

14 June 2024

Justice Mordy Bromberg  
President, Australian Law Reform Commission  
*By email: [jrsv@alrc.gov.au](mailto:jrsv@alrc.gov.au)*

Dear Justice Bromberg

## **Inquiry into justice responses to sexual violence**

Legal Aid NSW welcomes the opportunity to respond to the Australian Law Reform Commission's (**ALRC**) inquiry into justice responses to sexual violence. We support the inquiry's aim of promoting just outcomes for people who have experienced sexual violence.

Sexual violence is amongst the most violating of conduct, and many victims<sup>1</sup> report negative experiences of the criminal trial process. We support the ALRC considering improvements to make victim experiences more trauma informed and culturally safe, while maintaining the essential right of the accused to a fair trial.

We consider that victim experiences of the justice system could be significantly improved without harsher criminal justice responses. Further reform to the rules of evidence in sexual assault trials in NSW may not be appropriate while the impact of recent reforms is considered. In NSW, affirmative consent law reforms introduced in 2022 are currently under statutory review. There are also relevant matters currently before the High Court concerning the admissibility of expert evidence and evidence of prior sexual experience. Properly applied, the rules of evidence limit harassing and irrelevant evidence or questioning of victims.

We see benefit in the ALRC further exploring these issues:

### **Reporting stage**

Alternative reporting mechanisms for victim of domestic and family violence (**DFV**) are being developed in NSW, which we consider would also benefit victim of sexual violence. We suggest that ALRC consider:

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<sup>1</sup> People who have experienced sexual violence, domestic and family violence and other crimes prefer different terms to describe their experience. In this submission the term victim is intended to include victim-survivors.

- specialist police officer roles to provide advice, training, liaison for police, complainants and the community on sexual assault matters.<sup>2</sup>
- mechanisms to ensure police refer all complaints of sexual assault to specialist support. While specialist sexual assault services exist, such as within NSW Health, there is no automatic or consistent approach to referring all complainants.<sup>3</sup>
- co-locating sexual assault support workers within police stations, with the aim of encouraging victims to report to police, improving victims' experience of reporting, and streamlining their access to support.<sup>4</sup>
- sexual violence and trauma training for police officers on the topics listed under 'improved training for all justice system participants' below.
- where possible, allowing victims to choose the gender of the police officer to whom they report a sexual violence offences, and maintaining that officer's consistent involvement in the matter. This would assist the victim to build rapport with police and avoid unnecessarily retelling their story.
- providing cultural liaison officers to victims from culturally and linguistically diverse backgrounds. These victims can face additional barriers to reporting sexual assault, including different cultural views on sexual assault, mistrust of authorities, language barriers and challenges with confidentiality within small migrant communities in Australia. We suggest victims be able to choose the gender of interpreters, where possible.
- ensuring police inform victims of their right to have a support person present.

### Better informing victims about the justice system

Victims of sexual assault should be provided with more comprehensive information by the police and the Office of the Director of Public Prosecutions (**ODPP**) on:

- the criminal trial process, prior to any trial or charges, including information on the purpose of evidence in chief and cross examination, the detail in which they are likely to be required to give their evidence and the obligation on defence counsel to challenge their evidence.
- the progress of their matter during all stages, if the victim so wishes (including during the investigation and trial).
- the conditions of any order that relates to their protection.
- support available to victims of crime.

We also suggest that police make publicly available their prosecution guidelines for sexual assault (and DFV) matters prosecuted by police, to assist all parties to understand the factors considered. Our Domestic Violence Unit has worked with

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<sup>2</sup> This could be based on the specially trained domestic and family violence (**DFV**) liaison police officers (**DVLO**), who provide support and referral to victims of DFV.

<sup>3</sup> Services similar to the Women's Domestic Violence and Court Advocacy Service (**WDVCAS**) could be established for victims of sexual violence. The WDVCAS can provide support, information, safety planning and referral to services for women who are victims of sexual assault or other forms of violence within domestic relationships.

<sup>4</sup> A similar trial is currently taking place where a WDVCAS DFV specialist worker is co-located within NSW police stations to assist and support victims of DFV.

victims of sexual assault within domestic relationships who do not feel their views were considered when they did not wish the matter to proceed.

### Improved training for justice system participants

We support specialised sexual assault training for police, prosecutors, legal practitioners and the judiciary who work in this area, on topics including the impact of trauma, 'rape myths', the use of victim stereotypes and how this can be addressed, and memory. We consider that proposals such as specialist training for lawyers working on sexual violence matters would need to be accompanied by increased funding and remuneration for barristers and lawyers, to retain experienced staff and recognise the complexity of these trials.

### Harmonisation of laws

We support harmonising the definition of consent and the age of consent across Australian jurisdictions.

### Trial process reforms

- Nonpublication and suppression orders: automatic prohibitions on publishing the identities of victims in sexual offence proceedings are generally highly valued by victims. We also support victims having autonomy over when, and if, their experiences and involvement in court proceedings are shared. We consider that the current NSW legislation strikes the right balance, by prohibiting anything being published that identifies a victim in relation to a prescribed sexual offence, except where authorised by the court or with the consent of the victim.<sup>5</sup>

We suggest that police and the ODPP should also consider applying for suppression orders where appropriate and discuss this option with victims. For example, this could be appropriate in regional communities or other circumstances where the victim is identifiable to people who know him/her, despite their name not being published or when de-identified media reporting is creating a high level of distress, shame or embarrassment.

- Addressing delay: in our experience delay is often caused by resourcing issues throughout the trial process. This includes inadequate prosecution disclosure of material, late service of briefs by the ODPP and police, and allocation of matters to relatively inexperienced prosecutors during the pre-trial process who may not have authority to negotiate pleas.
- Better incentivising guilty pleas and early guilty pleas by providing a variety of sentencing options, including community-based sentences that may be appropriate for offences that are less objectively serious. This would

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<sup>5</sup> *Crimes Act 1900 (NSW)*, section 578A

recognise the diverse range of sexual violence offenders and offences that come before courts, and provide appropriate offenders with opportunities for rehabilitation. Judicial discretion regarding the sentencing discount would also assist.

- Providing witness intermediaries for all complainants who have communication difficulties or cognitive impairments. Witness intermediaries maximise the opportunity for vulnerable witnesses to give their best evidence. We similarly support witness intermediaries for vulnerable defendants, including child defendants.

### Sexual Assault Communications Privilege (SACP)

Our clients who are victims of sexual assault value the existence of SACP and the protection of their therapeutic relationship. The absence of this protection in the family law jurisdiction can deter victims of sexual assault from engaging in beneficial therapeutic treatment, for fear that this will be used against them or that the perpetrator will be able to access this information.

In our experience there are ongoing issues of noncompliance with SACP with subpoenas routinely issued without leave, narrow judicial interpretation of the scheme, and inconsistent approaches by police and the ODPP to the use of SACP material.

We note recommendation 73 of the Royal Commission into Institutional Responses to Child Sexual Abuse:

“the relevant state or territory government should work with its courts, prosecution and legal aid agencies to implement any necessary procedural or case management reforms to ensure that complainants are effectively able to claim the privilege without risking delaying the trial.”<sup>6</sup>

It is our experience that in NSW, victims are still placed in the position where they must choose between effectively claiming the privilege or the trial going ahead as planned.

Legal Aid NSW's SACP Service routinely receives referrals of victims whose counselling communications have been subpoenaed without leave. The offending subpoenas are not usually directed to health practitioners who can easily be identified as counsellors, such as psychologists and psychiatrists. Rather, they are directed to organisations that employ counsellors or are likely to hold the records of counsellors, such as hospitals, medical centres, the NSW Department of Communities and Justice (**DCJ**) (seeking care and protection records), out of home

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<sup>6</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, Part VII, recommendation 73, 266.

care providers and schools. These subpoenas often request “all documents” relating to the victim, are usually issued in the weeks before trial and often result in the production of large volumes of material.

While the issuer of the subpoena may initially indicate that they do not seek access to privileged material, once privileged material is identified, it is common for the issuer to press for access to that material. A retrospective leave application is then heard. This process causes considerable stress to the victim who is often already distressed as the trial approaches.

If the victim does not consent to disclose all the material, a hearing must be held. Large bundles of material are often in question, and there is a significant demand on court time. It is also stressful for the victim whose private information is at risk of disclosure.

We suggest that this issue could be addressed by improving court processes. For example, the court registry could take a more active role when asked to issue subpoenas to hospitals, medical centres, DCJ and schools. If these subpoenas are sought in proceedings for a sexual assault offence, the registry could ask the issuing party to specify the documents sought, rather than issuing a subpoena for “all documents”. Alternatively, the issuing party could be required to seek leave prior to issuing a subpoena for “all documents” to these organisations.

Care should be taken in how the subpoenas are worded to avoid inadvertent disclosures. The definition of “protected confidences” in SACP legislation is complex, and broader than is commonly thought.<sup>7</sup> A subpoena recipient would be likely to need legal assistance to comply with such a subpoena. If legal assistance is not sought, protected confidences are likely to be produced, resulting in inadvertent disclosure.<sup>8</sup>

We consider that SACP requires legal representation for the protected confider to be effective.

### Victims Impact Statements

Many of our clients who are the victims of sexual offending dealt with in the Local Court are not informed by police of their option to make a victim’s impact statement (**VIS**). They sometimes discover this after sentencing, when it is too late for them to tell the court about the impact of the offending. For victims who would have liked to make a VIS, this is very frustrating and disappointing, as it is the only opportunity for

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<sup>7</sup> For example, many recipients would expect that the “sexual assault communications privilege” would only apply to communications about the sexual assault, which is not correct.

<sup>8</sup> The likelihood of protected confidences being produced when the schedule requires production of “all documents except protected confidences” is so high that the ODPP is obliged to refer such subpoenas to the SACP Service so that the protected confider can be represented.

victims to provide this information and have their voice heard outside of the narrow confines of their complaint and role as a witness.

Consideration should be given to how existing processes can be improved to ensure that victims are made aware of their options and supported to provide a victim impact statement in a manner that is fair to the accused. We note that the NSW Sentencing Council made a number of recommendations around this in its Victims Involvement in Sentencing Report. We suggest that these recommendations be re-considered and advanced, in particular in relation to encouraging the use of VISs for sexual offence matters in this jurisdiction.

### Restorative justice

We support exploring restorative justice options, in appropriate matters. We would require further details on how restorative justice would sit alongside the criminal justice system to comment more fully.

### Compensation schemes

Our clients value the victims support scheme that operates in NSW, which provides financial support and access to counselling to victims of acts of violence and acts of modern slavery. This support can be of both symbolic and practical benefit to victims of crime.

We consider that assisting victims to apply for compensation and gather supporting materials in a trauma informed and culturally safe manner would significantly improve the NSW scheme and better promote just outcomes for victims. We also consider that the quantum of all recognition payments should be increased. Recognition payment amounts have remained unchanged since the current scheme commenced in June 2013.<sup>9</sup>

Currently applicants must gather and provide supporting documents for their application to be assessed. Previously Victims Services assisted applicants to complete their applications and gather supporting documents from government agencies and health professionals, relying on the *Victims Rights and Support Act 2013* (NSW) to compel the production of information. Victims must use other processes such as the *Government Information (Public Access) Act 2009* (NSW) (**GIPA**). GIPA applications can be difficult, bureaucratic and slow, routinely taking up to six months, even in circumstances where individuals are accessing their own personal information. Such delays can prevent victims from meeting application time limits.

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<sup>9</sup> *Victims Rights and Support Regulation 2019* (NSW) reg 14, *Victims Rights and Support Regulation 2013* (NSW) reg 12 (repealed)

Requiring victims to provide supporting documents without assistance has created barriers to accessing support, which can be insurmountable for some victims due to personal circumstances, the impact of trauma and/or the costs and complexities involved in collecting their own evidence. Barriers to access disproportionately impact on vulnerable populations, particularly:

- victim-survivors of domestic and family violence and victims of sexual violence as they often do not report the violence to the police;<sup>10</sup>
- Aboriginal people, who are significantly more likely to experience domestic and family violence than their non-Indigenous counterparts;<sup>11</sup>
- children and young people, particularly those in out-of-home care, older people and people with low literacy; and
- people in prison, who face additional barriers to accessing and collating evidence such as lack of access to the Victims Services NSW webpage on prison-issued tablets and limited ability to fund GIPA requests.

### Victims Charter

The rights in the legislative charter of rights of victims of crime<sup>12</sup> are of significance to many of our clients. Our solicitors report that some victims of crime are not treated in accordance with the Charter by NSW government agencies including police and DCJ, particularly the rights to be provided with information about services and remedies and the investigation of the crime.

We suggest consideration be given to the benefit in prescribing particular information that complainants should have access to under the Victims Charter. We suggest that the Commissioner of Victims Rights publicise and promote the right of victims to make a complaint about alleged breaches of the Charter. We also suggest that the Commissioner of Victims Rights be required to report annually on government agency compliance with the Charter, including on complaints about alleged breaches.

### Workplace laws/ sexual harassment

In our experience the main concerns of clients who have experienced sexual harassment pursuing legal claims are costs, feeling intimidated by court/ tribunal processes, the potential impact on their employment, delays in reaching conciliation<sup>13</sup>, and complexity of discrimination and harassment laws. The trauma of sexual harassment or violence can also affect our clients' ability and motivation to engage in legal processes.

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<sup>10</sup> See, eg, Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017). See also Birdsey and Snowball, *Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services* (BOCSAR Issues Paper No 91, October 2013).

<sup>11</sup> Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Catalogue No FVD 3, 5 June 2019).

<sup>12</sup> *Victims Rights and Support Act 2013* (NSW), section 6.

<sup>13</sup> In our experience for standard non-priority complaints, there is around 6-8 months between lodgement of complaint and allocation to a conciliation officer. Once allocated, there is often a further 3 – 6 month wait until conciliation.



Where our clients have pursued legal claims the availability of our trauma informed free legal service and accurate information about their legal options has been a significant factor. We have observed that clients who feel well supported by their family, friends or support services are more likely to pursue legal recourse.

We suggest that victims could be supported to use civil proceedings by funding trauma informed free legal services, implementing an equal access costs model, addressing delay in reaching conciliation and harmonising and simplifying discrimination laws.

Introducing witness safeguards in civil proceedings similar to those that apply to complainants giving evidence about alleged sexual offences in criminal proceedings would also be beneficial, including:

- An automatic prohibition on publishing the identity of victims of sexual harassment who are witnesses in civil proceedings, except with the consent of the witness.
- A requirement for the court to be closed while a victim of sexual harassment is giving their evidence.
- An entitlement for victims of sexual harassment to give their evidence by audio-visual link from a place other than the courtroom.
- An entitlement for all victims of sexual harassment to give their evidence in chief by way of a pre-recorded interview.
- A requirement that the evidence (including cross-examination) of victims of sexual harassment be recorded during court proceedings with a view to it being tendered in any subsequent court proceedings, to prevent the victim having to attend court on multiple occasions.
- A prohibition on victims of sexual harassment being cross-examined by a self-represented perpetrator.
- An entitlement for victims of sexual harassment to have a support person present when giving evidence.
- The ability for a court to order that the perpetrator sit out of a victim's line of sight whilst they are giving evidence.

#### [Apprehended Domestic Violence Order \(ADVO\) proceedings](#)

In sexual assault matters, where there is a domestic relationship, an ADVO is in place to protect the victim/s.

In NSW a protected person in an ADVO is an interested party, and not a party to the proceedings. This can present challenges for the protected person in some circumstances, for example where their views about individual ADVO conditions are not taken into consideration by prosecution. We suggest the ALRC explore the benefit of allowing the protected person to be a party to the proceedings, or an



aspect of the proceedings, with leave of the court. Relevant considerations could be prescribed, such as that the protected person's interests are not being adequately represented.

#### [Access to independent legal advice](#)

We support complainants in sexual assault matters having access to independent legal advice. In NSW where, to an extent this is already the case, it is our experience that independent legal advice is particularly beneficial where there is a domestic relationship between the complainant and the accused and there are family law issues, safety issues or when the complainant has conflicting views about the continuation of the prosecution. We see benefit in ensuring that all sexual assault complainants have access to this advice. To that end, any barriers to complainants accessing such advice should be identified and removed, and measures put in place to raise awareness of the availability of such services among police and prosecution so that complainants are properly referred.

If you require further information on our feedback or would like to discuss this letter further, please contact Tijana Jovanovic A/Manager Strategic Law Reform Unit on 0425 218 996 or [Tijana.Jovanovic@legalaid.nsw.gov.au](mailto:Tijana.Jovanovic@legalaid.nsw.gov.au).

Yours sincerely



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