible to provide safe, high quality restorative justice that minimises the risks associated with sexual violence.[150]

18.97 The importance of resourcing to make restorative justice accessible, safe, and high quality has also been highlighted in many reports.[151] Many people and organisations who contributed to our inquiry emphasised the importance of providing adequate and ongoing resourcing for restorative justice. Their strong support for restorative justice was conditional on it being properly funded.[152]

18.98 Significant funding is required to make sure people with expertise in sexual offending and the dynamics of sexual violence are available as restorative justice convenors and to support participants in restorative justice.

18.99 Therapeutic treatment programs and other 'wrap around' services for people who have used sexual violence also need to be established and properly funded.[153] We mention the support we heard for therapeutic treatment for people responsible for sexual violence in **Chapter 19**.

18.100 Therapeutic treatment programs for harmful sexual behaviours are highly regarded but currently access is limited.[154] These programs need to be well resourced and accessible to children and young people.

148 See Rossner et al (n 1) 48–9.
149 Ibid 48–54.
150 See, eg, Marsland and Farmer (n 85) 108; Rossner et al (n 1) ch 5; Daly (n 1) 276 [5].
151 See, eg, Women's Safety and Justice Taskforce (n 3) 388, 395, recs 90–91; Victorian Law Reform Commission (n 2) rec 29; Keys (n 88) 22. See also Kate Fitz-Gibbon et al, *National Plan Stakeholder Consultation Final Report* (2022) 170.
152 For example, the Australian Lawyers Alliance encouraged us to urge the Federal Government to 'adequately fund successful restorative justice programs': Australian Lawyers Alliance, *Submission 113*.
153 Centre for Innovative Justice (n 2) 68; Daly (n 1) 295; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (n 110) 185. See also Victoria Legal Aid, *Submission 119*; Jesuit Social Services, *Submission 190*.
154 See Victorian Law Reform Commission (n 2) 176–7 [8.57]–[8.63].

18.101 An evaluation found that resource constraints have contributed to 'significant delays' in restorative justice in the Australian Capital Territory, which limits access to restorative justice for sexual offences.[155]

18.102 Advocates for First Nations groups told us that securing adequate funding and providing equal access to restorative justice for their communities is likely to be difficult. We also heard that Aboriginal sentencing courts in Western Australia have failed in the past because they were not adequately resourced to support the involvement of Aboriginal Elders.

18.103 As mentioned earlier, while existing agencies should provide the restorative justice oversight functions we have recommended, their expanded functions need to be properly funded. Ultimately, the Commonwealth and state and territory governments are responsible for providing this funding. In some instances, additional funding may be available for aspects of their work from public purpose funding sources and independent regulatory bodies.[156]

18.104 Although providing high-quality restorative justice services is expensive, studies suggest it may be more cost-effective overall than the criminal justice system.[157] The ALRC is not suggesting that one can be traded off against the other — both systems need to be improved. Ultimately, the improvements we recommend in this report have the potential to produce cost savings as well as long-term social benefits.[158]

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155 Lawler (n 134) 10. Two judges interviewed about their perceptions of restorative justice in South Australia expressed concerns about it being resource intensive and contributing to delay in sentencing processes: Marsland and Farmer (n 85) 103.

156 For example, Legal Services Board and Commissioner in Victoria.

157 In the United Kingdom, Strang and her co-authors found that, 'on average, [restorative justice conferences] cause a modest but highly cost-effective reduction in repeat offending, with substantial benefits for victims. A cost-effectiveness estimate … found a ratio of 8 times more benefit in costs of crimes prevented than the cost of delivering [conferences]': Heather Strang et al, *Restorative Justice Conferencing Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction* (Systematic Review No 12, Campbell Systematic Reviews, 2013) 2. An evaluation of youth restorative justice in Queensland found that by comparison with traditional court processes, restorative justice conferencing is 'consistently more cost-efficient'. The study also found that through reductions in reoffending and diversions from court and/or formal sentencing, restorative justice produced annual savings of more than $22.5 million in the youth justice system: KPMG and Department of Youth Justice (Qld), *Restorative Justice Conferencing-Outcome and Economic Evaluation* (July 2020) 12.

158 In relation to restorative justice, the Law Council has said there is 'evidence that restorative justice has broader social benefits by seeking to repair the social relationships damaged by crime, and address the root causes of reoffending behaviour': Law Council of Australia, Supplementary Response to Questions on Notice, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, *Current and Proposed Sexual Consent Laws in Australia* (30 August 2023) 7.

***Table 18.1: Potential interaction between criminal justice and restorative justice processes dealing with sexual violence***

| No engagement with criminal justice process | Should restorative justice be available? | What effect does restorative justice have on criminal justice process? |
|---|---|---|
| Informal disclosure (for example, to family, friends, or a health carer) but no report to police | Yes | None, unless mandatory reporting provisions apply. If mandatory reporting applies, the matter will be reported to police and any of the steps set out below may apply |

| Type of engagement in criminal justice process | Should restorative justice be available, subject to eligibility and suitability requirements? | What effect does restorative justice have on criminal justice process? |
|---|---|---|
| Formal report: police investigate and consider if there is enough evidence to file or lay charges<br>Police decide there is not enough evidence to file or lay charges or police file or lay charges but the prosecution discontinues the matter | Yes | None: referral to restorative justice should have no effect on any other action or proposed action (such as a decision to file or lay charges) |
| Formal report involving an alleged offence by a child or young person | Yes | Police consider the restorative justice outcome and may decide not to file or lay charges ('diversion') |
| Charges filed or laid against a child or young person | Yes | The court considers the restorative justice outcome and may discharge the matter without conviction ('diversion') |
| Charges filed or laid against an adult and the case is before the court | Yes, but only if it is what the person harmed wants and the prosecution is not in the public interest[159] | The court considers the restorative justice outcome and may discharge the matter without conviction ('diversion') |
| Trial proceeds and the accused person pleads or is found guilty. Conviction recorded. | Yes | Sentencing court must consider the restorative justice outcome but is not required to reduce severity of any sentence |
| Person who used sexual violence is sentenced | Yes | Involvement of person who used sexual violence in restorative justice must be considered by corrections authorities/parole board but is not required to have any effect on its decisions |

159 See discussion at paragraphs [18.56]–[18.63].

# 19. Further Reform

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## Introduction

19.1 In this Inquiry the ALRC received a great deal of feedback about how justice responses to sexual violence could improve. The ALRC could not make recommendations about all the issues raised, or do so in a meaningful way, within the Inquiry's timeframe.

19.2 The recommendations in this Report reflect the issues the ALRC decided to focus on, because they dealt with matters the ALRC had enough information about, and the expertise required to make recommendations. They also covered issues where the ALRC considered that reform would likely lead to effective and long-term change in responding to sexual violence. There were many more issues raised by the Expert Advisory Group and other stakeholders that the ALRC was unable to examine.

19.3 Reform processes were already underway in some areas. The ALRC did not deal with these issues to avoid duplicating work. Some issues went beyond the Terms of Reference.

19.4 This chapter notes the issues that the ALRC did not deal with in this Inquiry, or did not have the opportunity to deal with to finality, but where further reform could be needed.

## Preventing sexual violence

19.5 While the justice system can prevent sexual violence by bringing a person who has used sexual violence to account, the Terms of Reference focused on justice responses to sexual violence after it occurs, rather than on preventing sexual violence. Apart from recommending public education about consent (**Recommendation 38**), the ALRC did not deal with broader issues that relate to preventing sexual violence or early intervention programs, although it heard about the importance of preventing sexual violence, and addressing its causes, many times in this Inquiry.

19.6 The ALRC recognises the importance of ongoing efforts to prevent sexual violence, such as consent and respectful relationships education that is being delivered in schools across Australia.[1] The recent national Rapid Review of Prevention Approaches to End Gender-Based Violence identified other areas of priority, including engaging with men and boys to prevent violence.[2]

19.7 There are efforts underway to address the risk of sexual offending — for example, a national offender prevention service will intervene early to advise and guide people who are at risk of committing child sexual abuse.[3] There is also work being done to strengthen responses nationally to children and young people who have engaged in harmful sexual behaviour.[4]

## Barriers to accessing and engaging with the justice system

19.8 **Chapter 1** outlines recommendations that aim to address the access and engagement barriers faced by groups who are disproportionately reflected in sexual violence statistics. In this chapter, the ALRC summarises other ideas that could address these barriers that the ALRC could not develop within this Inquiry's scope and timeframe.

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1 Domestic, Family and Sexual Violence Commission, *Yearly Report to Parliament: National Plan to End Violence Against Women and Children 2022–2032* (Australian Government, August 2024) 30.

2 Rapid Review Expert Panel, *Unlocking the Prevention Potential: Accelerating Action to End Domestic, Family and Sexual Violence* (Department of Prime Minister and Cabinet, 2024).

3 National Office for Child Safety, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030* (Commonwealth of Australia, 2021) 35.

4 Ibid Theme 3.

19.9 The ALRC heard about promising approaches to responding to sexual violence experienced by First Nations people, such as a First Nations sexual assault service model,[5] and Aboriginal sentencing courts.[6] The Northern Territory Director of Public Prosecutors noted an issue with jury representation there — while First Nations people make up a third of the Northern Territory population, they are underrepresented on juries.[7] These are ideas and issues that could be taken forward through the Standalone First Nations National Plan to address violence against First Nations women and children, which is being developed.[8]

19.10 Several submissions acknowledged the barriers to both reporting and engaging with the justice system faced by those with uncertain or insecure visa status.[9] These barriers are associated with a fear of losing their visa status or pathway, as well as limited eligibility for support and services.[10] Reform ideas included changes to the immigration framework,[11] 'firewalls' to enable migrant sex workers to report sexual violence without affecting their visa status,[12] and improved access to support services such as Medicare regardless of visa status.[13]

19.11 The ALRC notes the importance of further work to explore these ideas, as well as the importance of continuing and building on reform efforts by the Australian Government, to support people with uncertain visa status who have experienced sexual violence. The Australian Government is currently funding legal assistance for temporary visa holders leaving a violent relationship,[14] continuing to provide support services through the Escaping Violence Payment and the Temporary Visa Holders Experiencing Violence Pilot trials,[15] and enabling people to extend their stay in Australia to make a workplace exploitation claim through the Workplace Justice Pilot.[16]

19.12 Other reform ideas were raised in this Inquiry in relation to people with disability. For example, Women With Disabilities Australia suggested that the Australian Government, state and territory governments, and police services collaborate with

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5 Djirra, *Submission 41*; Victoria Legal Aid, *Submission 119*.
6 Aboriginal Family Legal Services (WA), *Submission 40*.
7 Northern Territory Director of Public Prosecutions, *Submission 143*.
8 National Indigenous Australians Agency, 'Standalone First Nations National Plan' <https://webarchive.nla.gov.au/awa/20240612182550/https://www.niaa.gov.au/our-work/closing-gap/standalone-first-nations-national-plan>.
9 Refugee Advice and Casework Service, *Submission 179*; Scarlet Alliance, *Submission 186*; Asylum Seeker Resource Centre, *Submission 194*; inTouch Women's Legal Centre, *Submission 204*.
10 Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (2022) 44.
11 Refugee Advice and Casework Service, *Submission 179*; Asylum Seeker Resource Centre, *Submission 194*.
12 Scarlet Alliance, *Submission 186*.
13 Asylum Seeker Resource Centre, *Submission 194*.
14 Commonwealth of Australia, *Budget 2024–25 (Women's Budget Statement)* (2024) 18.
15 Ibid 16.
16 Department of Home Affairs (Cth), 'Temporary Activity Visa (Subclass 408): Australian Government Endorsed Events (Workplace Justice Pilot)' <immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-activity-408/australian-government-endorsed-events-workplace-justice-pilot>.

people with disabilities to co-design, implement, and evaluate strategies to improve police responses to people with disabilities. They also suggested updating judicial bench books to address myths associated with the credibility of witnesses with disabilities.[17]

19.13 The ALRC notes the troubling ongoing practice of routinely strip-searching women who are incarcerated. Submissions noted that this could be experienced as a type of sexual violence, or could retraumatise people who have already experienced sexual violence.[18] The Human Rights Law Centre called for law reform to prohibit the practice of strip searching in prisons.[19] More broadly, the Queensland Human Rights Commission noted that these searches are ineffective in making prisons safer.[20] The Child Sexual Abuse Royal Commission and the Queensland Women's Safety and Justice Taskforce recommended other ways of detecting contraband to reduce the need for strip searching.[21] Body scanners have been introduced in one prison in Victoria and are being trialled in Queensland.[22] Lessons from these experiences should inform an expanded use of body scanners across all jurisdictions, noting that strip searching should only be used where necessary.

19.14 The ALRC notes that, as submitted by the Expert Advisory Group, decriminalising sex work would help address the barriers that sex workers face to report sexual violence and access the justice system.[23] This is an area of reform that should be explored in jurisdictions that have not decriminalised sex work.

19.15 The ALRC notes that other non-legal options for children and young people who have experienced sexual violence could be further developed. One submission proposed a code of conduct for schools that outlines minimum standard responses that schools must have to sexual violence.[24] Such a code could include practical arrangements that support children and young people who have experienced sexual violence to continue their schooling, such as extra learning support, and to support those who have engaged in harmful sexual behaviour.

19.16 In relation to people who have experienced sexual violence in aged care facilities, submissions focused on problems with reporting from aged care facilities, which are associated with aged care residents needing to access support or report

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17 Women With Disabilities Australia & People with Disability Australia, *Submission 192*.
18 See, eg, Not published, *Submission 1*; Human Rights Law Centre and Flat Out, *Submission 99*.
19 Human Rights Law Centre and Flat Out, *Submission 99*.
20 Queensland Human Rights Commission, *Stripped of Our Dignity: A Human Rights Review of Policies, Procedures, and Practices in Relation to Strip Searches of Women in Queensland Prisons* (2023) 40–4.
21 Women's Safety and Justice Taskforce, *Hear Her Voice: Report Two* (vol 1, 2022) recs 136, 137; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 15* (2017) rec 15.4.
22 Enver Erdogan MP, 'Improving Rehabilitation Services for Women in Custody' (Media Release, 17 April 2023); Queensland Corrective Services, 'Body Scanners - Its Role in Correctional Centre Safety and Prisoner Welfare' <https://corrections.qld.gov.au/body-scanners-its-role-in-correctional-centre-safety-and-prisoner-welfare/>.
23 Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.
24 D Villafaña, *Submission 182*.

through aged care service staff.[25] These problems continued even after the Serious Incident Response Scheme (SIRS), which guides the reporting and management of incidents of abuse and neglect of people receiving aged care,[26] was introduced in 2021. The ALRC heard about issues around subjective thresholds for reporting in the SIRS, inadequate education and training of staff about responding to sexual violence, as well as the lack of an appropriate body to properly manage responses to sexual violence.[27] One submission suggested promising approaches for reform such as tightening the reporting thresholds in the SIRS,[28] training for residential aged care service staff about responding to sexual violence,[29] as well as independently reviewing closed cases.[30] Some Expert Advisory Group members proposed requiring aged care providers to publish anonymous, deidentified data on sexual violence within their facilities to support transparency.

19.17 The ALRC was not able to address in detail barriers faced by people who experience sexual violence in other institutions, such as people in residential care. However, reform efforts have increasingly focused on addressing barriers to reporting for people in institutions.[31] Common themes that have arisen from inquiries that have examined this problem in more detail include ensuring there are safe spaces to disclose, having clear guidelines for staff, and ensuring that there is access to support.[32]

## Fundamental rights in the criminal justice system

19.18 The ALRC received some submissions on the right to silence and reconsidering the scope of this right.[33] The Victorian Women's Trust, for example,

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25 Australian Centre for Evidence Based Aged Care, *Submission 101*; Older Persons Advocacy Network, *Submission 65*.

26 Aged Care Quality and Safety Commission, 'The Serious Incident Response Scheme: An Introduction to the Serious Incident Response Scheme' <www.agedcarequality.gov.au/providers/serious-incident-response-scheme/introduction-sirs>.

27 Australian Centre for Evidence Based Aged Care, *Submission 101*.

28 Ibid.

29 Ibid.

30 Ibid.

31 See, eg, Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017); Commonwealth of Australia, Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (2021); Commonwealth of Australia, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023).

32 See, eg, Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 6* (2017); Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 7* (2017); Commonwealth of Australia, Royal Commission into Aged Care Quality and Safety, *Final Report: Volume 3A: The New System* (2021) rec 10; Commonwealth of Australia, Royal Commission into Aged Care Quality and Safety, *Final Report: Volume 3B: The New System* (2021) rec 100; Commonwealth of Australia, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary: Our Vision for an Inclusive Australia and Recommendations* (Final Report, 2023) 153–70.

33 Not published, *Submission 31*; Not published, *Submission 35*; A Wallace and R Clynes, *Submission 42*; Victorian Women's Trust, *Submission 63*; Queensland Sexual Assault Network, *Submission 70*.

said that in a sexual violence proceeding both parties must be treated equally by the court because the court is effectively a place that hears the competing claims of the accused person and the complainant.[34] This raises a complex issue that is not appropriate to be considered for sexual violence offences alone. If rights which have long been regarded as fundamental to providing a fair trial for accused persons are to be reviewed, a holistic review across all categories of offences would be necessary. The ALRC has taken the approach of upholding fundamental rights in the criminal justice system. We consider these rights as essential to maintain the state's role to prove wrongdoing and providing a fair trial for accused persons.

19.19 The ALRC also received submissions about piloting 'juryless' sexual violence courts, and notes the Expert Advisory Group's submission about this.[35] The submission was based on a South African model where sexual offence trials can be decided by a judge and two lay people. The ALRC concluded that it was too early to say if juryless trials would help achieve more just outcomes. While this is an area worth exploring further, more research is needed before this reform idea can be properly considered.

## Other criminal justice issues

19.20 **Chapters 4** to **12** of this Report deal with criminal justice topics that the ALRC focused on in this Inquiry. Within these topics, the ALRC often had to concentrate on selected sub-topics. For example, it was not possible in the Inquiry's timeframe to look at sentencing and appeals in detail. Within the many criminal justice topics, the ALRC generally focused on improving the ability of the justice system to achieve just outcomes and the complainant experience of these processes.

19.21 The following issues for reform were also raised. The ALRC did not address these issues, but consider these to be areas for potential future reform.

### Age of consent

19.22 The age of consent is the minimum age a person must be to legally be able to consent to engage in sexual activity with another person. In most Australian jurisdictions, the age of consent is 16. In Tasmania and South Australia, it is 17. This range is consistent with most Commonwealth countries and with 'good practice standards'.[36]

19.23 However, jurisdictions differ in relation to whether and how they regulate sexual activity:

- between people below the age of consent but who are close in age;

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34 Victorian Women's Trust, *Submission 63*.

35 Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.

36 Christopher Dowling et al, *National Review of Child Sexual Abuse and Sexual Assault Legislation in Australia* (Consultancy Report, Australian Institute of Criminology, 2024) 26; Indira Rosenthal, Rodney Croome and Robin Banks, *Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth* (Human Dignity Trust, 2019).

- between people aged within two years of each other, where one or more of them is below the age of consent; and
- between people who are above the age of consent but under 18, and people in positions of authority, care, or supervision.[37]

19.24 There are also differences in when the law permits a 'mistake of fact' defence in respect of the age of the person who has experienced sexual violence. It is over 10 years of age in New South Wales and the Australian Capital Territory, 12 years of age in Queensland and Victoria, 13 years of age in Tasmania, 14 years of age in the Northern Territory, and 16 years of age in South Australia.[38]

19.25 In consultations the ALRC heard that the lack of consistency on the age of consent across Australia can be confusing for young people and complicates messaging on consent in sex education. However, the ALRC was unable to review these provisions comprehensively within this Inquiry's timeframe.

## Child sexual offences

19.26 The ALRC has not considered child sexual offences as the Terms of Reference do not specifically mention these offences. The ALRC also notes the significant work done by the Child Sexual Abuse Royal Commission in these areas and the reforms its recommendations have led to. However, there are areas relating to child sexual offences that may need reform. The ALRC notes, for example, that some jurisdictions still use the term 'incest',[39] which is an outdated term that does not specifically target abusive relationships within the family context. We also note that the National Centre for Action on Child Sexual Abuse advocated for a consistent definition of 'child' in Australia's legislation on child sexual offences.[40]

## Child witness services

19.27 Some jurisdictions, such as Victoria and Western Australia, have independent child witness services that provide comprehensive support to address the particular needs of children who have experienced or witnessed sexual violence. Generally, the services provide support that includes information about what to expect in criminal proceedings, emotional support during the proceedings, and logistical support, such as facilitating pre-recorded evidence.

19.28 The ALRC heard that other child witness services across Australia, which fulfil a much-needed role in supporting children, receive less funding or have fewer resources. This is due to a range of reasons, including limited staff or volunteers and a lack of reach to regional or remote witnesses.

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37 Dowling et al (n 36) 38–9.
38 Ibid.
39 *Crimes Act 1900* (ACT) s 62; *Crimes Act 1900* (NSW) s 78A; *Criminal Code Act 1983* (NT) s 208MA; *Criminal Code Act 1899* (Qld) s 222; *Criminal Law Consolidation Act 1935* (SA) s 72; *Criminal Code Act 1924* (Tas) s 133.
40 National Centre for Action on Child Sexual Abuse, *Submission 85*.

19.29 In this Inquiry, there was general support shown for the positive impact of child witness services.[41] The Centre for Innovative Justice described it 'as a vital element of an improved criminal justice system response', following its unpublished review of the Victorian Child Witness Service (as it was then known) in 2020.[42]

19.30 While the ALRC did not have time to consider in detail how child witness services across Australia could be improved, there is opportunity, where this is not already in place, to establish or better resource a specialist child witness service to support child complainants and other child witnesses in their interactions with police, the prosecution, and the courts.

## Forensic medical examinations

19.31 While the ALRC did not consider forensic medical examinations in detail, some submissions noted the need to make forensic medical examinations more accessible.[43] These submissions noted the need for gender appropriate staff, more locations to access examinations, access to examinations without being required to report to police,[44] and better resourcing in terms of trained staff.[45] These are issues that would be important for governments to consider in improving justice responses to sexual violence.

## Mandatory reporting

19.32 During the Inquiry, the ALRC observed differences across states and territories in mandatory reporting laws, which are laws that require some groups of people to report cases of child abuse or neglect that they suspect or know about. There is opportunity to harmonise these laws, but the ALRC was not able to address the topic in the time it had.[46]

## Complaint and distress evidence

19.33 In the Issues Paper, the ALRC raised questions about the admissibility and use of complaint and distress evidence as part of the prosecution case in sexual assault trials.

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41 Parkerville Children and Youth Care, *Submission 91*; Centre for Innovative Justice, *Submission 216*.

42 Centre for Innovative Justice, *Submission 216*.

43 Not published, *Submission 36*; C Bulbeck, *Submission 73*; BPW Australia, *Submission 127*; Fair Agenda, *Submission 159*; Full Stop Australia, *Submission 214*.

44 Not published, *Submission 36*; C Bulbeck, *Submission 73*; BPW Australia, *Submission 127*; Fair Agenda, *Submission 159*; Full Stop Australia, *Submission 214*.

45 Not published, *Submission 36*; C Bulbeck, *Submission 73*; BPW Australia, *Submission 127*; Fair Agenda, *Submission 159*; Full Stop Australia, *Submission 214*.

46 Mandatory reporting laws are a vital part of responding to child sexual abuse. The ALRC notes, however, that some submissions from people who have experienced sexual violence described the process as disempowering: S Cuevas, *Submission 33*; D Villafaña, *Submission 182*.

19.34 Legislation across Australia has modified the common law test of admissibility for complaint evidence that was founded upon a misconceived expectation that people who experience sexual violence should complain to someone at the 'first reasonable opportunity'. The legislative tests for admissibility and the permissible uses of complaint evidence vary significantly across Australia. Concerns heard by the ALRC included that the complaint evidence led by the prosecution can undermine, rather than bolster, the credibility of complainants because of inconsistencies between the evidence of the complainant and the complaint witness, or witnesses, about the complaint.[47] There is also an issue about whether the admissibility and uses of complaint and distress evidence remain founded upon myths and misconceptions about the response behaviour of people who experience sexual violence. The ALRC was not able to address the complexity of this topic in the time it had.

## Tendency and coincidence evidence in relation to child sexual offences

19.35 In a criminal trial the prosecution may wish to call evidence that an accused person has committed acts which show a tendency (or propensity) to commit the offence with which they have been charged. This could be evidence that the accused person had been previously convicted of the same or a similar offence, or allegations made by the complainant or other witnesses that the accused person has behaved in a similar way at a time other than the time of the offence. The prosecution may also wish to call coincidence (or similar fact) evidence that the accused person was involved in events of a similar kind to the offences with which they have been charged, as evidence that it was the accused person who committed the charged acts.

19.36 The common law rules governing the admission of propensity evidence (or as it is now known in most states and territories, 'tendency evidence') were stringent, because of the concern that this evidence could prejudice juries against defendants, resulting in wrongful convictions. The same applied to the admission of 'similar fact' or 'coincidence' evidence.

19.37 Case law prevented the admissibility of such evidence, unless it revealed a pattern of activity which bore no reasonable explanation other than incriminating the accused person in the offence charged.[48] Because of the strictness of this rule, such evidence was usually excluded in sexual offence cases (as well as in other types of criminal prosecutions).[49]

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47 See, eg, Name withheld, *Submission 69*; Name withheld, *Submission 95*; Northern Territory Director of Public Prosecutions, *Submission 143*; Women's Legal Centre ACT, *Submission 169*.

48 See, eg, *Hoch v the Queen* (1988) 165 CLR 292, where the issue was whether evidence of three boys in a boys' home that they had been assaulted by a teacher was cross-admissible. It was held that it was not because the boys knew each other and might have concocted their stories: at 297 (Mason CJ, Wilson and Gaudron JJ).

49 See the discussion in Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III–VI* (2017) ch 23.

19.38 All Australian jurisdictions that have adopted the *Uniform Evidence Act* have legislated to change the common law rules relating to the admission of tendency and coincidence evidence. Importantly, that change has involved providing that tendency and coincidence evidence is not admissible where the court is not satisfied that the evidence has significant probative value.[50] Western Australia, Queensland, and South Australia have each legislated a similar threshold requirement.[51]

19.39 Threshold requirements to the effect that the evidence has significant probative value, as well as other aspects of the common law rules about tendency and coincidence evidence, came to be reconsidered in respect of child sexual abuse offences.

19.40 The Child Sexual Abuse Royal Commission undertook a detailed review of how the criminal justice system responded to institutional child sexual abuse. The Child Sexual Abuse Royal Commission Criminal Justice Report identified problems in the law governing the admissibility of tendency and coincidence evidence in criminal trials relating to child sexual abuse, and proposed reforms to facilitate greater admissibility in criminal trials. The Commission's view was that common law rules relating to the admission of tendency and coincidence evidence had prevented prosecution of persons who had been accused of multiple acts of child sexual abuse and contributed to a low conviction rate for child sexual offences. The Commission did not

> consider it acceptable that the prospects of a complainant obtaining criminal justice can depend so significantly on the jurisdiction in which the child sexual abuse offences are prosecuted. Victims – and the community – are entitled to expect a consistency in the approach of each state and territory of Australia.[52]

19.41 The Commission also found that restrictions on the use of this evidence had made it more difficult to hold joint trials in cases in which multiple children alleged they had experienced sexual violence or been physically assaulted.[53]

19.42 The Child Sexual Abuse Royal Commission considered that 'the risk of unfair prejudice to the accused arising from tendency or coincidence evidence has been

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50 *Evidence Act 2011* (ACT) ss 97(1), 98; *Evidence Act 1995* (Cth) ss 97(1), 98; *Evidence Act 1995* (NSW) ss 97(1), 98; *Evidence (National Uniform Legislation) Act 2011* (NT) ss 97(1), 98; *Evidence Act 2008* (Vic) ss 97(1), 98; *Evidence Act 2001* (Tas) ss 97(1), 98. In criminal trials a further safeguard was provided by s 101 of the legislation which originally required that the probative value of the evidence 'substantially outweigh' any prejudicial effect it may have. Some jurisdictions now only require that the probative value 'outweigh' its prejudicial effect.

51 Western Australia adopted a 'significant probative value test': *Evidence Act 1906* (WA) s 31A. In South Australia, the evidence must have 'strong probative value': *Evidence Act 1929* (SA) s 34P(2)(b). In Queensland, tendency and coincidence evidence must have 'significant probative value': *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) s 40, inserting ss 129AD(1)(b), 129AF(1)(b). The Queensland legislation has been passed but has not yet entered into force.

52 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III–VI* (n 49) 634.

53 Ibid 649.

overstated'.[54] In reaching that conclusion the Commission discussed a number of reports on jury reasoning, as well as critiques of those reports.[55] It also took account of a specially commissioned empirical report which suggested that the concern that juries would engage in unfair reasoning when dealing with cases involving allegations of multiple child sexual abuse offences had been overstated.[56] The Commission made recommendations to facilitate the admission of tendency and coincidence evidence in child sexual offence cases.[57]

19.43 The Commission proposed that the common law rules that restricted the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the accused person in a child sexual offence proceeding.[58] It proposed model provisions amending the rules governing admissibility of tendency evidence in Uniform Evidence Law jurisdictions in prosecutions for sexual offences against children, and prosecutions for the murder and manslaughter of children, which may occur in combination with sexual violence. It also proposed that 'the model amendments to the Uniform Evidence Law be used as the basis for new laws in those jurisdictions that do not apply the [Uniform Evidence] Law'.[59]

19.44 The recommendations made by the Child Sexual Abuse Royal Commission, with some amendments, have now been implemented in some jurisdictions. Section 97A has been inserted in the Evidence Acts of all of the Uniform Evidence Law jurisdictions,[60] except South Australia, Victoria, and the Commonwealth. The recommendations have also been adopted in Queensland.[61] The Law Reform Commission of Western Australia (LRCWA) has also recommended s 97A be adopted in Western Australia to cover the admissibility of tendency evidence, but not coincidence evidence; and that the language of the provision should make it clear that it applies to attempts to commit child sexual offences.[62]

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54 Ibid 634.

55 Ibid 460–86.

56 Jane Goodman-Delahunty, Annie Cossins and Natalie Martschuk, *Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study* (Report for Royal Commission into Institutional Responses to Child Sexual Abuse, 2016). The study involved the use of mock juries.

57 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III–VI* (n 49) 640, recs 45, 46, 47.

58 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II* (2017) rec 46. See also Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (2017) appendix N.

59 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (n 58) appendix N.

60 *Evidence Act 1995* (NSW) s 97A; *Evidence (National Uniform Legislation) Act 2011* (NT) s 97A; *Evidence Act 2001* (Tas) s 97A.

61 *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) s 40, inserting s 129AE. The Queensland legislation has been passed but has not yet entered into force.

62 Law Reform Commission of Western Australia, *Admissibility of Propensity and Relationship Evidence in WA* (Final Report, Project No 112, 2022) rec 3.

19.45 The wording of s 97A differs to some extent from the model proposed by the Child Sexual Abuse Royal Commission. But consistently with that proposal, s 97A creates a presumption that tendency evidence about an accused person's sexual interest in, or sexual acts with, children has significant probative value in child sexual violence prosecutions. In doing so it recognises that an accused person having a sexual interest in a child or acting on that interest is usually, of itself, sufficiently unusual conduct to have significant probative value.

19.46 The effect of the provision is that where there is evidence that the accused person has committed sexual violence against a particular child or against another child, or has demonstrated a sexual interest in that child or another child, that evidence will be regarded as having significant probative value unless the court considers that is not the case.

19.47 In addition to the presumption that certain tendency evidence has significant probative value unless the court is satisfied that it does not, s 97A(5) explicitly excludes matters which courts had previously taken into account in finding that evidence in child sexual abuse cases lacked significant probative value. Matters are not excluded where the court is satisfied that exceptional circumstances warrant the matters being taken into account.[63] The purpose of s 97A(5) is to overcome restrictive approaches which courts had earlier applied to the admissibility of tendency evidence in child sexual abuse cases, for example by finding that there were insufficient common features in the different sexual acts allegedly committed by accused persons or in the characteristics of complainants.[64] These provisions reflect the view of the Child Sexual Abuse Royal Commission that tendency evidence in child sexual abuse matters has a high level of probative value, even where there is no 'particular level of similarity between incidents of proven or alleged child sexual abuse'.[65] Rather, the two most important similarities are present. These are the evidence of other alleged sexual offending and the fact that the offending is against a child.[66]

19.48 The ALRC broadly agrees with the reasoning of the Child Sexual Abuse Royal Commission. We consider that the Commission's proposal for a provision like s 97A to apply consistently across all Australian jurisdictions should be fully implemented. Accordingly, steps should be taken in South Australia, Victoria, and the Commonwealth to amend their Evidence Act provisions and adopt a provision equivalent to s 97A. The ALRC understands that a review of the South Australian legislation has been commenced. We presume that the recommendation made by the LRCWA will be implemented in Western Australia.

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63 *Evidence Act 1995* (NSW) s 97A(5); *Evidence (National Uniform Legislation) Act 2011* (NT) s 97A(5); *Evidence Act 2001* (Tas) s 97A(5).

64 Attorney General's Department (NSW), *Evidence Amendment (Tendency and Coincidence) Act 2020* (Statutory Review Report, September 2022) [3.18]–[3.19].

65 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III–VI* (n 49) 594.

66 Ibid 594–5.

19.49 In taking this view we have considered the submission received from the Law Council of Australia[67] to the effect that the High Court has, in the cases of *Bauer*[68] and *Hughes v The Queen,*[69] overruled the previously restrictive approach, effectively enabling tendency and coincidence evidence to be admitted in more cases. We accept that these decisions have expanded the circumstances in which tendency evidence is admissible and have to some extent clarified the law. However, the High Court decisions do not resolve all of the uncertainties which can arise in cases involving child sexual abuse. In any event, so that the law is clear and consistent across Australia, there is significant utility in all Australian jurisdictions adopting a legislative provision equivalent to s 97A.

## Character evidence in sentencing

19.50 The ALRC received submissions that the law on character evidence — which in some situations allows for consideration, in sentencing, of the 'good character' of the person who has been convicted of a sexual violence offence — is problematic. The ALRC heard that jurisdictions take different approaches to this evidence.[70] There are also campaigns to further limit using this evidence in sentencing child sexual abuse cases,[71] and more broadly, to limit its use in any sexual offence cases.[72] The ALRC notes that the New South Wales Sentencing Council is considering the use of character evidence.[73] The outcome of this process should inform any further reform to how character evidence is used.

## Sexual violence treatment programs

19.51 Submissions highlighted the importance of support for people convicted of sexual offences, including therapeutic support.[74] This was not a focus of the Terms of Reference but is an important area to reform and resource. The ALRC notes that the

67 See Law Council of Australia, *Submission 215*.
68 *R v Bauer* (2018) 266 CLR 56.
69 *Hughes v The Queen* (2017) 263 CLR 338.
70 The Law Council's point relates specifically to how appellate courts in Victoria have interpreted the relevant provisions as distinct from the equivalent in New South Wales: see Law Council of Australia, *Submission 215*.
71 National Centre for Action on Child Sexual Abuse, *Submission 85*.
72 'Many rape and sexual assault offenders possess behavioural characteristics which align with courts' understanding of "good character". Employment, family and community engagement are mechanisms that perpetrators can use to commit offences, but more importantly, which are usually maintained during and despite their offending – therefore offering no logical proof of good character, let alone speaking to prospects of rehabilitation or recidivism': Rape and Sexual Assault Research and Advocacy, *Submission 206*.
73 New South Wales Sentencing Council, *Good Character at Sentencing* (Consultation Paper, December 2024).
74 Vacro, *Submission 164*; Community Restorative Centre, *Submission 166*.

Australian Government is funding innovative approaches to address gender-based violence.[75]

## Other civil justice issues

19.52 **Chapters 13** to **16** of this Report deal with civil justice topics that the ALRC focused on in this Inquiry. While the Report focuses on removing many barriers that apply to civil justice processes, the following issues for reform were also raised. The ALRC did not address these or could not address them to finality, but considers them to be areas for future reform.

### Protection against defamation when reporting sexual violence

19.53 The ALRC heard that the risk of defamation claims can create a barrier to reporting sexual violence.[76] The Australian Human Rights Commission's Respect@Work Report acknowledged this issue.[77] The Standing Council of Attorneys-General agreed that an absolute privilege, which protects against defamation claims, should be extended to reporting to police.[78] But only some jurisdictions have implemented this legal protection.[79] There is criticism that the protections do not go far enough as they do not include, for example, disclosures in the workplace.[80] The ALRC considers that there is opportunity to strengthen protections against defamation claims for people who have experienced sexual violence.

### Non-disclosure agreements

19.54 A non-disclosure agreement (or confidentiality agreement) is a provision in a settlement agreement that requires parties to keep certain information confidential. These agreements can restrict the parties from discussing the details of the settlement, including the sexual violence allegation itself. While non-disclosure agreements can have benefits for people who have experienced sexual violence,

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75 Federal Financial Relations, 'Family, Domestic and Sexual Violence Responses 2021–27' <federalfinancialrelations.gov.au/agreements/family-domestic-and-sexual-violence-responses-2021-27>.

76 Not published, *Submission 36*; Name withheld, *Submission 83*; Redfern Legal Centre and Human Rights Law Centre, *Submission 89*; Sex Discrimination Commissioner (Cth), *Submission 168*; Women's and Children's Health Network (SA), *Submission 175*; Youth Law Australia, *Submission 195*; Women's Legal Service NSW, *Submission 205*; Circle Green Community Legal, *Submission 208*; Women's Legal Services Australia, *Submission 212*.

77 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 33.

78 Australasian Parliamentary Counsel's Committee, *Model Defamation Provisions* (22 September 2023).

79 *Civil Law (Wrongs) Act 2002* (ACT) s 137(2)(ba); *Defamation Act 2005* (NSW) s 27(2)(b1); *Defamation Act 2005* (Vic) s 27(2)(ba).

80 Sarah Ailwood, 'Politicians Know Defamation Laws Can Silence Women, But They Won't Do Anything About It' (24 September 2024) *The Conversation* <theconversation.com/politicians-know-defamation-laws-can-silence-women-but-they-wont-do-anything-about-it-238079>.

such as privacy, they are also criticised for silencing people and keeping the sexual violence hidden.[81]

19.55 It has been suggested that use of non-disclosure agreements should be limited.[82] This was identified by some submissions as a promising area of reform.[83] The ALRC notes that a reform process is underway in Victoria where the Victorian Government has accepted in principle a recommendation to introduce legislative amendments to restrict the use of non-disclosure agreements.[84] The Victorian Government has since published a discussion paper for consultation on the topic.[85]

## Time limits

19.56 Time limits which vary from jurisdiction to jurisdiction are a challenge to relying on civil processes to obtain compensation and hold the person responsible accountable. Common law claims for personal injury generally have a three-year time limit.[86] Jurisdictions generally appear to have no limitation period for child sexual abuse claims, but this does not include sexual violence experienced as an adult.[87]

19.57 Relatively short time limits may pose particular problems for people who have experienced sexual violence, who may not disclose sexual violence for years after the event. In **Chapter 16**, the ALRC recommends extending time limits in victims of crime schemes. Governments should consider other proceedings in which time limits should be extended so that they do not unduly disadvantage people who have experienced sexual violence.

## Work health and safety regulation

19.58 The focus of **Chapters 14** and **15** is sexual harassment claims under the *Sex Discrimination Act* and the *Fair Work Act*. The Report does not consider sexual harassment in the context of work health and safety regulation in detail. However,

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81 Regina Featherstone and Sharon Bargon, *Let's Talk about Confidentiality: NDA Use in Sexual Harassment Settlements since the Respect@Work Report* (Sydney Law School Research Report, University of Sydney, March 2024).

82 Ibid.

83 Redfern Legal Centre and Human Rights Law Centre, *Submission 89*; Working Women Queensland, *Submission 122*; Sex Discrimination Commissioner (Cth), *Submission 168*; Circle Green Community Legal, *Submission 208*.

84 The recommendation was accepted in principle in relation to workplace sexual harassment cases in Victoria, using the Irish Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 and lessons from other jurisdictions (ie the United Kingdom and United States) as the model for reform: Ministerial Taskforce on Workplace Sexual Harassment, *Recommendations* 2022 rec 10; State of Victoria, *Victorian Government Response to the Ministerial Taskforce on Workplace Sexual Harassment* (July 2022) 10.

85 Department of Treasury and Finance (Vic), *Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases* (Discussion Paper, 2024).

86 See, eg, *Limitation of Actions Act 1974* (Qld) s 11(1); *Limitation of Actions Act 1936* (SA) s 36; *Limitation of Actions Act 1958* (Vic) ss 5(1AA), 27D; *Limitation Act 2005* (WA) s 14.

87 See, eg, *Limitation of Actions Act 1974* (Qld) s 11A; *Limitation of Actions Act 1936* (SA) s 3A; *Limitation of Actions Act 1958* (Vic) pt 2A div 5; *Limitation Act 2005* (WA) s 6A.

the ALRC considers that potential areas for reform include developing an express prohibition on gender-based violence and harassment in the Model Work Health and Safety Act and harmonising positive duties to prevent sexual violence in the Model Work Health and Safety Act and *Sex Discrimination Act* (or provide further guidance on how the Model Work Health and Safety Act and *Sex Discrimination Act* positive duties interact).

## Other systems and how they work together

19.59 It was clear from what the ALRC heard that the quality of the justice response to sexual violence depends in large part on how different parts of the system, or different systems, work together. The ALRC makes recommendations to support people who have experienced sexual violence to navigate the many systems, including through Safe, Informed, and Supported Engagement (**Recommendation 1**), independent legal advice (**Recommendations 1** and **9**) and justice system navigators (**Recommendation 1**). While the ALRC could not explore these themes in detail, the ALRC recognises the importance of work continuing on the following issues.

### Offending and investigations across different jurisdictions

19.60 Some people we heard from reported difficulties in reporting across jurisdictions.[88] The Expert Advisory Group recommended that instances of cross-jurisdiction sexual violence should be handled by the Australian Federal Police.[89] The ALRC notes a good model for cross-jurisdictional investigations of sexual violence are the Joint Anti Child Exploitation Teams (JACET), which are joint Australian Federal Police and state and territory child protection teams. The teams work collaboratively to share responsibilities in addressing child sexual exploitation.[90] Some Expert Advisory Group members also proposed developing an offence in Commonwealth legislation of aggravated sexual assault of a child in two or more jurisdictions to address difficulties that complainants experience in engaging with different police agencies.

### Other systems that respond to people who have experienced sexual violence

19.61 Given the connection between sexual violence and family violence (see **Chapter 2**), submissions discussed the need to address child protection practices,[91] family violence in the family law system,[92] and the interaction between family violence

88 Name withheld, *Submission 77*; Not published, *Submission 142*.
89 Several members of the Inquiry Expert Advisory Group and others, *Submission 165*.
90 Not published, *Submission 181*.
91 See, eg, Wiyi Yani U Thangani Institute for First Nations Gender Justice, *Submission 147*; Community Restorative Centre, *Submission 166*; Youth Law Australia, *Submission 195*; Victorian Aboriginal Legal Service, *Submission 198*.
92 Not published, *Submission 13*; Women's Legal Service Victoria, *Submission 207*.

and sexual assault services.[93] The ALRC considers these to be areas for further reform but was unable to make recommendations on these areas within the Inquiry's timeframe.

19.62 The ALRC also notes several Australian Government reform initiatives were provided for in relation to family violence and family law proceedings in the 2024–25 budget, such as expanding the Lighthouse Project, an approach to manage family violence and family safety risks in the family law system.[94] Further, the Family Law Council is currently considering a range of matters that relate to family violence, including whether the law adequately prevents and responds to systems abuse (where the justice system is used to perpetuate abuse) in family law matters, as well as how effective family law amendments have been in removing barriers to disclosing family violence and child abuse in family law proceedings.[95] The Family Law Council was due to report to the Attorney-General (Cth) by 2 December 2024.

### *The family law system*

19.63 The ALRC has considered whether people who have experienced sexual violence, who are also involved in family law proceedings, could have access to improved justice outcomes. In particular, consideration was given to whether a civil claim for damages made by a party to a marriage or de facto relationship who has experienced sexual violence could be conveniently dealt with in the one proceeding concurrently with a family law claim.

19.64 People who are party to a marriage or a de facto relationship, who may have experienced sexual violence, can be subject to a proceeding brought under the *Family Law Act 1975* (Cth), and have the matter dealt with by the Federal Circuit and Family Court of Australia (FCFOA). It is commonly the case that family law proceedings in the FCFOA raise for the court's determination whether a party to the proceeding has been the subject of sexual violence and the effect of that sexual violence.

19.65 In the 2022–23 more than 4 in 5, or 83 per cent, of parenting or parenting and property matters involved allegations that a party had experienced family violence.[96] Over a third of sexual violence recorded occurs is in the context of family and domestic violence.[97]

19.66 Allegations of assault (including sexual assault) as a form of family violence are relevant to a number of applications that can be made under the *Family Law Act*. Such applications include applications for the division of the property of the marriage

93 Safe and Equal, *Submission 199*.
94 Commonwealth of Australia (n 14) 13; Federal Circuit and Family Court of Australia, 'Lighthouse' <www.fcfcoa.gov.au/fl/fv/lighthouse>.
95 Family Law Council, 'Terms of Reference' <www.ag.gov.au/sites/default/files/2022-09/family-law-council-terms-of-reference.pdf>.
96 Law Council of Australia, Submission No 25 to Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment Bill 2024* (9 October 2024).
97 See **Chapter 2**.

or the de facto relationship. Conduct by one party to the relationship, including conduct involving family violence, that has caused one party's financial contribution to the relationship to be significantly more onerous has, since 1997, been regarded as a relevant consideration in property settlement proceedings before the FCFOA.[98]

19.67 Recent amendments made to the *Family Law Act* expressly require that the effect of any family violence to which one party to a marriage or de facto relationship has subjected or exposed the other party, be taken into account by the FCFOA in considering the financial contributions of the parties and in considering current and future circumstances of the parties in a property settlement proceeding.[99]

19.68 Where considerations such as those are raised it will be necessary for the FCFOA to make a finding as to whether or not the alleged family violence occurred. Where the family violence is alleged to have been occasioned by an assault or a number of assaults, findings as to whether the assaults occurred as well as findings as to the effect of the assaults will be necessary.[100]

19.69 Although in the division of the property of the marriage or de facto relationship, consideration will be given to the fact of and the effect of family violence, the full extent of any loss and damage suffered as a result of that violence will not likely be reflected in the division of property.[101] In order for the party to the relationship who has experienced the violence to fully realise their legal rights, and in particular their entitlement to civil damages, that party will need to make a civil claim for damages.

19.70 There are obvious and significant advantages for such a person if the civil claim could be brought in the FCFOA, and heard and determined concurrently with the family law proceeding, instead of being heard and determined by another court in a separate proceeding.

19.71 That approach would tend to facilitate the resolution (including through negotiation and mediation) of all claims between the parties at the same time. It would avoid the potential for a multiplicity of proceedings and would likely make the resolution of all claims simpler, more effective, and less traumatic for all parties to the marriage or de facto relationship. That opportunity would also potentially make available to a party who is awarded damages for sexual violence the very broad powers of the FCFOA to effectively distribute the property of the relationship and

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98 See, eg, *Kennon v Kennon* (1997) 139 FLR 118; *Benson v Drury* [2020] FamCAFC 303.

99 *Family Law Act 1975* (Cth) ss 75(2)(aa), 79(4)(ca), 79(5)(a), 90SF(3)(aa), 90SM(4)(ca), 90SM(5 (a) as introduced by *Family Law Amendment Act 2024* (Cth) sch 1 pt 1 div 1 items 6, 19, 24, 26, 38, 43. These provisions will come into effect on 10 June 2025.

100 *Kennon v Kennon* (1997) 139 FLR 118, 123–4; Attorney-General's Department (Cth), Australasian Institute of Judicial Administration and The University of Melbourne, *National Domestic and Family Violence Bench Book* (2024) [10.8] <dfvbenchbook.aija.org.au>. See also Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, 2019) 213–15 [6.81]–[6.88].

101 See generally Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates' (2014) 28(1) *Australian Journal of Family Law* 1.

thus avoid the expense and other difficulties often associated with proceedings to enforce a judgment for damages made by another court.

19.72 Prior attempts have been made by parties to family law proceedings before the FCFOA to have a civil tort proceeding for personal injury claiming damages heard and determined concurrently with an application made under the *Family Law Act*. The question which arises on such applications is whether what is known as the 'accrued jurisdiction' of the FCFOA is engaged.[102]

19.73 Historically, the FCFOA has taken a narrow, and in the view of some, an erroneous approach to its accrued jurisdiction.[103] The Court has to date rejected attempts to join a tortious claim for damages with a proceeding brought under the *Family Law Act*.[104]

19.74 The ALRC considers that the approach of the FCFOA to its accrued jurisdiction and in particular, to whether a non-federal tortious claim of assault can be concurrently heard with a federal claim made under the *Family Law Act*, is ripe for reconsideration by the FCFOA.

19.75 We consider that in relation to a civil tortious claim of sexual violence, the accrued jurisdiction of the FCFOA could be invoked in a family law proceeding where it is necessary for the FCFOA to determine whether one party to the marriage or de facto relationship has experienced sexual violence committed by the other party during the course of the relationship. In such cases it is likely that both the family law claim and the non-federal tortious claim 'so depend on common transactions and facts that they arise out of a common sub-stratum of facts',[105] such that the accrued jurisdiction of the court will be invoked.

19.76 If this reform is not able to be achieved through the FCFOA accepting that it has accrued jurisdiction to hear and determine a non-federal tortious claim of sexual violence, consideration could be given to whether legislative reform could achieve the same result. A civil claim in relation to sexual violence can be brought as a claim of sexual harassment under the *Sex Discrimination Act* (see **Chapter 14**). A sexual harassment claim is a federal claim and Division 2 of the FCFOA already has jurisdiction to deal with such claims.[106] The same jurisdiction could be readily conferred upon Division 1 of the FCFOA.

19.77 However, as discussed in **Chapter 14**, sexual harassment is only prohibited under the *Sex Discrimination Act* in certain specific areas of activity such as employment, the provision of education, or the provision of goods and services.

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102 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 512; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 278–9.

103 See Daniel J Matta, *The Intersection of Private Family Law and Non-Federal Claims: An Examination of the Family Court of Australia's Accrued Jurisdiction* (JD Thesis, Monash University, 2018).

104 See *Pichard v Pichard* [2022] FedCFamC1F 549.

105 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 512.

106 See *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1).

The list of activities do not extend to the private sphere in which sexual violence experienced in a marriage or de facto relationship is likely to occur.

19.78 **Recommendations 48** and **49** propose that the listed areas of activity be extended to all areas of public activity and that consideration be given to the prohibition on sexual harassment applying universally. However, legislative reform to the *Sex Discrimination Act* could take a more bespoke form directed at providing federal jurisdiction to the FCFOA in relation to sexual harassment which occurs in a marriage or de facto relationship. The discussion in **Chapter 14** about extending the areas of activity in which sexual harassment is prohibited will be relevant to the further consideration that will need to be given to a legislative option for reform.

19.79 The ALRC consulted with both the FCFOA and the Family Law Section of the Law Council of Australia in relation to these reforms. Further consultations should be held with these consultees and other stakeholders. In particular, consultations should consider the resourcing and other implications of these possible reforms on the operation of the FCFOA and on the conduct of its proceedings where both family law and related civil claims are dealt with concurrently.

### *The protection order regimes*

19.80 While the ALRC did not make recommendations on the protection order regimes, the ALRC considers that these regimes could be strengthened to improve just outcomes for people who have experienced sexual violence. Most jurisdictions have separate regimes for violence occurring within a family or domestic relationship ('Family Violence Protection Orders'),[107] and violence between people who are not in a family or domestic relationship ('Personal Violence Protection Orders').[108] Family Violence Protection Order regimes and Personal Violence Protection Order regimes generally cover most forms of sexual violence.

19.81 Protection order regimes, and in particular Family Violence Protection Order regimes, tend to have high volumes of applications for legal intervention, relative to the criminal justice system. Given the overlap between family and sexual violence (see **Chapter 2**), it is likely that many of the people who apply for Family Violence Protection Orders have experienced sexual violence. The Family Violence Protection order regime could therefore act as a key point of engagement with people who have experienced sexual violence, so that they can receive support and appropriate remedies. Further, these regimes tend to have benefits in terms of offering immediate

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107 For a list of the different names in different state and territories, see: Federal Circuit and Family Court of Australia, 'Family Violence Orders' <www.fcfcoa.gov.au/fl/fv/orders>.

108 Personal Violence Protection Orders have different names in different states and territories. In the Australian Capital Territory it is called a Personal Protection Order: *Personal Violence Act 2016* (ACT). In New South Wales it is an Apprehended Personal Violence Order: *Crimes (Domestic and Personal Violence) Act 2007* (NSW). In the Northern Territory it is a Personal Violence Restraining Order: *Personal Violence Restraining Orders Act 2016* (NT). In South Australia it is an Intervention Order: *Intervention Orders (Prevention of Abuse) Act 2009* (SA). In Victoria it is a Personal Safety Intervention Order: *Personal Safety Intervention Orders Act 2010* (Vic). In Western Australia it is a Violence Restraining Order: *Restraining Orders Act 1997* (WA).

protection because orders can be made quickly, compared to the prolonged timelines associated with litigation.

19.82 A limitation of these regimes is that their focus is future-oriented on the risk of future violence. The Queensland Sexual Assault Network proposed a 'sexual violence harm order'.[109] It was suggested that such an order could provide powerful recognition for some people who have experienced sexual violence, and that it could also be used as evidence in other processes and be made available to the police. The idea requires further consideration, including as to whether a focus on recognition of past violence would compromise the quick and immediate protection provided by these regimes (if the order were to be made available through these regimes).

19.83 Protection orders could include further conditions to prevent future violence and increase the safety of the applicant — for example, through requirements to engage with treatment programs.[110] Not all Family Violence Protection Order regimes provide for orders to be made requiring a respondent to attend counselling, training, or rehabilitation. In New South Wales, for example, counselling orders do not appear to be available at all, because the legislation only permits a court to make orders 'prohibiting' particular conduct, rather than requiring particular conduct, such as attending a program.[111] In Queensland, an order for counselling or treatment can only be made with the consent of the respondent to a Family Violence Intervention Order.[112]

19.84 These matters could be considered as part of the national review of family and domestic violence order frameworks.[113]

109 Queensland Sexual Assault Network, *Submission 70*.
110 Centre for Innovative Justice, RMIT, *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (2015) 65.
111 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 16(2A), 35, 36.
112 *Domestic and Family Violence Protection Act 2012* (Qld) ss 69, 71.
113 Commonwealth of Australia (n 14) 12.

# Appendix A
# Consultations

## Consultees

*Note that individuals are listed with the affiliation and title held at the time of consultation.*

| Name | Consultee location |
|---|---|
| Consultation 1 | |
| The Hon Felicity Hampel AM SC | Melbourne |
| Consultation 2 | |
| The Hon Judge Meryl Sexton, County Court of Victoria | Melbourne |
| Consultation 3 | |
| Associate Professor Jacqui Horan, Monash University | Melbourne |
| Consultation 4 | |
| Ms Rena De Francesco, Victoria Police | Melbourne |
| Consultation 5 | |
| Acting Assistant Commissioner Raegan Stewart, Australian Federal Police | Melbourne |
| Consultation 6 | |
| Dr Rick Brown, Australian Institute of Criminology | Canberra |
| Dr Chris Dowling, Australian Institute of Criminology | Canberra |
| Consultation 7 | |
| Professor Jane Goodman-Delahunty, University of Newcastle | Newcastle |
| Consultation 8 | |
| The Hon Judge Tracy Fantin, District Court of Queensland | Cairns |
| The Hon Judge Brad Farr SC, District Court of Queensland | Brisbane |

| Name | Consultee location |
|---|---|
| Consultation 9 | |
| The Hon Justice Jenny Blokland AO, Northern Territory Supreme Court | Darwin |
| Consultation 10 | |
| Helen Campbell, Department of Justice and Community Safety (Vic) | Melbourne |
| Lisa Hema, Child and Youth Witness Service (Vic) | Melbourne |
| Gina Squatrito, Department of Justice and Community Safety (Vic) | Melbourne |
| Consultation 11 | |
| Dr Greg Bryne PSM, Greg Byrne Law | Melbourne |
| Consultation 12 | |
| The Hon Judge Belinda Lonsdale, District Court of Western Australia | Perth |
| Consultation 13 | |
| Commissioner Micaela Cronin, Domestic, Family and Sexual Violence Commission (Cth) | Melbourne |
| Ciannon Cazaly, Domestic, Family and Sexual Violence Commission (Cth) | Melbourne |
| Consultation 14 | |
| Detective Superintendent Bernard Geason, Australian Federal Police | Melbourne |
| Detective Superintendent Timothy McKinney, Victoria Police | Melbourne |
| Consultation 15 | |
| The Hon Justice Helen Wood, Supreme Court of Tasmania | Hobart |
| Consultation 16 | |
| The Hon Judge Kara Shead SC, District Court of New South Wales | Sydney |
| Consultation 17 | |
| Professor Judy Cashmore AO, University of Sydney | Sydney |

| Name | Consultee location |
|---|---|
| Consultation 18 | |
| Professor Martine Powell, Griffith University | Brisbane |
| Consultation 19 | |
| The Hon Justice Shane Gill, Federal Circuit and Family Court | Canberra |
| The Hon Justice Alice Carter, Federal Circuit and Family Court | Melbourne |
| The Hon Judge Kylie Beckhouse, Federal Circuit and Family Court | Sydney |
| Consultation 20 | |
| Stan Winford, Open Circle | Melbourne |
| Renee Handsaker, Open Circle | Melbourne |
| Emily Piggott, Open Circle | Melbourne |
| Melanie Joosten, Open Circle | Melbourne |
| Jen Black, Open Circle | Melbourne |
| Consultation 21 | |
| Dr Patrick Tidmarsh, University of Suffolk | Suffolk (UK) |
| Consultation 22 | |
| The Hon Magistrate Felicity Broughton, Magistrates Court of Victoria | Melbourne |
| Consultation 23 | |
| The Hon Judge Geraldine Davison, District Court of South Australia | Adelaide |
| The Hon Judge Belinda Lonsdale, District Court of Western Australia | Perth |
| The Hon Chief Judge Brian Devereaux SC, District Court of Queensland | Brisbane |
| The Hon Judge Jane Culver, District Court of New South Wales | Sydney |
| The Hon Justice Tamara Jago, Supreme Court of Tasmania | Hobart |

| Name | Consultee location |
|---|---|
| The Hon Chief Justice Lucy McCallum, Supreme Court of the Australian Capital Territory | Canberra |
| The Hon Judge Amanda Chambers, County Court of Victoria | Melbourne |
| The Hon Chief Justice Michael Grant AO, Supreme Court of the Northern Territory | Darwin |
| Consultation 24 | |
| Professor Heather Douglas, University of Melbourne | Melbourne |
| Consultation 25 | |
| Commissioner Fiona McCormack, Victims of Crime Commission (Vic) | Melbourne |
| Consultation 26 | |
| Rena de Francesco, Victoria Police | Melbourne |
| Sonia Reed, Victoria Police | Victoria |
| Kellie Haines, Victoria Police | Melbourne |
| Kirsty Hales, New South Wales Police | New South Wales |
| Ellen Quinn, New South Wales Police | New South Wales |
| Matthew Lyons, South Australia Police | South Australia |
| Hamish McKenzie, Western Australia Police | Western Australia |
| Melanie Groves, Tasmania Police | Tasmania |
| Jacquelyn Verkade, Victoria Police | Victoria |
| Peter Roberts, Tasmania Police | Tasmania |
| Consultation 27 | |
| Karen McAteer, Queensland Police | Queensland |
| Stephen Jay, Australian Federal Police | Brisbane |
| Emma Smytheman, Australian Federal Police | Canberra |
| Montana Motuzas, Australian Federal Police | Canberra |
| Stephen Blanchard, Queensland Police | Queensland |

| Name | Consultee location |
|---|---|
| Kylie Lawson, Australian Capital Territory Policing | Canberra |
| Peter Whowell, Australian Federal Police | Canberra |
| Bob Rose, Australian Capital Territory Policing | Canberra |
| Consultation 28 | |
| Rachel Neil, Knowmore Legal | Melbourne |
| Sean Bowes, Knowmore Legal | Melbourne |
| Consultation 29 | |
| Professor Kathy Laster AM, Language Loop | Melbourne |
| Emiliano Zucchi, Language Loop | Melbourne |
| Consultation 30 | |
| Alanna Harper, Office of the eSafety Commissioner (Cth) | Canberra |
| Natalie Strong, Office of the eSafety Commissioner (Cth) | Canberra |
| Paul Jones, Office of the eSafety Commissioner (Cth) | Canberra |
| Consultation 31 | |
| Confidential | |
| Consultation 32 | |
| Dr Jane Bolitho, Transforming Justice Australia | Wellington (NZ) |
| Thea Deakin-Greenwood, Transforming Justice Australia | Sydney |
| Consultation 33 | |
| The Hon President Deborah Richards, Queensland Children's Court | Brisbane |
| The Hon Judge Ellen Skinner, District Court of New South Wales | Sydney |
| The Hon Magistrate Erica Contini, Children's Court of Victoria | Melbourne |
| The Hon Magistrate Kate Hodder, Youth Court of South Australia | Adelaide |
| The Hon Magistrate Jackie Hartnett, Magistrates Court of Tasmania | Hobart |

| Name | Consultee location |
|---|---|
| Consultation 34 | |
| Emerita Professor Margaret Thornton FAAL FASSA, Australian National University | Canberra |
| Professor Karen O'Connell, University of Technology Sydney | Sydney |
| Kate Eastman AM SC, New Chambers | Melbourne |
| Consultation 35 | |
| Dr Danny Sullivan, University of Melbourne | Melbourne |
| Dr Susan Pulman, Dr Susan Pulman and Associates | Sydney |
| Consultation 36 | |
| The Hon Deputy Chief Magistrate Anthony Gett, Magistrates Court of Queensland | Brisbane |
| The Hon Deputy Chief Magistrate Sharon Freund, Local Court of New South Wales | Sydney |
| The Hon Magistrate Donna Bakos, Magistrates Court of Victoria | Melbourne |
| The Hon Magistrate Catherine Crawford, Magistrates Court of Western Australia | Perth |
| The Hon Chief Judge Elizabeth Morris, Northern Territory Local Court | Darwin |
| The Hon Magistrate Roderick Jensen, South Australia Magistrates Court | Adelaide |
| Consultation 37 | |
| Carolyn Jones, YouthLaw | Sydney |
| Consultation 38 | |
| Dr Vivian Waller, Waller Legal | Melbourne |
| Consultation 39 | |
| Anna Coutts-Trotter, Survivor Hub | Broken Hill |
| Consultation 40 | |
| The Hon Judge Patricia Lees, South Eastern Circuit of England and Wales | United Kingdom |

| Name | Consultee location |
|---|---|
| Consultation 41 | |
| Associate Professor Mary Anne Kenny, Murdoch University | Perth |
| Stephanie Martin, Circle Green Community Legal | Perth |
| Katy Welch, Circle Green Community Legal Centre | Perth |
| Jarin White, Tasmanian Refugee Legal Service | Hobart |
| Dr Marilyn Metta, The Metis Centre | Perth |
| Isobel McGarity, Refugee Advice & Casework Service | Sydney |
| Hannah Dickinson, Asylum Seeker Resource Centre | Melbourne |
| Joanna Cull, Refugee & Immigration Legal Service | Brisbane |
| Asher Hirsch, Refugee Council of Australia | Melbourne |
| Consultation 42 | |
| Kathryn Rendell, Immigrant Women's Support Service | Brisbane |
| Rehana Chowdhry, InTouch | Melbourne |
| Beengul Ali, Islamic Women's Association of Australia | Brisbane |
| Nuria Alarcon Lopez, Harmony Alliance | Canberra |
| Mohita Roman, Settlement Services International | Melbourne |
| Emily Horsley, Settlement Services International | Sydney |
| Consultation 43 | |
| Craig Hughes-Cashmore, Survivors and Mates Support Network | Sydney |
| Prue Gregory OAM, Survivors and Mates Support Network | Sydney |
| Consultation 44 | |
| Dr Heather Strang, Cambridge University and the Australian National University | Cambridge (UK) |
| Consultation 45 | |
| Stefania Zotti, Office of the Director of Public Prosecutions (SA) | Adelaide |
| Lisa Hema, Department of Justice and Community Safety (Vic) | Melbourne |

| Name | Consultee location |
|---|---|
| Samantha Camilleri, PACT | Brisbane |
| Tania Taylor, PACT | Brisbane |
| Consultation 46 | |
| Sophie Cusworth, Women With Disabilities Australia | Melbourne |
| Claire Bertholli, Women With Disabilities Australia | Newcastle |
| Nadia Mattiazzo, Women With Disabilities Victoria | Melbourne |
| Gillian O'Brien, WWILD Sexual Violence Prevention Association | Brisbane |
| Kat Reed, Women With Disabilities ACT | Canberra |
| Consultation 47 | |
| Associate Professor Samantha Fairclough, University of Birmingham | Birmingham (UK) |
| Consultation 48 | |
| The Hon Chief Justice Lucy McCallum, National Judicial College of Australia | Canberra |
| Karen Gregory, National Judicial College of Australia | Canberra |
| Liz Margaronis, Judicial College of Victoria | Melbourne |
| Matt Weatherson, Judicial College of Victoria | Melbourne |
| Una Doyle, Judicial Commission of New South Wales | Sydney |
| Consultation 49 | |
| Kate Juhasz, Lucas Chambers | Brisbane |
| Paul Yovich, Francis Burt Chambers | Perth |
| Jane Powell, Len King Chambers | Adelaide |
| Patrick O'Halloran, Barrister | Tasmania |
| Mary Chalmers SC, Murray Chambers | Darwin |
| Paul Morgan, William Forster Chambers | Darwin |
| Jim Shaw, Barrister | Melbourne |
| Consultation 50 | |
| Suzette James-Nevell, Jesuit Social Services | Various |

| Name | Consultee location |
|---|---|
| Nicole Salter, Jesuit Social Services | Various |
| Kate Allen, Jesuit Social Services | Various |
| Marius Smith, Vacro | Melbourne |
| Consultation 51 | |
| Karen Fryar AM, Sexual Assault (Police) Review | Canberra |
| Professor Christine Nixon AO APM, Sexual Assault (Police) Review | Canberra |
| Consultation 52 | |
| Commissioner Micaela Cronin, Domestic, Family and Sexual Violence Commission (Cth) | Melbourne |
| Consultation 53 | |
| Dan Nicholson, Victoria Legal Aid | Melbourne |
| Ambrith Abayasekara, Northern Territory Legal Aid | Darwin |
| Rebecca Lancaster, Tasmania Legal Aid | Tasmania |
| Leah Annesse, Legal Services Commission of South Australia | Adelaide |
| Alison Dewar, Queensland Legal Aid | Brisbane |
| Nadine Miles, Aboriginal Legal Service NSW/ACT | New South Wales |
| Rhiannon McMillan, Legal Aid NSW | Sydney |
| Andrew Robson, Legal Aid WA | Perth |
| Jan de Bruin, Legal Aid ACT | Canberra |
| Arlia Flemming, Community Legal Centres Australia/Central Tablelands and Blue Mountains Community Legal Centre | New South Wales |
| Tasmin Sandford-Evan, Victorian Aboriginal Legal Service | Melbourne |
| Consultation 54 | |
| Dr Deirdre Thompson, Bravehearts | Gold Coast |
| Miranda Bain, Act for Kids | Brisbane |
| Jackie Bateman, Kids First Australia | Melbourne |

| Name | Consultee location |
|---|---|
| Bruce Morcombe, Daniel Morcombe Foundation | Sunshine Coast |
| Denise Morcombe, Daniel Morcombe Foundation | Sunshine Coast |
| Consultation 55 | |
| Nicole Lambert, Allambee Counselling | Perth |
| Kathleen Maltzahn, Sexual Assault Services Victoria | Melbourne |
| Jaqueline Bell, Sexual Assault Services Victoria | Melbourne |
| Chrystina Stanford, Canberra Rape Crisis Centre | Canberra |
| Kathryn Fordyce, Laurel House | Launceston |
| Angela Lynch AM, Queensland Sexual Assault Network | Townsville |
| Sarah Cooper, Yarrow Place | Adelaide |
| Kate Travers, Yarrow Place | Adelaide |
| Jessica Murray, Centre for Women's Safety and Wellbeing | Perth |
| Kate Wright, Centre Against Sexual Assault Central Victoria | Bendigo |
| Prudence Boylan, Sexual Assault Referral Centre | Northern Territory |
| Tara Hunter, Full Stop Australia | Sydney |
| Consultation 56 | |
| Professor Julia Quilter, University of Wollongong | Wollongong |
| Professor Luke McNamara, University of New South Wales | Sydney |
| Consultation 57 | |
| Eliza Amparo, Commonwealth Director of Public Prosecutions | Sydney |
| Stephanie Clancy, Office of Public Prosecutions (Vic) | Melbourne |
| Nicholas Donaghy, Office of Public Prosecutions (Vic) | Melbourne |
| Tracey Russell, Office of Public Prosecutions (Vic) | Melbourne |
| Tali Costi, Office of the Director of Public Prosecutions (SA) | Adelaide |

| Name | Consultee location |
|---|---|
| Consultation 58 | |
| Anne Whitehead, Office of the Director of Public Prosecutions (NSW) | Sydney |
| James Dorney, Office of the Director of Public Prosecutions (NSW) | Sydney |
| Matthew Karpin, Office of the Director of Public Prosecutions (NSW) | Sydney |
| Jane Wolf, Office of the Director of Public Prosecutions (NSW) | Sydney |
| Justin Whalley, Office of the Director of Public Prosecutions (WA) | Perth |
| Alison Finn, Office of the Director of Public Prosecutions (WA) | Perth |
| Tamara Grealy, Director of Public Prosecutions (NT) | Darwin |
| Skye Jerome, Office of the Director of Public Prosecutions (ACT) | Canberra |
| Victoria Engel SC, Office of the Director of Public Prosecutions (ACT) | Canberra |
| Consultation 59 | |
| The Hon Justice Deborah Sweeney, Supreme Court of New South Wales | Sydney |
| The Hon President Karin Emerton, Supreme Court of Victoria | Melbourne |
| The Hon Chief Justice Michael Grant AO, Supreme Court of the Northern Territory | Darwin |
| The Hon Justice Helen Wood, Supreme Court of Tasmania | Tasmania |
| The Hon Justice Sophie David, Supreme Court of South Australia | Adelaide |
| Consultation 60 | |
| Marita O'Connell, Department of Justice (Tas) | Hobart |
| Consultation 61 | |
| The Hon Chief Justice Lucy McCallum, National Judicial College of Australia | Canberra |

| Name | Consultee location |
|---|---|
| Karen Gregory, National Judicial College of Australia | Canberra |
| Consultation 62 | |
| Kirsty Maylin, Federal Circuit and Family Court of Australia | Adelaide |
| Consultation 63 | |
| The Hon Judge Hylton Quail, Children's Court of Western Australia | Perth |
| Consultation 64 | |
| Jessica Morath, Clayton Utz | Sydney |
| Susan Flynn, Clayton Utz | Sydney |
| Consultation 65 | |
| Registrar Amelia Edwards, Federal Court and Federal Circuit and Family Court of Australia | Melbourne |
| The Hon Deputy Chief Judge Patrizia Mercuri, Federal Circuit and Family Court of Australia | Melbourne |
| The Hon Judge Amanda Mansini, Federal Circuit and Family Court of Australia | Melbourne |
| The Hon Judge Karl Blake, Federal Circuit and Family Court of Australia | Melbourne |
| The Hon Justice Elizabeth Raper, Federal Court of Australia | Sydney |
| Consultation 66 | |
| Elena Campbell, RMIT Centre for Innovative Justice | Melbourne |
| Consultation 67 | |
| Dr Hannah McGlade, Curtin University | Perth |
| Consultation 68 | |
| Ombudsman Anna Booth, Fair Work Ombudsman | Sydney |
| Anthony Fogarty, Fair Work Ombudsman | Melbourne |
| Consultation 69 | |
| Representatives, Scarlett Alliance | Various |
| Representative, Sex Workers Outreach Project | Darwin |

| Name | Consultee location |
|---|---|
| Representative, Sex Workers Outreach Project | Sydney |
| Representative, Respect Inc Queensland | Brisbane |
| Representative, Vixen | Melbourne |
| Consultation 70 | |
| Priya Devendran, First Nations Advocates Against Family Violence (formerly National Family Violence Prevention and Legal Service Forum) | Melbourne |
| Consultation 71 | |
| Jason Walker, Law Council of Australia (Family Law Section) | Melbourne |
| Nicola Watts, Law Council of Australia (Family Law Section) | Perth |
| Jaquie Palavra, Law Council of Australia (Family Law Section) | Darwin |
| Nathan MacDonald, Law Council of Australia (Legal Policy) | Melbourne |
| Consultation 72 | |
| Siobhan Kelly, Owen Dixon Chambers | Melbourne |
| Daniel Proietto, Lander and Rogers | Melbourne |
| Katie Sweatman, Kingston Reid | Melbourne |
| Rachel Doyle SC, Ah Ket Chambers | Melbourne |
| Dr Laura Hilly, Aickin Chambers & University of Melbourne | Melbourne |
| Jenny Firkin KC, Aickin Chambers | Melbourne |
| Melanie Schleiger, Victoria Legal Aid | Melbourne |
| Catherine Hemingway, Victoria Legal Aid | Melbourne |
| Consultation 73 | |
| Professor Rita Shackel, University of Sydney | Sydney |
| Professor Jane Goodman-Delahunty, University of Newcastle | Newcastle |
| Consultation 74 | |
| Deanne Lightfoot, Aboriginal Interpreting WA Aboriginal Corporation | Perth |

| Name | Consultee location |
|---|---|
| Camille Lew Fatt, Aboriginal Interpreter Service Northern Territory | Darwin |
| Dorrelle Anderson, Central Australia and Territory Regional Growth | Northern Territory |
| Michelle Walker, Aboriginal Interpreter Service Northern Territory | Northern Territory |
| Valma Banks, Aboriginal Interpreting WA Aboriginal Corporation | Perth |
| Gail Yorkshire, Aboriginal Interpreting WA Aboriginal Corporation | Perth |
| Consultation 75 | |
| Commissioner Dr Anna Cody, Australian Human Rights Commission | Sydney |
| Consultation 76 | |
| Chris Ronalds SC, Frederick Jordan Chambers | Sydney |
| Consultation 77 | |
| Rachel Holt, Australian Human Rights Commission | Sydney |
| Julie O'Brien, Australian Human Rights Commission | Sydney |
| Consultation 78 | |
| Professor Ludmila Stern, University of New South Wales | Sydney |
| Professor Sandra Hale, University of New South Wales | Sydney |
| Olga Garcia-Caro Alcazar, Royal Melbourne Institute of Technology | Melbourne |
| Consultation 79 | |
| Kathryn Nicholson, WA Child Witness Service | Perth |
| Consultation 80 | |
| Sarah Rosenberg, Expert Advisory Group | Sydney |
| Dr Mary Iliadis, Deakin University | Melbourne |
| Angela Lynch, Queensland Sexual Assault Network | Brisbane |
| Eleanor Danks | Perth |

| Name | Consultee location |
|---|---|
| Professor Kerstin Braun, University of Southern Queensland | Ispwich |
| Dr Jennie Gray, Women's Legal Service WA | Perth |
| Jess de Vries, Women's Legal Service Victoria | Melbourne |
| Julie Sarkozi, Department of Justice and Attorney-General (Qld) | Brisbane |
| Erin Priestly, Women's Legal Centre ACT | Canberra |
| Michael O'Connell AM APM | Adelaide |
| Associate Professor Lata Satyen, Deakin University | Melbourne |
| Nadia Bromley, Women's Legal Service Queensland | Brisbane |
| Consultation 81 | |
| Tania Farha, Safe and Equal | Melbourne |
| Helen Bolton, Sexual Assault and Family Violence Centre | Geelong |
| Leigh Rhode, Mallee Sexual Assault Unit & Domestic Violence Service | Mallee |
| Kathleen Maltzahn, Sexual Assault Services Victoria | Melbourne |
| Lucy Lee, Centre Against Violence | Wangaratta |
| Jason Spratt, Mallee Sexual Assault Unit & Domestic Violence Service | Mallee |
| Consultation 82 | |
| Debbie Kilroy OAM, Sisters Inside | Queensland |
| Consultation 83 | |
| Sunny Marriner, Violence Against Women Advocate Case Review | Canada |
| Consultation 84 | |
| The Hon President Justice Adam Hatcher, Fair Work Commission | Sydney |
| Vice President Ingrid Asbury, Fair Work Commission | Brisbane |
| Commissioner Sarah McKinnon, Fair Work Commission | Sydney |

| Name | Consultee location |
|---|---|
| Consultation 85 | |
| Debbie McGrath, Transforming Justice Australia | Sydney |
| Consultation 86 | |
| Ombudsman Anna Booth, Fair Work Ombudsman | Sydney |
| Anthony Fogarty, Fair Work Ombudsman | Melbourne |
| Rachel Volzke, Fair Work Ombudsman | Brisbane |
| Consultation 87 | |
| Laura Vines, Respect Victoria | Melbourne |
| Georgia Bennett, Respect Victoria | Melbourne |
| Consultation 88 | |
| Sunny Marriner, Violence Against Women Advocate Case Review | Canada |
| Consultation 89 | |
| Dr Nina Burrowes, The Consent Collective | Scotland |
| Consultation 90 | |
| Nicci Lambert, National Association of Services Against Sexual Violence | Western Australia |
| Kathleen Maltzahn, Sexual Assault Services Victoria | Melbourne |
| Heather Clarke, National Association of Services Against Sexual Violence | Victoria |
| Chrystina Stanford, Canberra Rape Crisis Centre | Canberra |
| Kathryn Fordyce, Laurel House | Launceston |
| Dr Alison Evans, Centre for Women's Safety and Wellbeing | Perth |
| Sarah Cooper, SA Health | Adelaide |
| Katrina Dee, SA Health | Adelaide |
| Kate Wright, Centre Against Sexual Assault Central Victoria | Bendigo |
| Prudence Boylan, Department of Health (NT) | Northern Territory |

| Name | Consultee location |
|---|---|
| Max Taylor, Ruby Gaea Darwin Centre Against Sexual Violence | Darwin |
| Karen Bevan, Full Stop Australia | Sydney |
| Consultation 91 | |
| Richard Dening, ACT Government | Canberra |
| Zoe Hutchinson, ACT Government | Canberra |
| Consultation 92 | |
| Associate Professor Jacqui Horan, Monash University | Melbourne |
| Professor Jane Goodman-Delahunty, University of Newcastle | Newcastle |
| Consultation 93 | |
| Professor Martine Powell, Griffith University | Brisbane |
| Dr Paul McGorrey, Sentencing Advisory Council (Vic) | Melbourne |
| Andrew Robinson, Department of Youth Justice (Qld) | Brisbane |
| Consultation 94 | |
| Tara Hunter, Full Stop Australia | Sydney |
| Emily Dale, Full Stop Australia | Sydney |
| Karen Bevan, Full Stop Australia | Sydney |
| Consultation 95 | |
| Dr Amanda-Jane George, Central Queensland University | Queensland |
| Dr Vicki Lowick, Queensland Centre for Domestic and Family Violence Research | Brisbane |
| Consultation 96 | |
| Lauren Famulari, Sexual Assault and Family Violence Centre | Victoria |
| Leigh Rhode, Mallee Sexual Assault Unit and Domestic Violence Service | Mallee |
| Kathleen Maltzahn, Sexual Assault Services Victoria | Melbourne |
| Jaime Chubb, Centre Against Violence | Wangaratta |
| Jelena Djurdjevic, Safe & Equal | Melbourne |
| Kate Mecham, Safe & Equal | Melbourne |

| Name | Consultee location |
|---|---|
| Consultation 97 | |
| Marnie Williams, Victims of Crime Financial Assistance Scheme (Vic) | Melbourne |
| John Collins, Victims of Crime Financial Assistance Scheme (Vic) | Melbourne |
| Lauren Scholz, Victims of Crime Financial Assistance Scheme (Vic) | Melbourne |
| Consultation 98 | |
| Heather Corkhill, Queensland Human Rights Commission | Brisbane |
| Consultation 99 | |
| The Hon Peter McClellan AM KC, New South Wales Sentencing Council | Sydney |
| Tanya Railton, New South Wales Sentencing Council | Sydney |
| Rajiv Sharndil, New South Wales Sentencing Council | Sydney |
| Joseph Waugh, New South Wales Sentencing Council | Sydney |
| Professor John Anderson, New South Wales Sentencing Council | Sydney |
| Consultation 100 | |
| Kerry Staines, First Nations Advocates Against Family Violence (formerly National Family Violence Prevention and Legal Service Forum) | Cairns |
| Priya Devendran, First Nations Advocates Against Family Violence (formerly National Family Violence Prevention and Legal Service Forum) | Cairns |
| Consultation 101 | |
| The Hon Deputy Chief Judge Patrizia Mercuri, Federal Circuit and Family Court of Australia | Melbourne |
| The Hon Judge Amanda Mansini, Federal Circuit and Family Court of Australia | Melbourne |
| Registrar Amelia Edwards, Federal Court of Australia and Federal Circuit and Family Court of Australia | Melbourne |

| Name | Consultee location |
|---|---|
| Consultation 102 | |
| Commissioner Dr Anna Cody, Australian Human Rights Commission | Sydney |
| Julie O'Brien, Australian Human Rights Commission | Sydney |
| Christopher Crisafi, Fair Work Ombudsman | Melbourne |
| Rachel Volzke, Fair Work Ombudsman | Brisbane |
| Sarah Bendall, National Student Ombudsman and Commonwealth Ombudsman | Various |
| Timothy Oates, National Student Ombudsman and Commonwealth Ombudsman | Various |
| Brett Hinkly, Commonwealth Ombudsman | Melbourne |
| Henry Jones, Department of Employment and Workplace Relations (Cth) | Canberra |
| Ariel Chong, Department of Employment and Workplace Relations (Cth) | Canberra |
| Adrian Breen, Department of Employment and Workplace Relations (Cth) | Canberra |
| Consultation 103 | |
| Angela Lynch AM, Queensland Sexual Assault Network | Brisbane |
| Consultation 104 | |
| Professor Kate Seear, La Trobe University | Melbourne |
| Associate Professor Genevieve Grant, Monash University | Melbourne |
| Jacqueline Hickman, Victims of Crime Commissioner's Office (ACT) | Canberra |
| Julie MacKenzie, Department of Communities and Justice (NSW) | Sydney |
| Alex Ottens, Department of Communities and Justice (NSW) | Sydney |
| Charmaine Holyoak-Roberts, Criminal Injuries Compensation (WA) | Perth |

| Name | Consultee location |
|---|---|
| Consultation 105 | |
| Dorrelle Anderson, Central Australia and Territory Regional Growth | Northern Territory |
| Camille Lew Fatt, Aboriginal Interpreter Service Northern Territory | Northern Territory |
| Consultation 106 | |
| The Hon Justice Elizabeth Raper, Federal Court of Australia | Sydney |
| Registrar Amelia Edwards, Federal Circuit and Family Court of Australia & Federal Court of Australia | Melbourne |
| Consultation 107 | |
| Deanne Lightfoot, Aboriginal Interpreting WA Aboriginal Corporation | Western Australia |
| Valma Banks, Aboriginal Interpreting WA Aboriginal Corporation | Western Australia |
| Annette Kogolo, Aboriginal Interpreting WA Aboriginal Corporation | Western Australia |
| Consultation 108 | |
| Professor Nick James, Council of Australian Law Deans | Gold Coast |
| Consultation 109 | |
| Professor Blake McKimmie, University of Queensland | Brisbane |
| Consultation 110 | |
| Associate Professor Patrick Tidmarsh, University of Suffolk | Suffolk (UK) |
| Consultation 111 | |
| Saxon Mullins, Rape and Sexual Assault Research and Advocacy | Sydney |
| Nevo Rom, Teach Us Consent | Sydney |
| Julia Cooper, Consent Labs | Sydney |
| Flora Tucker, Consent Labs | Sydney |
| Helenna Baronne-Peters, Consent Labs | Sydney |
| Andrea Georgiou, Youth Law | Sydney |

| Name | Consultee location |
|---|---|
| Amy Watson, Australia's National Research Organisation for Women's Safety | Sydney |
| Consultation 112 | |
| Dr Greg Bryne PSM, Greg Bryne Law | Melbourne |
| Dr Rachael Burgin, Rape and Sexual Assault Research and Advocacy | Melbourne |
| Associate Professor Stella Tarrant, University of Western Australia | Perth |
| Julie Sarkozi, Department of Justice (Qld) | Brisbane |
| Associate Professor Terese Henning, University of Tasmania | Hobart |
| Professor Jill Hunter, University of New South Wales | Sydney |
| Stephen Odgers SC, Forbes Chambers | Sydney |
| Associate Professor David Plater, University of Adelaide | Adelaide |
| Dr Jamie Walvisch, University of Western Australia | Perth |
| Professor Heather Douglas, University of Melbourne | Melbourne |
| Associate Professor Mary Illiadis, Deakin University | Melbourne |
| Professor Jeremy Gans, University of Melbourne | Melbourne |
| Professor Patrick O'Leary, Griffith University | Brisbane |
| Sarah Rosenberg (Observer), With You We Can | Sydney |
| Consultation 113 | |
| Ellie Corrigan, Department of Justice and Attorney-General (Qld) | Brisbane |
| Jo Hughes, Department of Justice and Attorney-General (Qld) | Brisbane |
| Kate McMahon, Department of Justice and Attorney-General (Qld) | Brisbane |
| Jessica Symonds, Department of Justice and Community Safety (Vic) | Melbourne |

| Name | Consultee location |
|---|---|
| Consultation 114 | |
| Sascha Kelly, National Aboriginal Torres Strait Islander Legal Services | Melbourne |
| Consultation 115 | |
| Cate Allingham, Justice and Community Safety Directorate (ACT) | Canberra |
| Mark Follett, Department of Communities and Justice (NSW) | Sydney |
| Sallie McLean, Department of Communities and Justice (NSW) | Sydney |
| Lucian Tan, Department of Communities and Justice (NSW) | Sydney |
| Hilary Little, Department of Justice and Community Safety (Vic) | Melbourne |
| Philippa Ross, Department of Justice and Community Safety (Vic) | Melbourne |
| Alice Fishburn, Department of Justice and Community Safety (Vic) | Melbourne |
| Jelena Goluza, Department of Justice and Community Safety (Vic) | Melbourne |
| Consultation 116 | |
| Commonwealth Government Agencies Roundtable | Various |
| Consultation 117 | |
| The Hon Justice Shane Gill, Federal Circuit and Family Court of Australia | Canberra |
| The Hon Justice Kate Hughes, Federal Circuit and Family Court of Australia | Canberra |
| The Hon Justice Alice Carter, Federal Circuit and Family Court of Australia | Melbourne |
| Deputy Registrar Jordan Di Carlo, Federal Circuit and Family Court of Australia | Melbourne |
| Consultation 118 | |
| Associate Professor Guzyal Hill, Charles Darwin University | Darwin |

| Name | Consultee location |
|---|---|
| Consultation 119 | |
| The Hon Justice Murray Aldridge, Australasian Institute of Judicial Administration | Sydney |
| Alison MacDonald, Australasian Institute of Judicial Administration | Sydney |
| Consultation 120 | |
| Kerri-anne Millard, Victorian Legal Services Board + Commissioner | Melbourne |
| Dr Deborah Lawson, Victorian Legal Services Board + Commissioner | Melbourne |
| Consultation 121 | |
| Dr Lisa Heap, Australian Institute of Employment Rights | Melbourne |
| Consultation 122 | |
| Arlia Fleming, Community Legal Centres Australia | New South Wales |
| Naomi Bellingham, Federation of Community Legal Centres | Melbourne |
| Rachael Pliner, Federation of Community Legal Centres | Melbourne |
| Sean Bowes, Knowmore Legal | Melbourne |
| Phoebe Thompson, Knowmore Legal | Melbourne |
| Azin Baghaki-Jenkin, South-East Monash Legal Service | Melbourne |
| Katherine Post, Women's Legal Service Victoria | Melbourne |
| Rose Hunt, Djirra | Melbourne |
| Michaela Rhode, Asylum Seekers Resource Centre | Melbourne |
| Rehana Chowdhry, InTouch | Melbourne |
| Kimberley Allen, Women's Legal Service Queensland | Queensland |
| Lara Freidin, Women's Legal Services Australia | Canberra |
| Pip Davis, Women's Legal Services NSW | Sydney |
| Eloise Dalton, Working Women Queensland | Brisbane |
| Rachel Athaide, WEstjustice | Melbourne |

| Name | Consultee location |
|---|---|
| Jess de Vries, Women's Legal Service Victoria | Melbourne |
| Sarah Dahlenburg, Mid-North Coast Legal Centre | Port Macquarie |
| Linnea Burdon Smith, Northern Community Legal Centre | Melbourne |
| Consultation 123 | |
| Kate Eastman AM SC, New Chambers | Sydney |
| Chris Ronalds SC, Frederick Jordan Chambers | Sydney |
| Professor Karen O'Connell, University of Technology Sydney | Sydney |
| Emerita Professor Margaret Thornton FAAL FASSA, Australian National University | Canberra |
| Associate Professor Dominique Allen, Monash University | Melbourne |
| Consultation 124 | |
| Elizabeth Margaronis, Judicial College of Victoria | Melbourne |
| Matthew Weatherson, Judicial College of Victoria | Melbourne |
| Catherine Kenny, Judicial Commission of New South Wales | Sydney |
| Karen Gregory, National Judicial College of Australia | Canberra |
| Consultation 125 | |
| Commissioner Sarah Quick, Commissioner for Victims' Rights (SA) | South Australia |
| Consultation 126 | |
| The Hon Justice David Boddice, Supreme Court of Queensland | Queensland |

# Appendix B
# Submissions

| | Name |
|---|---|
| 1 | Not published |
| 2 | Name withheld |
| 3 | Not published |
| 4 | Body Safety Australia |
| 5 | Not published |
| 6 | Name withheld |
| 7 | Name withheld |
| 8 | Name withheld |
| 9 | D Thorp |
| 10 | Name withheld |
| 11 | Uniting Church in Australia Queensland Synod |
| 12 | Name withheld |
| 13 | Not published |
| 14 | Name withheld |
| 15 | Not published |
| 16 | Not published |
| 17 | Not published |
| 18 | Not published |
| 19 | A Williams |
| 20 | Not published |
| 21 | Relationships Australia |
| 22 | S Ford |
| 23 | Not published |
| 24 | Not published |

| | Name |
|---|---|
| 25 | K Richards, J Death, M Chataway, C Emzin, C Ronken, and R Chapman |
| 26 | Name withheld |
| 27 | D Hynd |
| 28 | In Good Faith Foundation |
| 29 | Name withheld |
| 30 | S Filmer |
| 31 | Not published |
| 32 | Not published |
| 33 | S Cuevas |
| 34 | Name withheld |
| 35 | Not published |
| 36 | Not published |
| 37 | Not published |
| 38 | TBG |
| 39 | A Brownlie |
| 40 | Aboriginal Family Legal Services (WA) |
| 41 | Djirra |
| 42 | A Wallace and R Clynes |
| 43 | Name withheld |
| 44 | Not published |
| 45 | M Batt |
| 46 | N Wilde |
| 47 | Not published |
| 48 | G Heydon, R Loney-Howes, T O'Neill, and N Henry |
| 49 | J Quilter and L McNamara |
| 50 | K Mack and S Roach Anleu |
| 51 | Not published |
| 52 | Not published |

| | Name |
|---|---|
| 53 | Not published |
| 54 | Not published |
| 55 | G Hamilton and D Gerryts |
| 56 | Not published |
| 57 | Name withheld |
| 58 | F Gilroy |
| 59 | National Network of Incarcerated and Formerly Incarcerated Women and Girls |
| 60 | Care Leavers Australasia Network |
| 61 | Your Reference Ain't Relevant Campaign |
| 62 | Not published |
| 63 | Victorian Women's Trust |
| 64 | Not published |
| 65 | Older Persons Advocacy Network |
| 66 | Name withheld |
| 67 | Not published |
| 68 | Not published |
| 69 | Name withheld |
| 70 | Queensland Sexual Assault Network |
| 71 | O Camera |
| 72 | E Henderson and K Duncanson |
| 73 | C Bulbeck |
| 74 | K Maher |
| 75 | Not published |
| 76 | ACON |
| 77 | Name withheld |
| 78 | S Lockwood |
| 79 | Not published |
| 80 | Not published |

| | Name |
|---|---|
| 81 | L Ryan |
| 82 | We Are Womxn |
| 83 | Name withheld |
| 84 | Not published |
| 85 | National Centre for Action on Child Sexual Abuse |
| 86 | Name withheld |
| 87 | P Brennan |
| 88 | Tasmania Legal Aid |
| 89 | Redfern Legal Centre and Human Rights Law Centre |
| 90 | Project Paradigm (IFYS) |
| 91 | Parkerville Children and Youth Care |
| 92 | Wesnet |
| 93 | Legal Services Commission (SA) |
| 94 | Centre for Innovative Justice |
| 95 | Name withheld |
| 96 | A Gregorio |
| 97 | Not published |
| 98 | Dementia Australia |
| 99 | Human Rights Law Centre and Flat Out |
| 100 | Sisters Inside Inc |
| 101 | Australian Centre for Evidence Based Aged Care |
| 102 | K Fryar and C Nixon |
| 103 | C Ishonay |
| 104 | National Family Violence Prevention and Legal Service Forum |
| 105 | National Aboriginal and Torres Strait Islander Women's Alliance |
| 106 | Australian Psychological Society |
| 107 | Brisbane Rape and Incest Survivor Support Centre |
| 108 | S Ailwood, R Loney-Howes, N Seuffert and C Sharp |

| | Name |
|---|---|
| 109 | Maternity Consumer Network and Maternity Choices Australia |
| 110 | L Henderson-Lancett, D Luong, and D Kemp |
| 111 | J Rose |
| 112 | Victim Support ACT |
| 113 | Australian Lawyers Alliance |
| 114 | E Garcia-Dolnik, L Klein, and S Loiselle |
| 115 | D Erlich and N Meyer |
| 116 | Mid North Coast Legal Centre |
| 117 | C van Golde, H Cullen, R Zhang and J Smith |
| 118 | Name withheld |
| 119 | Victoria Legal Aid |
| 120 | Health Justice Australia |
| 121 | J Smith, C van Golde, H Cullen and R Zhang |
| 122 | Working Women Queensland |
| 123 | Youth Affairs Council of South Australia |
| 124 | Colin Biggers and Paisley |
| 125 | B McKimmie, F Nitschke, G Ribeiro, and A Thompson |
| 126 | Legal Aid Queensland |
| 127 | BPW Australia |
| 128 | S Rosenberg, M Iliadis, M O'Connell and L Satyen |
| 129 | Project Respect |
| 130 | Commissioner for Children and Young People (WA) |
| 131 | A McIntosh |
| 132 | With You We Can |
| 133 | N Antolak-Saper |
| 134 | Not published |
| 135 | Name withheld |
| 136 | Name withheld |

| | Name |
|---|---|
| 137 | Not published |
| 138 | Feminist Legal Clinic Inc |
| 139 | H Robbins |
| 140 | Name withheld |
| 141 | J Crous |
| 142 | Not published |
| 143 | Northern Territory Director of Public Prosecutions |
| 144 | National Legal Aid |
| 145 | C Oddie |
| 146 | Legal Aid NT |
| 147 | Wiyi Yani U Thangani Institute for First Nations Gender Justice |
| 148 | Not published |
| 149 | Australia's National Research Organisation for Women's Safety (ANROWS) |
| 150 | Not published |
| 151 | Not published |
| 152 | Name withheld |
| 153 | Older Women's Network NSW |
| 154 | Royal Australian and New Zealand College of Psychiatrists (RANZCP) |
| 155 | Not published |
| 156 | Embolden |
| 157 | Our Watch |
| 158 | J Papadimitriou and T Nankivell |
| 159 | Fair Agenda |
| 160 | Name withheld |
| 161 | K Fitz-Gibbon and S Vasil |
| 162 | Name withheld |
| 163 | ACT Policing |
| 164 | Vacro |

| | Name |
|---|---|
| 165 | Several members of the Inquiry Expert Advisory Group and others |
| 166 | Community Restorative Centre |
| 167 | K Fitz-Gibbon, S Walklate and S Meyer |
| 168 | Sex Discrimination Commissioner |
| 169 | Women's Legal Centre ACT |
| 170 | WA Family and Domestic Violence Legal Workers Network |
| 171 | Not published |
| 172 | Aboriginal Legal Rights Movement |
| 173 | Not published |
| 174 | B Colbourne |
| 175 | Women's and Children's Health Network (SA) |
| 176 | Not published |
| 177 | K Seear, G Grant, S Mulcahy and A Farrugia |
| 178 | Name withheld |
| 179 | Refugee Advice and Casework Service |
| 180 | WEstjustice |
| 181 | Not published |
| 182 | D Villafaña |
| 183 | Clayton Utz Pro Bono Practice |
| 184 | National Women's Safety Alliance |
| 185 | Transforming Justice Australia |
| 186 | Scarlet Alliance |
| 187 | Knowmore |
| 188 | Victims Legal Services (Victoria) |
| 189 | Foundation for Alcohol Research and Education |
| 190 | Jesuit Social Services |
| 191 | Wirringa Baiya Aboriginal Women's Legal Centre |
| 192 | Women With Disabilities Australia and People with Disability Australia |

| | Name |
|---|---|
| 193 | Centre for Women's Safety and Wellbeing |
| 194 | Asylum Seeker Resource Centre |
| 195 | Youth Law Australia |
| 196 | No to Violence |
| 197 | Not published |
| 198 | Victorian Aboriginal Legal Service |
| 199 | Safe and Equal |
| 200 | Victims of Crime Assistance League |
| 201 | Legal Aid NSW |
| 202 | Family and Sexual Violence Alliance Steering Committee (Tas) |
| 203 | Sexual Assault Services Victoria |
| 204 | inTouch Women's Legal Centre |
| 205 | Women's Legal Service NSW |
| 206 | Rape and Sexual Assault Research and Advocacy |
| 207 | Women's Legal Service Victoria |
| 208 | Circle Green Community Legal |
| 209 | National Association of Services Against Sexual Violence |
| 210 | South-East Monash Legal Service Inc |
| 211 | Women's Legal Service Queensland |
| 212 | Women's Legal Services Australia |
| 213 | Federation of Community Legal Centres (Vic) |
| 214 | Full Stop Australia |
| 215 | Law Council of Australia |
| 216 | Centre for Innovative Justice |
| 217 | Maurice Blackburn Lawyers |
| 218 | Respect Victoria |
| 219 | Fair Work Ombudsman |
| 220 | Violet Co Legal & Consulting |

# Appendix C
# Primary sources

## Australian Legislation

### *Commonwealth legislation*

*Administrative Review Tribunal Act 2024* (Cth)

*Australian Human Rights Commission Act 1986* (Cth)

*Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth)

*Australian Law Reform Commission Act 1996* (Cth)

*Australian Securities and Investments Commission Act 2001* (Cth)

*Competition and Consumer Act 2010* (Cth)

*Corporations Act 2001* (Cth)

*Crimes Act 1914* (Cth)

*Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Act 2024* (Cth)

*Criminal Code 1995* (Cth)

*Evidence Act 1995* (Cth)

*Fair Work Act 2009* (Cth)

*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)

*Family Law Act 1975* (Cth)

*Family Law Amendment Act 2024* (Cth)

*Federal Court of Australia Act 1976* (Cth)

*Human Rights and Equal Opportunity Commission Act 1986* (Cth)

*National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth)

*Racial Discrimination Act 1975* (Cth)

*Regulatory Powers (Standard Provisions) Act 2014* (Cth)

*Sex and Age Discrimination Legislation Amendment Act 2011* (Cth)

*Sex Discrimination Act 1984* (Cth)

*Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth)

*Sex Discrimination and Other Legislation Amendment Act 1992* (Cth)

### *Commonwealth legislative instruments*

*Fair Work Regulations 2009* (Cth)

*Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)

*Federal Court Rules 2011* (Cth)

*Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Cth)

### *State and territory legislation*

*Anti-Discrimination Act 1977* (NSW)

*Anti-Discrimination Act 1991* (Qld)

*Anti-Discrimination Act 1992* (NT)

*Anti-Discrimination Act 1998* (Tas)

*Attorney-General Act 1999* (Qld)

*Biodiversity Conservation Act 2016* (NSW)

*Charter of Human Rights and Responsibilities Act 2006* (Vic)

*Children, Youth and Families Act 2005* (Vic)

*Civil Law (Wrongs) Act 2002* (ACT)

*Corrective Services Act 2006* (Qld)

*Crimes (Consent) Amendment Act 2022* (ACT)

*Crimes (Domestic and Personal Violence) Act 2007* (NSW)

*Crimes (Restorative Justice) Act 2004* (ACT)

*Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT)

*Crimes (Sentencing Procedure) Act 1999* (NSW)

*Crimes (Sentencing) Act 2005* (ACT)

*Crimes (Stealthing) Amendment Act 2021* (ACT)

*Crimes Act 1900* (ACT)

*Crimes Act 1900* (NSW)

*Crimes Act 1914* (Cth)

*Crimes Act 1958* (Vic)

*Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW)

*Criminal Code (Amendment) Consent Act 2004* (Tas)

*Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Act 2024* (Qld)

*Criminal Code 1913* (WA)

*Criminal Code 1924* (Tas)

*Criminal Code 1983* (NT)

*Criminal Code 1899* (Qld)

*Criminal Injuries Compensation Act 2003* (WA)

*Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld)

*Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld)

*Criminal Law Consolidation Act 1935* (SA)

*Criminal Procedure Act 1986* (NSW)

*Criminal Procedure Act 2004* (WA)

*Criminal Procedure Act 2009* (Vic)

*Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW)

*Defamation Act 2005* (NSW)

*Defamation Act 2005* (Vic)

*Discrimination Act 1991* (ACT)

*Disorderly Houses Amendment Act 1995* (NSW)

*Dispute Resolution Centres Act 1990* (Qld)

*Domestic and Family Violence Protection Act 2012* (Qld)

*Equal Opportunity Act 1984* (SA)

*Equal Opportunity Act 1984* (WA)

*Equal Opportunity Act 2010* (Vic)

*Evidence (Children and Special Witnesses) Act 2001* (Tas)

*Evidence (Children and Special Witnesses) Amendment Act 2024* (Tas)

*Evidence (Miscellaneous Provisions) Act 1958* (Vic)

*Evidence (Miscellaneous Provisions) Act 1991* (ACT)

*Evidence (National Uniform Legislation) Act 2011* (NT)

*Evidence Act 1906* (WA)

*Evidence Act 1929* (SA)

*Evidence Act 1939* (NT)

*Evidence Act 1977* (Qld)

*Evidence Act 1995* (NSW)

*Evidence Act 2001* (Tas)

*Evidence Act 2008* (Vic)

*Evidence Act 2011* (ACT)

*Family Violence Protection Act 2008* (Vic)

*Human Rights Act 2004* (ACT)

*Human Rights Act 2019* (Qld)

*Human Rights Commission Act 2005* (ACT)

*Intervention Orders (Prevention of Abuse) Act 2009* (SA)

*Jury Directions Act 2015* (Vic)

*Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic)

*Legislation Act 2001* (ACT)

*Limitation Act 2005* (WA)

*Limitation of Actions Act 1936* (SA)

*Limitation of Actions Act 1958* (Vic)

*Limitation of Actions Act 1974* (Qld)

*Penalties and Sentences Act 1992* (Qld)

*Personal Safety Intervention Orders Act 2010* (Vic)

*Personal Violence Act 2016* (ACT)

*Personal Violence Restraining Orders Act 2016* (NT)

*Respect at Work and Other Matters Amendment Act 2024* (Qld)

*Restraining Orders Act 1997* (WA)

*Sentencing Act 1991* (Vic)

*Sentencing Act 1995* (NT)

*Sentencing Act 1995* (WA)

*Sentencing Act 1997* (Tas)

*Sentencing Act 2017* (SA)

*Sex Industry Act 2019* (NT)

*Sex Work Decriminalisation Act 2022* (Vic)

*Sexual Offences (Evidence and Procedure) Act 1983* (NT)

*Summary Offences Act 1953* (SA)

*Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic)

*Victims of Crime (Financial Assistance) Act 2016* (ACT)

*Victims of Crime (Financial Assistance) Amendment Act 2024* (ACT)

*Victims of Crime Act 1994* (ACT)

*Victims of Crime Act 1994* (WA)

*Victims of Crime Act 2001* (SA)

*Victims of Crime Assistance Act 1976* (Tas)

*Victims of Crime Assistance Act 1996* (Vic)

*Victims of Crime Assistance Act 2006* (NT)

*Victims of Crime Assistance Act 2009* (Qld)

*Victims of Crime Commissioner Act 2015* (Vic)

*Victims of Crime Rights and Services Act 2006* (NT)

*Victims Rights and Support Act 2013* (NSW)

*Victims' Charter Act 2006* (Vic)

*Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld)

*Victims' Rights and Support Act 2013* (NSW)

*Youth Justice Act 2024* (Vic)

### *State and territory legislative instruments*

*Legal Profession (Barristers) Rules 2016* (Tas)

*Legal Profession (Barristers) Rules 2021* (ACT)

*Legal Profession (Solicitors) Conduct Rules 2015* (ACT)

*Legal Profession (Solicitors' Conduct) Rules 2020* (Tas)

*Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW, Vic, WA)

*Summary Offences Regulations 2016* (SA)

*Victims of Crime (Financial Assistance Scheme) Regulations 2024* (Vic)

*Victims of Crime (Financial Assistance) Regulation 2016* (ACT)

*Victims of Crime (Statutory Compensation) Regulations 2019* (SA)

*Victims of Crime Assistance Regulations 2007* (NT)

*Victims of Crime Assistance Regulations 2021* (Tas)

*Victims Rights and Support Regulation 2019* (NSW)

## Australian case law

*AB v Registrar of Births, Deaths & Marriages* (2007) 162 FCR 528

*Aldridge v Booth & Ors* (1986) EOC 92-177

*Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450

*AWK v Tasmania* [2024] TASCCA 5

*Aziz (a pseudonym) v The Queen* (2022) 110 NSWLR 317

*Benson v Drury* [2020] FamCAFC 303

*BQ v The King* (2024) 419 ALR 153

*Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245

*Briginshaw v Briginshaw* (1938) 60 CLR 336

*Bull v The Queen* (2000) 201 CLR 443

*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482

*Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645

*Cook (a pseudonym) v The King* (2024) 419 ALR 1

*Crofts v The Queen* (1996) 186 CLR 427

*Daley v Barrington* [2003] FMCA 93

*DH v R* [2015] NZSC 35

*DPP v Smith* [2024] HCA 32

*Duncan (a pseudonym) v The King* [2024] VSCA 27

*Dye v Commonwealth Securities Ltd* [2012] FCA 242

*Ewin v Vergara (No 3)* (2013) 307 ALR 576

*Ferguson v Tasmanian Cricket Association (trading as Cricket Tasmania) (No 2)* (2022) 404 ALR 262

*Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784

*GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857

*Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462

*Hoch v The Queen* (1988) 165 CLR 292

*Hughes v Hill* (2020) 277 FCR 231

*Hughes v The Queen* (2017) 263 CLR 338

*Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344

*Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847

*Jago v The District Court of New South Wales* (1989) 168 CLR 23

*Jarvis-Lavery v Commissioner of Taxation* [2023] FCA 1382

*Johanson v Michael Blackledge Meats* (2001) 163 FLR 58

*Keenan v Leighton Boral Amey NSW Pty Ltd* (2001) 163 FLR 58

*Kelleher v The Queen* (1974) 131 CLR 534

*Kennon v Kennon* (1997) 139 FLR 118

*Kenworthy v The Queen (No 2)* [2016] WASCA 207

*Kozarov v State of Victoria* [2020] VSC 78

*Kozarov v Victoria* (2022) 273 CLR 115

*Kraus v Menzie* [2012] FCA 3

*Lee v Smith* [2007] FMCA 59

*Lee v The Queen* (1998) 195 CLR 594

*Lehrmann v Network Ten Pty Limited* [2024] FCA 369

*Libke v The Queen* [2007] HCA 30

*Longman v The Queen* (1989) 168 CLR 79

*McMahon v Gould* (1982) 7 ACLR 202

*O'Callaghan v Loder* [1983] 3 NSWLR 89

*One Tree Community Service Inc v United Workers' Union* (2021) 284 FCR 489

*Pearce v The Queen* (1998) 194 CLR 610

*Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457

*Pichard v Pichard* [2022] FedCFamC1F 549

*Poniatowska v Hickinbotham* [2009] FCA 680

*R v Bauer* (2018) 266 CLR 56

*R v Mills* (2011) 252 FLR 295

*R v Porter (No 3)* [2022] ACTSC 236

*R v Sharma* (2002) 54 NSWLR 300

*R v TA* (2003) 57 NSWLR 444

*R v Turvey* (2017) 127 SASR 425

*Re Lynette Jane Aldridge v Grant Rodney Booth* [1988] FCA 170

*Re Ranger Uranium Mines Proprietary Limited and Others; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656

*Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* (1989) 20 FCR 217

*Reid v Howard* (1995) 184 CLR 1

*Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334

*San v Dirluck Pty Ltd & Anor* [2005] FMCA 750

*South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130

*Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261

*SZTRY v Minister for Immigration and Border Protection* [2015] FCAFC 86

*Taylor v August and Pemberton Pty Ltd* [2023] FCA 1313

*TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533

*Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960

*Weir v Telstra Corporation Limited* [2022] FCA 969

*Weller v Anderson* [2021] FCA 503

*Wong v Su* [2001] FMCA 108

*Wotton v Queensland (No 5)* [2016] FCA 1457

*Zheng v Beamish* [2004] FMCA 61

## Foreign legislation

*Sentencing Act 2002* (NZ)

*Youth Justice and Criminal Evidence Act 1999* (UK)

*Equality Act 2010* (UK)

*Title VII of the Civil Rights Act of 1964*, 42 USC (US)

### *Foreign legislative instruments*

*Criminal Procedure Rules 2020* (UK) SI 2020/759

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*R v Barton* [2019] 2 SCR 579

*R v Lubemba* [2014] EWCA Crim 2064

*R v Special Adjudicator; Ex parte Ullah* [2004] UKHL 26

*R v A (No 2)* (2002) 1 AC 45; [2001] UKHL 25

## International and supranational law

### *Conventions, declarations, and directives*

*Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1983)

*Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

*Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008)

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

*Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No 111 (entered into force 15 June 1960)

*International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)

*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

*International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

### *Case law and committee views*

Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence against women*, 11th sess, UN Doc A/47/38 (1992)

Committee on the Elimination of Discrimination against Women, *General Recommendation No 23: Political and public life*, UN Doc CEDAW/A/52/38 (3 August 2015)

Committee on the Elimination of Discrimination against Women, *General Recommendation No 35: Gender-based violence against women, updating general recommendation No. 19*, UN Doc CEDAW/C/GC/35 (26 July 2017)

# Appendix D
# Circumstances where there is no consent to sexual activity, by jurisdiction[1]

| Category | Circumstance | Cth | ACT | NSW | NT | Qld | SA | Tas | Vic | WA |
|---|---|---|---|---|---|---|---|---|---|---|
| Communication of consent | A person does not say or do anything to communicate consent | | | ✓ | | ✓ | | ✓ | ✓ | |
| | A person says or does something to communicate withdrawing agreement to the act either before or during the act | | ✓ | | | ✓ | | | ✓ | |
| | A person does not say or do something to resist the act | | | | | | | | | ✓ |
| | Any of the above | | ✓ | ✓ | | ✓ | | ✓ | ✓ | ✓ |

1 Christopher Dowling et al, *National Review of Child Sexual Abuse and Sexual Assault Legislation in Australia* (Consultancy Report, Australian Institute of Criminology, 2024) Table 4 (reproduced). The table was prepared by the Australian Institute of Criminology based on legislation as at 31 August 2023. The ALRC notes that the table does not reflect reforms in Queensland or the Northern Territory, which have both recently enacted more comprehensive lists. See *Criminal Code 1899* (Qld) s 348AA; *Criminal Code 1983* (NT) s 208GA(2).

| Category | Circumstance | Cth | ACT | NSW | NT | Qld | SA | Tas | Vic | WA |
|---|---|---|---|---|---|---|---|---|---|---|
| Threats or use of force or harm | A person participates in the act because of the infliction of violence or force on the person, or another person, an animal or property | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| | A person participates in the act because of a threat to inflict violence or force on the person, or another person, an animal or property | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| | A person participates in the act because of extortion, coercion, blackmail, psychological oppression, intimidation or a fear of public humiliation or disgrace of the person or another person | ✓ | ✓ | ✓ | | | ✓ | | ✓ | ✓ |
| | A person participates in the act because of a threat to mentally or physically harass the person or another person | | ✓ | | | | ✓ | ✓ | ✓ | |
| | A person participates in the act because of fear of harm of any type | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | |
| | A person participates because they are married to the other person | | ✓ | | | | | | | |
| | Any of the above | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |

| Category | Circumstance | Cth | ACT | NSW | NT | Qld | SA | Tas | Vic | WA |
|---|---|---|---|---|---|---|---|---|---|---|
| Fraud, deception, and mistakes | A person is mistaken about the identity of the other person | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | |
| | A person participates because the person is mistaken about the nature or purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes | ✓ | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | |
| | If the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes | | | | | | | | ✓ | |
| | A person participates in the act because of fraudulent misrepresentation of any fact made by someone else | | ✓ | ✓ | ✓ | | | ✓ | ✓ | ✓ |
| | A person participates in the act because of an intentional misrepresentation by another person about the use of a condom (stealthing) | | ✓ | | | | ✓ | ✓ | ✓ | |
| | Any of the above | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Abuse of position or relationship | A person participates in the act as a result of an abuse of a relationship of authority, power, trust or dependence | ✓ | ✓ | ✓ | | ✓ | | ✓ | ✓ | |
| | A person participates in the act as a result of an abuse of a professional relationship | | ✓ | | | | | | | |
| | Any of the above | ✓ | ✓ | ✓ | | ✓ | | ✓ | | |

| Category | Circumstance | Cth | ACT | NSW | NT | Qld | SA | Tas | Vic | WA |
|---|---|---|---|---|---|---|---|---|---|---|
| Detainment | A person is unlawfully detained or knows that another person is unlawfully detained | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | |
| Impairment and incapacitation | A person is incapable of agreeing to the act because of intoxication | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | |
| | A person does not have the capacity to agree or is unable to understand the nature of the act | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | |
| | A person is unconscious | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | |
| | A person is asleep | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | |
| | Any of the above | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | |

# Appendix E
# Restorative justice (RJ) for sexual violence in Australia and New Zealand — legislated, and government-funded, frameworks

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| New Zealand — adult | No single, enabling legislation for RJ: four separate Acts govern RJ for adults. New Zealand's Ministry of Justice funds and has oversight of RJ and community-based RJ providers.[1] | *Sentencing Act 2002* (NZ)<br>*Victims' Rights Act 2002* (NZ)<br>*Parole Act 2002* (NZ)<br>*Corrections Act 2004* (NZ)<br>Ministry of Justice (NZ), *Restorative Justice: Practice Framework* (2019)<br>Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (2013)<br>Ministry of Justice (NZ), *Practice Standards for Family Violence Cases* (2019) |
| | Since 2014, all District (mid-tier) Court matters, including those involving sexual offences, must be referred for an RJ suitability assessment after a guilty plea and before sentencing, if this is consistent with the wishes of the person who has been harmed. In addition, all courts have a discretion to refer matters for RJ following a guilty finding (for example, a conviction following a not guilty plea) and before sentencing. Outcomes of RJ must be considered in sentencing. | *Sentencing Act 2002* (NZ)<br>ss 8(j), 10, 24A |

1 Ministry of Justice (NZ), *Restorative Justice Standards for Sexual Offending Cases* (June 2013) 4; Ministry of Justice (NZ), *Restorative Justice Review* (Findings Report, July 2023) 3, 5.

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| New Zealand — children/young people | Youth Justice Family Group Conferences available for children (12–13 years old) and young people (14–17 years old) accused of sexual offending. Conferences must be held before a criminal prosecution against a young person is initiated. | *Oranga Tamariki*, or *Children, Young Persons and Their Families Act 1989* (NZ)<br>ss 245, 247–271, see also s 272 (children's liability to be prosecuted) |
| | Family Group Conferencing is not the same as RJ but has been described as 'broadly compatible' with its principles.[2] Research from 2004 suggests there are low rates of participation (less than 30%) for people harmed.[3] | |

2 Allison Morris, 'Youth Justice in New Zealand' (2014) 31 *Crime and Justice* 243, 243.

3 Lydia O'Hagan and Chris Marshall, 'The Present State and Future Direction of Restorative Justice Policy in New Zealand: Roundtable Discussion, 16–17 October, 2014' [2015] *Occasional Papers in Restorative Justice Practice* 7.

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| Australian Capital Territory — adult | An RJ framework was established in legislation in 2004. RJ has been available for sexual violence since 2018. The framework is administered by the Restorative Justice Unit within the Justice and Community Safety Directorate of the ACT Government.<br>Current reviews are considering how to improve the scheme, including by reducing delay and increasing referrals and the accessibility of RJ for sexual violence.[4] | *Crimes (Restorative Justice) Act 2004* (ACT)<br>*Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT) |
| | Sexual violence must have been reported to police for a referral to RJ.[5] | See *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT)<br>sch 6 cl 4 |
| | Before charges are filed, less serious sexual offences can be referred to RJ in exceptional circumstances, but the referral should have no effect on any other action or proposed action, such as a decision to file charges. | *Crimes (Restorative Justice) Act 2004* (ACT)<br>ss 7, 16(2), 33(2) |
| | After charges are filed and before a guilty plea or finding, less serious sexual offences can be referred to RJ in exceptional circumstances. Serious sexual offences cannot be referred to RJ. | *Crimes (Restorative Justice) Act 2004* (ACT)<br>ss 16(2), 27(5), 33(2) |
| | Matters can be referred to RJ following a guilty plea or finding and before sentencing. A court may but is not required to take the outcome of RJ into account to reduce the severity of a sentence. A court should not increase a sentence because an offender chose not to take part in RJ or stopped taking part. | *Crimes (Restorative Justice) Act 2004* (ACT)<br>s 53(e)<br>*Crimes (Sentencing) Act 2005* (ACT)<br>s 33(1)(y) |
| | Cases can be referred to RJ post-sentence without the offender being notified in advance. At all other stages, the offender must be informed of and agree to a referral. | *Crimes (Restorative Justice) Act 2004* (ACT)<br>s 28A<br>*Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT)<br>cl 4 |

4 Shane Rattenbury MLA, 'Boost for Restorative Justice in the ACT' (Media Release, 15 July 2024).

5 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (2021) 63. This appears to be the case even though the 'objects' section of the Act includes 'enabl[ing] access to restorative justice in relation to offenders and offences not dealt with by the criminal justice process': *Crimes (Restorative Justice) Act 2004* (ACT) s 6(e).

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| Australian Capital Territory — children/ young people | RJ has been available for sexual offences since 2018 for children who are at least 10 years old and young people — whether they are the person responsible, or the person harmed. Children under 10 years old are excluded from participation in RJ but can be represented by a related adult. | *Crimes (Restorative Justice) Act 2004* (ACT)<br>ss 12, 16(1), 17 |
| | As for adult RJ, sexual violence must have been reported for a referral to RJ.[6] | See *Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018* (ACT)<br>cl 4 |
| | Before charges are filed, less serious offences can be referred to RJ in exceptional circumstances, but the referral should have no effect on any other action or proposed action, such as a decision to file charges. | *Crimes (Restorative Justice) Act 2004* (ACT)<br>ss 7, 16(2), 33(2) |
| | For child offenders: after charges are filed, all sexual offences can be referred to RJ. | *Crimes (Restorative Justice) Act 2004* (ACT)<br>s 16(3) |
| | For young offenders: after charges are filed and before a guilty plea or finding, less serious sexual offences can be referred to RJ in exceptional circumstances. Serious sexual offences cannot be referred to RJ before a guilty plea or finding. Serious sexual offences can be referred to RJ following a guilty plea or finding and before sentencing. | *Crimes (Restorative Justice) Act 2004* (ACT)<br>ss 16(2), (4) |

6 Sexual Assault Prevention and Response Steering Committee (ACT) (n 5) 63. This appears to be the case even though the 'objects' section of the Act includes 'enabl[ing] access to restorative justice in relation to offenders and offences not dealt with by the criminal justice process': *Crimes (Restorative Justice) Act 2004* (ACT) s 6(e).

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| New South Wales — adult | Since 1999, RJ has been available if the person responsible has been found guilty, sentenced, and is serving a sentence, whether in custody or on parole. RJ is run by the Victims Register and Restorative Justice Unit (NSW Corrective Services).<br><br>All legal matters must have been finalised (eg, no outstanding appeals or civil actions, no imminent State Parole Authority hearing).<br><br>The program is not legislated. Its main features are set out in the 'Restorative Justice Service — Policy', which includes eligibility and suitability criteria; types of RJ available; referral criteria; a 'quality assurance' framework; and guidance on legal issues. | Corrective Services, Department of Communities and Justice (NSW), *Restorative Justice Service: Policy* (November 2023) |
| | While it is available for sexual offences, RJ is not available for offences that involve domestic violence. Alternative processes that do not involve communication between the person responsible and the person harmed (eg, restorative circles) may be facilitated. | Corrective Services, Department of Communities and Justice (NSW), *Restorative Justice Service: Policy* (November 2023) 13 [4.4] |
| | For sexual offences, if the person responsible is eligible for a sex offender program, and such a program is available to them, they must have successfully completed this program before any communication with the person harmed, unless there are extenuating circumstances. | Corrective Services, Department of Communities and Justice (NSW), *Restorative Justice Service: Policy* (November 2023) 18 [5.2] |
| | Participating in RJ should not have any impact on the sentence or parole of the person responsible. | Corrective Services, Department of Communities and Justice (NSW), *Restorative Justice Service: Policy* (November 2023) 19 [6.1] |
| | No specific legal protection of confidentiality. A court has the right to require participants and facilitators to attend court to give evidence about disclosures made in the context of an RJ process or to subpoena documents that were mentioned or produced during RJ. | Corrective Services, Department of Communities and Justice (NSW), *Restorative Justice Service: Policy* (November 2023) 20 [6.2] |

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| New South Wales — children/young people | Youth Justice Conferencing is available as part of the criminal justice system to young people who have admitted to or been found guilty of offences, but sexual offences and most domestic and family violence offences are excluded. | *Young Offenders Act 1997* (NSW)<br>Youth Justice NSW, *Conferencing Manual* (2021) |
| Northern Territory — adult | The Northern Territory's *Charter of Victims' Rights* suggests that RJ options are available for some crimes, but as far as we know, RJ has not been used for sexual offences in the Northern Territory. | Northern Territory Government, *Northern Territory Charter of Victims' Rights*, 7 |
| Northern Territory — children/young people | The Northern Territory legislates restorative justice conferencing for children and young people. Most serious sexual offences are excluded. | *Youth Justice Act 2005* (NT)<br>ss 38A, 39(1), 39(2)(c), 39(3), 64, 84<br>*Criminal Code Act 1983* (NT)<br>pt VIA (listing some of the prescribed sexual offences) |
| Queensland<br>— adult | RJ — described as 'mediation' in the *Dispute Resolution Centres Act 1990* (Qld) — has been available since the 1990s, including for sexual offences.<br>The Dispute Resolution Branch in the Department of Justice and Attorney-General operates an Adult Restorative Justice Conferencing service, which 'is currently used primarily as a diversionary option for criminal matters at the pre-trial stage, although an RJ conference can also be requested at other stages of the criminal justice process — including as a pre-sentence and post-sentence option.'[7] | *Dispute Resolution Centres Act 1990* (Qld) |
| | In response to recommendations in Hear Her Voice – Report Two, the Queensland Government committed to looking at how to improve and expand adult restorative justice. The Dispute Resolution Branch has been funded to lead this project.[8] | |

7 Sentencing Advisory Council (Qld), *Sentencing of Sexual Assault and Rape: The Ripple Effect* (Consultation Paper, March 2024) 69.

8 Ibid 70.

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| Queensland<br>— children/ young people | RJ is available for children and young people who are accused of offending, including sexual offences. It is part of the criminal justice system and available as a diversionary process before or after charges are filed. The police or the court can refer a child or young person to RJ. The child or young person must admit to committing the offence. Sentencing courts can also refer children and young people to RJ as part of a sentence and can make a 'Restorative Justice Order'.<br>For an RJ conference to be convened, there must be some degree of participation from the person harmed (who may be a child or young person), either directly or through a representative. A representative can include someone from a victims' advocacy group. Participation can include pre-recorded communication. | *Youth Justice Act 1992* (Qld) pt 3 |
| South Australia<br>— adult | RJ is not available through any programs or schemes supported by government.[9] A 2004 pilot made RJ available for adult offenders following a guilty plea. It was positively evaluated, with the evaluation recommending a legislated framework for RJ, but this has not been implemented.[10] | N/A |

9 Corrine Marsland and Clare Farmer, 'Restorative Justice for Adult Offenders in South Australia: Judicial Perspectives and Insights' (2024) 27(2–3) *Contemporary Justice Review* 91, 92.

10 Ibid 110.

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| South Australia — children/ young people | 'Youth Justice Family conferencing' is available as part of the criminal justice system for children and young people (aged 10–17 years) in South Australia who are accused of offending, including for 'minor' sexual offences. It is available as a diversionary process before or after charges are filed.<br><br>People who have been harmed, including children over ten years and young people, can be invited (along with their guardians) and may choose to participate, but conferences can go ahead without their involvement. | *Young Offenders Act 1993* (SA)<br><br>s 4, pt 2 div 3 |
| | 'Youth Justice Family conferencing' is part of the criminal justice system and the legislation does not specifically include restorative principles. There must be a police representative at all conferences, and convenors are usually Magistrates of the Youth Court. | *Young Offenders Act 1993* (SA)<br><br>ss 9, 10, 11 |
| | Conferencing in sexual offence cases has been extensively and positively evaluated. Daly suggests it provided a validating experience for people who experienced harm who participated. She also found that for first time offenders, re-offending was 'significantly slowed' by comparison with offenders who were dealt with in court, but only if the offenders participated in the 'Mary Street Adolescent Sexual Abuse Prevention Program'.[11] | |
| Tasmania — adult | Sentencing courts may refer matters to 'mediation' following a guilty plea or finding and before sentencing and may take the outcomes of mediation into account in sentencing. Victims must agree to the referral to mediation, which occurs between the victim and the offender: *Sentencing Act 1997* (Tas) ss 84(1), 85(1). The legislation does not refer to restorative principles. | *Sentencing Act 1997* (Tas)<br><br>ss 84–88 |

11 Kathleen Daly, 'Conferences and Gendered Violence: Practices, Politics, and Evidence' in Inga Vanfraechem and Estelle Zinsstag (eds), *Conferencing and Restorative Justice: International Practices and Perspectives* (Oxford University Press, 2012) 117, 128–9.

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| Tasmania — children/young people | 'Community Conferencing' is a diversionary model available for children and young people as part of the criminal justice system. The legislation does not specifically include restorative principles. For police diversions, people who have been harmed, including children and young people, are notified about conferences and can request to be informed about their outcome but are not invited to participate: Youth Justice Act, s 14(2)(d). They are invited to participate in court ordered community conferences: Youth Justice Act, s 38(2)(f). | *Youth Justice Act 1997* (Tas)<br>pt 2 div 3, pt 4 div 4 |
| Victoria<br>— adult | RJ is available at any time for sexual offences that involve family violence, although if a legal process is underway, the RJ will be put on hold. Separately, RJ is available for any sexual offence where the person responsible has been sentenced and is serving a sentence or is on parole.[12]<br>The 'Victim-Centred Restorative Justice Program' is a free service run by the Department of Justice and Community Safety. The provision of RJ is guided by the 'Framework' originally developed for RJ for family violence. | Victorian Government, *Framework: Restorative Justice for Victim Survivors of Family Violence* (2017) |
| Victoria<br>— children/ young people | Referred to as 'group conferencing', RJ is available for some crimes but not for sexual offences.[13] However, restorative justice conferences can be part of treatment programs for children and young people displaying harmful sexual behaviours. | *Children, Youth and Families Act 2005* (Vic)<br>s 415 |

12 Department of Justice and Community Safety (Vic), 'Restorative Justice for Victims of Crime on the Victims Register' <www.justice.vic.gov.au/vcrj/restorative-justice-for-victims-of-crime-on-the-victims-register>.

13 Children's Court of Victoria, 'Group Conferencing' <www.childrenscourt.vic.gov.au/criminal-division/group-conferencing>.

| Jurisdiction | Description | Legislation/Policy/Guidelines |
|---|---|---|
| Western Australia — adult | Sentencing courts may refer matters to 'mediation' following a guilty plea or finding and before sentencing and may take the outcomes of mediation into account in sentencing. The 'Victim-offender Mediation Unit', which is part of the Office of the Commissioner for Victims of Crime in Western Australia, provides 'reparative mediation' based on restorative justice principles, but not for sexual offences.[14] | *Sentencing Act 1993* (WA)<br>pt 3 div 5 |
| Western Australia — children and young people | 'Juvenile Justice Team Meetings' are available for children and young people who accept responsibility for offending, as part of a diversionary scheme for lesser offences, including less serious sexual offences. Children and young people who have been harmed may contribute to or participate in these meetings.<br>'Juvenile Justice Team Meetings' operate as part of the criminal justice system and the legislation does not specifically include restorative principles. | *Young Offenders Act 1994* (WA)<br>pt 5 divs 2, 3 |

14 Office of the Commissioner for Victims of Crime, Department of Justice (WA), *Alternatives to Criminal Justice Responses* (Discussion Paper 4, Improving Experiences for Victim Survivors: Review of Criminal Justice System Responses to Sexual Offending, 2023) 9.