Collaborative submission to ALRC Issues Paper 49

> We are all visitors to this time, this place. We are just passing through. Our purpose here is to observe, to learn, to grow, to love and then we return home.
>
> – Australian Aboriginal saying
> (*contributor Sandra Noble*)

We respectfully acknowledge the Traditional Owners of the lands throughout Australia. For more than 65,000 years, First Nations communities, culture, and lore have shown a deep and abiding connection to the land, sea, sky and waterways. We pay respects to their Ancestors, and descendants, who continue those cultural and spiritual connections to Country. We honour the ongoing leadership of First Nations communities across Australia and those who work with them to address inequalities and improve access to justice. We pay respects to Elders past, present and emerging.

We also honour the lived and living expertise of all victims and survivors of sexual violence, which impacts all ages, cultures, abilities and backgrounds. We recognise those who, today, are experiencing sexual violence. We are committed to doing all we can to promote their access to justice. We pay respects to those who did not survive and to their family and friends.

The voices of those whose lives are affected by the decisions governments make should fundamentally inform those decisions.[1]

Yellow Pansy Butterfly With a Broken Wing and An Ant, Hari K Patibanda, Licensed under CC2.0.

[1] National Centre for Action on Child Sexual Abuse; University of Queensland.

31 May 2024

Hon Marcia Neave AO, Judge Liesl Kudelka
Commissioners
Australian Law Reform Commission
Inquiry into Justice Responses to Sexual Violence Australian Law Reform Commission
PO Box 209 Flinders Lane VIC 8009
E: jrsv@alrc.gov.au

Dear Commissioners,

Thank you for the opportunity to make submissions on Issues Paper 49 (Issues Paper) by the Australian Law Reform Commission (ALRC), in its inquiry into Australia's *Justice Responses to Sexual Violence* (Inquiry). The Inquiry is an urgent and necessary response to the increasingly shocking prevalence of sexual violence in Australia.

These submissions represent a collaboration between several members of the Expert Advisory Group ('EAG') to the ALRC's current Inquiry, and some of the co-authors of a 2023 report that is currently informing the Inquiry, *Specialist Approaches to Managing Sexual Assault Proceedings* ('Specialist Report').[2]

The Specialist Report was produced by researchers at the CQUniversity College of Law and Justice, an innovative fully online law school with a strong focus on equity, access to legal education, and social justice, in conjunction with the Queensland Centre for Domestic and Family Violence Research ('QCDFVR'). The QCDFVR initiates, undertakes, and collaborates on innovative and interdisciplinary research and publications to reduce deficits in domestic, sexual and family violence knowledge and literature. QCDFVR is also committed to undertaking applied research and evaluation that supports the development of policy and practice in the field of domestic and family violence prevention.

The EAG members are drawn from many diverse communities, and the impacts of our lived and/or living experience of sexual violence are different for each of us. However, we are united with the common thread of trauma – from sexual violence, and also from the system that was supposed to provide us with a sense of justice. Our First Nations colleagues also deal with a myriad of complex intersecting factors including racism, colonialism, historical and intergenerational trauma. Yet each of us are driven to seek innovative and transformative reform of the 'justice system',[3] as well as meaningful alternatives to it, for all who have been (or, tragically, will be) subjected to sexual violence. We see this Inquiry as a once-in-a-generation opportunity for systemic, nation-wide change.

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[2] Amanda-Jane George, Vicki Lowik, Masahiro Suzuki and Nichola Corbett-Jarvis, *Specialist Approaches to Managing Sexual Assault Proceedings* (Report, 2023) ('Specialist Report'). The Report was funded by the Australasian Institute of Judicial Administration and the Commonwealth Attorney-General's Department.

[3] We use this term because it is adopted in the Issues Paper and in common legal parlance, but note that many victim-survivors do not experience justice in this system as it presently stands.

Our submissions do not answer each of the questions in the Issues Paper. They commence with an important preliminary issue: the framework underpinning the ALRC's analytical work, its forthcoming proposals, and its recommendations for reform. Following this discussion our submissions proceed in the general order of the Issues Paper: disclosure; police response; prosecution. We then discuss specialist courts and alternative pathways.

We thank you for your consideration.

Regards,
The Collaborating Team
(See Appendix B).

Submissions

Below is a compilation of the submissions we make. We note there is some overlap to highlight areas of particular concern for our collaborative group.

Submission 1:
The Commission should expressly adopt a human rights framework as the foundation and touchstone for its recommended reforms in this Inquiry, with the objective of introducing a greater focus on human rights in the criminal justice and associated responses to sexual violence.

Submission 2:
The Commission's recommended proposals and reforms should be clearly informed by and reflect lived experience perspectives and voices from all marginalised communities, as rights holders.

Submission 3:
The Commission should recommend that the Commonwealth, State and Territory governments work together to ensure compliance with Australia's obligations in the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), including those contained in the CEDAW Committee *General Recommendation 35 On gender-based violence against women*, as a matter of urgent priority. This includes the recommendations on legislative, executive and judicial matters.

Submission 4:
The Commission should recommend specialist training for all judicial officers, to eliminate acts or practices that apply stereotypical notions of gender-based violence, in order to secure for women and girls equal treatment before the law, a fair trial, and effective remedies. In doing so, the Commission should raise awareness that such training is mandated by Australia's CEDAW obligations. On training, we also note submission 8.

Submission 5:
The Commission should, in its Inquiry Report, raise awareness that the CEDAW requires the Commonwealth, State and Territory governments to work together to ensure adequate funding for measures addressing gender-based violence, such as those emerging from this Inquiry. The continued failure to provide adequate budgetary resources to enable a system that functions effectively in practice is a human rights violation under the CEDAW, as interpreted by *General Recommendation 35*.

Submission 6:
The Commission should, to allow due time for wide and inclusive consultations, recommend a separate inquiry regarding First Nations women and girls' experience of sexual violence, indigenous-led responses, and implementing the CEDAW Committee *General Recommendation 39 On the rights of Indigenous women and girls*.

Submission 7:
The Commission should recommend that the States and Territories embed a broad requirement for trauma-informed training and practice across all agencies, institutions, organisations and actors dealing with victim-survivors of sexual violence, including police, court personnel, judicial, legal and support services. The States and Territories should work with relevant police services and heads of jurisdiction to legislatively embed this requirement for police and all legal practitioners. Consideration should be given to introduction of a 'trauma-informed legal practice' or similar unit as a new knowledge area in all Australian undergraduate law degree programs.

Submission 8:
The Commission should recommend that the States and Territories fund, develop and implement specialist sexual violence training for the participants in the justice system mentioned in recommendation 7, in consultation with victim-survivors, First Nations peoples, service and legal system stakeholders. Such training should be appropriate to the participants' role(s), include trauma impacts on behaviour, memory and neurobiology, and address cultural safety, diversity and the intersecting needs of marginalised 'overrepresented' communities including First Nations people, children and young people, people from culturally and

linguistically diverse (CALD) backgrounds, im/migrants, people with disability, LGBTQIA+ communities, people who have been convicted of criminal offences and been incarcerated, sex workers and older people. The training should be developed with expert input on evidence-based best practice principles, and should be ongoing on a 'refresher' basis.

Submission 9:
The Commission should, when considering reforms to the criminal justice response to sexual violence, including training reforms and information aids and resources, ensure that they reflect the need for physical, emotional and cultural safety of women and girls with disabilities, and are accessible and inclusive.

Submission 10:
The Commission should, when considering reforms to court infrastructure, recommend accessibility standards.

Submission 11:
The Commission should, when considering reforms to information systems, ensure that all websites be funded to enable upgrading to Web Content Accessible Guidelines (WCAG) standard 2.0 and all resources developed are accessible to screen readers, as well as available in audio format, video resources are captioned and interpreted into AUSLAN, and Easy Read resources are available.

Submission 12:
Further to our previous submission on funding, the Commission should, when considering reforms impacting women and girls with disabilities, recommend long-term funding models for specialised lived experience-led organisations and peer led organisations specialising in these intersections.

Submission 13:
The Commission, when proposing and recommending reforms, including training reforms and information aids and resources, ensure that such reforms are inclusive of LGBTQIA+ communities' experiences of sexual violence.

Submission 14:
The Commission, when proposing and recommending reforms, including training reforms and information aids and resources, ensure that such reforms are inclusive of im/migrants' experiences of sexual violence.

Submission 15:
The Commission should recommend the full decriminalisation of sex work federally and in all states and territories, including noting that the criminalisation of sex worker or buyer lead to an increased risk of violence.

Submission 16:
The Commission should recommend including the words 'sex workers' in anti-discrimination and anti-vilification protections on both state and federal level.

Submission 17:
The Commission should recommend the usage of the words 'sex work' in policies and legislation to accurately describe the consensual sexual activity between adults in exchange for money and the usage of language that distinguishes rather than conflates sexual exploitation with sex work.

Submission 18:
The Commission, in its recommendations regarding police training, should include recommendations around the necessity for training as to the perspectives and experiences of sex workers and victim-survivors, and the need for appropriate language when interacting with sex workers.

Submission 19:
Further to our previous submission on funding, the Commission should recommend adequate funding models for peer led organisations, supports and solutions for sex workers who have experienced sexual violence or exploitation.

Submission 20:
The Commission, when proposing and recommending reforms, including training reforms, information aids and resources, and evidentiary processes, ensure that such reforms are inclusive of older womens' experiences of sexual violence.

Submission 21:
The Commission should recommend all States and Territories adequately fund and implement specialist training for all police personnel, including the Australian Federal Police, and specialist interview training for all police interviewers dealing with sexual violence victim-survivors.

Further to our previous submission on training, police training should include trauma impacts on behaviour, memory and neurobiology, and address cultural safety, diversity and working with vulnerable communities including First Nations people, children and young people, people from culturally and linguistically diverse (CALD) backgrounds, im/migrants, people with disability, LGBTQIA+ communities, people who have been convicted of criminal offences and been incarcerated, sex workers and older people. The training should be victim-centred, co-designed by those with lived experience and developed with expert input on evidence-based best practice principles. Participants should be required to undertake periodic 'refresher' courses to update their training on an ongoing basis.

Submission 22:
The Commission should recommend that the States and Territories fund, develop and implement, together with victim-survivors (including from overrepresented communities), service and legal system stakeholders, a co-designed range of information aids and resources to assist disclosure and reporting, and outline the legal process, the various options, alternatives, and supports available for victim-survivors.

Resources should be age and developmentally appropriate, trauma-informed, culturally safe, accessible, inclusive, and widely publicised so that victim-survivors and their families or supporters can easily locate them. They should be produced in a variety of languages, and formats appropriate for victim-survivors with disability. Formats should include online text, videos for those with low literacy levels, as well as hard copies for those who do not have access to the internet. The hard copies should be made available at many different outlets, institutions, agencies and providers including police, health providers, specialist sexual assault services, and Centrelink.

Submission 23:
Further to our previous submission on funding, the Commission recommend specific funding for victim-led initiatives that enhance a victim-survivors' ability to access the legal system.

Submission 24:
The Commission should recommend the Commonwealth Government work with State and Territory Governments to ensure reliable, adequate, long-term funding models for all frontline and support services, and greater availability of trauma-informed reporting spaces in specialist sexual assault services.

Submission 25:
The Commission should recommend a legally enforceable Duty of Care for victims.

Submission 26:
The Commission should recommend a legally mandated minimum police standard of investigation.

Submission 27:
The Commission should recommend an independent, legally mandated complaints mechanism for handling victim-survivors complaints regarding police conduct.

Submission 28:
The Commission should recommend that instances of cross-jurisdiction rape and sexual assault should be handled by the Australian Federal Police.

Submission 29:
The Commission should recommend that, where not already available, the States and Territories in consultation with victim-survivors, First Nations peoples and service and legal system stakeholders, fund, develop and implement a professional victim advocate service to be available from before police disclosure, through to report, trial (including support during cross-examination) and post-trial (including assistance for preparation of victim impact statements).

Further to our previous submission on training, victim-advocate training should include trauma impacts on behaviour, memory and neurobiology, cultural safety, diversity and working with vulnerable communities including First Nations people, children and young people, people from culturally and linguistically diverse (CALD) backgrounds, im/migrants, people with disability, LGBTQIA+ communities, people who have been convicted of criminal offences and been incarcerated, sex workers and older people. The training should be victim-centred, co-designed by those with lived experience and developed with expert input on evidence-based best practice principles. Knowledge of police and legal processes, the range of services and support options, and alternatives to the criminal justice system, would also be required to provide the much needed informational 'bridge' across institutions, agencies and services for victim-survivors. The training should be ongoing on a 'refresher' basis.

Submission 30:
The Commission should recommend that the States and Territories uniformly implement specialist training for all prosecutors dealing with sexual offences. Further to our previous submission on training, prosecutor training should include trauma impacts on behaviour, memory and neurobiology, cultural safety, diversity and working with vulnerable communities including First Nations people, children and young people, people from culturally and linguistically diverse (CALD) backgrounds, im/migrants, people with disability, LGBTQIA+ communities, people who have been convicted of criminal offences and been incarcerated, sex workers and older people. The training should be victim-centred, co-designed by those with lived experience and developed with expert input on evidence-based best practice principles. Prosecutors should be required to undertake periodic 'refresher' courses to update their training on an ongoing basis.

Submission 31:
The Commission should recommend prosecutors keep victim-survivors informed by regular communications with prosecutors, according to a communications protocol, unless requested otherwise.

Submission 32:
The Commission should recommend that the process of plea negotiations involve prior consultation with victim-survivors with time for them to consult relevant support and advocacy services before providing their opinion on the proposal.

Submission 33:
The Commission should recommend that all victim-survivors should have the benefit of a court preparation program.

Submission 34:
The Commission should recommend, where not already established in States and Territories, that an independent review panel for prosecution decision-making be established.

Submission 35:
The Commission should recommend that vertical prosecution be considered best practice for sexual offences cases and implemented wherever possible, particularly in child sexual abuse cases.

Submission 36:
The Commission should recommend that the above measures be incorporated in consistent, consolidated and regularly updated written prosecution guidelines for each State and Territory. The process for independent reviews of prosecution decision-making should also be detailed in the guidelines. Prosecutors should have an obligation to inform victim-survivors of their right to apply for a review, which should also be detailed in the guidelines. Consideration should be given to the prosecution guidelines in Aotearoa New Zealand.

Submission 37:
The Commission should recommend legislative changes to allow for independent lawyers for victims to support, advise and represent victims in all steps of the police and legal processes.

Submission 38:
The Commission should recommend funding to allow for independent lawyers for victims to support, advise and represent victims in all steps of the police and legal processes.

Submission 39:
The Commission should recommend a commitment to cultural and judicial education relating to the role of independent lawyers for victims to facilitate understanding and adherence to procedural guidelines, and to minimise victim-blaming for victims who may present to police with a lawyer.

Submission 40:
The Commission should recommend, where not otherwise implemented, that States and Territories work with heads of jurisdiction to establish a pilot specialist sexual violence court or list in each State or Territory. Appropriate data should be collected for evaluation at 12 months, two years and three years.

Submission 41:
The Commission should recommend the best practice measures set out in the Specialist Report as a non-exhaustive indication of features required for an appropriate response by the justice system to sexual violence.

Submission 42:
The Commission should recommend the States and Territories work together to implement, where not otherwise available, the following initiatives discussed in the Specialist Report:

- Mandatory specialist sexual violence training for all defence counsel appearing in sexual violence cases, as per our training submissions;
- Mandatory ground rules hearings in every State and Territory, as per the Victorian model;
- The option as standard for victim-survivors to utilise pre-recorded evidence (including evidence in chief (with the option of using a recorded police interview), cross-examination, re-examination);
- The option as standard for 'special relationship' witnesses in child sexual abuse cases to pre-record all evidence, as per the National Centre submissions;
- The piloting of a juryless specialist sexual violence court;
- Closer consideration of wrap-around services such as Thuthuzela Care Centres, where not otherwise available in a jurisdiction.

Submission 43:
The Commission should recommend that the States and Territories implement a consistent approach to the exclusion of good character reference in sexual violence matters.

Submission 44:
The Commission should, in its consideration of reforms to tendency, coincidence and discreditable conduct, give serious consideration to recommending the implementation of a model similar to the United Kingdom for introduction of bad character evidence, admissible on satisfaction of one of a number of 'gateways'.

Submission 45:
We acknowledge and gratefully adopt the submissions by QSAN regarding a new innovative civil approach, as outlined in those submissions and appendices.

Submission 46:
We acknowledge and gratefully adopt the submissions by the National Centre for Action on Child Sexual Abuse regarding legislative implementation of the GLJ decision.

Submission 47:
The Committee should recommend that, where 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'. The choice of whether to use restorative justice must be that of the victim-survivor, and that implementation and use of restorative justice mechanisms must not come at the expense of genuine reform of the criminal justice system.

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1. Framework underpinning this Inquiry

Transparent articulation of frameworks and approaches is an essential element in any robust analytical work. We submit that the Commission should expressly adopt human rights as a conceptual and legal framework to underpin its work in this Inquiry. This is an important preliminary point, because the approach adopted by the Commission will necessarily impact on its analysis, deliberations, proposals and its final recommendations. In Appendix A, we also discuss the need for the Commission to adopt systems thinking and human-centred design approaches to its work, given the requirement for systems thinking in the Terms of Reference (ToR).[4] Applying human-centred methodology and a human-rights analytical lens will together provide the necessary foundations for reforms that are 'trauma-informed, holistic, whole-of-systems and transformative' as envisioned by the ToR.[5]

1.1 Human rights as foundational framework

We refer to the Specialist Report, which details the international and Australian human rights framework of relevance in this space.[6] We note the Australian Human Rights Commission (AHRC) has candidly stated that:

> The national framing of human rights protections in Australia to date has been intermittent and incomplete. There has been patchy implementation, false starts and abandoned plans and frameworks. This has resulted in significant gaps in protection of human rights at home and failure to fully implement our international obligations.[7]

However, the Commissioners will no doubt be aware of the very good progress being made in overhauling Australia's human rights framework and working towards the introduction of important new human rights legislation.[8] As Australia turns to embrace human rights more

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[4] Attorney-General, Australian Government, 'Terms of Reference' (24 January 2024) 2.

[5] Ibid.

[6] Specialist Report 18-21. The report relevantly discusses the *Charter of the United Nations 1945* (Web Page), *Universal Declaration of Human Rights 1948* (Web Page), *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted by UN General Assembly 18 December 1979 (entry into force as an international treaty 3 September 1981). While not legally binding, these provisions have been incorporated in various international treaties to which Australia is a party, including the *International Covenant on Civil and Political Rights 1976* (signed 1972, ratification/accession 1980), *Convention on the Elimination of All Forms of Discrimination against Women 1981* ('CEDAW') (signed 1980, ratification/accession 1983). Australia, as a party State, has a 'legal obligation to prevent and respond to all forms of violence against women, including sexual violence, and provide remedies to victim-survivors': Indira Rosenthal, Rodney Croome and Robin Banks, *Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth* (Report for the Human Dignity Trust, November 2019), 19 <https://www.humandignitytrust.org/wp-content/uploads/resources/Good-Practice-in-Human-Rights-Compliant-Sexual-Offences-Laws-in-the-Commonwealth_Final.pdf>.

[7] Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Summary Report, 2023) 8.

[8] Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (May 2024). However, we note with concern the Committee's conclusion that: 'Australia's model of federation means it is not within the federal government's power to address concerns falling within the remit of the states and territories. For example, concerns regarding … gender-based violence' [9.10]. We support the position of the Womens' Legal Service New South Wales, that a federal HRA that expressly addressed gender-based violence would assist in areas where the federal government has responsibility and would 'send a powerful message about the pervasiveness of gender-based violence and the need to address it' across jurisdictions' [8.221].

enthusiastically at a national level, we maintain that the time is right to reframe the narrative around sexual violence.

We believe that the Commission can, in its proposals and recommendations, signal its strong support for the emerging Australian human rights dialogue and show innovative thought leadership in this space. Of the many different fields of law, the law and practice regarding sexual violence canvasses matters that are both deeply personal, and quintessentially human; it is entirely apposite to approach such matters with a human rights lens.

Currently, the language of international human rights law is somewhat imperfect in describing sexual violence as gender-based discrimination; it is overwhelmingly experienced by women and girls but it can obviously be experienced by any gender identity (including nonbinary and agender). It can breach many interdependent human rights, including:[9]

> The right to: life, health, privacy, liberty, security of the person, freedom from torture and cruel, inhuman or degrading treatment, as well as the overarching right to human dignity.[10]

Sexual violence can adversely impact almost every aspect of a victim-survivor's life. The wide variety of devastating physical, psychological, emotional, social and financial impacts is discussed in the Specialist Report.[11] Yet despite the clear and obvious harms, current Australian statistics show lifetime experience of sexual violence is at shocking levels: 51% of women 24-30 years, 34% of women 40-45 years, and 26% of women 68-73 years.[12] These figures are worse for some LGBTQIA victim-survivors (76% of bisexual women) and women with disability (73%).[13] First Nations women and girls are around 2-5 times more likely to experience sexual violence than non-Indigenous Australians,[14] and the *Australian Child Maltreatment Study* shows more than 1 in 4 or 28.5% of children have experienced sexual violence.[15]

Contributing to these statistics, recent research shows a culture of toxic masculinity and acceptance of violence against women and girls is pervasive and embedded in Australia:[16]

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[9] CEDAW Committee, General Recommendation 19, adopted in the 11th session on gender-based violence against women, 1992: <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>. Rape is said to be a form of gender-based violence as it 'affects women disproportionately'.

[10] *R v Kitchener* (1993) 29 NSWLR 696 at 697 (Kirby P), noting the rights to privacy and dignity.

[11] Specialist Report, 21-25.

[12] ANROWS, Prevalence of sexual violence: findings from the Australian longitudinal study on women's health (2022).

[13] Ibid.

[14] Queensland Centre for Domestic and Family Violence Research, Prevention, Early Intervention and Support for Aboriginal and Torres Strait Islander People who have Experienced Sexual Violence (2019) 5.

[15] Divna Haslam et al, The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report (Report, 2023) 3 <http://doi.org/10.5204/rep.eprints.239397>

[16] Matt Tyler, Rachel Thomson, Krystal Navez d'Aubremont, Olivia Stephenson, Bill King, Professor Marita McCabe, *The Man Box 2024: Re-examining what it means to be a man in Australia* (Report, 2024).

- More than 1 in 3 of Australia's 18- to 30-year-old men (37%) perceive pressure to conform to Man Box rules.[17] (Highest result: the Man Box pillar of 'acting tough').
- Almost half (50% and 44% respectively) of 18- to 30-year-old men reported that they were told this is how a 'real man' behaves.
- Concerningly, many of the Man Box rules where men felt pressure to conform were those that could involve harm to those around them.
- Four in ten men (39%) perceive social messages that men should have the final say in decisions.
- More than a third of men (35%) believe society says men are entitled to know where their partner is at all times.
- A similar proportion perceive society expects men to 'Use violence to get respect if necessary' (34%).

These statistics on cultural perceptions are then borne out in participants' *personal beliefs*:

- On average, more than one in four (26%) 18- to 30-year-old men surveyed *personally agreed* with the Man Box rule 'Men should use violence to get respect if necessary'. More than 1 in 5 – 22% – of younger men and 11% of the older age group personally agreed.

We refer also to Salter et al's recent research results indicating:

- 'around one in six (15.1%) Australian men reports sexual feelings towards children;
- around one in 10 (9.4%) Australian men has sexually offended against children (including technologically facilitated and offline abuse), with approximately half (4.9%) of this group reporting sexual feelings towards children;
- the 4.9% of men with sexual feelings who had offended against children were more likely than men with no sexual feelings or offending against children to:
    - be married, working with children, earning higher incomes
    - report anxiety, depression, and binge drinking behaviours
    - have been sexually abused or had adverse experiences in childhood
    - be active online, including on social media, encrypted apps and cryptocurrency
    - consume pornography that involves violence or bestiality'.[18]

A shift to a human rights-based approach to the problem of sexual violence encourages, in systems terms, positive action at the individual, collective and institutional levels. Eleanor Roosevelt observed the need for grassroots action to uphold human rights in 1958:

> Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood [they live] in; the school or college [they] attend; the factory, farm or office where [they] work. Such are the places where every[one] … seeks equal justice, equal opportunity, equal dignity without

[17] The Man Box consists of 19 rules categorised into 7 'pillars': (1) self sufficiency; (2) acting tough; (3) physical attractiveness; (4) rigid gender roles; (5) homophobia and transphobia; (6) hypersexuality; (7) aggression and control: ibid 9.

[18] World's largest child sexual abuse perpetration prevalence study recommends significant investment in early intervention measures, *UNSW News* (Blog Post), citing Salter et al, Identifying and understanding child sexual offending behaviours and attitudes among Australian men (Report, November 2023).

> discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[19]

Measures to directly address the individual, collective and cultural attitudes that drive sexual violence are urgently needed. But while these are largely beyond the purview of this Inquiry, reforms of the justice system that refocus responses using a human rights lens can feed back to the individual, collective and cultural levels. As Marjorie Levis said in 1980:

> While … changes [to the criminal justice system] will not eradicate rape, they should play an important part in changing community attitudes to rape.
>
> It should be of major concern to us to change the situation for the individual rape victim and hopefully to end such statements as 'I felt I had been raped all over again by the court'; "... if I had known, I wouldn't have reported it'; ... the trial was worse than the rape'.
>
> While there is an obvious need to change the legal system, rape will still be with us … [a]s long as sexism exists, while masculinity means aggression, while men refuse to accept their responsibility in coming to terms with their conditioning ...[20]

Thus, there is a symbiotic relationship in the systemic actors and institutions, and law reform has a definite part to play in driving positive cultural change.

In a whole-of-systems sense, applying a human rights-based approach to the problem of sexual violence shifts the dial. It places fundamental notions of human dignity and what that means at the centre, facilitating accessible, respectful and inclusive dialogue at individual, collective, institutional and systems levels.

A human rights approach to sexual violence demands recognition of the victim-survivor as rights holder, a frank acknowledgment of the rights violated by the perpetrator, as well as the legal obligation to implement an effective system to address those violations. But it also serves as a robust platform on which to conceptualise and build legislative, court and policy reforms which, in turn, have the potential to influence positive wider social and cultural change.

1.2 CEDAW's General Recommendation 35

Our position is supported by Australia's obligations under international law. The Specialist Report discusses the *Convention on the Elimination of All Forms of Discrimination against*

[19] Eleanor Roosevelt, Chair of the committee created by the United Nations Commission on Human Rights to draft the Universal Declaration of Human Rights, at the presentation of IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights, United Nations, New York, 27 March 1958. Modified to gender neutral terms.

[20] Marjorie Levis, 'The politics of rape - a feminist perspective', in Jocelynne A Scutt (ed), *Rape Law Reform* (Edited Conference Papers, 1980) 204.

Women (CEDAW).[21] While the text of that Convention does not expressly address gender-based violence (which is perhaps one of the issues leading to the 'patchy' implementation conceded by the AHRC), the CEDAW Committee periodically releases general recommendations on issues 'which it believes the States should devote more attention'.[22] General Recommendation 35, *Gender-based violence against women*,[23] is a critical Recommendation that, we submit, the Commission should consider in its work.

The Recommendation shows that, as a party to the CEDAW, Australia's continued failure to adopt an effective legal and policy framework to address the issue of sexual violence *of itself constitutes a violation of human rights*. Under the CEDAW Committee's Recommendation, delay in implementing an effective framework is not acceptable on any ground. The Recommendation therefore adds both the weight of Australia's international human rights law obligations, and a heightened sense of urgency, to this Inquiry and subsequent implementation efforts.

1.2.1 A whole-of-systems analysis

The CEDAW Committee's Recommendation notes that the prohibition of gender-based violence has evolved into a broader principle of customary international law.[24] It also acknowledges that civil society groups have had a 'profound social and political impact, contributing to the recognition of gender-based violence against women as a human rights violation'.[25] However, despite the awareness-raising efforts of civil society groups, section 6 of CEDAW's Recommendation 35 frankly notes that gender-based violence 'remains pervasive in all countries, with high levels of impunity'.[26]

This situation has not changed, and as the statistics show, it continues in Australia.

The CEDAW Committee essentially takes a whole-of-systems approach, acknowledging that discrimination against women is 'inextricably linked to other factors' affecting their lives,[27] including 'ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status [such as being undocumented with no valid visa], heading households, [being in sex work], living with HIV/AIDS, being deprived of liberty … as well as trafficking in women [modern slavery and similar

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[21] Specialist Report, 19-21. See the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted by the UN General Assembly 18 December 1979 (entry into force as an international treaty 3 September 1981).
[22] United Nations Human Rights Office of the High Commissioner, *CEDAW: General Recommendations* (UN website, 8 February 2020) <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Comments.aspx>.
[23] CEDAW Committee, General Recommendation 35, adopted in the 67th session, *On gender-based violence against women*, 2017: <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.
[24] CEDAW General Recommendation 35, § 2.
[25] Ibid, § 4. However, it is important to note that the norms established by the international human rights framework 'apply regardless of the sex or gender of a victim-survivor': Rosenthal, Croome and Banks, above n1, 18.
[26] Ibid, § 6.
[27] Ibid § 12.

exploitation], situations of armed conflict, geographical remoteness and the stigmatization of women who fight for their rights, including human rights defenders.'[28]

To these intersectional factors, we would specifically add women and girls with prison experience, and those experiencing homelessness or housing insecurity. Such factors are often exacerbated by a wide range of ideological, technological, political, religious, social and environmental factors.[29]

The CEDAW Committee underscores the fact that the right to live free from gender-based violence is indivisible from and interdependent on a range of human rights, including the rights to 'life, health, liberty and security of the person, equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, and freedom of expression, movement, participation, assembly and association'.[30] However, violence is perpetuated by continued ideologies of male entitlement, social norms around masculinity and the need to assert control and power, assert gender roles or ostracise or punish 'unacceptable' female behaviour.[31] The problem is pervasive, in 'all spaces and spheres of human interaction'.[32]

This is amply demonstrated by the recent Australian research on 'Man Box' perceptions, attitudes and beliefs discussed above.

1.2.2 Failure to address the issue is a human rights violation

Having articulated the multifaceted systemic nature of the problem, the Committee reminds States of their obligation under Article 2 of CEDAW, to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence', and that 'delays cannot be justified on any ground'.[33]

Article 2(e) of CEDAW imposes a 'due diligence' obligation that underpins the Convention; Recommendation 35 states that this requires parties to implement *effective measures* to address gender-based violence. It discusses the due diligence obligation as follows –

> 2(b): Article 2 (e) of the Convention explicitly provides that States parties are to ***take all appropriate measures to eliminate discrimination against women*** by any person, organization or enterprise. That obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole and accordingly ***States parties will be held responsible should they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by non-State actors that result in gender-based violence against women***, including actions taken by corporations operating extraterritorially. In particular, States parties are required to take the steps necessary to prevent human rights violations perpetrated

[28] Ibid.
[29] Ibid §14.
[30] Ibid §15.
[31] Ibid §19.
[32] Ibid §20.
[33] Ibid §2.

> abroad by corporations over which they may exercise influence, whether through regulatory means or the use of incentives, including economic incentives. Under the obligation of due diligence, ***State parties must adopt and implement*** diverse measures to tackle gender-based violence against women committed by non-State actors, including having ***laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws***. The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. ***Such failures or omissions constitute human rights violations***.[34]

Some have called the decades-long continuation of government inaction regarding the ineffective laws and institutions that deal with sexual violence (despite volumes of research showing the risks of sexual violence) the 'decriminalisation of rape'.[35] Similarly, the CEDAW perspective is that inaction provides tacit permission for, or encouragement of, sexual violence, which is a human rights violation.

The Commonwealth routinely acknowledges its obligations as Member State[36] and, as noted, is progressing the national dialogue on human rights legislation. We submit that it now needs to redouble its efforts and actively work with the States and Territories to implement its obligations to ensure our laws, institutions and systems that address sexual violence 'function effectively in practice'. We acknowledge the valuable work of the Standing Council of Attorneys General[37] in this regard, and recognise its position as a key mechanism to facilitate, support and implement these obligations. The CEDAW Recommendation requires legislative, executive and judicial-level steps to address gender-based violence.

1.2.3 Legislative measures

On legislative measures, § 26(a) of the General Recommendation confirms that States have a due diligence obligation to ensure their legislation contains provisions:

> … [recognising that] women who are victims/survivors of such violence should be considered to be right holders.

The CEDAW Committee therefore recommends parties embed the recognition of gender-based violence as a human rights violation and:

> Ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity.[38]

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[34] Ibid, emphasis added.
[35] See Rape Crisis England and Wales, *Decriminalisation of rape* (Report, 2020).
[36] See, for example, participant comment, Commonwealth Attorney-General, *National Roundtable on Justice Responses to Sexual Violence: Summary Report* (Report, September 2023) 5. Commonwealth Attorney-General, *Protection from exploitation, violence and abuse* (Information Sheet).
[37] Attorney-General, Australian Government, *Standing Council of Attorneys General* (Website, 2024).
[38] General Recommendation 35 § 29(e).

Further, the CEDAW Committee recommends legislation that constitutes *effective* legal protection, including civil, family, and criminal law, along with evidentiary and procedural law.[39] The Committee specifically recommends parties 'introduce, without delay, … civil remedies.'[40]

The introduction of effective legislative measures without delay is specifically required by Australia's obligations under §§ 2(b), (c), (e), (f), (g) of CEDAW, as interpreted by General Recommendation 35.

1.2.4 Executive measures

At the Executive level, States are to 'adopt and **adequately provide budgetary resources**' for the diverse institutional measures required to address violence against women and girls – including focused public policies, development and implementation of monitoring mechanisms and establishment and funding of tribunals.[41]

Support services must be 'accessible, affordable and adequate' to protect against, prevent and make reparations for gender based violence. All institutional or individual conduct constituting, tolerating or providing a context for failures to respond or negligent responses is to be eliminated.[42]

We note that none of the 'innovative or transformative' recommendations emerging from this Commission's Inquiry can be implemented without adequate funding.

The support services sector has been making its case for adequate funding for decades. Advocates indicate that victim-survivors as young as 12 years old are spending months on waiting lists because support services are at capacity.[43] Legal services estimate 52,000 victim-survivors are being turned away each year.[44]

Indeed, the 2024 Independent Review of the National Legal Assistance Partnership (LNAP) found that '[c]urrent funding levels are insufficient to meet the legal assistance needs of the Australian community',[45] and that 'Government has treated service providers like sporting clubs tendering for funds to renovate a block of change rooms'.[46]

On this point, we also note that the issue of adequate funding for access to justice for those whose human rights have been impacted was recognised in Sen Thorpe's Recommendation in the recent Parliamentary Joint Committee on Human Rights Inquiry report.[47]

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[39] Ibid.
[40] Ibid, § 29(a), emphasis added.
[41] Ibid, § 26(b).
[42] Ibid.
[43] Angela Lynch, 'We need action and tangible outcomes not more talk' (LinkedIn Post, 6 May 2024).
[44] Naomi Neilson, 'Women need legal services more than ever, national group says', Lawyers' Weekly, (Post, 6 May 2024).
[45] Warren Mundy, *Independent Review of the National Legal Assistance Partnership: Final Report* (Report, 2024) iii.
[46] Ibid iv.
[47] Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (May 2024) 372.

We maintain it is time to explicitly recognise that the Australian government's continued failure to 'take all appropriate measures' to address this issue, and to work with States and Territories to provide adequate funding across all organisations, institutions and actors in the sector (including support services, police, court staff, prosecution and legal services), is a human rights violation under CEDAW that impacts on availability of such services, and requires immediate redress.

1.2.5 Judicial measures

At the judicial level, the CEDAW Recommendation states that all judicial bodies are to refrain from acts or practices of discrimination or gender-based violence and apply criminal law punishing such violence, 'ensuring all legal procedures … are impartial, fair and unaffected by gender stereotypes.' The application of stereotypical notions of gender-based violence, and expected responses, affects 'women's rights to equality before the law, a fair trial and effective remedy'.[48]

This CEDAW Recommendation has implications for judicial training. Australia's CEDAW obligations necessitate specialist training to eliminate acts or practices that apply stereotypical notions of gender-based violence, in order to secure for women and girls equal treatment before the law, a fair trial, and effective remedies. Training in relation to the effects of vicarious trauma and compassion fatigue is an essential part of such training.

1.2.6 Australia's lack of implementation of CEDAW Recommendations

As noted, Australia has acceded to, and has obligations under, the CEDAW[49] although Australian States and Territories are not required to comply with international human rights instruments. The Australian Capital Territory, Queensland and Victoria have enacted legislation that enshrines human rights,[50] but does not explicitly refer to CEDAW. A current Queensland inquiry is considering whether to expressly embed CEDAW rights in the State human rights legislation, to more explicitly address the issue.[51]

As discussed above, the statistics clearly show that Australia's CEDAW obligations to implement laws, institutions and a system that functions effectively to address sexual violence

[48] General Recommendation 35 § 26(c).
[49] Australia signed in 1980; ratified/acceded 1983.
[50] See the *Human Rights Act 2004* (ACT), *Human Rights Act 2019* (Qld), the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In New South Wales there have been long running campaigns for human rights legislation (see New South Wales Law Society, *Human Rights Legislation for New South Wales* (Report, 2022); Human Rights Act for New South Wales Campaign); similarly in Western Australia (*Western Australia for a Human Rights Act*); human rights legislation has also been recommended in 2024 for Tasmania (University of Tasmania, *Human rights laws recommended for Tasmania*). In 2023, South Australia held consultations (South Australian Parliament, *Inquiry into the potential for a human rights act in South Australia*). The Northern Territory has an Anti-Discrimination Commission.
[51] Attorney-General of Queensland, Terms of Reference for the First independent review of the *Human Rights Act 2019* (Qld) (27 February 2024).

have not been met. Sadly, this is the case internationally. See the 2020 report from the Special Rapporteur on Violence Against Women and Girls:[52]

> 9. Currently, the international human rights framework and jurisprudence recognizes rape as a human rights violation and a manifestation of gender-based violence against women and girls that could amount to torture. Under international humanitarian law and international criminal law, rape can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide when the other elements of the crimes are present.
>
> 10. However, these international standards have not been fully incorporated at the national level. States criminalize rape using different definitions (based on force or on lack of consent), protecting different persons (only women or all persons), including or excluding marital rape, covering different types of penetrations, prescribing different aggravating and mitigating circumstances, setting different lengths of sentences, prescribing ex officio or ex parte prosecution of rape, and providing or not providing at all for different statutes of limitation for its prosecution.
>
> 11. Additionally, their implementation is influenced by the surrounding general context of different forms of discrimination and gender-based violence against women, myths and gender-based stereotyping on rape by the media and the criminal justice system.
>
> 12. All these factors contribute to the fact that rape is frequently not reported. If rape is reported, it is seldom prosecuted; if prosecuted, the prosecution is rarely pursued in a gender sensitive manner and often leads to very few convictions, the revictimization of survivors and high attrition rates, resulting in a normalization of rape, a culture of rape or silence on rape, stigmatization of victims and impunity for perpetrators.
>
> 13. Governments' failure to address all the structural, normative and policy factors that result in impunity for perpetrators is now being challenged by many women's marches and protests, feminist movements, the Me Too movement and civil society movements that are breaking the silence on rape.

While written in 2020, the Special Rapporteur's comments accurately capture the current sentiment in the Australian public and particularly victim-survivors, advocates, frontline workers, and supporters, as observed in the recent nation-wide marches.

Australia's only submission to this report consisted of a 4-page note indicating that the criminalisation of sexual assault is 'the responsibility of the states and territories rather than the federal government', and detailing the ways in which our jurisdictional consent laws differ from each other.[53] We submit such evasive responses are no longer acceptable.

We acknowledge and support the submissions to this Inquiry by the Queensland Sexual Assault Network (QSAN) and the National Centre for Action on Child Sexual Abuse,

[52] UN Special Rapporteur on Violence Against Women and Girls, *Rape as a grave and systematic human rights violation and gender-based violence against women* (Report, 2020). The report was directed at measures to harmonise national laws on rape.

[53] Submission by Australia, *Special Rapporteur on violence against women, its causes and consequences – call for submissions on the criminalisation and prosecution of rape* (Submission, 2020).

particularly regarding the need for bringing a human rights focus to the issue of sexual violence.[54]

Submission 1: The Commission should expressly adopt a human rights framework as the foundation and touchstone for its recommended reforms in this Inquiry, with the objective of introducing a greater focus on human rights in the criminal justice and associated responses to sexual violence.

Submission 2: The Commission's recommended proposals and reforms should be clearly informed by and reflect lived experience perspectives and voices from all marginalised communities, as rights holders.

Submission 3: The Commission should recommend that the Commonwealth, State and Territory governments work together to ensure compliance with Australia's obligations in the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), including those contained in the CEDAW Committee *General Recommendation 35 On gender-based violence against women*, as a matter of urgent priority. This includes the recommendations on legislative, executive and judicial matters.

Submission 4: The Commission should recommend specialist training for all judicial officers, to eliminate acts or practices that apply stereotypical notions of gender-based violence, in order to secure for women and girls equal treatment before the law, a fair trial, and effective remedies. In doing so, the Commission should raise awareness that such training is mandated by Australia's CEDAW obligations. On training, we also note submission 8.

Submission 5: The Commission should, in its Inquiry Report, raise awareness that the CEDAW requires the Commonwealth, State and Territory governments to work together to ensure adequate funding for measures addressing gender-based violence, such as those emerging from this Inquiry. The continued failure to provide adequate budgetary resources to enable a system that functions effectively in practice is a human rights violation under the CEDAW, as interpreted by *General Recommendation 35*.

1.3 Human rights, First Nations victims and survivors

In discussing human rights, we wish to acknowledge First Nations victims and survivors. The grievous human rights violations, and trauma, experienced from sexual violence are multiplied for First Nations victims and survivors who face challenges from a constellation of trauma-inducing factors, including racism, colonialism and intergenerational trauma;[55] they are between 2-5 times (on best estimates around three times) more likely to suffer sexual

[54] Queensland Sexual Assault Network, Submission to the Australian Law Reform Commission, *Inquiry into Justice Responses to Sexual Violence*, May 2024.
[55] Leilani Darwin, Stacey Vervoort, Emma Vollert and Shol Blustein, *Intergenerational trauma and mental health* (Report, 2023).

violence.[56] We therefore amplify the voices of First Nations women and girls, and urge that their perspectives be heard, understood, and actioned.

1.3.1 General Recommendation 39

In 2022, the CEDAW Committee made General Recommendation 39, *On the rights of Indigenous women and girls*.[57] The Recommendation notes that:

> Gender-based violence, including psychological, physical, sexual, economic, spiritual, political and environmental violence, is adversely affecting the lives of many Indigenous women and girls. Indigenous women often suffer violence in the home, in the workplace and in public and educational institutions; while receiving health services and navigating child welfare systems; as leaders in political and community life; as human rights defenders; when deprived of liberty; and when confined to institutions.
>
> Indigenous women and girls are disproportionately at risk of rape and sexual harassment; gender-based killings and femicide; disappearances and kidnapping; trafficking in persons; contemporary forms of slavery; exploitation, including exploitation of prostitution of women; sexual servitude; forced labour; coerced pregnancies; State policies mandating forced contraception and intrauterine devices; and domestic work that is not decent, safe or adequately remunerated. The Committee highlights, in particular, the gravity of discrimination and gender-based violence against Indigenous women and girls with disabilities who are living in institutions.[58]

Section 24, on access to justice and plural legal systems, notes that:

> Access to justice for Indigenous women requires a multidisciplinary and holistic approach that reflects an understanding that their access is linked to other human rights challenges that they face, including racism, racial discrimination and the effects of colonialism; sex- and gender-based discrimination; discrimination on the basis of socioeconomic status; disability-based discrimination; barriers in gaining access to their lands, territories and natural resources; the lack of adequate and culturally pertinent health and education services; and disruptions and threats to their spiritual lives. As indicated by other global human rights mechanisms, Indigenous Peoples must have access to justice that is guaranteed both by States and through their Indigenous customary and legal systems.

Section 33 then recommends that States:

> (a) Ensure that Indigenous women and girls have effective access to adequate non-Indigenous and Indigenous justice systems, free from racial and/or gender-based discrimination, bias, stereotypes, retribution and reprisals;

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[56] ACT Government, Listen. Take Action to Prevent, Believe and Heal Report (Sexual Assault Prevention and Response Program Steering Committee Final Report, 2022) 22 ('ACT Report') <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0006/1915332/CSD_SAPR_approved_WCAG_plus.pdf>.

[57] CEDAW Committee, General Recommendation 39 (published 26 October 2022, CEDAW/C/GC/39): <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no39-2022-rights-indigeneous>.

[58] Part II Section 9.

(b) Adopt measures to ensure that Indigenous women and girls with disabilities have physical access to law enforcement and judiciary buildings, information, transportation, support services, and procedures critical to their access to justice;

(c) Provide continuous training to judges and all law enforcement officials in both the non-Indigenous and Indigenous justice systems on the rights of Indigenous women and girls and the need for an approach to justice that is guided by gender, intersectional, Indigenous women and girls, intercultural and multidisciplinary perspectives, as defined in paragraphs 4 and 5. Training on Indigenous justice should be part of training for all legal professionals;

(d) Recruit, train and appoint Indigenous women justices and other court personnel in both non-Indigenous and Indigenous justice systems;

(e) Ensure equal access to justice for all Indigenous women and girls, including through the provision of procedural accommodations and adjustments for those who need them owing to age, disability or illness, which may include sign language interpretation and other communication support, as well as longer time frames for submissions;

(f) Ensure that justice systems include interpreters, translators, anthropologists, psychologists and health-care professionals specialized and trained in the needs of Indigenous women and girls, giving priority to qualified Indigenous women, and provide information on legal remedies in both the nonIndigenous and Indigenous justice systems in Indigenous languages and in accessible formats. Awareness-raising campaigns should be undertaken to make known these legal remedies and avenues, as well as the means to report cases of structural and systemic violence. Follow-up mechanisms are critical in cases of gender-based violence and discrimination against Indigenous women and girls;

(g) Ensure that Indigenous women and girls without sufficient means and whose legal capacity has been removed have access to free and quality legal aid, including in cases of gender-based violence against women. States parties should financially support non-governmental organizations that provide free and specialized legal assistance to Indigenous women and girls;

(h) Guarantee that judicial institutions, remedies and services are available in urban areas and in proximity to Indigenous territories;

(i) Adopt criminal justice, civil and administrative measures and policies that consider the historical conditions of poverty, racism and gender-based violence, which have affected and continue to affect Indigenous women and girls;

(j) Adopt measures to ensure that all Indigenous women and girls have access to information and education on existing laws, the legal system and how to gain access to both non-Indigenous and Indigenous justice systems. These measures can take the form of awareness-raising campaigns, community trainings, and legal and mobile clinics that offer this information;

(k) Ensure that Indigenous women and girls effectively enjoy the rights to a fair trial, equality before the law and equal protection of the law;

(l) Ensure that integral reparations for human rights violations are a key component of the administration of justice in both non-Indigenous and Indigenous systems, including consideration for spiritual and collective harm.

1.3.2 Comparison – CEDAW Recommendation 39 and lived experience

In stark contrast to the CEDAW Recommendations, one of our First Nations EAG members contributes her lived experience perspective –

There is a noticeable silence in Australia when victims of sexual violence are Indigenous. There is no public outrage, and no vigils.

Sexual violence is being normalised and rendered invisible when it comes to Indigenous women and children.

I personally think that there needs to be a separate plan for First Nations people regarding sexual violence against women and children.

For any program to work we must build TRUST. If people do not trust the system, then no matter how great we try to make it, the system will not be used. First Nations people are a closed shop when they have no trust in something.

We also need to stop telling First Nations people what they are going to have in their communities and start talking and listening to the women of these communities instead.

There also needs to be a greater representation of First Nations people involved in the decision-making bodies.

We need local and regional initiatives combined with all mainstream services. We must have First Nations people at the table designing these processes.

I realise some of you may not have experienced living remotely. The more remote the community, the less chance the victims have of getting help, and the more the perpetrator continues to get away with the abuse.

In dealing with sexual assaults in remote communities, here are some of the logistical nightmares that a victim may encounter:

- *No resources are readily on hand.*
- *No follow up with any service providers.*
- *In the wet season, which usually lasts five months of the year, and when there is no sorry business (which is when there is a death in the community) there are no services available at the community because they are not allowed to enter.*
- *What also happens is services are usually flown into the community and are highly visible so that the victims have no privacy.*
- *Due to their remoteness a victim also can suffer from lack of choice of service provider, which raises the issue of gender availability.*
- *A lack of transport resulting in an inability to access services.*
- *Communications are lacking in many remote areas.*
- *Many remote communities are policed by male police officers. Traditionally, First Nations women do not speak to males about sexual matters (irrespective of their profession), and so this is where cultural appropriateness really needs to be addressed.*

I would also like to see training and cultural awareness programs offered to all professionals working in this field.

While I agree with specialist police officers in remote Aboriginal areas, this will prove very difficult. The reason being is this: it is hard enough to get people to transfer to these communities to begin with, when they do, they mostly only do a term of two years,

which is hardly enough time to form any trusting relationships with First Nations people. I know that for a fact, most police officers only go to remote communities on the promise that when they have done their two years, they will be able to step into a career promotion. This once again points to a need to see change in police culture.

There are also insufficient female Aboriginal Community Liaison officers which again needs to be addressed.

Let's be brutally honest here, this current system is not working for either Non-Indigenous or Indigenous women and children.

I don't think we can apply a one size fits all approach.

Submission 6: The Commission should, to allow due time for wide and inclusive consultations, recommend a separate inquiry regarding First Nations women and girls' experience of sexual violence, indigenous-led responses, and implementing the CEDAW Committee *General Recommendation 39 On the rights of Indigenous women and girls*.

1.4 Human rights, victims and survivors of child sexual abuse

We expressly acknowledge and support the submissions to this Inquiry by the National Centre for Action on Child Sexual Abuse (National Centre), particularly regarding the need for bringing a human rights focus to the issue of child sexual abuse (CSA), and greater implementation of international legal obligations for greater protection and support of child and adult victim-survivors of CSA.[59]

1.5 A human rights approach requires trauma-informed measures

Introducing human rights as the touchstone for reform leads naturally to the conclusion that a trauma-informed approach to law and practice is urgently required to protect the human dignity and rights of victim-survivors. On this point, we support the Womens' Legal Service of New South Wales position as recently submitted to the Parliamentary Joint Committee on Human Rights *Inquiry into Australia's Human Rights Framework*, that Australia's new human rights legislation should expressly address a duty of equal access that includes a right to be treated with dignity and compassion in the legal process.[60]

As George et al note:[61]

> If one is to accept that reform [of the adversarial criminal justice system] is possible, then the unique and highly intimate subject matter of sexual offences proceedings provides an archetypal example of the need to temper adversarial justice with a greater

[59] National Centre for Action on Child Sexual Abuse, Submission to the Australian Law Reform Commission, *Inquiry into Justice Responses to Sexual Violence*, 24 May 2024. We acknowledge that one of our co-authors, Dr Amanda-Jane George, collaborated with the National Centre in the development of its submissions.

[60] Parliamentary Joint Committee on Human Rights, Inquiry into Australia's Human Rights Framework (May 2024) 157.

[61] Amanda-Jane George, Vicki Lowik, Masahiro Suzuki and Nichola Corbett-Jarvis, 'The "trauma-informed" court: specialist approaches to managing sexual offence proceedings (Part Two)' (2024) *Journal of Judicial Administration* (forthcoming).

concern for human dignity and wellbeing. In this space, that means recognition of, and accommodations for, the complainant's trauma. As the first article shows, there is now a strong evidence base indicating the adverse impacts of '"excessive" adversarialism'[62] in sexual offences trials which can and, we would argue, should be addressed with specialist trauma-informed measures. Ideally, the further development and implementation of such measures would be guided by an 'ethic of care',[63] something akin to a criminal justice version of the Hippocratic oath, as posited by Cossins: (i) do no further harm, (ii) achieve best evidence, and (iii) acknowledge a victim-survivor's 'justice interests'[64] or justice needs.

Of course, the accused's rights – including the right to a fair trial and the ability to properly test the evidence – and the court's impartiality, must be preserved.

1.5.1 A fair trial – for the accused, complainant, and public interests

The right to a fair trial is established in Article 14(1) of the *International Covenant on Civil and Political Rights 1976*.[65]

The notion of a fair trial is most often discussed in terms of the accused's rights. However, it is important to note that the concept of a fair trial does not *only* encompass the accused's interests. It also encompasses the victim-survivor's interests, as well as the broader public interest.

This has been recognised in jurisprudence for more than 20 years, as Lord Steyn stated in 2001:[66]

> There must be fairness to all sides. In a criminal case this requires … taking into account the position of the accused, the victim and his or her family, and the public.

Such sentiments were also echoed by the Grand Chamber of the European Court of Human Rights in 2011:[67]

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[62] Lawrence W Sherman, 'Reason for emotion: Reinventing justice with theories, innovations, and research – the American Society of Criminology 2002 Presidential Address' (2003) 41(1) *Criminology* 1, 26.

[63] Elizabeth Richardson, Pauline Spencer and David Wexler, 'The International Framework for Court Excellence and therapeutic jurisprudence: creating excellent courts and enhancing wellbeing' (2016) 25 *Journal of Judicial Administration* 148 157, citing MS King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 *Journal of Judicial Administration* 133, 151.

[64] Annie Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan, 2020), 629, citing Kathleen Daly, 'Sexual violence and victims' justice interests' in Estelle Zinsstag and Marie Keenan (eds.), *Sexual Violence and Restorative Justice: Legal, Social and Therapeutic Dimensions* (Routledge, 2017) 111.

[65] Signed 1972, Australian ratification/accession 1980.

[66] *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118 (Lord Steyn).

[67] *Al-Khawaja* [2011] ECHR 212, [146].

> … the traditional way in which the Court approaches the issue of the overall fairness of the proceedings … [is] to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.

A failure to recognise the victim-survivor's interests, and to protect their human rights by introducing trauma-informed practice, not only fails to provide a fair trial – it prejudices the public interest in the rule of law, because offenders are effectively freed from accountability.

1.5.2 A trauma-informed approach supports the rule of law

This sentiment is eloquently captured by Lord Hope:[68]

> To ask oneself whether [measures] are fair to the defendant is to address one side of the balance only. On the other side there is the public interest in the rule of law. The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary distress and humiliation of witnesses is inadequate. So too if evidence or questions are permitted at the trial which lie so close to the margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case.

Lord Hope accurately identifies both the overarching problem – re-traumatisation – and a particularly 'profound locus'[69] of re-traumatisation, which is cross-examination.

In addition to prejudicing the victim-survivor's right to a fair trial, and the rule of law, a failure to provide a trauma-informed criminal justice system continues the pervasive culture of impunity which, as discussed above, also constitutes a human rights violation.

There is no convincing argument to maintain the re-traumatising status quo in the criminal justice system where a victim-survivor's interests can be protected without prejudice to the accused, and particularly where trauma-informed measures also enable best evidence to be obtained.

As the UK Law Commission has observed:

> Just because a change does not coincide with the way we have always done things does not mean that it should be rejected… Do proposed changes cause unfair prejudice to the defendant? If so, of course, they cannot happen. If however they make it more likely to

[68] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [94] (Lord Hope). See also the commentary by advocates, to the effect that rape has been 'decriminalised': Centre for Women's Justice, End Violence Against Women coalition, Imkaan, and Rape Crisis England & Wales, *The decriminalisation of rape: Why the justice system is failing rape survivors and what needs to change* (Report, 2020); Haroon Siddique, 'We are facing the 'decriminalisation of rape', warns victims' commissioner', *The Guardian* (Online News, 14 July 2020).
[69] Specialist Report, 222.

> enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective.[70]

Accordingly, from a human rights perspective, a trauma-informed approach must underpin and infuse all aspects of law reform in this area – to uphold the notion of a fair trial and the rule of law, to obtain best evidence, and to implement Australia's CEDAW obligation to have a system that functions effectively in practice and is supported.

1.5.3 Legislatively embedding a trauma-informed approach

One example of legislatively embedding a trauma-informed approach is provided by the preamble to Québec's new *Act to create a court specialized in sexual violence and domestic violence* (T-15.2) on 30 November 2021.[71] The Act establishes pilot courts, with a 'Division Specialized in Sexual Violence and Domestic Violence' to be ultimately established within the Criminal and Penal Division of the Québec Courts of Justice.[72] The preamble to the legislation, and section 1 (objects clause), are as follows:

> AS sexual violence and domestic violence problems in society are widely prevalent and complex;
>
> AS it is important that psychosocial and justice system actors act in a concerted manner to prevent and fight those problems;
>
> AS respecting the rights of an accused, including the presumption of innocence, is one of the founding principles of the penal and criminal system;
>
> THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:
>
> 1. This Act is intended to rebuild trust in the justice system for persons who are victims of sexual violence or domestic violence and, for that purpose, to see that measures are taken so that persons wishing to do so may initiate and pursue a judicial process.
>
> It is intended to ensure that psychosocial and judicial services offered to persons who are victims are integrated and adapted, that the physical premises are laid out in a safe and reassuring manner and that a sustained effort is made to reduce delays in processing files.
>
> It is intended to ensure a special procedure for proceedings involving sexual violence or domestic violence and ensure the professional development of actors in those matters to reduce the risks of secondary victimization that would expose persons who are victims to trivialization of or a lack of sensitivity regarding the violence they have suffered.
>
> It is intended to ensure that the special needs of persons who are victims of sexual violence or domestic violence are considered all along their journey, including during the judicial process.
>
> It is intended to ensure that persons who are victims are supported by specialized and dedicated actors, and that their specialization is ensured through continuing education.
>
> It is intended to ensure that support measures take into account the cultural and historic realities of First Nations and Inuit persons who are victims.

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[70] UK Law Commission, *Evidence in Sexual Offences Prosecutions: a consultation paper* (Report, 23 March 2023), citing Judicial College, *The Equal Treatment Bench Book* (July 2022), [2-44], drawing from the (then) Lord Chief Justice, Lord Judge, in the Toulmin Lecture (2013).

[71] National Assembly of Québec, *An Act to create a court specialized in sexual violence and domestic violence* ('Québec Specialist Court Act'), Chapitre dans le Recueil annuel des lois du Québec: 2021, chapitre 32 <https://www.legisquebec.gouv.qc.ca/en/document/cs/T-15.2%20/>; see the whole Bill 92 as passed online at <https://m.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-92-42-1.html>.

[72] Specialist Report, 60.

In Scotland, a trauma-informed approach will also be legislatively mandated if a current Bill[73] to reform law and practice on sexual violence (including introduction of a specialist court) is passed. Section 69 defines 'trauma-informed practice' as 'a means of operating that –

(a) recognises that a person may have experienced trauma,

(b) understands the effects which trauma may have on the person, and

(c) involves adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to—

(i) any recurrence of past trauma, or

(ii) further trauma.'

This is essentially a legislative adoption of the 4R approach to trauma-informed practice developed in the United States: *realise* the widespread impact of trauma, *recognise* its signs and symptoms, *respond* by fully integrating trauma knowledge into policies, procedures and practices, and seek to actively *resist* re-traumatisation.[74]

The Scottish Bill embeds trauma-informed practice across the justice system generally, via new duties on criminal justice agencies regarding adoption of trauma-informed practice, including:

- in the Standards of Service for Victims and Witnesses;
- empowering courts to set rules and procedures on trauma-informed practice for civil and criminal cases; and
- requiring the judiciary to take trauma-informed practice into account when civil and criminal business is being scheduled.[75]

Submission 7: The Commission should recommend that the States and Territories embed a broad requirement for trauma-informed training and practice across all agencies, institutions, organisations and actors dealing with victim-survivors of sexual violence, including police, court personnel, judicial, legal and support services. The States and Territories should work with relevant police services and heads of jurisdiction to legislatively embed this requirement for police and all legal practitioners. Consideration should be given to introduction of a 'trauma-informed legal practice' or similar unit as a new knowledge area in all Australian undergraduate law degree programs.

Submission 8: The Commission should recommend that the States and Territories fund, develop and implement specialist sexual violence training for the participants in the justice system mentioned in recommendation 7, in consultation with victim-survivors, First Nations peoples, service and legal system stakeholders. Such training should be appropriate

[73] *Victims, Witnesses, and Justice Reform (Scotland) Bill* (SP Bill 26) (introduced on 25 April 2023). Stage 1 of scrutiny of general principles underpinning the Bill has been completed and submissions received. The Bill is presently at Stage 2, where Members of Parliament may propose changes.

[74] Substance Abuse and Mental Health Services Administration, SAMHSA's concept of trauma and guidance for a trauma-informed approach, (Trauma and Justice Strategic Initiative Report, 2014) 9.

[75] Scottish Parliament, 'Policy Memorandum', *Victims, Witnesses, and Justice Reform (Scotland) Bill* (introduced into Scottish Parliament 25 April 2023) 2-3.

to the participants' role(s),[76] include trauma impacts on behaviour, memory and neurobiology, and address cultural safety, diversity and the intersecting needs of marginalised 'overrepresented' communities including First Nations people, children and young people, people from culturally and linguistically diverse (CALD) backgrounds, im/migrants, people with disability, LGBTQIA+ communities, people who have been convicted of criminal offences and been incarcerated, sex workers and older people. The training should be developed with expert input on evidence-based best practice principles, and should be ongoing on a 'refresher' basis.

Having discussed the necessary human rights framework and trauma-informed approach to reforming the criminal justice system and associated responses to sexual violence, we now discuss the themes raised by the Issues Paper. We do not attempt to answer all questions or themes, but our submissions are presented in the general order of the Issues Paper.

2. Disclosure issues (Questions 1-4)

Various factors can act as barriers to prevent victim-survivors from disclosing sexual violence to others, or reporting to police. As the Specialist Report notes, common barriers cited by victim-survivors include 'fear, blame, mistrust of government and police, and fear of destroying familial relationships.'[77] Intersecting factors may also create barriers to reporting.[78] These factors can include gender identity, culture, ethnicity, religion, disability, age, and/or sexual orientation.[79] In addition, people from rural, regional and remote locations, people who have been convicted of crimes and are or have been incarcerated, sex workers, and older people, especially those in residential aged-care settings, can also experience barriers that are unique to their circumstances.[80] There is some unavoidable overlap in the discussions in this section with those in the following section regarding police responses.

2.1 First Nations victim-survivors

As discussed above, there is evidence that First Nations women and girls are three times more likely to be sexually assaulted than non-Indigenous women,[81] but few report. The compounding impacts of colonisation and intergenerational trauma on Aboriginal and Torres Strait Islander peoples create 'significant barriers to reporting and seeking support', with

[76] Here, we acknowledge and adopt the National Centre's submissions regarding the need for active learning such as role play in the training of legal professionals (particularly regarding questioning of witnesses).

[77] Specialist Report, 14. See the Queensland Women's Safety and Justice Taskforce *Hear her voice - Report two – Women and girls' experiences across the criminal justice system, Volume 1*, Queensland (1 July 2022) 95 ('WSJT Report') <https://www.womenstaskforce.qld.gov.au/publications>.

[78] Queensland Government, *Fact sheet 6: Priority population groups* (Web Page, 27 June 2022).

[79] Australian Institute of Health and Welfare ('AIHW'), 'Family, domestic, and sexual violence in Australia: continuing the national story' (2019) *AIHW* 70.

[80] Ibid; see also Lixia Qu et al, *National elder abuse prevalence study: final report* (Australian Institute of Family Studies Report 2021) 32; Antonia Quadara, *Sex workers and sexual assault in Australia: Prevalence, risk and safety* (Australian Centre for the Study of Sexual Assault Report 2008, Issues No. 8) 4 <https://aifs.gov.au/sites/default/files/publication-documents/acssa_issues8_0.pdf>.

[81] ACT Government, *Listen. Take Action to Prevent, Believe and Heal Report* (Sexual Assault Prevention and Response Program Steering Committee Final Report, 2022) ('ACT Report') <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0006/1915332/CSD_SAPR_approved_WCAG_plus.pdf>.

many having 'profound levels of mistrust of government, the legal system, and [the] mainstream service system.'[82] For First Nations victim-survivors, there is little to no incentive to approach police and report, given the long history and culture of police maltreatment, racism, and the overlay of colonial oppression. An Australian Institute of Criminology report identifies the following constraints on reporting inherent in the criminal justice system:[83]

- 'Fear of social welfare officers removing their children;
- Fear of not being believed by the police;
- Uncertainty about how the police and CJS will respond to the report;
- Fear of the police when already traumatised by the sexual violence;
- Excessive time taken to convict a guilty perpetrator of the sexual violence;
- Belief that punishment for the perpetrator will be inadequate.'

One First Nations co-author contributes her views on the particular challenges of reporting for those living in remote Australia; she calls it *The great digital exclusion* –

> *While mainstream Australia may experience public phone boxes and fixed landline services as redundant, access and availability of fixed line phone services and public phone boxes in remote and regional and Town Camp localities are essential to making contact with essential services, maintaining social connectedness including cultural and family ties and to ensure safety and wellbeing, especially in the case of an emergency.*
>
> *There is a severe lack of easily accessible working public phones in Town Camp and remote localities, and an increasing trend towards card-only Telstra phones.*
>
> *What you may not know is that First Nations people who are living in town camps and remote communities are severely disadvantaged when it comes to a simple thing like calling for HELP!*
>
> *Why is it always assumed that the whole universe has access to a mobile phone or internet?*
>
> *The assumption is that everybody has a mobile, and secondly, that everybody has a mobile with credit on it.*
>
> *While there has been some benefit to the NBN rollout in Alice Springs, and some availability of telecommunications services in Town Camps, Town Camp and remote residents overwhelmingly lack the fundamental telecommunications services guaranteed to them under the Universal Service Obligation. The access, availability and affordability of telecommunications services including fixed, mobile, public phone and data services is an ongoing barrier to the access of essential services including health and emergency services. The cost of accessing pre-paid mobile and data services remains disproportionate to the income of most Town Camp and remote First Nations communities. Where data services are available, and are being accessed, the lack of digital literacy and support services to ensure appropriate use of these devices poses additional risk to the safety and wellbeing of vulnerable groups.*
>
> *All Town Camps and remote communities have pay phones – some of these are not easily accessible to elderly or disabled people – plus they are mostly Card only Telstra phones not coin operated.*

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[82] Antoinette Braybrook, 'Family violence in Aboriginal communities' (2015) 2 *Domestic Violence Resource Centre Advocate* 18, 20.

[83] Australian Institute of Criminology, *Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia* (Report, 2007).

Imagine this..

You have survived a nightmare of the worst kind and from the inner depths of your soul you decide to report this or reach out for help and support; it is 40-plus degree heat; the public phone maybe working – but you have all eyes on you as it is, after all, PUBLIC – the phone is in the direct sunlight and it's hell hot flies everywhere or worse still it's a pitch black night and the phone box light is broken and you have no other light source … you're terrified … your courage has diminished … it's just impossible.[84]

We reiterate our submission that the Commission should recommend a separate inquiry regarding First Nations women and girls' experience of sexual violence, indigenous-led responses, and achieving the CEDAW Recommendations.

2.2 Children and young people

2.2.1 Prevalence of sexual violence

The recent statistics on prevalence of child sexual abuse (CSA) in Australia are deeply concerning. The *Australian Child Maltreatment Study* shows that more than 1 in 4 (28.5%) of all Australians aged 16-65 years and more than 1 in 3 (35.2%) of all females aged 16-24 years have experienced CSA.[85] The Australian Institute of Health and Welfare also notes that about 3 in 5 (59%) of all recorded sexual assault victims had an age at incident under 18 years in 2022.[86]

The research outlined above regarding men's sexual feelings towards children and 'Man Box' beliefs indicates an embedded and resistant culture of toxic masculinity. Further recent research shows that peer perpetration by young people is increasing, putting children and young people at risk.[87]

2.2.2 Lived experience contributions, barriers to disclosure

One co-author describes the barriers to reporting peer sexual violence in a religious setting:

When I was 14, I was groomed to become the 'girlfriend' of a 19 year old leader in a youth group associated with my family's Pentecostal church. All associated with the youth group, and my parents, knew of the relationship and approved, given his status in the church and youth group. Over approximately six months he sexually abused me often. I am still impacted by the somatic memory of these events; my body literally 'keeps the score' as Bessel van der Kolk would say. I was so ashamed, and given his position in the church, I did not disclose the abuse to my parents. I have never felt so utterly alone and silenced.

I did eventually escape the abuse with the assistance of another leader in the youth group. However, under the cover of the religious and parental settings of approval, the

[84] The co-author recommends the following as excellent further reading in this regard: https://shop.aiatsis.gov.au/products/our-greatest-challenge.

[85] Divna Haslam et al, *The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report* (Report, 2023) 14, 17 <http://doi.org/10.5204/rep.eprints.239397>

[86] Australian Institute of Health and Welfare, *Family, domestic and sexual violence* (Statistical Information, 2024).

[87] Ben Matthews et al, 'Child sexual abuse by different classes and types of perpetrator: Prevalence and trends from an Australian national survey' (2024) 147 Child Abuse & Neglect 106562 (Matthews et al).

next youth leader also groomed me to become a 'girlfriend', the cycle repeated itself, and I was again sexually abused.

I did have one trusted teacher I disclosed to at the Pentecostal school I attended, but was told to pray for forgiveness and to resist further sexual temptation. This not only immediately added to my deep and sickening sense of shame, but was shockingly overt victim-blaming of a minor. I was not responsible, and I was not 'tempted' – I was forced, hated it, was repulsed by it and racked with guilt, but literally had no way out. It took me several more years to escape that second relationship, although, as indicated by the Australian Child Maltreatment Study,[88] further abuse occurred. My subsequent marriage worsened into protracted sexual, emotional, psychological and financial abuse; I had children of that marriage and unfortunately they have their own direct traumatic experiences as well as inherited transgenerational trauma from myself. While I have hope for their children, sometimes the cycle seems endless.

Another co-author and Expert Advisory Group Member, Chris Coombes, contributes:

I am a survivor of child sex abuse in an institution. Never in my life have I met a male-presenting person who has shared their truth with me about survivorship. Paradoxically, the statistics tell me survivors are all around me. To what or whom do I attribute blame for this lonely upbringing? Is it the sorry state of masculinity in this country that means my disclosure of abuse was met with shame or ridicule by childhood friends? Shame silences women and girls, men, boys, and those for whom such binaries make little sense. It prevents us from healing.

We acknowledge and support the submissions to this Inquiry by the National Centre, particularly its research regarding barriers to disclosure for victim-survivors of CSA, including a deep sense of shame and stigma. We honour the contributions to those submissions by the National Centre's lived experience College members.[89]

2.3 People with disability

2.3.1 Prevalence of sexual violence for people with disability

The findings of the Disability Royal Commission[90] underscored the critical imperative of integrating people with disabilities into the framework of violence prevention, support, and justice responses. It indicated:

- '55% of people with disabilities between 18 and 64 have been physically or sexually abused.
- 90% of women with intellectual disabilities have experienced sexual abuse.
- Women with disabilities account for nearly half of all domestic violence victims in Australia.
- 40% of women with disabilities have experienced physical violence, and they are twice as likely to experience sexual violence compared to women without disabilities.

[88] Divna Haslam et al, *The prevalence and impact of child maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report* (Report, 2023) 19 <http://doi.org/10.5204/rep.eprints.239397>.
[89] National Centre Submissions.
[90] Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023).

- From the age of 15, 46% of women with cognitive disabilities and 50% of women with psychological disabilities have experienced sexual violence, compared to 16% of women without disabilities.
- Women with disabilities are twice as likely to experience sexual violence over one year compared to women without disabilities.
- Of LGBTQIA+ individuals who reported harassment or violence in the last 12 months, 46% had a disability.
- In 2016, the cost of violence against women with disabilities was estimated at $1.7 billion.'[91]

The Australian Institute of Health and Welfare data adds to a comprehensive picture of sexual violence experienced by people with disability in Australia:

- 'About 1 in 5 adults with disability in 2016 had experienced physical and/or sexual violence from an intimate partner since the age of 15, totaling around 1.2 million individuals.
- Women with disabilities were about three times as likely as men with disabilities to have experienced intimate partner violence since the age of 15.
- Adults with severe or profound disabilities were about three times as likely as adults without disabilities to have experienced sexual violence since the age of 15.
- A higher proportion of adults with disabilities experienced abuse before the age of 15 compared to those without disabilities, with parents/step-parents and known individuals who are not family members being the most common perpetrators.
- Adults with severe or profound disabilities were about three times as likely as those without disabilities to report experiencing sexual violence since the age of 15.
- Adults with disabilities, particularly women and those with severe or profound disabilities, were more likely than those without disabilities to report experiences of sexual harassment, including unwanted touching, inappropriate comments, indecent exposure, and indecent phone calls.'[92]

2.3.2 Barriers to accessing Support and Justice for People with Disability

The People with Disability Australia Building Access project focused on enabling domestic and family violence (DFV) services to better meet the needs of women and children with disability.[93] The research found that Women with Disability (WWD) faced pre-access and access barriers to receiving support. For culturally and linguistically diverse (CALD) and First Nations WWD, barriers include a lack of knowledge related to their rights or to the law against DFV; not knowing where to go to seek support; visa vulnerability; family commitments; lack of culturally appropriate support; and being unable to leave their partner for cultural reasons.[94] Further barriers include:

- Fear and mistrust of support systems due to previous bad experiences or due to discrimination in daily life and privacy or confidentiality concerns.
- Not realising at the time that what they were experiencing was abuse.

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[91] Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Alarming rates of family, domestic and sexual violence of women and girls with disability to be examined in hearing* (Media Release, 12 October 2021).
[92] Australian Institute of Health and Welfare, *People with disability* (Statistical Information, 12 April 2024).
[93] People with Disability Australia Building Access project (Final Report, 2023).
[94] Ibid 26.

- Lack of support after disclosure.
- Inaccessibility of websites and resources for screen readers; visually and cognitively inaccessible websites.
- For people with neurological disability or neurodiversity, inaccessibility due to executive dysfunction or overwhelm and communication barriers due to different processing of social cues.
- Financial barriers that contribute to being unable to afford accessible transport, especially in regional and rural areas.
- Women with disability, particularly those with complicated/high support needs and those in group homes, as well as women on temporary visas, often have no pathways to leave the place where the violence is being perpetrated.[95]

Such barriers are likely to be replicated in the process of reporting to police.

2.3.3 Drivers of violence against women and girls with disabilities

OurWatch's *Changing the Landscape* report[96] notes two consistent intersecting drivers of violence against women and girls with disabilities: expressions of gender inequality and ableism. Gender inequality and gendered drivers include:

- Condoning of violence against women.
- Men's control of decision-making and limits to women's independence in public and private life.
- Rigid gender stereotyping and dominant forms of masculinity.
- Male peer relations and cultures of masculinity that emphasise aggression, dominance and control.

Ableism and ableist drivers include:

- Negative stereotypes about people with disabilities.
- Accepting or normalising violence, disrespect and discrimination against people with disabilities.
- Controlling people with disabilities' decision-making, and limiting independence.
- Social segregation and exclusion of people with disabilities.

Further, other forms of oppression such as racism, classism, homophobia and transphobia can intersect with gender inequality and ableism to influence the prevalence, nature and dynamics of violence perpetrated against women and girls with disabilities.

2.3.4 Addressing violence against women with disabilities

To ensure that work that aims to address violence against women and girls with disabilities is effective, meaningful, safe and respectful, OurWatch the following guiding principles:

- Centre the input of women and girls with disabilities.
- Ensure autonomy, community ownership and control.
- Co-design.
- Use a strengths-based approach.

[95] Ibid 36.
[96] OurWatch, *Changing the Landscape* (Summary Report, 2022) 4.

- Build partnerships and opportunities for collaboration. Be respectful and authentic.
- Ensure the physical, emotional and cultural safety of women and girls with disabilities. Ensure accessibility and inclusion.
- Ensure prevention work is informed by critical frameworks.
- Contribute to the evidence base.[97]

2.3.5 Co-author contributions of lived experience

The urgent need for incorporation of such principles into the criminal justice response to sexual violence for people with disability is amply illustrated by co-author Sarah Rosenberg's contribution:

> *It took 24 hours over 3 months to finalise my statement to the police. I had to break up reporting into sessions, because my disability restricts me from concentrating, sitting upright or remaining energised or even awake for long periods of time. There was no alternative offered, and each session involved finding someone to take me to the police station, travelling to the police station, and managing the stress of finding someone to collect me at whatever time we estimated I would be finished for the day - I hated the thought of keeping anyone waiting, and there was no phone signal inside the walls of the station. The station itself was what I imagine a gaol cell to feel like - small, windowless rooms with no fresh air and fluorescent lights which would exacerbate my pain.*
>
> *Sometimes I would have sessions booked in by appointment, show up and wait, just for the appointment to be cancelled. Even the stress of planning to go to the station, let alone sitting there and anxiously waiting to give my statement, only to be cancelled on, would be distressing for someone without a disability. For me, it involved huge exacerbations of complex inflammatory symptoms which would take days to recover from. When the pandemic started, I began giving my statement over the phone, as NSW Police did not have a Zoom system or similar yet. This was easier - I remember speaking to detectives over the phone, sometimes from the bathtub while soaking my aching legs.*

Another co-author's contribution clearly shows the extreme challenges facing a person with disability in finding a safe space to disclose – accessibility to safe shelter is a prerequisite to access to justice:

> *I have supported a victim-survivor with physical disabilities that was trying to leave a domestic violence with sexual violence situation. The person was completely relying on the perpetrator to leave the house or be driven to appointments. There was financial abuse, so the victim-survivor did not have any money to pay for Ubers or taxis to travel by themselves.*
>
> *The person was located in the city outskirts and the nearest public transport stop was a 15 minute walk away. They were unable to walk by themselves and therefore unable to access transport by themselves.*
>
> *There is a service called Access Sydney that focuses on supporting people who are elderly, frail or have an illness or disability that makes ordinary transport difficult. Their services are designed for those who don't or can't drive, cannot arrange transport through a friend or relative, can't use public transport or afford ordinary transport. The victim-survivor was unable to use this service, firstly due to not being offered in the area they live, secondly because the service only stops at designated locations and does not pick people up from their location. This makes the service*

[97] OurWatch, *Changing the Landscape* (Summary Report, 2022) 6.

inaccessible to most people with disabilities or who are elderly and who struggle to walk to a location to be picked up.

Their disabilities weren't diagnosed and therefore the person was ineligible to access NDIS. Further, the disability was most likely caused by ongoing abuse for decades.

The victim-survivor tried to contact police, but they dismissed them and said they should be grateful for the support the perpetrator offers. Due to this experience the person did not feel comfortable to report to police again.

That's why we tried to access support through DV services and phone lines. Not a single DV service had capacity, so we [resorted to] trying to call DV Line and Link2Home. Neither of those emergency accommodation services were aware of what shelters were accessible for people with physical disabilities. We were connected to various refuges and answered numerous invasive questions, only to find out after days of waiting for an eligibility assessment that we were declined because the safe house was inaccessible. We were always transparent with services and disclosed in the beginning of the conversation the access needs of the victim-survivor. The emergency accommodations weren't transparent with us and didn't disclose that their accommodation is not suited for people with physical disability from the beginning.

After months of trying, the victim-survivor was finally offered a space in the shelter. Upon arrival they found out that the accommodation was inaccessible for them. While they are grateful to be offered a safe space, their movement in the space is restricted due to inaccessibility.

Even if this person had found a way to leave their home to report to police, the police would have most likely referred them to an inaccessible shelter. Accessible emergency accommodation for people with disabilities is a prerequisite to access to justice.

Services that support victim-survivors experiencing sexual violence need to be accessible, with staff offices and clients common areas being designed and built to Silver Level accessibility standards. This includes police, DV services, sexual health / assault clinics, refuges, etc. In regards to emergency accommodation accessibility is achieved when all units have Silver Level and each site having at least one unit that meets Gold Level accessibility standards.

There needs to be a free transport option for people who are experiencing violence or are at risk of violence, that can pick victim-survivors up from their home or location and drive them to police or other services. This transport should be accessed by any person who has mobility or transport access struggles and should not need a formal disability diagnosis.

Another co-author describes trying to report to police as a person with neurodiversity:

I tried to report an experience of physical violence and sexual harassment by my neighbour to police.

The police station in my area was too small so they sent me to a police station further away.

When I reported to police I showed them the video footage of an act of severe physical violence, videos of the abuse, as well as the threatening text messages. I asked to receive an AVO.

The police officers said that I do not express myself like someone in this situation and my facial expression and tonality did not match. They told me I am lucky that they aren't charging me with offences due to meeting with someone during lockdowns. Additionally, they refused to give me an AVO and said that police only provide AVOs for DV, not for neighbour disputes and I have to go to court if I want an AVO. They also refused to take my statement and I didn't receive a case number. Further, they said that the neighbour had a disability and that there is nothing they can do.

I was overwhelmed, in tears, sunk down to the ground and started rocking back and forward. The police officer wanted me to leave the police station but I wasn't able to walk. I wasn't even able to answer the police officer because I became non verbal. I tried to speak but no sound was coming out of my mouth.

The next day I went to the court and inquired about AVO proceedings. They told me that the waiting times are one month, but I had read online about AVOs and insisted on an interim AVO. I received a court date two days later and the judge granted me an interim AVO, and a month later I received an AVO.

The neighbour breached his AVO and continued texting and screaming death threats. I recorded those incidents and called police for the breach of AVO. Police refused to look at the evidence and said there is nothing they can do.

At this stage I was looking to leave my rental, before the lease ended. I barely had any money left to my name, because the neighbour practically drained my bank account with all his needs. I had to reach out to some of my regular sex work clients and ask them for money to be able to move, and they indeed supported me and never asked for services in return.

I don't know how I would have been able to leave this situation without my clients' support. I was a migrant with no rights to access welfare supports or covid payments, wasn't aware about the victims support scheme at the time, and because police refused to take my statement I wouldn't have been eligible for it anyway.

I wasn't aware at that time that I was autistic, but I clearly showed signs of autism. A person should not have to disclose their disability to police and police need to be better trained to recognise symptoms of disability. When someone's facial expressions and tone do not match, the person goes non-verbal and they start rocking back and forth; those are very clear indicators of neurodiversity.

I received an autism diagnosis a couple of months later, after disclosing the incident to a counsellor. They said that non-autistic people are able to identify when they are being threatened for prolonged periods of time.

Submission 9: The Commission should, when considering reforms to the criminal justice response to sexual violence, including training reforms and information aids and resources, ensure that they reflect the need for physical, emotional and cultural safety of women and girls with disabilities, and are accessible and inclusive.

Submission 10: The Commission should, when considering reforms to court infrastructure, recommend accessibility standards.

Submission 11: The Commission should, when considering reforms to information systems, ensure that all websites be funded to enable upgrading to Web Content Accessible Guidelines (WCAG) standard 2.0 and all resources developed are accessible to screen readers, as well as available in audio format, video resources are captioned and interpreted into AUSLAN, and Easy Read resources are available.

Submission 12: Further to our previous submission on funding, the Commission should, when considering reforms impacting women and girls with disabilities, recommend long-term funding models for specialised lived experience-led organisations and peer led organisations specialising in these intersections.

2.4 LGBTQIA+ victim survivors

2.4.1 Prevalence of sexual violence in LGBTQIA+ communities

Australian Institute of Health and Welfare data, drawing from the *Private Lives* survey, indicates:

- Nearly half (49%) of respondents had ever experienced sexual assault;
- More than 3 in 5 (59%) had ever experienced sexual assault from an intimate partner;
- Queer, pansexual, and bisexual individuals had the highest prevalence of lifetime sexual assault, followed by lesbians, asexual, and gay individuals.
- Non-binary individuals, cisgender women, and trans men also reported high rates of sexual assault, with significant proportions of trans women and cisgender men also experiencing it.
- Former intimate partners, current intimate partners, friends, casual encounters, and strangers were commonly identified as perpetrators of the most recent sexual assault.
- Cisgender men were the most commonly identified gender of perpetrator in the most recent incidents of sexual assault, followed by cisgender women, non-binary individuals, trans women, and trans men.[98]

The findings of the Disability Royal Commission further underscores the critical imperative of integrating LGBTQIA+ people with disability into the framework of violence prevention, support, and justice responses.[99]

2.4.2 Barriers to reporting

The 2020 Australian Government House of Representatives inquiry into Family and Domestic Violence (FDSV) identified barriers for LGBTIQA+ individuals in reporting and seeking help, including homophobia, transphobia, and fear of discrimination.[100] LGBTIQA+ individuals are less likely to find support services tailored to their needs . A national survey of 1,157 workers in specialist family, domestic, and sexual violence services highlighted:

- Workers expressed a need for more training on understanding LGBTQ+ experiences of violence.
- There is a perceived lack of training and capacity to support LGBTQ+ communities among service providers.[101]

Further, service providers may struggle to recognise violence within LGBTQ+ relationships.[102]

2.4.3 LGBTQIA+ experiences of sexual violence

The Aids Council of NSW (ACON) research addresses the historical neglect of sexual violence within LGBTQIA+ communities in New South Wales (NSW) and Australia, despite growing evidence of its prevalence. It aims to fill this knowledge gap by exploring LGBTQIA+ individuals' experiences, perceptions, and responses to sexual violence,

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[98] Australian Institute of Health and Welfare, *LGBTQIA people* (Statistical Information, 12 April 2024).
[99] Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023).
[100] Parliament of Australia, Inquiry into family, domestic and sexual violence (Report, March 2021).
[101] Department of Social Services, First national survey to strengthen sexual violence prevention and support in LGBTIQA+ communities (Survey Results: 21 February 2024).
[102] Australian Institute of Health and Welfare, *LGBTQIA people* (Statistical Information, 12 April 2024).

informing ACON's efforts in prevention and support, and influencing NSW policy and practice in the sexual violence space. Its survey assessed disclosure and reporting of the most impactful sexual violence experiences:

- 78% of respondents disclosed their experiences, while 19% did not.
- Gay respondents were less likely to disclose, with nearly a third reporting non-disclosure.
- First Nations respondents were also less likely to disclose compared to non-Indigenous respondents.
- Only 11% disclosed to police first, while 8% turned to sexual assault or domestic violence support services, and 5% reached out to LGBTQ+ specialist services.

These findings suggest a need to empower LGBTQIA+ individuals and their allies as first responders to sexual violence and enhance LGBTQIA+ organisations' capacity to develop and promote community-led specialist services.

In relation to police reporting, the survey indicates the following:

- The majority of respondents (86%) did not report their most impactful sexual violence experience to the police.
- Only 13% made formal reports, while 2% used the NSW-specific Sexual Assault Reporting Option (SARO).
- All – 100% – of trans women did not report to police, compared to 85-87% for other genders.
- Negative or mixed experiences were common among those who reported, with feelings of invalidation, dismissal, or inaction.
- Some participants reported trying to take their own lives due to traumatic reporting processes.
- Few reported positive experiences, such as being believed and validated by a specialist sexual assault officer.[103]

Submission 13: The Commission, when proposing and recommending reforms, including training reforms and information aids and resources, ensure that such reforms are inclusive of LGBTQIA+ communities' experiences of sexual violence.

2.5 Migrant victim-survivors of sexual violence and exploitation

2.5.1 Prevalence of sexual violence in migrant communities

The ANROWS Migrant and refugee women's attitudes, experiences and responses to sexual harassment in the workplace study found that:

- Around 2 in 3 (68%) had experienced at least one form of sexual harassment in any setting in the last 5 years in Australia.
- Almost half (46%) of respondents experienced at least one form of sexual harassment in the workplace in the last 5 years.
- Participants believed harassment was often motivated by gender and/or sex, with men being the most frequent harassers, especially those in senior positions or

[103] ACON & Say it Out Loud, *LGBTQ+ People's Experiences and Perceptions of Sexual Violence* (Report Summary 21. March 2023).

clients/customers and women in temporary or casual roles were more likely to experience harassment.

- More than one third (37%) of participants did not disclose their experience with major reasons for not reporting included race/religion, feeling responsible, uncertainty about what to do, and concerns about employment impact, as well as threats or warnings against reporting were common.[104]

Further, the Monash study of migrant and refugee women in Australia found:

- One third of migrant and refugee women reported experiencing some form of DFV.
- The vast majority (91%) of those who experienced FFV encountered controlling behaviours related to migration abuse.
- Almost 1 in 2 (42%) experienced physical or sexual violence.
- Further, 40% of temporary visa holders, 32% of Australian citizens and 28% of permanent visa holders have experienced DFV.[105]

2.5.2 Barriers to reporting sexual violence for migrant communities

The above report highlights the specific impact of migration status on the experience of family violence and access to support. It points out that migration status often adds a layer of complexity and uncertainty for women. There is an overlap of family, domestic and sexual violence with forms of coercion and abuse that are akin to Commonwealth trafficking and slavery offences.[106] Migrants on temporary visas, in particular, experience significant barriers to access services, support and justice for a variety of reasons that are often outside their control. Many of those barriers are unique to this cohort of women:

- Victim-survivors on a temporary visa may be dependent on a violent partner or employer for residency and may not disclose violence due to the fear they may be deported. Threats of visa cancellation, detention and deportation prevent many abused migrants from even considering whether to act on their rights.
- Conditions of temporary visas can result in social isolation due to, for example, restrictions to accessing employment and housing. Isolation may be further heightened for those who do not speak English or drive or those with a lack of community support and networks.[107]
- Temporary visa holders are often unable to access social support such as income support and healthcare (e.g. through Medicare), as eligibility is limited to people with permanent residency or citizenship status. This includes limited to no access to crisis accommodation, social services, public health services, housing and other services available to Australian women.[108]
- Prejudicial attitudes from services, including police because of their migrant/visa status.[109]

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[104] M Segrave, R Wickes, C Keel, and SJ Tan, *Migrant and refugee women in Australia: A study of sexual harassment in the workplace* (Research report, 2023).
[105] Marie Segrave, Rebecca Wickes, Chloe Keel, *Migrant and refugee women in Australia: The safety and security study*. (Report, 2021).
[106] Ibid.
[107] See for example the Australian Institute of Health and Welfare data (Website, 2024).
[108] Immigration Advice and Rights Centre, *Submission to national plan to end violence against women and children* (25 February 2022).
[109] Ibid.

- Language, cultural, communication and technical barriers including lack of CALD-specific information (for example, related to gender equality and violence, service availability, or legal rights and entitlements).
- Fear and distrust of authorities due to pre-settlement experiences.
- Community norms or social stigma that discourage disclosure, acknowledgement and intervention of violence within relationships.
- Community belief that family and domestic violence issues should be dealt with within the family unit or family being overseas and unable to offer support.[110]

Right now the Australian migration system does not empower temporary visa holders to leave abusive/exploitative situations. Even worse, reporting incidents of violence to police or other justice systems can lead to victim-survivors' visas being cancelled.

2.5.3 Migration-related abuse

There is an intersection between domestic, family and sexual violence and migration related abuse. The Immigration Rights and Advice Center (IARC), a not for profit community legal centre providing free immigration advice and assistance to people throughout New South Wales, observes that almost every woman they assist who has experienced DFSV also discloses experiences of immigration related abuse.

Migration related abuse is a subcategory of coercive and controlling behaviour. It is often perpetrated by their partner to whom they are often bound due to their partner either being the visa sponsor, or main visa holder. Migration related abuse includes threats to cancel their visas, have them deported, or separate them from their children. Women on temporary visas are placed in a uniquely vulnerable position to be controlled and manipulated, because of their visa status. Reporting DFSV brings the real risk of visa cancellation, social and cultural stigma and fear of harm from family and community at home.[111]

We note one example of seeking help for sexual violence, which led to temporary visa cancelation (as cited by the Migrant Workers' Centre):

> *I came to Australia on a Student visa. When I finished my degree, I found a job with visa sponsorship. I felt so lucky, but it turns out I was not after all. My boss would make me stay late alone with him or ask me to accompany him on overnight business trips. When I made excuses to refuse him, he would casually remind me of my visa sponsorship or threaten me that I might lose the job.*
>
> *According to the visa regulations, I become eligible for transition to permanent residency when I have worked for the sponsoring employer for over three years and the employer agrees to continue sponsoring me for a permanent visa. So, I ended up working in the unsafe work environment for four years. After filing for my permanent visa application, my boss took a further step and started touching me. I was so scared. I went to police, but there was nothing to be done as I had no evidence or witness. And I didn't want to lose his visa sponsorship, either, when my permanent residency seemed to be just around the corner.*

[110] Ibid.

[111] Immigration Advice and Rights Centre, *Submission to national plan to end violence against women and children* (25 February 2022).

One morning, he fired me by a text message. He came to my house and made a scene, yelling at me that I was not cooperative. I talked to a lawyer because I was about to lose both my job and years of efforts toward settlement in Australia.

My lawyer negotiated with the boss and made him sign a deed stating that he would keep me on the book for five more months so that I could get my permanent visa in exchange for my silence about his sexual harassment. However, visa processing was delayed during the pandemic, and the boss reported my termination to the Government 5 months later.

My temporary visa was cancelled, and the permanent visa application was rejected. I am in the process of appealing the decision.[112]

2.5.4 Addressing migration-related abuse

We believe that visa conditions and settings that create vulnerability to exploitation must be abolished, and protections must be created for migrants who take action against their perpetrators whether those are partners, employers or other parties. The protections need to be sufficient to address the power imbalance between visa-holders, who risk detention and removal from Australia, and perpetrators including employers who stand to benefit from this vulnerability.

On this issue, we refer to our co-author's individual submissions regarding visa conditions and refer the Commissioners to these separately.

Taken together, research and lived experience underscores the need for tailored interventions and improved responses to support women with temporary migration status who are experiencing violence. It is important for policies and support systems to recognise and address the specific challenges faced by this group, including the threat of deportation and separation from children, which can exacerbate their vulnerability and hinder their ability to seek help.[113]

Submission 14: The Commission, when proposing and recommending reforms, including training reforms and information aids and resources, ensure that such reforms are inclusive of im/migrants' experiences of sexual violence.

[112] Migrant Workers Center, *Insecure by Design: Australia's migration system and migrant workers' job market experience - Migrants Workers Center* (Report March 2023).

[113] See also Migrant Worker Centre, *Insecure by Design* (Report, 2023). This research of over 1000 migrant workers found that 58% have experienced exploitation in the form of underpayment and between 25-34% have experienced other forms of exploitation including being pressured into doing unsafe work. While their 2021 research *Lives in Limbo* with over 700 temporary migrant workers highlighted that 65% have experienced underpayment and 1 in 4 have additionally experienced other forms of labour exploitation. A link between workplace exploitation and temporary visa status was found, whereby 91% of workers surveyed who experienced wage theft arrived on a visa with no pathway to permanent residency.

2.6 Sex worker victim-survivors of sexual violence

2.6.1 Terminology

Sex work must not be confused or conflated with 'trafficking', which the sex work community refers to as 'modern slavery, human trafficking and related exploitation'. As research by the Australian Institute of Family Studies notes, sex work 'can be broadly defined as the exchange of sexual services (including oral sex, vaginal and anal sex, sexual touching, masturbation and massage) for payment or reward. However, there is great variation in the forms these exchanges take. Streetbased sex work, brothel work, private work, bondage and discipline services, escort work, and tabletop and exotic dancing all create very different experiences of sex work for those involved, and differences in the kinds of associated risks and dangers and the standard of living they provide.'[114] The issue of terminology is discussed further below in relation to stigma.

2.6.2 Prevalence of sexual violence

There is a dearth of Australian research in this area; Quadara's 2008 study on prevalence notes 'it is clear that very little is known about sectors other than the street-based trade. Few comparative studies exist, with the tendency to either collapse all industries together or to focus exclusively on street sex work'.[115] Discussion of prevalence must be distinguished between sexual violence in sex workers' private lives, and in their work lives. In private lives, the statistics for prevalence in sex workers are no different to any other cohort.

At work, Guadara's review of literature found 'street-based workers are the most vulnerable to all forms of workplace violence, including sexual assault. They are more likely to experience:

- repeat victimisation;
- aggravated or particularly brutal sexual assaults;
- kidnapping and unlawful imprisonment; and
- multiple forms of interpersonal violence while at work, including verbal abuse, physical assault, and other crimes such as robbery and non-payment'.[116]

In particular, underage street workers were found to be particularly vulnerable to sexual assault due to inexperience with dangerous situations, or where perpetrators specifically target them, knowing their inexperience and reluctance to go to police.[117]

The review discusses international literature indicating prevalence for street workers from 13% (United States) to 27% (Aotearoa New Zealand), and in Australia one study found that 78.8% of street workers had ever experienced sexual assault; 60.6% of these from a client, 27.3% once and 33.3% more than once.[118]

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[114] Antonia Quadara, 'Sex workers and sexual assault in Australia Prevalence, risk and safety' (2008) 8 ACSSA Issues 1, 3.
[115] Ibid 8.
[116] Ibid.
[117] Ibid.
[118] Ibid.

A 2020 Canadian study cites a 2014 global systematic review that found a lifetime prevalence (45–75%) of physical, sexual, or combined workplace violence against women sex workers.[119]

2.6.3 Criminalisation of sex work creates barriers to reporting, influences police response

Sex work remains criminalised in nearly every state and territory in Australia. Even in a number of jurisdictions that have 'decriminalised' sex work, there remain criminal penalties for street based sex work in particular areas.[120] This places sex workers in the 'paradoxical position whereby sex workers continue to be targeted as "criminals", even and especially when they attempt to report rape and sexual assault.'[121] Sex workers report police not treating their claims seriously, not considering their experience as 'legitimate' sexual' assault, or expecting free services in return for not charging them for sex work offences. Stardust et al report one sex worker's experience:[122]

> *I had to engage with the police in reporting [of a sexual assault] ... as part of reporting it, it became clear to the police that I was a sex worker ... and a lot of things were said to me during that time that were completely unacceptable and I noticed it was just like everything is going along and you're being treated with respect and then just you know, click your fingers and all of a sudden, everything is very different ... I was really just treated with no dignity, with no humility, with no respect.*[123]

One co-author contributes their experience of reporting to police as a migrant sex worker:

> *I reported to police several times sexual or other types of violence I experienced as a sex worker.*
>
> *Rather than listening to what had happened to me, police started questioning me about my work and visa status. I was asked what visa I was on, how many hours I was working and if I was paying my taxes. On at least two occasions the officers said that they might have to report me to Australian Border Control due to suspecting I am in breach of my student visa work hour restrictions.*
>
> *I never worked in breach of my visa conditions. I actually started engaging in sex work due to feeling that it was my only choice to survive on 40 hour per fortnight work hour restrictions.*
>
> *I was then further questioned about sex work and in NSW about working from home. Every single time I reported police officers said that they first had to investigate me for engaging in sex work. I had to explain them sex work legislation. In Victoria that I was working in legal brothels and that sex work was legalised, and in NSW that sex work was decriminalised in 1995.*
>
> *Police officers didn't believe me and I sometimes had to wait multiple hours until their research concluded I was telling the truth. In NSW I was aware of a sex worker liaison officer in Kings Cross and asked officers to give their colleague a call.*

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[119] Bronwyn McBride, Kate Shannon, Brittany Bingham, Melissa Braschel, Steffanie Strathdee and Shira M Goldenberg, 'Underreporting of Violence to Police among Women Sex Workers in Canada' (2020) 22(2) *Health Hum Rights* 257, 257.

[120] For example, s38A *Summary Offences Act 1966 (Vic)*.

[121] Zahra Stardust and Hilary Caldwell. 'Archetypal Sluts.' New Directions in Sexual Violence Scholarship, May 12, 2023, 45–64. https://doi.org/10.4324/9781003379331-5

[122] Zahra Stardust et al, "I Wouldn't Call the Cops if I was Being Bashed to Death': Sex Work, Whore Stigma and the Criminal Legal System' *International Journal for Crime, Justice and Social Democracy,* vol. 10, no. 3, Sept. 2021, pp. 142-57, <doi:10.5204/ijcjsd.1894>

[123] Ibid.

On one occasion, the police officer started questioning me about how I advertise my services. He started googling and looking up escort websites in front of me.

Only after officers came to the conclusion that I wasn't breaking any laws, they started taking my statement and asking questions about the violence that has happened to me. None of my reports was ever further investigated.

Last year, when I was trying to rhyme together all the violence that has happened to me, I went to NSW police and asked for my E-reference numbers. I received an A4 page of reports. I asked about the details of the reports and not a single reference mentioned [or] referred to a crime I reported as a sex worker. I even asked to check my work name, in case they recorded it under a different name. There were no reports made under my work name.

Since then I have met multiple other migrant victim-survivors that have been threatened by police with reports to Border Force while they were reporting sexual or other forms of violence. In some cases the report was actually made and confirmed either verbally by a police officer or in writing documented in the police report.

2.6.4 Decriminalisation is necessary to address sexual violence against sex workers

Human Rights Watch (HRW) research,[124] as well as credible investigations and analysis from academics, health journals, anti-trafficking organizations, UN women's rights bodies, and sex workers themselves, consistently find that criminalization of the demand or supply of sexual services makes sex workers more vulnerable to violence, including rape, assault, and murder, while having no demonstrable impact on the eradication of trafficking.

> The use of criminal law to regulate women's bodies is not an effective tool for their protection. Instead HRW recommends decriminalization of sex work as a critical step in the eradication of violence against sex workers and survivors of trafficking for sexual exploitation.
>
> Sex workers and victim-survivors of sexual violence or exploitation should be supported to lead discussions about their lives and participate meaningfully in policy forums.[125]

2.6.5 Inappropriate language leads to stigma and sexual violence against sex workers

As discussed above, unfortunately under international law the terms 'sexual exploitation', 'trafficking into sexual exploitation', and 'sex work' are often used interchangebly despite being distinct concepts. HRW notes the importance of using accurate and respectful language when speaking about sex work and trafficking, especially due to those concepts being often used interchangeably. HRW recommends the usage of 'sex work' when referring to those who call themselves 'sex workers', not only out of respect for the people involved, but also for legal clarity.[126]

> The language used to discuss sex work and trafficking should be respectful and precise, so as not to further the dehumanization of sex workers.[127]

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[124] Human Rights Watch, *Why Sex Work Should Be Decriminalized* (News Post, August 7, 2019).
[125] Ibid.
[126] Ibid.
[127] Ibid.

A 2017 article published by the Journal of Sex Research found that stigmatisation 'plays a role in fostering an environment where disrespect, devaluation, and even violence are acceptable'. The term 'prostitute', except in cases in which it is explicitly reclaimed by affected communities, connotes criminality and discursively suggests that sex workers are deserving of punishment . Objectifying, patronising, and dehumanising language – including 'prostituted women' – is directly tied to several forms of violence that women face, in part because it normalises that violence. HRW investigations have found that sex workers face physical, psychological, sexual, economic, and other forms of violence from a wide range of perpetrators, including police, clients, health care providers, government bodies, and others.

Further, in 2020, Scarlet Alliance conducted research with CSRH.[128] They surveyed 647 sex workers regarding stigma and discrimination. The study indicated:

- 96% of participants reported experiencing stigma or discrimination regarding their sex work in the last 12 months (34% indicated that this 'often' or 'always' occurred).
- 91% of participants reported negative treatment by health workers (24% indicated this 'often' or 'always' happened).

In 2015, a study by CSRH found that:

- 31% of health workers self-reported they would behave negatively toward sex workers because of their sex work.
- 64% of the general public self-reported they would behave negatively toward sex workers because of their sex work.[129]

This widespread discrimination is a result of deeply embedded stigma and criminalisation of sex workers. (Please note the word 'prostitution' in this submission is only used in direct quotes).

Submission 15: The Commission should recommend the full decriminalisation of sex work federally and in all states and territories, including noting that the criminalisation of sex worker or buyer lead to an increased risk of violence.

Submission 16: The Commission should recommend including the words 'sex workers' in anti-discrimination and anti-vilification protections on both state and federal level.

Submission 17: The Commission should recommend the usage of the words 'sex work' in policies and legislation to accurately describe the consensual sexual activity between adults in exchange for money and the usage of language that distinguishes rather than conflates sexual exploitation with sex work.

Submission 18: The Commission, in its recommendations regarding police training, should include recommendations around the necessity for training as to the perspectives and experiences of sex workers and victim-survivors, and the need for appropriate language when interacting with sex workers.

[128] As cited in Scarlet Alliance, *Anti-discrimination and vilification protections for sex workers in Australia* (Briefing Paper, 2022).
[129] Ibid.

Submission 19: Further to our previous submission on funding, the Commission should recommend adequate funding models for peer led organisations, supports and solutions for sex workers who have experienced sexual violence or exploitation.

2.7 Older Women that experience sexual violence

2.7.1 Prevalence of sexual violence for older women

In 2020, the Australian Institute of Health and Welfare undertook the *Elder Abuse Prevalence Study*, which surveyed 7,000 older people in 2020 who were living in the community and had the capacity to engage in telephone interviews. Notably, aged care residents or those with cognitive impairment were excluded. However, as the AIHW notes, this is 'the best national data source at present'. This data indicates that '39,500 (1.0%) had experienced sexual abuse in the past year'.[130]

As to aged care facilities, the Royal Commission into Aged Care Quality and Safety in Australia,[131] which delivered its final report in March 2021, highlighted the national shame that there are about 50 sexual assaults which take place in residential care facilities *every week* – 2,600 per year. The Commission found that sexual assaults in aged care facilities are under-reported. In the years leading up to the Commission's report, there were hundreds of alleged unlawful sexual contacts reported annually in aged care. However, these represent only those cases that were formally recognized and reported. There is a significant failure to hold providers of aged care accountable for their dereliction of duty to keep older women safe in aged care facilities. We continue to hear from sexual assault services that providers are not keeping older women safe from known perpetrators with cognitive decline who are repeat offenders of sexual assault.

2.7.2 Barriers to reporting for older women

Sexual assault against older women is a particularly under-reported issue for several reasons including stigma, dependency on caregivers, and cognitive impairments that may affect the victim's ability to report the abuse. We can infer from broader statistics on elder abuse and sexual violence that older women are not spared by virtue of their age. Ageism leads to stereotyping of older adults as weak, dependent, and asexual, which contributes to their invisibility in discussions about sexual violence. Such stereotypes lead to society, including law enforcement, healthcare providers, and even family members, to dismiss or overlook the possibility of sexual abuse among older women. This makes it easier for perpetrators to believe they can commit such acts without detection.

When older women report abuse, ageism can lead to their claims being taken less seriously than those of younger victims. Perpetrators benefit from this bias because it decreases the likelihood of facing consequences. Doubts about the reliability, mental capacity, or credibility of older victims can lead to inadequate investigations and a lack of legal recourse.

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[130] Australian Institute of Health and Welfare, *Elder Abuse Prevalence Study* (2021) as cited in Australian Institute of Health and Welfare, Family, domestic and sexual violence: older people (2024).
[131] Commonwealth, Royal Commission into Aged Care Quality and Safety in Australia, *Final Report* (2023).

2.7.3 Experiences of reporting sexual violence against older women

The following testimony by the daughter of Sandra, an older victim-survivor, speaks to how older women in aged care are not taken seriously:

> *A friend put me in contact with a retired senior police officer, who agreed to review mum's notes and make up a timeline of what occurred. He contacted the police on our behalf to ask them to investigate the possibility that mum had been sexually assaulted. We had copies of mum's records from the aged care service and noted that some references to rape had been removed; we wanted police to investigate that as well.*
>
> *The police said they would not investigate because mum had dementia. Not because of her cognition; but because of her diagnosis of dementia. I told them I thought that was outrageous. We got a copy of the police report and it refers to mum's 'rape fantasies'*[132].

We believe the justice system needs to adapt its evidentiary standards and procedures to better accommodate cases involving older victims. This might include the use of video testimonies to avoid re-traumatization and to assist those who may have mobility or health issues that make court appearances difficult. Courts should also be equipped to handle cases where victims may have cognitive impairments, ensuring their testimony is given appropriate weight and consideration. We make submissions further below on pre-recording of evidence.

Courts should have access to victim advocates, and independent legal representatives (ILRs), who specialise in working with older adults. These advocates can assist victims throughout the legal process, from reporting the abuse to navigating the court system. Providing psychological support and legal assistance tailored to the needs of older women can help them come forward and sustain their involvement in often lengthy judicial processes. We make submissions further below in the sections on victim advocates and ILRs.

Submission 20: The Commission, when proposing and recommending reforms, including training reforms, information aids and resources, and evidentiary processes, ensure that such reforms are inclusive of older womens' experiences of sexual violence.

3. Police responses to reporting (Questions 5-7)

3.1 Police culture of disbelief, disinterest and dissuasion

Many adult victim-survivors do not formally report to police due to the pervasive culture in the police force of disbelief, disinterest and dissuading victim-survivors from reporting. We note the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse that each Australian government should ensure its policing agency:

> … recognises that a victim or survivor's initial contact with police will be important in determining their satisfaction with the entire criminal justice response and in

[132] *https://www.opalinstitute.org/uploads/1/5/3/9/15399992/sandrastoryb.pdf*

influencing their willingness to proceed with a report and to participate in a prosecution.[133]

A co-author remembers what is a common victim-survivor experience – presenting to formally report to police, but being actively dissuaded from making the report:

> *I approached the local police station to disclose the rapes. I was herded into a small, airless office with three male detectives, who took 3 hours to convince me that no matter what I had endured, my life would be much worse if I made an official report. I had video evidence of some of the offences, but despite this, the detectives managed to dissuade me from engaging with the criminal justice process. They intimated that I would be a bad mother if I decided to report, because if a prosecution were to proceed, my children would suffer along with me through all the years it would take to bring the matter to trial. My work performance would also suffer, and any impact on my employment would then also have an impact on my children. Of course, they also drove home the negligible chances of successfully obtaining a conviction. When I asked them how many rape cases they had successfully brought to conviction, they told me – none. I left without filing a report.*

However, a trauma-informed disclosure experience provides a stark contrast:

> *They put me through to a police officer who worked in a specialist sexual offences division. He did not try to hurry me, and listened without interrupting. He was very respectful and encouraging in his tone, and presented me with all the options and variables. The most important thing he said to me was 'this is your journey. You might wish to go ahead with it, and if you do, you might succeed or you might not. Sometimes it just helps to have your say, to tell your story. Sometimes it's the telling that helps as much as or more than the outcome.' I was minded to continue, but the evidence was then sent to detectives at a different branch, who were both impersonal and judgmental. They convinced me not to proceed with a formal report.*

3.2 Difficulties with Australian Border Force

One co-author with lived experience as a migrant sex worker notes that the Australian Border Force's (ABF) investigative processes for visa breaches are often punitive and fail to consider the complexities of migrant exploitation. When there is a plausibility that a migrant has been coerced into coming to Australia via an illegitimate visa pathway to work in exploitative conditions, Australia has a duty of care to ensure the migrant's safety. It must investigate and rule out the possibility of modern slavery, human trafficking, or related exploitation.

Migrants found to have breached their visa conditions should be referred for legal and psychological assistance. This process is essential to determine whether the migrant was coerced, deceived, or defrauded, or if they intended to exploit the Australian system. Failing to provide migrants with translation services and legal support, and immediately detaining and deporting them for visa breaches, constitutes a grievous human rights violation. ABF is uniquely positioned to detect instances of modern slavery, human trafficking, and other forms of violence. It should refer victim-survivors to the necessary support services.

However, ABF's current approach emphasises punishment over rehabilitation or support. This typically involves strict enforcement actions, including detention and deportation for immigration violations, without a thorough investigation into the individual's circumstances. Rapid detention and deportation can circumvent proper legal procedures, denying individuals

[133] Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 2017) 194, recommendation 3(a).

the chance to present their case or receive support, and is a violation of human rights. This approach makes victim-survivors fear law enforcement, causing them to avoid disclosing their situations due to the fear of punishment or deportation.

A multi-agency collaboration is needed between the AFP, Border Force, and victim-survivor support organisations (including legal and psychological support) to ensure no victim-survivor is missed or left behind. Currently, only the AFP and ABF investigate cases, with no independent legal representation or psychological support. Everyone makes mistakes, this includes AFP and ABF.

Border Force receives reports of visa breaches, whether this is about individuals or workplaces. There is clear evidence that perpetrators threaten victim-survivors with deportation by reporting them or their workplaces to ABF. If nearly all migrant women who experience DFSV are experiencing visa related abuse, such as threats of being reported to ABF, there is a high likelihood of those threats being put into action.

ABF and AFP have an enforcement approach and raid migrant workplaces with the goal to identify migrants who are in breach of their visa conditions. This approach leaves room to misidentify migrants who have experienced violence or exploitation and are in breach of their visa conditions due to coercion, threat or deception, as migrants who are trying to exploit Australia. Due to the punitive nature of ABF and AFPs work, migrants in breach of their visa conditions are detained and then deported.

Most victim-survivors struggle to identify that they are experiencing violence or exploitation while it is happening to them. Without a safety mechanism of independent control there is a high risk of victim-survivors being detained and deported. It is more important to ensure no victim-survivor is left behind, than deporting migrants in breach of their visa conditions.

This co-author shares their experience being reported to Border Control:

> *I have been threatened by brothel owners, farm owners, former dates and police with being reported to border control, but I am unsure who actually reported me.*
>
> *I also had friends who have been deported at the border when trying to re-enter Australia.*
>
> *For example, one international student who was studying a diploma study in my class was deported for working more than 40 hours per fortnight. I was aware that this student was working beyond their allowed hours, but it was their only way of survival while being paid between 12-14$ an hour.*
>
> *Another migrant victim-survivor of mine was stopped at the border, questioned and consequently deported. This person was experiencing sexual and physical violence in their relationship.*
>
> *Those experiences made me wary, and that's why every time I travelled I educated myself about the Australian migration legislation to ensure I am aware of my rights and restrictions of my student visa. Further, I engaged an accountant and kept records of the amounts of hours I worked.*
>
> *Indeed, I was stopped by Border Control. The first time it happened I was travelling with my partner back to Australia from a visit to my family.*
>
> *I was stopped during passport control, was asked to hand in my phone and started being interrogated about how many hours a week I was working.*

I started sex work due to feeling it was my only choice to survive on 40 hour per fortnight student visa restrictions and I never worked in breach of my visa conditions.

I was held for multiple hours, asked repeatedly about my work pattern. The immigration officer even tried to trick me by asking me if I ever work more hours in one week and less hours in another week. I explained that I am aware that a fortnight starts every Monday and that I have never worked more than 20 hours a week.

While going through my phone searching for indicators that show that I was in breach of my visa restrictions, the border force officer stumbled over message evidence that I was experiencing domestic violence. She pulled me aside and started telling me that there is support available. I was really confused and thought they were questioning me about sex work and I let them know that I am connected with sex worker organisations. She explained that there are domestic violence services available.

This confused me even more, because I wasn't aware at the time that I was experiencing DV. I laughed it off, thanked her and said I am not experiencing domestic violence. I wasn't handed any information about domestic violence or shown where or how to access DV support.

The border force officer let me go due to being unable to find evidence for being in breach of my student visa.

While they were able to identify I was in a DV situation, they missed the debt bondage like situation on the farm my partner and I were experiencing.

The next time I crossed the border I was again stopped by immigration. My phone was taken away and I had to wait until I was released. This time this interrogation process was shorter and I was released without any further comments or checking-in whether I am still experiencing DV.

The third time I was stopped at the border, interrogated and my phone was taken away, I asked whether Immigration had randomly checked me or if I was reported to border control. The officer stated that there was a report made and that's why I am getting stopped every time I enter the country. Again, the immigration officer did not check with me whether I was experiencing domestic violence.

I wonder what would have happened if I was provided with information about domestic violence, modern slavery, human trafficking and related exploitation. While I understand that it might have been unsafe to hand me those resources while crossing the border with my partner, those resources could have been handed to me the other two times I crossed the border by myself.

But even at the time when I was travelling with my partner, border force officer interrogated me by myself. During this time they could have showed me resources online and how to keep myself safe when doing this search, and I could have looked up information about DV at a later stage at home.

It took another two years after that until I realised that I was experiencing DV, and after two years after that to find out that I have experienced exploitation, with some episodes breaching into modern slavery.

I was lucky not to be deported, but that's due to my privilege and knowledge of the legislation. If I was deported, I wouldn't be here able to advocate for change and tell my story.

Submission 21: The Commission should recommend all States and Territories adequately fund and implement specialist training for all police personnel, including the Australian Federal Police, and specialist interview training for all police interviewers dealing with sexual violence victim-survivors.

Further to our previous submission on training, police training should include trauma impacts on behaviour, memory and neurobiology, and address cultural safety, diversity and working with vulnerable communities including First Nations people, children and young people, people from culturally and linguistically diverse (CALD) backgrounds, im/migrants, people with disability, LGBTQIA+ communities, people who have been convicted of criminal offences and been incarcerated, sex workers and older people. The training should be victim-centred, co-designed by those with lived experience and developed with expert input on evidence-based best practice principles. Participants should be required to undertake periodic 'refresher' courses to update their training on an ongoing basis.

3.3 Information about reporting processes

3.3.1 There is a lack of information on sexual violence, reporting, police processes

In addition to non-reporting due to minimal confidence in police, as discussed above, there is a dearth of detailed information about disclosure, how to report sexual violence, what to expect during the process of reporting, how investigations are conducted, options (including alternatives to the justice system) and support services.

After experiencing sexual violence, commonly victim-survivors will undertake an 'information finding expedition'. Victim-survivors search for information to clarify that what they experienced was assault, to understand the context of the crime, and to determine their options and potential supports. But information is far from accessible. Support hotlines often fail to gauge the victim's situation, equipped to respond to crisis but not able to advise a victim wanting to consider the justice process, while sexual assault support services do not as yet have in-clinic lawyers. Even if a support worker had capacity to physically assist a victim to report to police, they risk necessitating that the victims' counselling records be included in the investigative brief, and may have to testify as a witness themselves. As such, information about the reporting process is limited, conflicting and piecemeal. It also lacks nuance.

The need for information about system processes is clear, as victims speak not only of a lack of detailed information but chaotic and contradictory communication which leaves them unaware of their rights, confused about police procedure and frustrated with decisions being made about them, without them. Despite a myriad of announcements about police training, how a victim experiences the police process is down to the 'luck of the draw'. Whether intentionally or not, many detectives are insensitive to the unique needs of victims during the reporting process.

3.3.2 Information, training would help to address public acceptance of rape myths

Adequate information about disclosure and reporting would not only support and facilitate victim-survivors in their decision to report, but it would also go some way to addressing public ignorance about the legal system, which is an unaddressed driver of rape culture.

For example, many subscribe to the myth that a victim is making a false allegation, as if her claim would be investigated easily and without question; or that victims report for revenge, as if they have any ability to press charges against a perpetrator. That a victim is in control is *so far* from the reality of reporting sexual violence. Not only are victims undermined by a system that should be validating them, misconceptions about the system have society invalidating them, too. Already ill-prepared and misinformed, victims are further isolated in an isolating process. If we are teaching consent and sex education, which will prevent a proportion of sexual violence in the future, we should be teaching people how to report crime. Public faith in, and indeed the functionality of, our public institutions depend on it.

3.3.3 Co-authors' lived experiences of reporting to police

One co-author, Sarah Rosenberg submits her harrowing experience of reporting to several different police stations and different officers:

> *First I called my local police station in Paddington. The officer told me to try Bondi instead, because "they have a victim liaison officer there, someone who's more familiar with… um… you know." Hesitant about working up the courage to try again, I thanked the officer for his time and went to hang up. He must have sensed me withdrawing because he wasted no time telling me that making a false allegation was serious business. Later that week I called Bondi - they'd never heard of a "victim liaison officer," but said I could book an appointment to come in. It'd have to be next week, though.*
>
> *I attended the Bondi police station with my Mum. For two and a half hours I disclosed what had happened to me. It was the first time my Mum had heard any of it. I felt ashamed and dirty. But I also felt relieved. Until the Detective said I'd need to go to Kings Cross Police Station to report. I thought I was reporting.*
>
> *It would take me months to once again work up the courage to formally make a statement at Kings Cross. Despite booking an appointment, I waited two hours there with my father. As I was guided to a private room I was told he couldn't come with me because he was a potential witness. I felt guilty for making him wait and wish they'd told me earlier.*
>
> *Making a statement took 24 hours over three months - I had been told that 5 hours was the nightmare threshold to beat. Each session was an hour or so wait at reception (despite making an appointment) (sometimes for the session to be cancelled anyway), before three or so hours talking about what I had for breakfast the morning of my fourth date with the perpetrator, and so on. And each time I thought it would be the time to disclose the assault. The final session was four hours long.*
>
> *By then I was on my third detective. And that was just at Kings Cross. The first detective was kind, but I was her first sexual offence case. Sharing my story with her was excruciatingly slow, and she would often refer to victim-blaming stereotypes without, I'm sure, intending to. I was offended that they'd risk my mental, and physical, wellbeing so that I could be her guinea pig. The second detective, who, ironically, was familiar with sex offence cases and the toll they take, moved on to a sex crimes squad and reassigned me.*
>
> *No one told me what was expected of me. No one told me why some context to my story was relevant and other details not. No one could estimate how long the process would take. No one prepared me for the rotation of officers in and out of my case. No one even told me that a support person could accompany me, so long as they weren't a witness. The kinds of heads up I thought were common decency must obviously be details only a victim would find important. It certainly wasn't information accessible on the NSW police website.*

> *In the end, at trial, the difficulties I experienced just **trying** to report the crime, were used to present me as 'shopping my story around' because officers hadn't thought it was worth investigating.*
>
> *I am a white, straight, cis and able-bodied girl living in the eastern suburbs of Sydney, with family and friends to drive me to the station, with a boss kind enough to understand, with easy and safe access to the police. And I was exhausted. What must the process be like for the majority of victims in this country?*

Another EAG member shared their experience of confusion about whether police had taken evidence correctly:

> *I was sexually touched by a masseur when accessing acupuncture and cupping at a massage parlour.*
>
> *After the incident I immediately went to the police station to make a report. The officer told me that no offence was committed. I went home, researched the legislation and came back to the police the next day to make a report. I cited 61 KC of the NSW Crimes Act about sexual touching and asked to speak to a LGBTQIA+ liaison officer. Even though it was a weekday, no LGBTQIA+ officer was available. I was offered to come back another day to report to an LGBTQIA+ officer or report to a male officer on shift.*
>
> *I decided to report, gave evidence and the male police officer asked me to take pictures to collect evidence. I was asked to undress so the officer could take pictures of the cupping marks.*
>
> *The case was not pursued any further, but now the police have nude pictures of me on their records. I don't know what happened to the pictures, how they are stored and whether police officers have easy access to them.*
>
> *Further, I am wondering if there is any way to get the pictures deleted from my police file. I agreed for the pictures to be taken because I wanted this matter to be investigated. If I had known the police would throw out the case immediately, I wouldn't have agreed to my nude pictures to be taken.*

3.3.4 Information must be accessible and inclusive

In addition to the general lack of information, there is a lack of resources that are accessible for people who are disabled, have low literacy, or are culturally and linguistically diverse.

We note that Easy English and Easy Read resources on sexual violence, reporting and support pathways were being created by the Disability and Sexual Violence Portfolio Team in collaboration with people with disability. This project focused on enhancing specialist therapeutic service accessibility for children, young people and adults with disability who have been sexually assaulted, as well as children and young people with disability who have engaged in problematic and/or harmful sexual behaviours. This resource project was part of the NSW Health's response to The Royal Commission into Instiutional Responses to Child Sexual Abuse. We understand that the project was defunded and had to be closed. While the Simple English and Easy Read resources were being created and reviewed by people with disability, it is unclear if the work was ever finished.[134]

[134] See further here. The documents cannot be easily found online.

3.4 Reform initiatives (Questions 2-4, 6-7)

3.4.1 Addressing the lack of information

We note that the Senate Legal and Constitutional Affairs Committee in 2023, when reporting on its inquiry into *Current and proposed sexual consent laws in Australia*, observed that:

> 5.41 Victim-survivors deserve to be supported by the system that purports to protect them and to hold perpetrators accountable, including by … providing them with sufficient information to make informed decisions about the reporting and prosecution of a complaint. This information for victim-survivors should specifically include guidance about what the committee heard is the most difficult part of a prosecution: the giving of evidence-in-chief and cross-examination.
>
> 5.42 Not only should victim-survivors be provided with information about the supports available to them and the legal process; they also ought to be provided with or have access to specialist legal assistance, to assist them to better understand and navigate legal processes in a way that respects their agency and supports their interests, including recovery and healing.

The Committee recommended:

> 5.43 … that state and territory governments, in collaboration with relevant stakeholders, develop and deliver materials to provide people who report sexual assaults with appropriate guidance and information, including:
>
> - an explanation of how a complaint will be investigated;
> - an explanation of how the criminal justice system operates;
> - the purpose of giving evidence-in-chief and cross examination;
> - the level of detail required for evidential purposes; and
> - the obligation on the accused's legal representative to challenge evidence.[135]

Submission 22: The Commission should recommend that the States and Territories fund, develop and implement, together with victim-survivors (including from overrepresented communities), service and legal system stakeholders, a co-designed range of information aids and resources to assist disclosure and reporting, and outline the legal process, the various options, alternatives, and supports available for victim-survivors.

Resources should be age and developmentally appropriate, trauma-informed, culturally safe, accessible, inclusive, and widely publicised so that victim-survivors and their families or supporters can easily locate them. They should be produced in a variety of languages, and formats appropriate for victim-survivors with disability. Formats should include online text, videos for those with low literacy levels, as well as hard copies for those who do not have access to the internet. The hard copies should be made available at many different outlets, institutions, agencies and providers including police, health providers, specialist sexual assault services, and Centrelink.

[135] Senate Legal and Constitutional Affairs Committee, *Inquiry into Current and proposed sexual consent laws in Australia* (Report, September 2023) 105.

3.4.2 Victim-led collaborative resources

With You We Can is a victim-led network demystifying the police and legal processes for victims of sexual violence while working to improve them. Uniquely informed by both sector and lived expertise, with input from academics, front-line services, advocates, sex crime detectives and state solicitors, it aims to empower victims for whom it is safe to report, and for all victims to be informed of their options. If we create understanding around our legal system, not just for the victims going through it, but for the general public who might not otherwise engage, we are better placed to reform it. The *With You We Can* knowledge hub debunks myths that discredit victims and exonerate perpetrators, breaks down legal terms by jurisdiction, contextualises sexual violence in Australia's policy landscape, and provides reporting and criminal proceedings guidelines and timelines. It also offers guidance around alternatives to reporting, and links to legal, compensatory and support resources, including victim-identified healing resources.

With You We Can is a national-first, born out of a desire to democratise access to honest, fact-checked information, particularly in the face of the gap between theory/policy and practice when it comes to progressing through the legal system. The resource should not have to exist – that the government inform victims, with detail and with honesty, information about how to report crime so that the state can prosecute to keep the community safe, is the bare minimum. With cross and multi-sector support, and unfortunately, an ever-growing need, *With You We Can* continues to collaborate with services to expand its offering and cater to more diverse experiences of victimhood and of the legal system.

Submission 23: Further to our previous submission on funding, the Commission recommend specific funding for victim-led initiatives that enhance a victim-survivors' ability to access the legal system.

3.4.3 Support services assistance in reporting

We note that participants at the Attorney-General's Roundtable stated that 'frontline health services can be a key point of disclosure and should be supported to more effectively intervene early with victims and survivors.'[136] The Gold Coast Centre Against Sexual Violence (GCCASV) provides one such example. The GCCASV offers a safe reporting space, where a member of the police force attends the centre, and women can come to report their sexual assaults. Reporting can occur in a calm, confidential and trauma-informed environment. Such services are incredibly important, but yet another drain on the funding of support services. They underscore the need for better funding models for such services.

Submission 24: The Commission should recommend the Commonwealth Government work with State and Territory Governments to ensure reliable, adequate, long-term funding

[136] Commonwealth Attorney-General, *National Roundtable on Justice Responses to Sexual Violence: Summary Report* (Report, September 2023) 6.

models for all frontline and support services, and greater availability of trauma-informed reporting spaces in specialist sexual assault services.

3.5 A legally enforceable Duty of Care for victims

Our police owe perpetrators and defendants a duty of care – but not victim-survivors. There is currently litigation in Victoria and Queensland by two separate sexual assault victims testing this principle. We urgently need a Duty of Care to make sure that Police do not re-traumatise victim-survivors. This goes beyond anti victim-blaming training and victims charters. We want police to take care of victim-survivors; to support referrals to mental health, the inclusion of independent lawyers and victim advocates and other supports.

Positive Duty of Care precedent exists in other critical government services such as hospitals, local councils and educational institutions. Police should protect victims of violence - not further harm them. This issue has been canvassed in high profile cases - further examples can be provided on request. By ensuring that police "do no harm", victim-survivors may be encouraged to report to police – hence enabling the justice system to respond to, and prevent, rape, sexual violence and other gender-based violence.

Submission 25: The Commission should recommend a legally enforceable Duty of Care for victims.

3.5.1 A legally mandated minimum standard of investigation

Currently police have discretion what, if at all, to investigate and how. This means that bias (such as racism, homophobia, victim-blaming) negatively impacts police action (or indeed inaction as multiple coronial inquests have found)[137].

As a principle, access to justice should be evenly applied, police responses to *all* victim-survivors should be predictable and without bias.

One First Nations co-author shares her experience:

> *I naively expected that when I went to police as a 24-year-old that they would do something. That they would interview the boys and men who raped me. That they would contact my co-victim and witnesses. None of that ever happened.*
>
> *The experience of reporting such unspeakable crimes, and having absolutely nothing done, makes you feel completely disbelieved. The sexual assaults themselves I have processed to a degree. It's the police that have caused me the most unspeakable trauma.*
>
> *I expect, as I think many in our community would, that police at the very least should have a minimum duty to investigate. Especially for very serious crimes against children, such as aggravated sexual assault and gang rape. I think people would be horrified to think their child would be treated this way by police.*

[137] The NSW Coroner handed down her recommendations into the deaths of Mona and Cindy Smith - two Aboriginal girls killed, and sexually assaulted, by a non-Aboriginal man in 1987. The family has spent 36 years calling for a proper police investigation into the sexual assault and deaths of their girls. ABC, 'Coroner finds racial bias affected the investigation into deaths of Indigenous teens near Bourke in 1987', (25 April 2024) https://www.abc.net.au/news/2024-04-25/coroner-racial-bias-investigation-deaths-indigenous-teens-bourke/103770350.

As a 14-year-old I kicked, screamed and fought back. I was held down and gagged. If we are going to change young boys' and men's attitudes towards sexual assault, to get them to act respectfully towards women and to use consent, then women must have confidence that if they report to police at the very least they will be taken seriously.

Predictability and equality in the application of the law can encourage victim-survivors to report to police – hence holding perpetrators accountable and preventing further violence against women.

The USA FBI exceptional clearance model, recently applied in NSW Police (but not legally enforceable) are precedents in this area. Additionally, the Special Commission of Inquiry into LGBTIQ hate crimes (New South Wales) 2023[138] is instructive on standards and changes to police investigations.

The same co-author recommends that mandated minimum standards of investigation include:

a) Require police to create an incident report for all reports of rape and sexual violence;[139]
b) Require police to retain and store evidence;[140]
c) Interview and take a statement and evidence from a victim-survivor at an appropriate time, if they choose;
d) Interview relevant witnesses at an appropriate time;
e) Interview perpetrators at an appropriate time;
f) Report back, in writing, to the complainant/victim at regular intervals on the progress of the investigation, and provide rationale for decisions made by police in regards to not pursuing certain lines of investigation. (See LGBTQI Hate Crimes Inquiry Report NSW). This can minimise unresolved trauma and re-traumatisation.
g) Prior to closing an investigation, or putting it "on hold pending further information" , undertake an independent review per the "exceptional clearance model" and communicate, in writing, to the complainant/victim.

These 'minimum' steps are ordinary expectations of the Australian public as the opinion polling from Essential Media (2023) demonstrates.[141]

Rape and sexual assault are among the most serious crimes on our criminal statutes. We must support police to prioritise the adequate and appropriate investigation of these crimes. Unfortunately culture change and patchy training efforts within police (over successive decades) have not brought about the appropriate level of change in a timely manner. Sexual violence is the largest growing crime in Australia.

To support police resourcing the following options could be considered:

h) Restrict the "minimum standard of investigation" to certain categories of crimes – e.g. Aggravated Sexual Assaults and homicide.
i) Re-direct police resources into specialist sexual assault squads.

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[138] See LECC review NSW.
[139] See LGBTQI Hate Crimes Inquiry Report NSW.
[140] Ibid.
[141] https://www.makepoliceinvestigate.org/

j) Support police local area commands to better triage matters and resourcing according to the severity of crime – even if they are historical – and eliminate unconscious bias that can prevent investigation into rape and sexual violence, or investigation into the complaints of certain "types" of victims (e.g. Aboriginal, LGBTQI, women, children etc).

Submission 26: The Commission should recommend a legally mandated minimum police standard of investigation.

3.5.2 Independent and transparent police accountability mechanisms

When police do not exercise a duty of care and harm or re-traumatise victim-survivors, or unreasonably refuse to investigate, they must be held accountable. Multiple Commissions of Inquiry in Australia in the past 24 months have recommended new models and practices – for example, the Yoorrook Justice Commission (Victoria) 2023-4,[142] the Independent Commission of Inquiry into Queensland Police Service responses to domestic and family violence (Queensland) 2022,[143] and Review of NSW Police Force responses to family and domestic violence incidents (New South Wales) 2023.[144]

The Police Ombudsman for Northern Ireland[145] model provides an excellent, evidence based, blueprint for Australian jurisdictions. 'This Office provides an independent, impartial system for the handling of complaints about the conduct of police officers. We will deal with those complaints in a manner which is free from any police, governmental or sectional community interest and which is of the highest standard.'

Submission 27: The Commission should recommend an independent, legally mandated complaints mechanism for handling victim-survivors complaints regarding police conduct.

3.5.3 Cross-jurisdiction rape, sexual assault to be handled by the Australian Federal Police

All instances of cross-jurisdiction rape and sexual assault to be handled by the Australian Federal Police to ensure that victim-survivors are not dealing with multiple police forces in multiple jurisdictions regarding the same perpetrators.

As one First Nations co-author's personal circumstances demonstrate:

> *There is a need to have a single Federal Police Force response to instances of multi-jurisdictional sexual assault (i.e. by the same perpetrator/s against the same victim). There are already powers to do this for particular sex crimes - I am seeking to have this extended to all sex crimes. Dealing with multiple police forces, multiple proceedings, is simply too re-traumatising and inconsistent for victim-survivors. I believe that this is a change that is within your power to make this term of government.*

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[142] Yoorrook Justice Commission (Victoria) 2023/4.

[143] Independent Commission of Inquiry into Queensland Police Service responses to domestic and family violence.

[144] Review of NSW Police Force responses to family and domestic violence incidents.

[145] See https://www.policeombudsman.org/.

Submission 28: The Commission should recommend that instances of cross-jurisdiction rape and sexual assault should be handled by the Australian Federal Police.

3.6 Victim advocates

The Specialist Report notes that Aotearoa New Zealand has had success with Sexual Violence Victim advocates (SVVAs), who liaise with the victim-survivor, police, judiciary, prosecution and community organisations, ensure victim-survivor's safety in court, conduct court education programs, and ensure their rights are upheld under the legislation. Evaluations indicated that support from SVVAs reduced victim-survivors' re-traumatisation.[146] A related initiative, Court Support Counsellors (CSCs), involves a specialist trauma-informed role with expertise and knowledge of the Court's operations and systems, supporting victim-survivors with holistic emotional support, psychoeducation and advocacy. Evaluation of the CSCs indicated victim-survivors:

> … were well-informed about the criminal justice process and that their families were well-informed and cared for during trial preparation. Victim-survivors highlighted that it was helpful to learn about psychosocial strategies to manage anxiety, depression and negative thoughts. Some victim-survivors indicated that their 'harrowing' cross-examination experiences would have impacted on their wellbeing if they had not been prepared for that by the CSC.[147]

The Independent Sexual Violence Advisors in England and Wales provide another model of victim-survivor assistance.[148] The Victorian Law Reform Commission notes that '[t]here is increasing evidence of the value of the English adviser model. This research shows that advocates can make it easier for people to get justice, in the sense of helping them to recover from sexual violence. They can also influence practice and policy within organisations.'[149] The Commission notes research that where support was received, cases were more likely to be deemed a crime, result in charge, and almost twice as likely to result in a conviction; they were 42% less likely to result in police taking 'no further action' and 49% less likely to withdraw from the process. There is a promising link between support and attrition (10% withdrawal rather than 20%).[150]

This research aligns with the South African experience with Thuthuzela Care Centres – there is an intuitive link between victim-survivor support and lower attrition which is borne out by evaluations.[151]

The VLRC noted widespread support for victim advocates from stakeholders. It suggested the main features of a victim advocate model should be:

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[146] Specialist Report, 93-94.
[147] Specialist Report, 98.
[148] Specialist Report, 73-74; for more detail see the Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences Report* (Report, 2021) ('VLRC Report').
[149] VLRC Report, 254.
[150] Ibid.
[151] Specialist Report, 69.

- providing information about justice options and general information about legal processes
- supporting victim survivors to understand and exercise their rights, including their rights to information, and information about the progress of their cases, under the Victims' Charter Act
- supporting their individual needs, including by identifying any needs and referring them to services
- liaising with, and advocating for them to, services and legal systems.[152]

On the issue of victim advocates providing information, and assisting victim-survivors to understand and exercise their rights, we note the Specialist Report states:

> When information is provided by justice system stakeholders to victim-survivors in a sensitive and timely way, it embodies a trauma-informed approach that can engender a sense of collaboration and trust. Empowerment also emerges from understanding the choices that are available, and exercising them, which increases the sense of participation, voice and agency. Conversely, a lack of information about the court process and potential trauma triggers risks retraumatisation, and operates as a specific barrier to seeking justice – particularly for First Nations women and girls, CALD and LGBTQIA+ communities, people living with disability, and older women. Thus clear, transparent information about system processes, case progression, court timelines, and rights, is a major factor in addressing victim-survivors' justice system needs. It lessens the confusion and opacity inherent in the criminal justice system for many.[153]

The Specialist Report found that even in jurisdictions where victims charters existed, the extent and consistency of communication and information provision varies in practice and victim-survivors' needs continue to remain unidentified or unmet.[154] For such reasons, the Queensland review of its human rights legislation is considering insertion of its Charter of Victims' Rights into the human rights legislation, to buttress these rights and encourage enforcement. A victim advocate would be a pivotal development in ensuring rights on paper were actually translated into practice.

The VLRC's report also found that victim advocates should not be limited to those engaging with the criminal justice system (that is, those seeking alternate pathways), and access should not stop when the criminal justice system stops. Accordingly, we submit the victim advocate role should encompass activities including supporting the victim-survivor to prepare a victim impact statement, should they so choose. In addition, the Commission found that access to a victim advocate should not depend on which court a person is attending. Access should prioritise 'overrepresented' cohorts including children and people with disability, and diverse points of access would be required. The system should be co-designed, with appropriate training, and include oversight.[155] The Commission anticipated the victim advocate role to expand to supporting victim-survivors during cross-examination, rather than, at this stage, expanding the ILR role to in-court presence (except as a 'silent party').[156]

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[152] Ibid 258.
[153] Specialist Report, 223-224.
[154] Ibid 224.
[155] Ibid 261-262.
[156] Ibid 268.

The Queensland Women's Safety and Justice Taskforce report notes a Scottish evaluation of a similar advocate service found that clients found the support 'invaluable' and 'life-changing'. It recommended the government develop, fund and implement a statewide model for the delivery of a professional victim advocate service to 'provide individualised, culturally safe, trauma-informed support to victims of sexual violence to help them navigate through the service and criminal justice systems and beyond.'[157] The role was scoped along the same lines as the Victorian recommendation.

Submission 29: The Commission should recommend that, where not already available, the States and Territories in consultation with victim-survivors, First Nations peoples and service and legal system stakeholders, fund, develop and implement a professional victim advocate service to be available from before police disclosure, through to report, trial (including support during cross-examination) and post-trial (including assistance for preparation of victim impact statements).

Further to our previous submission on training, victim-advocate training should include trauma impacts on behaviour, memory and neurobiology, cultural safety, diversity and working with vulnerable communities including First Nations people, children and young people, people from culturally and linguistically diverse (CALD) backgrounds, im/migrants, people with disability, LGBTQIA+ communities, people who have been convicted of criminal offences and been incarcerated, sex workers and older people. The training should be victim-centred, co-designed by those with lived experience and developed with expert input on evidence-based best practice principles. Knowledge of police and legal processes, the range of services and support options, and alternatives to the criminal justice system, would also be required to provide the much needed informational 'bridge' across institutions, agencies and services for victim-survivors. The training should be ongoing on a 'refresher' basis.

4. Prosecution: reforms, improvements (Questions 8-10)

4.1 Rape myths, communication and information

The Specialist Report indicates that a key point of attrition from the justice system in sexual violence cases is the exercise of prosecutorial discretion, which is sometimes reliant on rape myths; prosecution can also be dogged by ineffective, minimal (or no) communication or information, and a lack of trauma-informed training.[158]

One co-author with a disability, Sarah Rosenberg, contributes her reflections on her prosecutor's lack of trauma-informed and disability-aware prosecution:

> *Pre-trial, I flagged my disability in every interaction I had with the DPP. I begged for state solicitors to pay attention, knowing the defence would gain access to my medical history in order to incorrectly suggest that my autoimmune disease, Myalgic*

[157] Queensland Women's Safety and Justice Taskforce Hear her voice - Report two – Women and girls' experiences across the criminal justice system, Volume 1, Queensland (1 July 2022) 129 ('WSJT Report') <https://www.womenstaskforce.qld.gov.au/publications>.
[158] Specialist Report, 183.

Encephalomyelitis, caused psychiatric instability. I wasn't even told I had the right to independent legal representation to 'protect' my counselling and medical history until such a time so close to trial that I had to choose between delaying trial or setting a precedent that would make it easier for the next victim's privacy to be invaded.

My family attempted multiple times to have the DPP obtain a report from one of my doctors. It remains a mystery why the DPP did not assist with those efforts. When finally a medical report was obtained, it was rejected on the basis of lateness, and the prosecution did not persist. Perhaps to cover their mistake, I was told it was a good thing the report had been rejected because it made me sound crazy, it "went on and on about my brain fog." Having since had access to the report, we strongly reject the Crown's characterisation of it, as to independent assessors. The report articulated a clear and concise outline of my illness and treatment, and distinctly set apart any mental symptoms as being caused by complex PTSD as a result of the assault. It would have carried enormous weight if admitted in evidence, before a jury. Especially in circumstances where my mental health was prioritised by defence as the key factor the jury should consider in determining whether my complaint was credible and reliable.

Significantly, this false characterisation of the report destroyed my relationship with my doctor for months, heavily leaning into the shame and betrayal I had cultivated over years of ignorance toward my disability.

I was told I needed to be available four weeks prior to trial for preparation. I rescheduled important medical appointments and long-planned retreats, but ultimately was given a single 40-minute meeting a few days prior to the trial, and that I had to beg for. I was told I was lucky even to have had that one meeting.

For the trial itself, my parents had discussed the necessity of regular breaks for me throughout the trial regardless of whether I was distressed, to protect me from collapse due to my disability. This was agreed to by the Crown who advised he would make an application to the court. This application was never made. Despite my obvious distress at times during cross examination, and despite my parents' pleas to the Crown and solicitor throughout the trial, regular breaks were not given. Rather, lunch breaks were halved, and morning tea breaks skipped. I did not even have a break between my testimony, before beginning an arduous four and a half days in cross-examination.

At one point, I was in so much pain and so nauseous that I couldn't continue cross-examination. I desperately tried to get the attention of the state solicitor (the Crown had not made eye contact with me for the entirety of the trial). The solicitor nudged the Crown who hesitantly told the judge that "something is going on with the complainant." Whether a panic attack or severe discomfort, or both in my case, the prosecution should be sensical enough to see that I was in distress and needed a break.

Submission 30: The Commission should recommend that the States and Territories uniformly implement specialist training for all prosecutors dealing with sexual offences. Further to our previous submission on training, prosecutor training should include trauma impacts on behaviour, memory and neurobiology, cultural safety, diversity and working with vulnerable communities including First Nations people, children and young people, people from culturally and linguistically diverse (CALD) backgrounds, im/migrants, people with disability, LGBTQIA+ communities, people who have been convicted of criminal offences and been incarcerated, sex workers and older people. The training should be victim-centred, co-designed by those with lived experience and developed with expert input on evidence-based best practice principles. Prosecutors should be required to undertake periodic 'refresher' courses to update their training on an ongoing basis.

Submission 31: The Commission should recommend prosecutors keep victim-survivors informed by regular communications with prosecutors, according to a communications protocol, unless requested otherwise.

Submission 32: The Commission should recommend that the process of plea negotiations involve prior consultation with victim-survivors with time for them to consult relevant support and advocacy services before providing their opinion on the proposal.

Submission 33: The Commission should recommend that all victim-survivors should have the benefit of a court preparation program.

4.2 Independent review of decision-making

The Specialist Report notes that:

> The exercise of prosecutorial discretion is one of the key points of attrition in the prosecution process. The ALRC/NSWLRC Report noted that prosecutions are more likely where the factual circumstances resonate with social misconceptions or rape myths, such as the victim-survivor being injured, expressing non-consent, the assault was more severe in some way (such as involving a weapon), the defendant used force, was non-Caucasian, or was a stranger. Cases involving strangers, rather than intimate or family relationships, are more likely to proceed and result in a conviction.' Such decision-making has been described as the 'bookmaker's test' (predicting juror reaction to a witness, drawing on rape myths). For this reason, the report recommends an independent review mechanism for prosecution decision-making.[159]

Submission 34: The Commission should recommend, where not already established in States and Territories, that an independent review panel for prosecution decision-making be established.

4.3 Vertical prosecution

Prosecution workloads are a common challenge in providing a trauma-informed service for victim-survivors. As such, even in jurisdictions where vertical prosecution (one prosecutor throughout the case from start to finish) is the aim, this is often not achieved in practice.

However, vertical prosecution is particularly important in child sexual abuse cases.[160] It 'promotes trust in the prosecutor, a better understanding of the victim-survivor and their family, assists with continuity in legal strategy (avoiding the delays associated with different

[159] Specialist Report, 183. This is supported by State law reform reports including the Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences Report* (Report, 2021) ('VLRC Report') <https://www.lawreform.vic.gov.au/wp-content/uploads/2022/04/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf>; WSJT Report.

[160] See Specialist Report, 184.

approaches to evidentiary issues and trial tactics), and reduces the risk of miscommunication between prosecution staff and the rest of the multidisciplinary team associated with the case. This makes the "criminal justice system less traumatic and impersonal to the victims and their families who have [already] suffered" from the abusive incident.'[161]

One co-author, Sarah Rosenberg, submits her experience with case reassignment:

> *The first solicitor assigned to the case was promoted and re-assigned. I found out when my email to her bounced back. The next solicitor went on maternity leave - unavoidable, but a blow nonetheless. The Crown Prosecutor ultimately assigned to the case was the second. I met him the weekend prior to the trial, and had to beg for that meeting to be in-person. The first Crown Prosecutor, assigned at the time of the accused's plea deal, was the only person who was honest with me; she let me know that there was a high likelihood that she would not be assigned to the case at the time of the trial.*
>
> *Why was the decency of basic information so hard to come by? Why are states' victims charters so easily undermined? Victims wait and wait for information but have no choice over when, how, or if, that information comes. Providing information to victims about the progress of the case against their own perpetrator and their crucial role in it, is the bare minimum.*
>
> *The distress associated with a lack of communication and a lack of continuity in case management leads to attrition, lower reporting rates and general distrust of the legal system. For victims who remain engaged, it leaves them ill-prepared to give evidence, when the state's prosecution is most dependent on their testimony, and results in prosecutors experiencing a lack of familiarity with the case at hand - ineffective prosecution, to say the least.*
>
> *For victims in NSW and QLD, who currently are afforded independent legal representation to protect their private and sensitive third party information such as counselling communications, inconsistent case management leads to delay. Also, the victims' private information is often subpoenaed without notice being handed down.*

While stakeholders to the ALRC's 2010 report on family violence supported vertical prosecution,[162] the ALRC did not ultimately recommend it. We believe now is the time to address the issue of sufficient funding and capacity building, and to recommend vertical prosecution as a best practice requirement in sexual offences cases in all State and Territory prosecution guidelines. This is particularly important for children. It is also important in view of the CEDAW obligations in relation to an *effectively* functioning system that minimises the risk of re-traumatisation for victim-survivors.

Submission 35: The Commission should recommend that vertical prosecution be considered best practice for sexual offences cases and implemented wherever possible, particularly in child sexual abuse cases.

4.4 Written guidelines

There is a need for written prosecution guidelines in each State and Territory that are consistent and set out best practice processes and procedures for prosecutors. The Specialist

[161] Ibid.

[162] ALRC and NSWLRC, *Family Violence – A National Legal Response* (Report 114, 11 November 2010) [5.167] ('ALRC/NSWLRC Report') [26.86].

Report indicates that the Aotearoa New Zealand guidelines are worthy of consideration in this regard.[163]

Submission 36: The Commission should recommend that the above measures be incorporated in consistent, consolidated and regularly updated written prosecution guidelines for each State and Territory. The process for independent reviews of prosecution decision-making should also be detailed in the guidelines. Prosecutors should have an obligation to inform victim-survivors of their right to apply for a review, which should also be detailed in the guidelines. Consideration should be given to the prosecution guidelines in Aotearoa New Zealand.

4.5 Independent legal representation

One reform that cuts across police and prosecution responses is the concept of independent legal representation (ILR) for victim-survivors. The following introduction to the significance of independent legal representation is taken from one co-author, Sarah Rosenberg's, separate submission to the Inquiry, titled "The Right to a Fair Trial: Fairness Beyond the Accused":

> *"Due to the adversarial nature of the Australian legal system, victims of sexual crime have essentially zero legally enforceable rights. From the moment the crime is reported, through to criminal proceedings, the victim is a mere passenger. The re-traumatisation this causes is well-documented; along with insensitive treatment, the lack of agency associated with inconsistent communication and case management, and little information about the process throughout its entirety, "nothing has the potential to replicate the dynamics of abuse more than being positioned as 'just a witness' in the accountability process for her or his own rape" (Benton-Greig, 2011). Victims feel excluded, dismissed, ill-prepared, humiliated and distressed, describing the process decades ago as "state-sanctioned victimisation" (Van De Zandt, 1998), and now, still, "barbaric and inhumane" (Lee, 2018). Indeed, "if one set out intentionally to design a system for provoking symptoms of traumatic stress, it would look very much like a court of law" (Herman, 2005). Overwhelmingly, victims' rights are evaded, circumvented and resisted (Kelly et al., 2006; Smith, 2018; Iliadis, 2020), the adversarial focus on winning eclipsing legislative safeguards meant to protect victims' privacy, known as 'rape shield' laws (Burton et al., 2007; Mulcahy, 2008; McDonald & Tinsley, 2011; Killean, 2021). With no avenue to redress repeated departures from proscribed procedure by agents of justice (Benton-Greig, 2011), victims are bystanders in a system that would collapse without their cooperation (O'Connell, 2024 [forthcoming]).*
>
> *As a result, we see high attrition rates (prosecution is rarely commenced) (VLRC, 2021) and improper attrition rates (complainant abandonment due to fear) (Iliadis, Smith & Doak, 2021), and low conviction rates (AIHW, 2020), when the ability for the state to prosecute is already limited by incredibly low rates of reporting (ABS, 2021) and no enforceable duty for police to investigate (Iles, 2023). Knowing that the justice system relies on victims to report crime and cooperate as a witness for the state (Holder, 2018; Iliadis, 2020), our treatment of victims is dramatically behind where it should be. How many more victims have to be sexually assaulted by perpetrators whose earlier victims did not make or maintain their complaints because they could not cope with the legal system? (Bartley, 2001).*
>
> *It is our belief that Independent Legal Representation (ILR) for victims of sexual violence, with the important inclusion of legal standing at designated times in the courtroom, could be the factor that finally makes a difference. Indeed, the absence of representation for complainants has surfaced as a major factor contributing to the feelings of isolation and fear that drive low reporting and high attrition rates (Iliadis,*

[163] Specialist Report, 230.

Smith & Doak, 2021; Donovan, 2022). Rape jurisprudence has long established that secondary victimisation can be mininised when justice processes offer dignity, recognition and voice to complainants (McGlynn & Westmarland, 2019), and when procedural justice - which is of equal if not more importance to them than the trial outcome (Herman, 2003; Clark, 2010; Elliott et al., 2012; Holder, 2014; Wemmers, 2014; Iliadis & Flynn, 2018), while also being a key consideration in the decision for other victims to report - is upheld. ILR is the most legitimate route through which to meet these needs (Gillen Review, 2019)...

ILR can better secure victim evidence in the context of the fair trial process (Kirchengast, 2021) and strengthen the integrity and functionality of the legal system. That is, the contribution of ILR to achieving procedural justice is not only valuable in and of itself, it is a tool to realise substantive justice. Contrary to the belief that the state cannot accommodate victims' needs because they may not align with public interest, we argue that upholding victims' rights is inherently in the public interest. As the state's chief witness, without whom the prosecution of offenders would not proceed, upholding procedures that ensure their confident testimony, the presentation of evidence supporting their account, the protection of their private and sensitive information, and the objection to humiliating questioning, is critical for effective prosecution.

Without enforcing these procedures, which are legislated but routinely circumvented, a jury is persuaded against the victim and consequently, the state. Not only is the victim denied procedural justice, the result is a negative impact on substantive justice outcomes and the reinforcement of community misconceptions about sexual violence."

The need to support victims has moved beyond counselling services and compensation as adjuncts to the criminal trial. The unique circumstances of sexual assault victimhood demand unique supports, and the departures from legal procedure that victims experience throughout the entire "justice journey" require legal redress. The co-author, Sarah Rosenberg, states:

'Justice' looks different for everyone, but most victims can tell you what it isn't: the justice system.

For too long, upholding victims' fundamental human rights has been seen as a nuisance. It is time we recognise that protecting victims is in the public interest - without victims, the legal system does not exist.

While many victims turn to alternatives to the legal system, and indeed it is warranted that they do, forcing victims to seek alternatives is another way patriarchy, colonialism and discrimination against women prevent us from access to formal, publicly recognised justice.

4.5.1 Remit of ILR

ILR provides victims with their own lawyer during the criminal prosecution process. The ILR is independent of the prosecutor and prioritises the victims' interests, which can mitigate secondary harm, improve the state's prosecution efforts and strengthen the integrity of the legal system. The role can include, but not be limited to, providing case management, advocacy, advice and representation to victims at various stages of the police and legal processes, including prior to reporting, during the investigation, pre-trial, during trial and after proceedings are finalised. Very few countries fail to offer victims any form of legal representation, suggesting that ILR is not all that uncommon, even within adversarial systems. It is of course vital that complainants are made aware of the specific powers and limits that govern the role of their legal representative.

See co-author Sarah Rosenberg's personal submission for a detailed comparison of ILR in international jurisdictions, and a description of how ILR helps Australia comply with the

Convention on Preventing and Combating Violence Against Women and Domestic Violence, the European Court of Human Rights, CEDAW, the Rome Statute and the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

The ILR should be publicly funded and available through legal service providers such as Women's Legal Services and Legal Aid, including any culturally-specific or First Nations service providers. Costs for the implementation of ILR have to be considered in relation to the legal costs and long-term public health costs that are offset, and the benefits accrued, such as the prevention of future offending, increased efficiency of the court process, shorter cross-examination, and the reduction of costs of trauma to victims and better employment outcomes. See the co-author's personal submission for more information about cost estimates.

The ILR should be specialised in sexual offence matters, culturally-sensitive, with an understanding of how culture, race, religion and socioeconomic status influences women's perception of abuse and their help-seeking behaviour, and trauma-informed, with a goal of reducing shame and promoting dignity. NHS Education for Scotland[164] has developed a trauma-informed skills framework for working with victims and witnesses, which details a roadmap for different members of the legal system to minimise re-traumatisation, support recovery, and maximise participation to gain and interpret the best evidence. The framework is cumulative, allowing for the development or commissioning of skills training ranging from trauma-informed to trauma-enhanced, for people who have greater contact or lesser contact with witnesses or their evidence.

See Sarah Rosenberg's personal submission for a detailed description of how criticisms that 1) ILR is unnecessary or 2) that they are inappropriate, are false or outdated. While ILR for victims has not historically been a part of adversarial systems, this does not mean it cannot become part of the adversarial system in future.[165] "The criminal justice system, which cannot function without victims, needs to adjust its perspective to see them as valued participants and to support them appropriately."[166]

4.5.2 ILR in Australia

ILR has operated in NSW since 2011 to prevent or restrict the disclosure of sexual assault complainants' counselling notes that may contain confidential material. In Queensland, it is available to counselled persons for representation at domestic violence and criminal law proceedings to determine if leave will be granted to subpoena protected counselling notes (regarding a related sexual assault) and/or if material produced under a subpoena can be disclosed. Queensland are currently considering extension of the remit of ILR to protect a complainant's prior sexual experiences that do not necessarily feature in counselling records.

In NSW and Queensland, defence counsel have been known to subpoena complainants' protected communications prior to their referral to ILR. They have also been known to make late applications (during the trial) to subpoena complainants' protected communications, which precludes the opportunity for a complainant to engage ILR, because the ILR is limited to pre-trial hearings. There are also circumstances where ILR will successfully argue against defence counsel's application to adduce protected communications, but, for a range of

[164] NHS Education for Scotland, 2022.
[165] Braun, 2014
[166] Victims Commissioner for England and Wales, 2020.

reasons already outlined, questioning on protected communications will occur nonetheless. This underscores the need to expand the scope of ILR to the time that the decision to prosecute is made, and into the trial itself. Doing so takes advantage of the retraumatization-mitigating case-management aspects of support ILR can offer.

We note that the Senate Legal and Constitutional Affairs Committee in 2023, when reporting on its inquiry into *Current and proposed sexual consent laws in Australia*, observed:

> The committee heard that, in addition to these realities, the criminal justice process is significantly re-traumatising victim-survivors, in some instances more so than the offence itself. Overwhelmingly, the committee was told that victim-survivors have little hope of achieving justice through the criminal court process. When the deep and sustained trauma of sexual assault is considered in this context, it is difficult to conclude that our justice system is serving victim-survivors as it should.
>
> 5.39 As an example, the committee heard that an accused can access a victim-survivor's counselling notes. The committee queries what probative value there is in sharing the deeply personal impacts of a sexual crime with a perpetrator? Moreover, the committee is concerned that the risk of access to a victim-survivor's counselling notes may dissuade victim-survivors from seeking the counselling they need.
>
> 5.40 Victim-survivors deserve to be supported by the system that purports to protect them and to hold perpetrators accountable, including by not leading evidence that might effectively put them on trial…[167]

One co-author, Sarah Rosenberg, shares her experience of ILR and counselling records in NSW:

> *In NSW, where criminal proceedings were, ILR is afforded to victims of sexual violence in relation to protecting their counselling communications. If you have a nifty lawyer, that can extend to medical records, too, although this is not explicitly defined in the legislation.*
>
> *In the two years I spent waiting for the trial, never once was I told that I had the right to representation. Despite bringing up my chronic autoimmune disease in every single communication with the DPP, desperate to get them across what was without a doubt going to be the key line of argument from the defence, never once was I told that my counselling records were protected under legislation.*
>
> *In fact when my family brought up ILR in relation to just the court process itself - feeling dismissed, ill-prepared and appalled at the discontinuity of communication and case management (the usual distress that victims voice), the DPP told us that hiring any form of ILR would make the state prosecutors feel threatened, like we didn't trust them to do their jobs.*
>
> *They weren't doing their jobs.*
>
> *I had phone calls from doctors I hadn't seen in over a decade, asking me, in the thick of trauma, what they should do, whether they should hand over my private records.*
>
> *I was finally flicked to Legal Aid without much information as to why, like any kind of talk about my disability or the communications privilege itself was dirty. At that time,*

[167] Senate Legal and Constitutional Affairs Committee, *Inquiry into Current and proposed sexual consent laws in Australia* (Report, September 2023) 104.

the defence had already subpoenaed my medical history without applying for leave. I was told that the SACP was fairly misunderstood, and that this was common. The thing about privacy is that once evaded, it is difficult to restore.

With only a few weeks until trial after the two years of waiting, the process of referring me to Legal Aid was so late that I had to choose between enforcing the protection over my records and delaying the trial, or risk setting a precedent in making it easier for future victims to have their privacy invaded.

My mother wasn't sure I could survive a delay, and so, with some negotiation to ensure that at least some aspects of my privacy would be protected, we asked my fiercely intelligent and experienced legal representative to back down on the appeal to protect my counselling records. My legal representative who, because of the DPP's delay in referring me to him, rushed to court to represent me at one of the hearings about my privacy having barely just learnt my name. He wasn't told about my SACP hearing until the morning it was occurring.

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.

Come trial, I remember having to just laugh at the inefficiency of it all, the waste of state resources. Because as I was hurled through the courtroom door to begin four and a half days of cross-examination, with 15 minutes warning that my time on the stand had come, the doors shut behind me and I was alone. And I was questioned on the 'protected' information anyway.

And nobody objected. Not the state, whether it was incompetency surrounding the SACP or fear of not appearing impartial, nor the Judge, who was not the presiding Judge in the previous hearings about the matter and did not know the SACP was at play.

I couldn't understand it, because, in not following procedure, in not upholding legislative instructions, the prosecution was only supporting defence in swaying the jury against me. I was made out to be clinically insane. A clinically insane person, with multiple psychiatric illnesses - of which I do not even have one - cannot understand consent, the Judge said. And so it was; the perpetrator was acquitted on all six counts.

My experience underscores the need for victims to be afforded ILR from the time the decision to prosecute is made. We cannot wait until the first subpoena – we cannot rely on the DPP to be on top of notice and pre-trial hearings. It also underscores the need to extend ILR into the courtroom. The role of the ILR would be to represent victims when late applications are made to access their private records, and, importantly, to enforce any established legislative procedures. This is arguably no more than what victims are already entitled to, but do not receive. The other legal actors who are ultimately responsible for upholding any legislative instructions established pre-trial through the ILR, cannot be held to account if the ILR is not inside the courtroom.

Research shows that advocates and witness assistance officers make minimal difference to the way victims are treated by legal actors. Certainly, they make no difference to the enforcement of procedure. My support person, forced to sit at the back of the courtroom and watch the horrors unfold in silence, could not assist. Departures from legal procedure require legal intervention.

For the states that do offer ILR, and for the states that are piloting it this year, there is a lack of knowledge amongst victims' about their rights to representation. There must be automatic referral to ILR at the time of the decision to prosecute. In doing so, there is so much potential for case management by independent lawyers, to mitigate re-traumatisation throughout the entirety of the legal process. It doesn't put anyone out of a job, it just serves to keep victims, on whom the legal process is entirely dependent, engaged. It costs less than the costs of reoffending, or more importantly, the wasted

costs of preparing a brief to be eligible for prosecution and then failing to prosecute it effectively.

The ACT, WA and Victoria have received federal funding to pilot ILR in varying contexts, with flexibility to expand the scope of the ILR as the pilots evolve. Victoria and the ACT are allowing ILR into the trial as part of the pilots where defence make late applications to subpoena protected communications. Noting that the evaluation of these pilots will not be for some time, co-authors are in direct communication with the services leading the pilots, particularly in Victoria and the ACT.

In the interim, more can be done through police regulations and practice, and increased funding to the community legal sector, to encourage the involvement of independent lawyers to support victims, as well as a critical up-skilling of the legal profession.

One co-author submits:

> *My practice has commenced a new pro bono sexual assault clinic in partnership with local organisations - particularly supporting First Nations women in the pre-reporting and reporting stages.*
>
> *Is there an opportunity for me to assist in articulating some cost-neutral and effective solutions to supporting the profession? I believe that, as one of the few practitioners working with victim-survivors in the pre-reporting, and police reporting stages, and beyond, I have a lot to offer in this space and would be pleased to assist.*

Submission 37: The Commission should recommend legislative changes to allow for independent lawyers for victims to support, advise and represent victims in all steps of the police and legal processes.

Submission 38: The Commission should recommend funding to allow for independent lawyers for victims to support, advise and represent victims in all steps of the police and legal processes.

Submission 39: The Commission should recommend a commitment to cultural and judicial education relating to the role of independent lawyers for victims to facilitate understanding and adherence to procedural guidelines, and to minimise victim-blaming for victims who may present to police with a lawyer.

5. Specialist courts

We refer to the Specialist Report and the compelling evidence therein for introduction of a pilot specialist sexual violence court or list in each State and Territory. We note and welcome the recent progress towards a sexual violence list in Queensland, and the announcement this week that a specialist list will be established in the ACT following Parliamentary

consideration of the Specialist Report.[168] We acknowledge and adopt the best practice measures in the Specialist Report as a non-exhaustive indication of features required for an appropriate response by the justice system to sexual violence.

In particular, we would like to express our support for:

- Mandatory specialist sexual violence training for all defence counsel appearing in sexual violence cases, as per our training submissions;
- Mandatory ground rules hearings in every State and Territory, as per the Victorian model;
- The option as standard for victim-survivors to utilise pre-recorded evidence (including evidence in chief (with the option of using a recorded police interview), cross-examination, re-examination);
- The option for 'special relationship' witnesses in child sexual abuse cases to pre-record all evidence, as per the National Centre submissions;
- The piloting of a juryless specialist sexual violence court;
- Closer consideration of wrap-around services such as Thuthuzela Care Centres, where not otherwise available in a jurisdiction.

Submission 40: The Commission should recommend, where not otherwise implemented, that States and Territories work with heads of jurisdiction to establish a pilot specialist sexual violence court or list in each State or Territory. Appropriate data should be collected for evaluation at 12 months, two years and three years.

Submission 41: The Commission should recommend the best practice measures set out in the Specialist Report as a non-exhaustive indication of features required for an appropriate response by the justice system to sexual violence.

Submission 42: The Commission should recommend the States and Territories work together to implement, where not otherwise available, the following initiatives discussed in the Specialist Report:

- Mandatory specialist sexual violence training for all defence counsel appearing in sexual violence cases, as per our training submissions;
- Mandatory ground rules hearings in every State and Territory, as per the Victorian model;
- The option as standard for victim-survivors to utilise pre-recorded evidence (including evidence in chief (with the option of using a recorded police interview), cross-examination, re-examination);
- The option as standard for 'special relationship' witnesses in child sexual abuse cases to pre-record all evidence, as per the National Centre submissions;
- The piloting of a juryless specialist sexual violence court;
- Closer consideration of wrap-around services such as Thuthuzela Care Centres, where not otherwise available in a jurisdiction.

[168] Tim Piccione, 'ACT set to introduce sexual assault list', *Canberra Times* (28 May 2024).

5.1 Good character evidence

In addition, we acknowledge and adopt the submissions by the National Centre and QSAN regarding good character evidence in sexual violence matters, noting that this 'can be weaponised to deter the victim survivor reporting and to demean, minimise and dismiss the victim-survivor's experience'. In sentencing, an accused can still present mitigating factors such as genuine remorse. We note that New South Wales is already considering the exclusion of such evidence for child sexual abuse matters,[169] and the Attorney General has referred the matter to the Standing Council of Attorneys General.[170]

Submission 43: The Commission should recommend that the States and Territories implement a consistent approach to the exclusion of good character evidence in sexual violence matters.

5.2 Bad character evidence

We note the Commission's prior discussions of tendency, coincidence and bad character evidence,[171] as well as the Royal Commission's view that exclusionary rules tended to give offenders impunity and that '[t]he criminal justice system is often seen as not being effective in responding to crimes of sexual violence'. We understand that amendments have been made to the *Uniform Evidence Law* to implement the Royal Commission's recommendations, although they may not be operating effectively given their failure to address the problem of complexity, and potentially adding further layers of complexity.[172]

Given the breadth of issues discussed in the Issues Paper and relatively short duration of the consultation period, we do not make submissions on this complex issue. However, given that the Commission will be considering the issue of tendency, coincidence and discreditable conduct in this Inquiry, we acknowledge and adopt the submissions by QSAN regarding the ability to lead bad character evidence, currently implemented in the United Kingdom where certain 'gateways' are satisfied. There is some indication that the introduction of such a model is particularly apt for certain states where strict application of thresholds is problematic:

> There is a strong argument, however, for the common law states, in particular Queensland, to implement the UK's gateway regime for bad character evidence. The strictness with which Queensland applies the common law thresholds is becoming more and more at odds with the direction of evidence law in both Australia and the UK, and

[169] Melissa Coade, 'NSW to review if 'good character' evidence should be used in child sexual assault sentencing', *The Mandarin* (Blog post, 28 July 2023).
[170] Harrison James, LinkedIn post (18 May 2024).
[171] Australian Law Reform Commission and New South Wales Law Reform Commission, *Uniform Evidence Evidence Law Report* (Report 102, 2005).
[172] David Hamer, Myths, Misconceptions and Mixed Messages: An Early Look at the New Tendency and Coincidence Evidence Provisions (2021) 45 Criminal Law Journal 232.

particularly with the research into child sex offenders and the findings of the Royal Commission.[173]

Submission 44: The Commission should, in its consideration of reforms to tendency, coincidence and discreditable conduct, give serious consideration to recommending the implementation of a model similar to the United Kingdom for introduction of bad character evidence, admissible on satisfaction of one of a number of 'gateways'.

6. Alternative pathways: civil actions

We acknowledge and support the submissions by QSAN regarding an innovative new model for civil actions for sexual violence, and the National Centre's submissions regarding permanent stays in civil proceedings.

Submission 45: We acknowledge and gratefully adopt the submissions by QSAN regarding a new innovative civil approach, as outlined in those submissions and appendices.

Submission 46: We acknowledge and gratefully adopt the submissions by the National Centre for Action on Child Sexual Abuse regarding legislative implementation of the *GLJ* decision.

7. Alternative pathways: restorative justice

The Specialist Report notes that several Australian jurisdictions are considering expanding alternatives to the criminal justice system, including restorative justice options.[174] We note that the 2019 Australian Institute of Criminology evaluation of a restorative justice program in the Australian Capital Territory was favourable. The program implements intensive risk assessment, case review (with additional oversight from senior convenors and leadership for sexual violence cases), and a co-convenor model. In this model, two convenors are assigned to each referral as well as a case reviewer; convenors actively look for evidence of history of harm; and practice enhancements further prioritise interests of the person harmed in recognition of increased risks and potential power imbalances.[175] The evaluation found:

- 80% of persons harmed, 100% of persons responsible and 89% of supporters said they felt prepared for the conference
- 90% of persons harmed said they felt supported, and that they were treated fairly and respectfully during the conference

[173] Katie Lush, 'Should Australia follow the British model and admit bad character evidence as set out in sections 98-113 of the criminal justice act 2003 (UK)?' (2021) *USQ Law Society Law Review*.
[174] Specialist Report, 51.
[175] 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 (Report, 2019) 11.

- 80% of persons harmed said they felt heard and were able to say what they wanted to say.[176]

However, there were some difficulties with the co-convenor model, particularly where there were 'tensions between Convenors, primarily attributed to differences in working styles and experience; stakeholders also suggested that the co-Convenor model was in part responsible for … delays'.[177]

A New Zealand restorative justice model, Project Restore, was discussed in research released this year.[178] This model uses specialist support roles dedicated to both the victim-survivor and person responsible ('3-legged stool' model):

- A restorative justice facilitator qualified in dynamics of sexual violence; plus
- A survivor specialist, who acts for the victim-survivor; and
- An accountability specialist, who acts for the person responsible.

The research (study involving 37 victim-survivors and 28 persons responsible, completion of a survey). The views of victim-survivors were:

- 97% felt able to ask all the questions they wanted to
- 91% reported all questions were answered
- 91% satisfied with overall level of input
- 85% satisfied with information they found out and 85% felt needs taken into consideration as agreements were made
- 91% said they received an apology
- 78% of persons responsible admitted the wrongdoing, slightly fewer took responsibility for harm
- 26% of persons responsible explained why they harmed
- 48% victim-survivor felt person responsible partially explained their behaviour
- 6% victim-survivor reported someone challenged their stories
- 97% felt persons responsible listened or 'somewhat listened' to their stories
- 68% felt persons responsible 'made some attempt to put things right'.[179]

Persons responsible:

- 80% had pleaded guilty before participating
- 15% reported feeling pressured to pleading guilty
- [one] respondent commented elsewhere that they decided to participate in restorative justice due to "pragmatism" and that they pleaded guilty due to "strategy," suggesting that their participation overall was cynical and insincere. By contrast, a second respondent expressed that, "All the pressure came from within myself. I felt the need to say sorry and this was my way of showing it."

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[176] Ibid.
[177] Ibid 28.
[178] Shirley Jülicha, Megan Brady-Clarka, Polly Yeunga and Fiona Landon, 'Restorative Justice Responses to Sexual Violence: Perspectives and Experiences of Participating Persons Responsible and Persons Harmed' (2024) *Victims and Offenders* 1.
[179] Ibid 14.

- 95% said they wanted to acknowledge their accountability and take responsibility for the harm caused
- the majority of persons responsible (90%+) felt they were treated with respect, that they were treated fairly, and that they had a voice in the process.[180]

The recent Senate Legal and Constitutional Affairs References Committee Report on *Current and proposed sexual consent laws in Australia* also heard evidence on restorative justice from a wide range of stakeholders. As the submission by the National Centre notes, at this inquiry the option of a restorative justice program was supported by many stakeholders including the Law Council of Australia and ANROWS, although others, while agreeing, maintained that it was equally important that the criminal justice system be fixed. Most importantly, witnesses emphasised that it would be essential for each victim-survivor to choose for themselves whether or not to utilise a restorative justice option.[181]

The Committee supported alternative approaches such as restorative justice so long as they are 'effective', with 'clear outcomes' and they 'respect the agency of victim-survivors'. It reiterated that the choice of whether to use restorative justice must be that of the victim-survivor, and that implementation and use of restorative justice mechanisms did not come at the expense of genuine reform of the criminal justice system.[182]

One co-author, Chris Coombes, contributes their thoughts on the need for alternative pathways:

> *I am unconvinced that more prisons and police, harsher punishment, should be the end goal of law reform. As someone whose perpetrator was sent to prison for many years, I felt neither safety nor justice at the point in which I heard the Judge utter words that I later learnt meant imprisonment. But there are many who I love who do yearn for the person who caused them irreparable harm to be imprisoned.*
>
> *My submissions here are ultimately about expanding the choices available to survivors. Throughout my journey in the criminal justice system, I had so little say in: where I wanted the person to go; what I wanted the person to know; what I could ask the person; whether he and/or I went to therapy; and what the community should know about him. To borrow the words of another expert in the group, "it is an injustice system".*
>
> *As a nine year old thrown around by the legal-carceral-injustice system in NSW, I did discover that the man who perpetrated the harm lived with mental illness, intellectual disability, was socially isolated, and addicted to substances. While this does not excuse his behaviour, it helped me as a 9 year old make sense of how and why it happened. I recall after the sentencing hearing, at that tender age of 9 asking, "will this man get help in prison so he doesn't do it again?" My parents assured me he would.*
>
> *Fast-forward to my twenties, I realise the legal system can't answer - or refuses to answer - the question of healing. I learnt this only when I started working in prisons, and held this profession for a decade. It was in this professional capacity that I came to the realisation that the person who exacted the harm on me did not receive the help he needed, despite my parents naïve or protective assurances. A Senior Psychologist at a prison told me, "we psychologists exist to keep people from killing themselves". He added, "We're that busy and under-resourced, that we don't actually provide meaningful therapeutic care. People often leave prison less connected, as addicted, more homeless, but now with criminal mates".*

[180] Ibid 14-15.
[181] Senate Legal and Constitutional Affairs References Committee, Current and proposed sexual consent laws in Australia (Report, September 2023) [3.32]-[3.41] (Senate Sexual Consent Laws Report).
[182] Ibid.

I'm now mostly finished with a master's degree in Human Rights Law. This extreme privilege was afforded by funding provided by the National Redress Scheme, which was only accessible because my abuse happened in an institution that has signed up to the Scheme. The degree is giving me a language to understand the harms of certain groups and speak up. I'm presently exploring restorative justice processes for myself, which is giving me hope, voice and purpose. The redress scheme has been life-changing for me. It needs continuity of funding and expansion to new cohorts.

The legal system must be urgently and radically reformed, co-designed by victim survivors. I am no expert in this area and so I rely on my colleagues' submissions to guide these legal reforms. But in my mind, I look to Queensland's prisons currently at 130% capacity and feel despair knowing these human rights abysses aren't healing the people I work alongside. I see only more prisons being built, and ever intensifying calls for harsher punishment.

I look at the vast over-representation of disabled and First Nations prisoners and worry that increasing the rate of incarceration for offenders who cause sexual harm will only worsen the issues these communities face. Any reforms to tougher bail laws or mandatory sentencing, for example, lead to many more people with disability, people of colour, and First Nations peoples being warehoused and forgotten. This is not due to an inherent criminality; it relates to over-policing, lack of legal aid, racism and ableism that percolate the veins of our legal systems.

Incarceration and policing attracts billions of dollars, with very little evidence for its effectiveness in reducing recidivism. According to a UNSW study, 1 in 10 Australian men have sexually offended against children. If we improve the criminal justice system to the point that even half of these instances secure convictions, the cost of incarcerating the additional hundreds of thousands of men would be astronomical. This money is owed to survivors, and the people that should not have to wear the heavy label of victim-survivor in the future. It should be spent improving prevention and creating evidence-based alternatives that are co-designed by communities.

In terms of solutions to reduce the likelihood of harm ever occurring again, reform must listen to the research and wisdom of Jess Hill and Professor Michael Salter. They hold that we need to address alcohol and other drugs and harmful gambling. We must look to public policy responses including AIDS and smoking for evidence and inspiration. The continent of online needs co-designed regulation. Targeted ads should be co-designed that reach over-represented groups of survivors and those who use harm. It could include targeting apps like Element and Signal, for whom users of sexual violence are over-represented on these platforms. Where these platforms fail to comply with co-designed standards, they should be sanctioned. Sex workers and young people's voices should be centred in any co-design of online regulation.

We must reform mandatory reporting, so that disclosures of sexual feelings about causing harm aren't met with police responses but instead well-resourced, evidence-based programs to heal. There needs to be information-sharing, guided by communities.

Bespoke community-based programs should be imagined, implemented and evaluated by First Nations and disabled communities on how to keep each other safe, noting the disproportionate harm caused to First Nations communities by non-Indigenous men. These should be community-led and have recurrent funding.

There needs to be redress schemes extended to communities not caught by the arbitrary opt-in criteria of happened in a participating institution. There needs to exist sufficient sessions of opt-in evidence-based counselling, art therapy, music therapy, psychology, play therapy, available to survivors including their families. The threshold mustn't be dependent on a criminal conviction, but rather tiered based on the level of reported harm. There must be in-reach of an expanded victim-survivor redress Scheme to prisons, group homes, and forensic mental health facilities, where people detained are over-represented among survivors of sexual abuse.

Restorative justice should be recurrently funded in every state and territory. This shouldn't be goal-oriented and need not result in a survivor-victim entering a room with the person who did the harm. Instead, the process should be therapeutic, creative, consensual and survivor-led. Restorative justice can either complement criminal justice proceedings or provide an alternative choice, based on what the survivor wants.

While the legal system needs urgent reform, we need not treat the legal justice system as the panacea. Why funnel the 87% of people who don't (or can't) report to police into a system not fit for purpose. For this alternative and complementary pathway to be meaningful, it must not be governed by legal gatekeepers. It must not be used as only instrumental in lowering the cost of the legal system, driven only by standards of efficiency. Instead, survivor-victims should be able to choose to initiate restorative processes at a time it is safe to do so, noting this may be long after the abuse. Legal aid should be funded to ensure people receive good legal advice, whichever justice approach they choose. Such interventions can and must happen alongside improvements to the legal system in a way that does not let the legal system off the hook. But we must always treat victim-survivors as capable of selecting a justice pathway for themselves.

We must (re)establish rituals of redemption, where people who have survived harm reconnect safely with elders or community members. Particularly, these processes could be led by survivors for whom it is safe. These should be facilitated by professionals trained in restorative and transformative justice and focus on accountability and behaviour-change.

There should be expansion of programs that promote altruism among prisoners – see Risdon prison's growing of fruit and vegetables for local charities, for example. We must have a national conversation about public housing and subsistence, so that people who leave prison do not fall back into addiction, homelessness and contexts where sexual violence is prevelent.

I make these recommendations knowing these ideas might feel to some victim-survivors that we're caring more as a society about people who cause harm. To me, it's the contrary; we owe prevention to survivors. For this to occur, we must explore the roots of why people cause harm and address it. Our communities must heal.

Another co-author observes that:

There is an initiative by the NSW government called 'New Street Services' that focuses on providing therapeutic services for children and young people aged 10 to 17 years who have engaged in harmful sexual behaviours towards others. Those perpetrating children have usually been engaged with the justice system before they are referred to New Street.

The service works with the young person to assist them to understand, acknowledge, take responsibility for and cease the harmful sexual behaviour. The New Street Service model involves working with the whole family unit, and engaging with other agencies and community services to sustain and support interventions. Central to the model is the principle of safety, both for any children that have been sexually harmed and for the young person engaged in the harmful behaviour who may themselves be a victim of abuse and neglect.

This pathway is currently accessible only after young people have exhibited sexually harmful behaviour and entered the justice system. It may be beneficial to extend this program to reach children and youth before they encounter the justice process, and to ensure its availability to children in all states.[183]

Further, this co-author observes that if someone has pedophilic or sexually harmful thoughts they can only be reported to police, but unless they have acted on those thoughts there will not be a justice response. They note there are currently no programs in Australia for people

[183] See NSW Government New Street Services (Information about New Street Services 17 May 2022).

who have pedophilic or sexually harmful thoughts. When those people act on their thoughts, and consequently get engaged in the justice system, they note it is too late and the system failed to prevent harm from happening. They continue:

> *In 2005 the project 'Dunkelfeld' was initiated in Germany, to prevent child sexual abuse by targeting potential offenders who have are sexually attracted to children, but have not yet committed offenses. The project's approach is encapsulated in its slogan: "You are not guilty because of your sexual desire, but you are responsible for your sexual behaviour. There is help! Don't become an offender!". The therapy includes cognitive behaviour therapy to improve coping skills, stress management, and sexual attitudes. Medications that reduce general sex drive, such as serotonin reuptake inhibitors and anti-androgens, may also be offered as part of the treatment.*[184]

> *The effectiveness of Project Dunkelfeld has been evaluated, and the results suggest that it does indeed reduce risk factors for child sexual abuse. The project's approach has been shown to prevent sexual offending against minors and reduce the number of contact offences. Additionally, it has been reported to decrease the frequency and severity of child pornography offences.*[185]

Submission 47: The Committee should recommend that, where 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'. The choice of whether to use restorative justice must be that of the victim-survivor, and implementation and use of restorative justice mechanisms must not come at the expense of genuine reform of the criminal justice system.

[184] See, for example, Andreas Mokros and Rainer Banse, 'The "Dunkelfeld" Project for Self-Identified Pedophiles: A Reappraisal of its Effectiveness' (2019) 16(5) *Journal of Sexual Medicine* 609-613; Charité – Universitätsmedizin Berlin, Prevention Project Dunkelfeld: Strategies to prevent child sexual abuse and child abuse image offending in pedophiles and hebephiles (Slides, undated). See also Wikipedia, *Prevention Project Dunkelfeld* (Information Project Dunkelfeld 11. March 2024).

[185] Springer Link, *Proactive Strategies to Prevent Child Sexual Abuse and the Use of Child Abuse Images: The German Dunkelfeld-Project for Adults (PPD) and Juveniles (PPJ)* (Information Project Dunkelfeld 25.08.2006).

Appendix A: Systems and human-centred thinking

Whole-of-systems approach

Systems thinking is an informative research field[186] that takes a holistic approach to 'improve the capability of identifying and understanding systems, predicting their behaviors, and devising modifications to them in order to produce desired effects.'[187]

Emphasis is placed on analysis of the function of the system, its constituent elements and their interrelation, and how the system changes over time (and in relation to other systems).[188] Systems thinkers 'position themselves such that they can see both the forest and the trees; one eye on each'.[189]

By requiring a systems builder to take a wide-angle macro view as well as a fine-grained micro view of its elements, the dual focus provides not only insight into system operations and intrinsic problems, but also as to *leverage point(s)* for influencing more constructive outcomes that do not worsen the situation in the long run.[190]

Systems thinking on a complex legal and/or regulatory task requires determining the structure and function of the system, depicting relationships between system components and feedback loops, understanding dynamic behaviour,[191] and identifying inconsistencies between goals and functions.[192]

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[186] For useful overviews see Three Sigma Inc, *Systems Theory Analytical Tools and Models* (2003) <http://www.threesigma.com/tools_models.htm>; Mark K Smith, 'Peter Senge and the learning organization', *Infed* (website, 2001) <http://infed.org/mobi/peter-senge-and-the-learning-organization/>.

[187] Ross D Arnold, Jon P Wade, 'A Definition of Systems Thinking' (2015) *Conference on Systems Engineering Research* 669, 675.

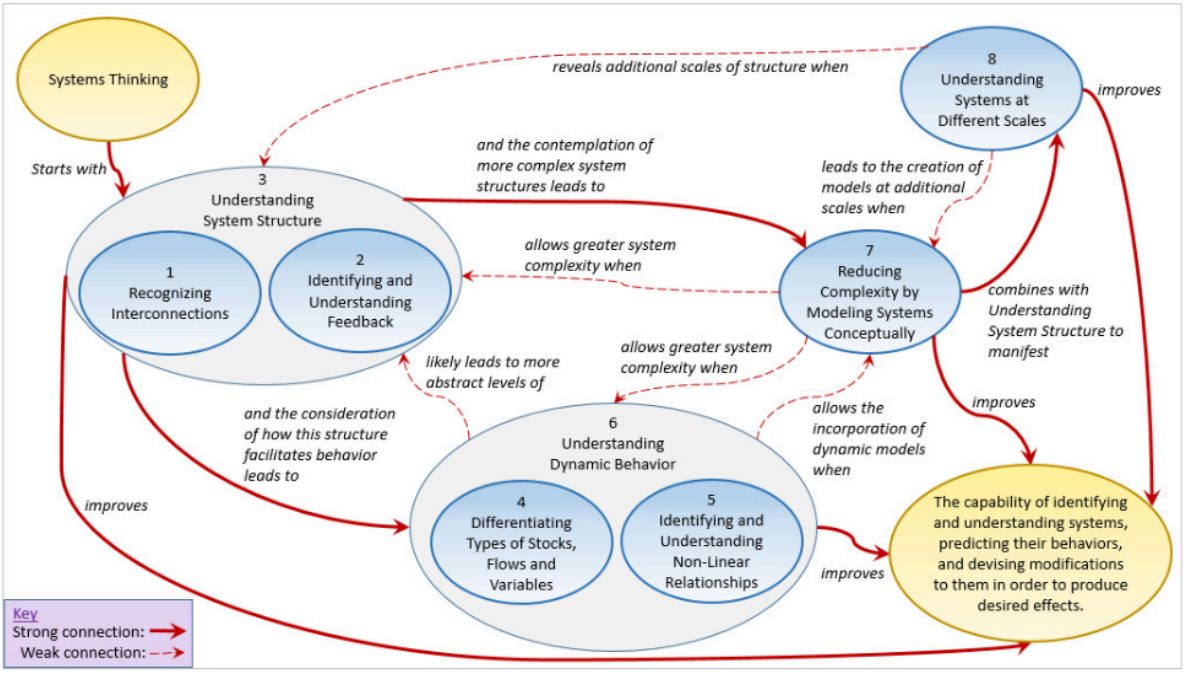
[188] Ibid 670-671.

[189] Ross D Arnold and Jon P. Wade, 'A Definition of Systems Thinking: A Systems Approach' (2015) 44 *Procedia Computer Science* 669, 671, citing B Richmond, 'Systems Dynamics/Systems Thinking: Let's Just Get On With It' (Conference Paper, International Systems Dynamics Conference, 1994).

[190] Ibid.

[191] Arnold and Wade (n 2) 676.

[192] Lynn M. LoPucki, 'Systems approach to law' (1997) 82 *Cornell Law Review* 479 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2680&context=clr>.



Source: Arnold and Wade, 'Systemigram', reproduced under CC BY-NC-ND 4.0[193]

A key insight of systems thinking is: '*how we describe our actions in the world affects the kinds of actions we take in the world*' – adopting the lens of interrelationships allows more effective analysis of complex systems than conceptualising via simple cause-and-effect pairs.[194] Thinking of society (and socio-legal problems) as having functionally different systems requires consideration of what language will resonate with regulatees, and acknowledges the risk of noncompliance 'when the rational-legal language and concepts used in law and in regulation do not reflect or resonate with those used in the economic, environmental, or societal areas they seek to address'.[195] Yet where systems thinking is applied well to regulatory issues, it may:

> … help to increase the flexibility, adaptability, and resilience of regulatory agencies and the regulatory sector as a whole ... Ultimately, ongoing application of systems thinking to regulatory governance may add a tendency of learning and inquiring to the day-to-day practice of development, implementation, and enforcement of regulation … That is: an ongoing questioning of whether the regulatory system performs as we would like it to perform; an ongoing learning from day-to-day practice; and an ongoing inquiry into how we can improve performance even further.[196]

Given that the criminal justice response to sexual violence comprises a regulatory system, which is not currently functioning to achieve its goals, systems thinking is not only apposite to the analysis – it is directly mandated by the Terms of Reference.

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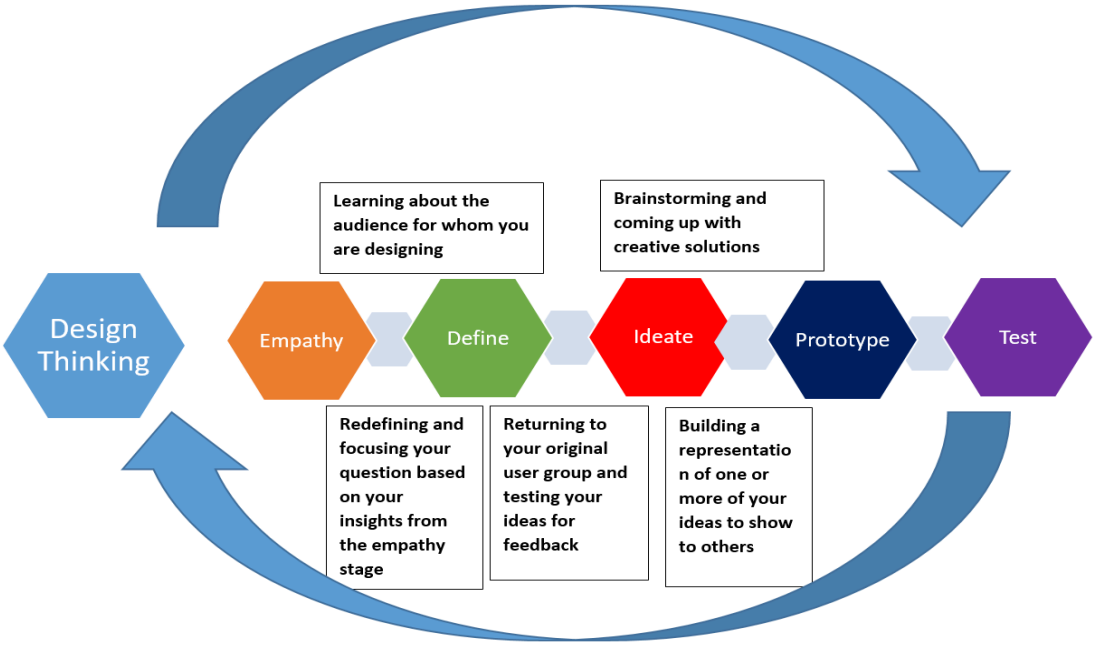
[193] Arnold and Wade (n 2) 676.
[194] Daniel H Kim, *Introduction to systems thinking* (Pegasus Communications Inc, 1999) 6.
[195] Jeroen van der Heijden, 'The Value of Systems Thinking for and in Regulatory Governance: An Evidence Synthesis' (2022) 12(2) *SAGE Open* <https://journals.sagepub.com/doi/epub/10.1177/21582440221106172>.
[196] Ibid.

Design thinking (human-centred thinking)

Design thinking or 'd.thinking' is a companion tool to systems thinking. It was developed by Hasso Plattner at Stanford University to improve the product design process and spur innovative thinking.[197] It is sometimes called *human-centred thinking*. Essentially it involves a series of (non-linear) steps and loops to guide an innovation process:



Source: 'Design Thinking' reproduced under Creative Commons Attribution-Share Alike 4.0[198]

Human-centred methodology is useful in providing structure to a legal/regulatory problem and is increasingly being used in policy reform[199] as it sits comfortably with growing notions of inclusive policymaking and lawmaking. In particular, the empathy step, and closed-loop design, is fitting for an Inquiry of this nature if it is to truly be trauma-informed.

Design thinking for innovation in law has close ties with systems thinking:

> Designers apply a "systems lens" to their design problem when they engage in [the design thinking process]. They work directly with understanding the system, looking for those leverage and tipping points where a system can be moved to change, without

[197] Hasso Plattner Institute of Design at Stanford, *Bootcamp Bootleg* (website, 12 February 2020) <https://static1.squarespace.com/static/57c6b79629687fde090a0fdd/t/58890239db29d6cc6c3338f7/1485374014340/METHODCARDS-v3-slim.pdf>. See also Felicity Bell and Checker McCarthy, *Legal design: a quick reference guide* (Information Sheet, Law Society of New South Wales)

[198] MrJanzen1984, *Design Thinking* <https://commons.wikimedia.org/wiki/File:Design_thinking.png>.

[199] Maria Katsonis, 'When Design Meets Power: Design Thinking, Public Sector Innovation And The Politics Of Policymaking', *The Mandarin* (online policy forum, 14 October 2019) <https://www.themandarin.com.au/117989-design-thinking-public-sector-innovation/>; Michael Mintrom, 'Design Thinking in Policymaking Processes: Opportunities and Challenges' (2016) 75(3) *Australian Journal of Public Administration* 391.

> necessarily doing away with what might be a very necessary system in other respects in the process.[200]

As frontier legal designer Margaret Hagan writes,

> The purpose of legal design is to develop a human-centred, participatory approach to reforming the legal system—one that recognizes the importance of new technology but that does not privilege it as the main way to innovate. The approach weaves together the design of documents, products, services, spaces, policies, and laws to make systemic changes that still pay close attention to front-line realities. It recognizes the value of having interdisciplinary, inclusive groups build and test new improvements to the system. Legal design draws on the creative exploration and making of design work, along with the systems thinking and analysis of legal work. The wider theory of change for a design-driven approach to law is that cascading layers of efforts are needed for transformative impact. The entry points could be diverse and multi-channel.[201]

And further -

> Design offers a way to rethink and improve people's experiences of law. … It offers intentionality in the face of a system that has been hacked and patched together haphazardly and without user testing. Design holds the power to crack open the world of law, and make it more accessible, democratic, and usable.[202]

Systems and human-centred design in this Inquiry

We note that the Australian Law Reform Commission itself has indicated a preference for human-centred design, at least in relation to legislative reform.[203] We would encourage the Commission to expressly adopt a systems and human-centred design approach to the legal 'problems' set by the Terms of Reference. Taking this approach locates law as an important factor, though one among many in a constellation of intersecting legal, social, cultural, and other factors that inform how we understand sexual offences and consent. Moreover, it focuses on inclusiveness, despite the many different stakeholders and competing priorities, and incorporates methods involving construction of new artefacts, testing, and 'collaborative iteration' to develop stronger 'visions of change'.[204] It encapsulates the whole-of-systems and transformative approach mandated by the Terms of Reference.

We understand it is not within the Commission's Terms of Reference to address the broader social and cultural systems that underpin the problem of sexual offending and barriers to

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[200] Susan Ursel, 'Building Better Law: How Design Thinking Can Help Us Be Better Lawyers, Meet New Challenges, And Create The Future Of Law' (2017) 34(1) *Windsor Yearbook of Access to Justice* 28, 49.

[201] Margaret Hagan, 'Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System' (2020) 36(3) *Design Issues* <https://direct.mit.edu/desi/issue/36/3>.

[202] Margaret Hagan, *Law by Design* (2017) <https://lawbydesign.co/>. See also Margaret Hagan's Legal Design Lab at https://law.stanford.edu/organizations/pages/legal-design-lab/.

[203] William Isdale and Christopher Ash, 'The design of everyday law', *ALRC News* (Blog Post, 25 November 2022) https://www.alrc.gov.au/news/design-of-everyday-law/; Ellie Filkin and Christopher Ash, 'Unpacking and repacking Chapter 7: Improving the structure and framing of financial services legislation', *ALRC News* (Blog Post, 22 June 2023) <https://www.alrc.gov.au/news/unpacking-and-repacking-chapter-7-improving-the-structure-and-framing-of-financial-services-legislation/>

[204] Hagan (n)

reporting. However, in systems terms, acknowledging other elements at play beyond legal doctrine is likely to allow for a more fulsome analysis that will meet the legislative intent and purpose. As McJunkin notes –

> Extralegal realms, while easily overlooked from a doctrinal perspective, constitute a critical site for assessing the *role that law plays in constructing society*. Simplified: we have the potential to affect the nature of rape in society by altering the law that responds to it.[205]

The Specialist Report discusses some of this 'extralegal realm' in terms of barriers to reporting. Nevertheless, there is much research to be done in this space – particularly in understanding communities who experience sexual violence at disproportionate rates, and the exacerbating issue of intersectional experiences of sexual violence. We hope that our discussion, together with other submissions from victims and survivors and those working in the support services sector, will go some way towards illuminating some of the extralegal elements in this wicked social system problem.

[205] Ben A McJunkin, 'Deconstructing rape by fraud' (2014) 28 *Columbia Journal of Gender and Law* 1, 41. Emphasis added.

Appendix B: Collaborators & Supporters

Collaborators

Dr Amanda-Jane George
Dr Masahiro Suzuki
Sandra Noble
Nanushka
Sarah Rosenberg
Pip Brennan
Karen Iles
Chris Coombes
Danielle Villafaña
Sarah Odondi
Yumi Lee
Nicole Edwards
Dr Tasha Riley

Supporters

Professor Lee Di Milia
Professor Janya McCalman
Associate Professor Heather Lovatt
Associate Professor Scott Beattie
Associate Professor Anthony Weber
Dr Nichola Corbett-Jarvis
Dr Emma Turley
Dr Vicki Saunders
Dr Rachel Hale
Dr Chantal Orgeas
Dr Vanita Yadav
Dr Jay Deagon
Dr Robyn Preston
Dr Vicki Pascoe
Dr Lyndal Sleep
Dr Shirley Ledger
Sonia Naomi Smith
Kimberly Solomon
Janine Rees
Amanda Morrison
Tanya Dunstan
Anna-Marie Stancombe
Anna Day
Simone Ohlin
Marija Csihar
Sonja Swanton
Robyn Tobin
Jen Mulvogue
Cath King
Madeline Batsiokis
Jonathan House
Sara Brown
Lee Baker
Anna Coetzer
Monika Kansal
Samantha Reynolds
Marti Harris
Kristy-Lee Dawson
Kellie Dyer
Richard V Bradbury
Noni Umson
Rachael Hubbard
Sharon Tandridge