



Inquiry into Justice Responses to Sexual Violence

Australian Law Reform Commission

20 June 2024

Acknowledgements

We acknowledge the Traditional Owners of Country, recognise their continuing connection to land, water, and community, and pay respect to Elders past and present.

We acknowledge the victim-survivors of domestic, family, and sexual violence who we work with and their voices and experiences which inform our advocacy for justice, equality, and safety for women.

About Women's Legal Services Australia

Women's Legal Services Australia (**WLSA**) is the national peak body for 13 specialist Women's Legal Services in each state and territory across Australia, including two First Nations Women's Legal Services. We provide a national voice for Women's Legal Services to influence policy and law reform, and advocate to increase access to gender-specialist, integrated legal services for women.

About Women's Legal Services

Women's Legal Services provide high quality free legal services for women, including legal advice and representation, support services and financial counselling, community legal education, training for professionals, and engage in advocacy for policy and law reform. Some Women's Legal Services have operated for more than 40 years.

WLSA members include:

- Women's Legal Service Victoria
- Women's Legal Service Tasmania
- Women's Legal Service NSW
- Women's Legal Service WA
- Women's Legal Service SA
- Women's Legal Service Queensland
- North Queensland Women's Legal Service
- First Nations Women's Legal Service Queensland
- Women's Legal Centre ACT
- Wirringa Baiya Aboriginal Women's Legal Centre NSW
- Top End Women's Legal Service
- Central Australian Women's Legal Service
- Katherine Women's Information and Legal Service

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Executive Summary

Improving responses to sexual violence is a national issue and requires a commitment from all state and territory governments to implement reforms and invest in fundamentally changing the criminal legal system within their jurisdictions. Consistent with the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022 – 2027, all state and territory governments must strengthen legal frameworks to ensure victim-survivors have improved justice outcomes and protections and engage in wide-spread systems reforms.

Legislative reforms should be urgently implemented in all jurisdictions to provide enhanced protections, rights, entitlements to victim-survivors of sexual violence navigating the criminal legal system. A reform priority must be granting standing to complainants in criminal proceedings for sexual violence offences, including pre-trial proceedings and at trial, to ensure their rights and entitlements are upheld and protected, particularly in relation to evidence.

It is important to recognise legislative reform alone will not significantly improve outcomes for victim-survivors of sexual violence. We need to see cultural change and systems reform towards having trauma-informed, culturally safe, and gendered violence-informed systems – with the purpose of both increasing conviction rates through the criminal legal system and improving other outcomes for victim-survivors.

We also need significant investment from Commonwealth, state and territory governments to increase access to frontline domestic, family, and sexual violence services, including specialist legal assistance services for victim-survivors of sexual violence. This must include legal assistance to navigate the criminal legal system and to assist with intersecting legal issues, from when a victim-survivor is considering whether to report through to the end of their legal matters. This must also include culturally safe and appropriate services for First Nations people and culturally and linguistically diverse people.

Increased access to legal assistance is vital to improving justice responses to sexual violence. Victim-survivors must have access to legal advice to ensure they understand criminal justice processes, are informed about their rights and entitlements and the options available and have their own independent legal representation throughout engagement with criminal legal processes to ensure any legislative protections or entitlements are applied appropriately, including inside the courtroom at pre-trial hearings and at trial.

The current pilot for sexual assault legal services funded by the Commonwealth Government is a welcome step in the right direction and has increased the capacity of Women's Legal Centre ACT, Women's Legal Service WA, and Women's Legal Service Victoria to deliver legal assistance to victim-survivors of sexual assault. However, significant additional funding for legal assistance is needed to ensure all victim-survivors across Australia can access Women's Legal Services and the supports they need to navigate the criminal legal system.

Recommendations

- Recommendation 1: Legislation should not refer to victim-survivors of sexual violence or complainants in criminal proceedings as 'vulnerable'.
- Recommendation 2: Commonwealth, state, and territory governments should prioritise increased investment in Women's Legal Services to provide trauma-informed sexual violence legal services.
- Recommendation 3: Complainants should have standing in criminal proceedings for sexual violence offences, including pre-trial proceedings and at trial, to ensure their rights and entitlements are upheld and protected, particularly in relation to evidence.
- Recommendation 4: Sex offence legislation should respond to sexual violence that occurs within the context of family and domestic violence.
- Recommendation 5: Audio-visual recordings should be available for complainants of all sexual violence offences for their evidence in chief, cross-examination, and re-examination.
- Recommendation 6: Audio-visual recordings should be available to special relationship witnesses in proceedings involving child complainants.
- Recommendation 7: Ground rules hearings should be available in all jurisdictions for all sexual violence trials, alongside investment in intermediaries and legal assistance for complainants.
- Recommendation 8: Jury directions should address misconceptions about consent, trauma, sexual violence, and family and domestic violence.
- Recommendation 9: Sexual reputation evidence should be inadmissible in all circumstances, and sexual experience evidence should only be admissible in very limited circumstances.
- Recommendation 10: Protections for complainants from improper, inappropriate, or aggressive questioning should be strengthened, alongside increased access to independent legal representation.
- Recommendation 11: Defendants should be prohibited from personally cross-examining any complainant or other witness in sexual violence proceedings, and legal assistance services should be funded to conduct any cross-examination on behalf of the defendant.
- Recommendation 12: Protections for confidential counselling or health records should be strengthened, and complainants should have standing in proceedings in relation to this evidence.
- Recommendation 13: Judicial training on the complexities of sexual violence and trauma.
- Recommendation 14: Nationally consistent, strong models of affirmative consent.
- Recommendation 15: People who make sexual violence complaints to police or other complaint-handling bodies and medical/health professionals should have absolute immunity from defamation.

Terminology

1. We note the terms 'vulnerable person' and 'vulnerable adult complainant' are used in the *Crimes Act 1914* (Cth) and in criminal legislation in some state/territory jurisdictions. We understand the intent is to provide legal protections for cohorts of people giving evidence in criminal proceedings.
2. It is important that language is strengths-based, focuses on accountability and is language with which a victim-survivor identifies. People are not vulnerable simply because, for example, their age, a cognitive impairment, or a traumatic experience; it is systems, structures, discrimination, and other barriers to equality, justice and safety that must be challenged.
3. We recommend removing the language of 'vulnerable person' and 'vulnerable adult complainant' from all relevant legislation. All complainants in sexual violence proceedings should be able to access protections that seek to ensure they can give their best possible evidence and are not subjected to further trauma and harmful or distressing experiences, and this is in the public interest.

Recommendation 1

Legislation should not refer to victim-survivors of sexual violence or complainants in criminal proceedings as 'vulnerable'.

Trauma-informed legal assistance for victim-survivors of sexual violence

Access to specialist Women's Legal Services

4. Accessing the justice system and reporting can be made easier for victim-survivors through access to specialist Women's Legal Services with expertise in providing trauma-informed legal assistance for responding to sexual violence.
5. Women's Legal Services are specialist, gender-led legal assistance services for women, particularly women who have experienced or are experiencing family and domestic violence. Women's Legal Services assist women who have experienced sexual assault, often within the context of family and domestic violence, including access to legal assistance with criminal law, family violence, family law, victims of crime compensation, child protection, migration law, and employment and discrimination law, alongside social supports such as social work, case management, cultural safety and financial counselling support.
6. Given that Women's Legal Services have specialist expertise in providing assistance to victim-survivors, our services are well placed to provide assistance to victims to navigate the criminal justice system, to pursue their rights and entitlements, and to identify and pursue alternative avenues such as civil litigation, financial compensation or restorative justice. Alongside this, Women's Legal Services can help to address any intersecting legal problems in other areas such as family violence, family law or migration law.

7. Specialist legal assistance should be available to victim-survivors to provide a range of different types of assistance, such as:
 - a) Understanding options in relation to reporting to police, civil litigation, financial compensation, and restorative justice.
 - b) Pursuing and protecting substantive legal rights and entitlements, such as rights in Victims' Charters to be consulted by police or the prosecution, rights to privacy, and rights to respectful and dignified treatment.
 - c) Support to navigate the criminal legal system, including understanding criminal law processes, evidence requirements and legislative protections for complainants, including witness protections.
 - d) Assistance with drafting special witness arrangements applications, applications for ground rule hearings, victim impact statements, applications in relation to protecting confidential counselling or health records or self-publication provisions.
 - e) Intersections between the criminal law system and other legal issues, such as family violence, family law, child protection and migration law.
8. Particularly given the barriers to reporting to police, and the difficulties with successfully prosecuting sex offences, legal representatives for victim-survivors should be accessible to advocate for complainants throughout the process and ensure that it meets their needs.
9. For further details about the specialist legal assistance that can be provided to victim-survivors of sexual violence through a Women's Legal Service model, see WLSA's submission to the Attorney-General's Department consultation on the 'specialised and trauma-informed legal services pilot for victims and survivors of sexual assault'.¹
10. The Victorian Law Reform Commission (VLRC) has recommended the Victorian Government fund legal advice and, where necessary, representation until the point of trial and in related hearings, to ensure victim survivors can exercise their rights and protect their interests, including their rights and privileges in relation to evidence (for example, the confidential communication privilege, alternative arrangements (pre-recorded) and special protections, access to intermediaries), their rights to privacy in relation to disclosures of personal information (for example, information about their sexual history, the nature of cross-examination, or suppression orders), their options for compensation, including under the *Sentencing Act 1991* (Vic), victims of crime compensation, and civil or other compensation schemes, and the implications of taking part in restorative justice and referrals to restorative justice when applying for compensation or restitution orders.²
11. We were pleased to see \$8.4 million over three years in the October 2022 Federal Budget allocated for a pilot to provide victim-survivors of sexual assault with greater access to dedicated legal services to support their recovery and engagement with the criminal justice system. Women's Legal Centre ACT (in partnership with Victims Assist) and Women's Legal Service WA (in partnership with Ruah Community Services Legal and the Aboriginal Family Legal Service) are funded by the Federal Government to deliver trauma-informed sexual assault legal service pilots. Women's Legal Service Victoria is also a partner of the Victims Legal Service pilot site in Victoria.

¹ Women's Legal Services Australia, *Submission to the Attorney-General's Department, 'Specialised and trauma-informed legal services pilot for victims and survivors of sexual assault'*, 15 May 2023 < [Specialised and trauma-informed legal services pilot for victims and survivors of sexual assault – Women's Legal Services Australia \(wlsa.org.au\)](#) >

² Recommendation 46, Victorian Law Reform Commission, *'Improving the Response of the Justice System to Sexual Offences'*, 12 November 2021 < [Improving the Response of the Justice System to Sexual Offences - Victorian Law Reform Commission](#) >

12. This pilot should be expanded across the country to test different models in each jurisdiction, allow all victim-survivors to have access to legal assistance, and enable all Women's Legal Services to provide services to victim-survivors of sexual violence to support their recovery and engagement with the criminal justice system and alternative avenues.
13. Many Women's Legal Services are already working with victim-survivors of sexual assault and delivering services to support them to navigate the legal system, as far as existing resources allow. In our recent submission to the Federal Budget 2024-25, WLSA sought an additional \$4.6 million per year (plus indexation) to set up an additional 5 pilots in the remaining jurisdictions and ensure victim-survivors in every state and territory jurisdiction can access a pilot site.³ No additional funding was provided in the Federal Budget for the sexual assault legal services pilot.

Recommendation 2

Commonwealth, state, and territory governments should prioritise increased investment in Women's Legal Services to provide trauma-informed sexual violence legal services.

Legal standing for complainants in criminal proceedings

14. Traditionally, victim-survivors have not been recognised as participants in the criminal justice system and have merely been treated as witnesses for the prosecution. A prosecutor is a lawyer for the Crown, not the victim. Discovering that this is still the reality of the criminal justice system can be surprising, distressing and traumatising for victim-survivors and can be a prohibitive factor in seeking a justice response.
15. However, the traditional view is slowly changing and there is increasing recognition in many jurisdictions that victims have rights and entitlements and a personal stake in the criminal justice process, for example through the introduction of Victims' Charters and additional legislative protections for victims, as well as recognition that sexual assault legal service pilots should be funded by the Federal Government. The Victorian Law Reform Commission (VLRC) has acknowledged that victims have an 'inherent interest' in the criminal justice process and must be recognized as key participants.⁴
16. In some jurisdictions across Australia, some complainants in sexual violence matters already have legal standing or can seek leave to appear in pre-trial processes, such as pre-trial hearings in relation to sexual assault counselling privilege to seek protections for confidential counselling records. For example, Women's Legal Service Queensland lawyers regularly appear in pre-trial hearings on behalf of complainants where they have standing under section 14L of the *Evidence Act 1977* (Qld). The complainant is not a party to the proceeding.
17. The feedback from Women's Legal Service clients across Australia is often that they are distressed to discover that they do not have standing in the proceeding. Women express it is unfair that the accused has their own legal representation and protections throughout the

³ Women's Legal Services Australia, *Federal Pre-Budget Submission 2024-25*, 25 January 2024 < [Federal Budget Submission 2024-25 – Women's Legal Services Australia \(wlsa.org.au\)](#) >

⁴ Victorian Law Reform Commission, 'Victims of Crime in the Criminal Trial Process: Report', 22 November 2016 < [Victims of Crime in the Criminal Trial Process: Report \(pdf and Word\) - Victorian Law Reform Commission](#) >

- criminal justice process that they do not. Women also often tell us they wish they could have a lawyer present with them in the courtroom to act on their behalf and to protect their interests, particularly where the prosecutor or the court does not.
18. WLSA supports reforms in all jurisdictions to provide standing to complainants of sexual violence offences in certain pre-trial processes and at trial to ensure their interests, rights and entitlements are upheld and protected, particularly in relation to evidence. This should include pre-trial hearings in relation to sexual assault counselling privilege, decisions about evidence such as the disclosure of victims' sexual history evidence, and during cross-examination and re-examination at trial to object to inappropriate or aggressive questioning, and to otherwise ensure that victim rights and entitlements are protected.
 19. All victim-survivors of sexual violence should have access to independent legal representation to support them to appear where they have standing to do so. Independent legal representation for sexual violence complainants in criminal proceedings would support better outcomes and contribute to ensuring that legislative protections, rights and entitlements for victim-survivors are appropriately utilised and effective.
 20. Academics, women's organisations, and victim advocates have raised concerns about the lack of judicial intervention to protect victims in the courtroom, and the lack of information or assistance provided to victims to support their rights and entitlements in the criminal justice process and have called for complainants to have standing alongside victim lawyers to address this. Experts in criminology and gendered violence such as Dr Mary Iliadis, Associate Professor of Criminology at Deakin University, Dr Kate Fitz-Gibbon at Monash University and Dr Kerstin Braun at University of Southern Queensland have examined the merits of the provision of independent legal representation.⁵
 21. Research suggests independent legal representation for victim-survivors can increase reporting rates and engagement with the criminal justice system, and having a lawyer present at trial may decrease victims' feelings of stress and anxiety and improve their confidence when testifying.⁶ Academics have also highlighted international examples of different models for independent legal representation for victims around the world.⁷ For example, in Germany victims of sexual offences can be represented by a lawyer at trial, with the ability to elicit evidence and ask questions of the accused person at trial.⁸

Recommendation 3

Complainants should have standing in criminal proceedings for sexual violence offences, including pre-trial proceedings and at trial, to ensure their rights and entitlements are upheld and protected, particularly in relation to evidence.

⁵ Iliadis, Mary; Fitz-Gibbon, K; Walklate, S (2021). *Improving justice responses for victims of intimate partner violence: examining the merits of the provision of independent legal representation*. Deakin University. Journal contribution. <https://hdl.handle.net/10536/DRO/DU:30133187>

⁶ Dr Mary Iliadis and Kersin Braun, 'Sexual assault victims can easily be re-traumatised going to court – here's one way to stop this', *The Conversation*, 25 March 2021 < [Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this \(theconversation.com\)](#)>

⁷ Dr Mary Iliadis and Kersin Braun, 'Sexual assault victims can easily be re-traumatised going to court – here's one way to stop this', *The Conversation*, 25 March 2021 < [Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this \(theconversation.com\)](#)>

⁸ Kerstin Braun, 'Legal Representation for Sexual Assault Victims – Possibilities for Law Reform?', *Current Issues in Criminal Justice*, Volume 25, Number 3, March 2014 < [6.pdf \(austlii.edu.au\)](#)>

Addressing sexual violence within the context of family and domestic violence

22. The epidemic of violence against women has gained nationwide attention in recent years, with a number of State and Territory inquiries into sexual violence, domestic and family violence, and family law. Despite maturing community literacy on family and domestic violence and its links to gender inequality, community understanding of sexual violence within the context of family and domestic violence is weak. This is reflected by a justice system that is not adequately equipped to respond to sexual violence that occurs in the context of family and domestic violence.
23. Sexual assault is frequently an element of a broader pattern of coercive control, relationship dependence, power imbalance, and violence. These relationship dynamics can impact on whether consent is being freely given. Domestic and family violence can create a climate of entrenched fear which makes it difficult to facilitate or negotiate safe sexual activity. At times, a natural response to coercive control will be to compromise autonomy to manage safety. In such situations, women may prioritise other aspects of physical safety for themselves and others, rather than take the risk of triggering an escalation of violence or abuse by refusing to engage in sexual activity.⁹
24. Coercive control tactics are nuanced and often targeted to the circumstances of the victim-survivor.¹⁰ Tactics can be subtle and difficult to identify externally. Sexual violence in these relationships can occur within the context of sexual routine, prior consensual activity, and the presumption of continuous consent. This can create situations where unwanted sex is agreed to, or there is a resistance to ask for sex to stop.¹¹ Often it is only the victim-survivor in the relationship who can comprehend the level and likelihood of harm and punishment if she says no. This highlights that consent in family and family-like relationships must be understood within an entrapment context that is riddled with risks, survival mechanisms, and based on the perpetrator's establishment of power.¹²
25. Sexual violence in family and family-like relationships can form part of a process of abuse that aims to create psychological control. These forms of abuse "interact in ways that can be unidirectional, bi-directional or simultaneous to develop and maintain an environment of fear and control and erode women's self-worth. This often results in women not being able to say "no" even when [she is] fearful or distressed".¹³ Shame is often also used as a tool to engage in sexual violence. At times rendering the victim-survivor in a position of diminished self-worth. Shame works to create a sense of vulnerability that can be exploited.¹⁴
26. TK Logan et. al., (2007) studied the use of sexual degradation of women in violent relationships and interpreted this dimension of sexual abuse as closely resembling psychological abuse.

9 Australia's National Research Organisation for Women's Safety (2019), *Intimate partner sexual violence: Research synthesis (2nd Ed.; ANROWS Insights, 08/2019)*. Sydney, NSW: ANROWS, p. 1 <IPSV-Research-Synthesis-2ed.pdf (anrowsdev.wpenginpowered.com)>.

10 Stella Tarrant, Julia Tolmie and George Giudice (2019), *Transforming legal understandings of intimate partner violence (Research Report, 06/2019)*, Australia's National Research Organisation for Women's Safety, p. 18 < RP.17.10_Tarrant_RR_Transforming-Legal-Understandings-of-IPV.pdf (anrowsdev.wpenginpowered.com)>.

11 Australia's National Research Organisation for Women's Safety, *Submission to the New South Wales Law Reform Commission on: Consent in relation to sexual offences (draft proposals)*, 18 November 2019, p.6 <CO67.pdf (anrowsdev.wpenginpowered.com)>.

12 Evan Stark (1995), pp.10-11 in Stella Tarrant, Julia Tolmie and George Giudice (2019), *Transforming legal understandings of intimate partner violence (Research Report, 06/2019)*, Australia's National Research Organisation for Women's Safety, p. 28 < RP.17.10_Tarrant_RR_Transforming-Legal-Understandings-of-IPV.pdf (anrowsdev.wpenginpowered.com)>.

13 Laura Tarzia and Kelsey Hegarty (2023), "He'd Tell Me I was Frigid and Ugly and Force me to Have Sex with Him Anyway": Women's Experiences of Co-Occurring Sexual Violence and Psychological Abuse in Heterosexual Relationships, *Journal of Interpersonal Violence*, Vol. 38(1-2).

14 Liz Wall (2012), *The many facets of shame in intimate partner sexual violence (Research Summary)*, Australian Centre for the Study of Sexual Assault, p. 6 < The many facets of shame in intimate partner sexual violence (aifs.gov.au)>.

Some of the women in this study understood that humiliation and degradation was a way for perpetrators to reinforce psychological abuse. Forcing the victim-survivor to submit to particular sexual acts that degrade, humiliate and induce shame.¹⁵ Victim-survivors may also have a sense of sexual obligation to their partners once a sexual relationship has been established. This perception can create a further shame dynamic.

27. It is vitally important that all sex offence laws respond to the complex dynamics of coercive control, and acknowledge that there is no consent where a sexual act is submitted to because they are a victim of coercive control. For example, the Victorian sexual consent legislation provides that consent is vitiated where the person submits to the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of when the force, harm or conduct giving rise to the fear occurs, and whether it is, or is a result of, a single incident or is part of an ongoing pattern.¹⁶ The legislation explicitly includes examples of the type of harm this includes, including family violence.

Recommendation 4

Sex offence legislation should respond to sexual violence that occurs within the context of family and domestic violence.

Reporting the experience of sexual violence safely

28. The majority of victim-survivors do not engage with the justice system due to a number of barriers, including a well-founded fear that the justice system will not provide a safe or effective response. Sexual violence perpetrated in the context of domestic and family violence is also often perceived as less believable.
29. Barriers to reporting include self-blame, guilt, low self-esteem, and shame.¹⁷ Often this is exacerbated by perceptions that discussing sex or sexual assault within relationships is private, particularly in culturally and linguistically diverse communities. Shame is further reinforced by police responding through the lens of rape stereotypes and misconceptions. For example, a study on the attitudes of Australian police towards sexual assault victim-survivors found that police were more likely to consider a victim to be credible if the sexual assault was perpetrated by an ex-partner rather than by a current partner or husband.¹⁸
30. Barriers to reporting sexual violence are compounded for victim-survivors who face marginalisation, discrimination and structural unfairness, particularly for culturally and linguistically diverse victim-survivors who experience domestic and family violence on a dual

¹⁵ TK Logan and Jennifer Cole et. al., (2007), *A mixed-methods examination of sexual coercion and degradation among women in violent relationships who do and do not report forced sex*, *Violence and Victims*, Vol. 22(1), 71–94 in Liz Wall (2012), *The many facets of shame in intimate partner sexual violence* (Research Summary), Australian Centre for the Study of Sexual Assault, p. 6 <[The many facets of shame in intimate partner sexual violence \(aifs.gov.au\)](https://www.aifs.gov.au)>.

¹⁶ *Crimes Act 1958 (Vic)*, s 36AA, amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic)*.

¹⁷ Peta Cox (2016), *Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey (ANROWS Horizons, 01.01/2016 Rev. ed.)*. Sydney, NSW: ANROWS <[PSS_2016update.pdf \(anrowsdev.wpenginepowered.com\)](https://www.anrows.gov.au/sites/default/files/2016-01/01/2016%20update.pdf)>.

¹⁸ Denise Livemore (2005), *No Longer Silent: A study of women's help-seeking decisions and service responses to sexual assault*, A report prepared by the Australian Institute of Criminology for the Australian Government's Office for Women, p. 52 <<https://www.aic.gov.au/sites/default/files/2020-05/no-longer-silent-a-womens-help-seeking-decisions-and-service-responses-to-sexual-assult.pdf>>.

paradigm. Many culturally and linguistically diverse clients of Women's Legal Services tell us that they are fearful of family and community response to disclosures of domestic and family violence and sexual violence.¹⁹ For this reason, culturally and linguistically diverse women are likely overrepresented as victim-survivors of domestic and family violence and sexual violence, but underrepresented in statistics on domestic and family violence, sexual violence and victimisation.²⁰

31. Sexual violence is particularly underreported in First Nations communities despite its prevalence. Clients of Northern Territory Women's Legal Services have reported experiences of being 'cut off' when reporting, often being turned away, a lack of interpreters and very few available female officers.²¹ The communication gap that often exists between police and sexual assault victim-survivors is particularly pronounced for First Nations women. When police do respond to First Nations women's calls for help, they can often apply gender bias along with racist myths about First Nations.²² Wirringa Baiya Aboriginal Women's Legal Centre also report that victim-survivors who report violence perpetrated by ex-partners are often persuaded by police that the act of violence was merely a 'misunderstanding' or 'dispute.'²³ Stereotyping by police can often be linked to the increasing rate of First Nations women imprisonment.
32. In addition to barriers to reporting, current conviction rates for sexual violence offences are an indication that justice system responses are often failing and consent laws are not operating as intended. Overall, very few sexual violence offence claims progress to trial and result in conviction.²⁴
33. The failure of the criminal justice system response to sexual violence is also evidenced through attrition rates. Across Australia, rape has the highest attrition rate of any offence and is therefore least likely to progress through the justice system.²⁵ In Victoria, between 2015-16 and 2016-17, allegations of sexual violence involving current partners were the most likely to be withdrawn and least likely to succeed at trial, despite police arguably having the evidence.²⁶ Attrition was highest during police investigation (e.g., police identifying a perpetrator, recording a perpetrator and ultimately charging a perpetrator).²⁷ During this time, police formally identified a perpetrator for half (48%) of incidents and charged half (52%) of those identified perpetrators. This means around 75% of incidents that entered the criminal justice system did not progress past police investigation.²⁸
34. Police officers will often prioritise cases that they predict are most likely to result in a conviction. This can involve considering the likelihood of whether a jury would convict.²⁹ A strong affirmative consent model, which shifts the focus from the actions of the victim-survivor to the perpetrator, has the potential to minimise the influence of non-legal factors on attrition rates.
35. A United States study on female police officers from the late 1970s to the early 1990s, confirmed that an increase in female officers in a particular district was associated with an increase in

¹⁹ Women's Legal Service WA (2022), *Submission to the Western Australia Government's Inquiry into Legislative Responses to Coercive Control in Western Australia*, 8 August 2022, p. 4.

²⁰ Victoria Government (2016), *Royal Commission into Family Violence: Volume 5 Report and recommendations*, p.101 < [Microsoft Word - ENDORSED Family Violence Data Collection Framework FVDCF.DOCX \(content.vic.gov.au\)](#)>.

²¹ The Central Australian Women's Legal Service, Katherine Women's Information & Legal Service and Top End Women's Legal Service, *Submission to the Northern Territory Department of the Attorney-General and Justice on the Exposure Draft – Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023*, 20 February 2023, p. 4.

²² Wirringa Baiya Aboriginal Women's Legal Centre Inc., *Submission No. 142 to the New South Wales Inquiry into Coercive Control in Domestic Relationships*, 19 February 2021, p. 6 <[Submission - 142.pdf \(nsw.gov.au\)](#)>.

²³ *Ibid.*

²⁴ Australian Institute of Criminology (2007), *Guilty outcomes in reported sexual assault and related offence incidents*, Factsheet No. 162.

²⁵ Crime Statistics Agency (2021), *Attrition of sexual offence incidents through the Victorian criminal justice system: 2021 update*, Government of Victoria, p. 3 < [Crime Statistics Agency - Attrition of sexual offence incidents through the criminal justice system.pdf](#)>.

²⁶ *Ibid.*, pp. 20 and 32.

²⁷ *Ibid.*, p. 1.

²⁸ *Ibid.*

²⁹ *Ibid.*, pp. 135 and 138.

crime reporting by female assault victims.³⁰ In particular, a 7.4% increase in female officer representation correlated with a 13.6% increase in reports of domestic and family violence, and there was a significant reduction in intimate partner homicides in districts with more female officers.³¹ Female officers were said to change the culture of police departments by influencing male behaviours, following-through on domestic and family violence reports and encouraging reporting by taking victim-survivor statements in lieu of male officers.³²

36. If victim-survivors were provided with access to legal assistance prior to reporting, this would enable legal services to work with victim-survivors to address any concerns they have about reporting, act as their advocate throughout engagement with police, to understand the consequences of reporting, particularly if the violence is occurring within the context of family and domestic violence, or to identify alternative avenues to reporting.

Police responses

37. Women's Legal Service clients have reported appreciation for police officers who have provided respectful, believing, supportive responses to their complaints of sexual violence and who have kept in touch with them throughout the process and provided the support they need to continue through the prosecution process. Other clients have felt police made incorrect assumptions about their reasons for reporting or doubted their credibility. Many report failure by police to keep them updated about the progress of investigations, whether or not charges have been laid and if so, what charges and the accused plea.
38. WLSA supports police being appropriately resourced to undertake effective investigations of sexual violence, efforts to increase specialisation of the police force in responding to sexual violence including gender-led and trauma informed approaches, continuous improvement approaches to training and ongoing evaluation of effectiveness, and independent accountability and oversight mechanisms to ensure complaints against police are handed appropriately.

Prosecution responses

39. Women's Legal Services regularly hear from clients they do not understand how decisions are made in their matter and by whom, including how charges may be laid or negotiated in plea-bargaining, or a decision made to withdraw or not to lay charges in the first instance. WLSA supports Victims Charters and requirements for prosecutors to provide information to complainants about processes and decisions being made throughout the criminal justice process.
40. WLSA also supports transparent and easily accessible internal 'right to review' processes, particularly for prosecutorial decisions relating to sexual violence. This is particularly important given the very high attrition rates for sexual offences and differing views as to the extent this is related to complainants not wanting to proceed or other factors such as prosecution decisions. It would also be useful to publish data in every jurisdiction about the number of requests made

³⁰ Amalia R Miller and Carmit Segal (2019), *Do Female Officers Improve Law Enforcement Quality? Effects on Crime Reporting and Domestic Violence*, *The Review of Economic Studies*, Vol. 86(5), 2220–2247 in Caroline Newman, 'Study: Hiring Female Police Officers Helps Women Report Violence, Sexual Assault', *University of Virginia Today* (Online, 27 September 2018) < <https://news.virginia.edu/content/study-hiring-female-police-officers-helps-women-report-violence-sexual-assault>>.

³¹ *Ibid.*

³² *Ibid.*

to review a prosecution decision and the outcome, including reasons provided if the original decision is upheld.

Evidence in the form of audio-visual recordings

41. We support provisions to allow the evidence of children and adult complainants in sexual offence proceedings to be recorded, and to allow this evidence to be tendered in subsequent trials or retrials. Enabling victim-survivors to give evidence remotely is important to reduce trauma and enable a complainant to give the best possible evidence they can give, which is in the interests of justice.
42. The laws to enable people to provide their evidence in the form of audio-visual recordings are different in each jurisdiction across Australia. There are differences in the scope of the provisions i.e. which category of complainant they apply to or which type of criminal offence. In some jurisdictions audio-visual recordings are only available for child complainants or cognitively impaired people, or only available for certain serious offences, whereas some jurisdictions allow audio-visual recordings to be available for complainants of all sexual violence offences. WLSA supports audio-visual recordings being available for complainants of all sexual violence offences in every jurisdiction.
43. There are also differences in each jurisdiction regarding what the audio-visual recording can be used for: evidence in chief, cross-examination, or re-examination during trial. We note that in some jurisdictions where audio-visual recordings can be used for all these forms of evidence, usually complainants will still be asked further evidence in chief questions from a prosecutor and subjected to cross-examination. WLSA supports audio-visual recordings being available for evidence in chief, cross-examination, and re-examination.
44. There are also differences in each jurisdiction regarding whether police interviews can be relied on as evidence in chief, cross-examination, or re-examination during a trial in a criminal proceeding.
45. We note there may be circumstances where a witness would prefer to participate in an audio-visual recording for their evidence in chief instead of relying on a recording of an earlier interview such as a police interview, and it is appropriate that the court considers these wishes when making an order.
46. Finally, the court can determine whether a complainant can use audio-visual recording as their evidence. It is unclear in some jurisdictions what criteria the judge can use to determine this, and it is often a discretionary consideration regarding what is in the interests of justice.

Recommendation 5

Audio-visual recordings should be available for complainants of all sexual violence offences for their evidence in chief, cross-examination, and re-examination.

Special relationship witnesses

47. The *Evidence (Miscellaneous Provisions) Act 1991* (ACT) recognises a specific category of witness (“special relationship witness”) that is entitled to have their police interview audio-

visually recorded and relied on as evidence in chief at trial – they are also entitled to give evidence at a pre-trial hearing.

48. A special relationship witness in a sexual offence proceeding involving a child complainant is defined as a witness who is a close family member of the complainant; or the court considers has a beneficial supporting relationship with the complainant in the proceeding; and will be able to provide emotional support for the complainant after the proceeding; or in a serious violent offence proceeding involving the death of a person—a witness who is a close friend or family member of the person. This category of person was introduced as a direct response to the Royal Commission into Institutional Responses to Child Sexual Abuse.
49. The benefit of these ACT provisions is the witness can give evidence at the same time as the child complainant, before the trial, and can then openly and fully support them in the lead up to the trial without the concern and complications of having their evidence outstanding.
50. We recommend consideration of whether all jurisdictions across Australia should apply their audio-visual recordings provisions to special relationship witnesses.

Recommendation 6

Audio-visual recordings should be available to special relationship witnesses in proceedings involving child complainants.

Intermediaries and ground rules hearings

51. WLSA supports legislation in all jurisdictions providing for ground rules hearings to discuss the 'ground rules' for taking the evidence of the complainant for all sexual violence trials. This must be accompanied by adequate funding for intermediaries that are appropriately qualified, trauma-informed, and culturally safe.
52. In our experience, there is often a conflict between the interests of the prosecutor and the victim-survivor, and there is a need for a victim-survivor to have their own independent advocate who can act on their behalf in ground rules hearings. Intermediary schemes lead to better outcomes for victim-survivors, for example the Victorian Law Reform Commission noted the benefits of the Victorian intermediaries pilot in their report on improving the response to sexual offences.³³
53. To ensure ground rules hearings and intermediaries are effective in improving protections for victim-survivors, there is a role for independent legal representation in ensuring victim-survivors of sexual violence can exercise their entitlements, including access to intermediaries, and understand the ground rules hearing process. The VLRC recommended “the Victorian Government should fund legal advice and, where necessary, representation until the point of trial and in related hearings, to ensure victim survivors can exercise their rights and protect their interests, including... their rights and privileges in relation to evidence (for example... access to intermediaries).”³⁴

³³ Victorian Law Reform Commission, 'Improving the Response of the Justice System to Sexual Offences', 12 November 2021 < [Improving the Response of the Justice System to Sexual Offences - Victorian Law Reform Commission](#) >

³⁴ Recommendation 46, Victorian Law Reform Commission, 'Improving the Response of the Justice System to Sexual Offences', 12 November 2021 < [Improving the Response of the Justice System to Sexual Offences - Victorian Law Reform Commission](#) >

54. Independent legal representation available to the victim-survivor as an alternative to an intermediary, or in addition to an intermediary, to ensure their legal rights and entitlements are pursued appropriately.

Recommendation 7

Ground rules hearings should be available in all jurisdictions for all sexual violence trials, alongside investment in intermediaries and legal assistance for complainants.

Jury directions

55. The efficacy of jury directions has been addressed by law reform commissions in their reviews of sex offence legislation in the relevant jurisdiction. There is a general view that additional directions are useful to address the misconceptions that jurors may hold about consensual and non-consensual sexual activity, such as misconceptions about a victim-survivor's appearance, their emotional response to sexual violence, and their relationship with the accused and the implications this has for whether there was consent.³⁵
56. There are reports that the new jury directions in Victorian legislation have been successful on the basis that they have simplified directions, improved juror attitudes, and reduced appeals based on misdirection.³⁶ However, not enough time has passed since the introduction of new directions in New South Wales and Victoria to adequately assess their efficacy. It is important there are jury directions in relation to sexual offence matters involving complainants who are children and young people. Regular reviews of the effectiveness of jury directions must also be undertaken.
57. WLSA note that statutory reforms and rules addressing rape myths and misconceptions are not self-executing. Unconscious biases towards victim-survivors will not change, nor will sexual consent literacy increase, until there is social and cultural change in regard to attitudes towards women and sexual violence. There is a view that the efficacy of jury directions will be limited because they are "founded on the (incorrect) assumption that deeply entrenched beliefs about rape can be corrected".³⁷
58. Research suggests that jury directions should be used proactively and at the time of the evidence in question, and for maximum effect it is preferable if judges give 'corrective' directions.³⁸
59. WLSA supports jury directions to clarify assumptions that should not be made regarding the victim's appearance or clothing, the victim's lack of resistance (or 'freezing' response), a continued relationship between the victim and the accused, or the emotional response of the victim given the impacts of trauma. It is particularly important for juries to understand that

³⁵ Victorian Law Reform Commission (2021), *Improving the Justice System Response to Sexual Offences*, p. 437 <[VLRC Improving Justice System Response to Sex Offences Report web.pdf \(lawreform.vic.gov.au\)](#)>.

³⁶ Women's Safety and Justice Taskforce, *Hear her Voice: Report 2, Volume 1, Women and girls' experiences across the justice system*, p. 356 <[WSJT Discussion Paper 2 \(womenstaskforce.qld.gov.au\)](#)>

³⁷ Julia Cooper (2022), *Judges as myth-busters: a re-examination of jury directions in rape trials*, *Griffith Law Review*, Vol. 31(4), p. 496.

³⁸ Quilter, J, McNamara, L & Porter, M (2022b) 'New Jury Directions for Sexual Offence Trials in NSW: The Importance of Timing', *Criminal Law Journal*, 46(3), 138-150.

women may acquiesce to sex to protect themselves or family members from other forms of harm and punishment.

60. We are also aware of the continued misconception that a delay in reporting rape can be interpreted as suspicious or a sign of fabrication. We are concerned that there continues to be weaponising of delay by defence counsel, and that can be believed by jurors and requires clarification.

Recommendation 8

Jury directions should address misconceptions about consent, trauma, sexual violence, and family and domestic violence.

Sexual reputation and sexual experience evidence

61. Sexual reputation and sexual experience evidence have been used to undermine the credibility and reliability of complainants and reinforce rape myths that consent to sexual activity is likely to have been given where a person has previously engaged in consensual sex with the accused or with others.
62. We strongly support evidence of sexual reputation being inadmissible in all circumstances. We agree with comments made by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General in 1999, that evidence of this nature is too far removed from actual events or relevant facts for its admission to be in the interests of justice in any circumstances.
63. It is our strong view that evidence of sexual experience should only be admissible in very limited circumstances. As noted by the Australian Law Reform Commission previously, the admission of sexual experience evidence can have the effect of re-traumatisation through humiliation and 'victim-blaming'.
64. Evidence of a complainant's sexual history is more likely to be admitted in proceedings concerned sexual offences perpetrated in a domestic and family violence or intimate partner context. The intersection between sexual assault and domestic and family violence is well established. Sexual assault is frequently an element of a broader pattern of coercive control, relationship dependence, power imbalance, and violence. Domestic and family violence can create a climate of entrenched fear which makes it difficult to facilitate or negotiate consensual sexual activity.
65. Whether a person has engaged in sexual activity over a long period of time in an intimate partner relationship, or whether it has been consented to previously, should not be relevant to whether sexual assault has occurred. Many of the women assisted by Women's Legal Services have experienced sexual assault in the context of family violence. Allowing this evidence to be admitted reinforces misunderstandings or 'rape myths' that sexual assault is less likely to occur within a relationship context.
66. Sexual experience evidence being admissible also reinforces prejudices that jury members may hold about women who engage in sexual activity – that they be more likely to have consented because they have a certain reputation, disposition, or previous experience.

Recommendation 9

Sexual reputation evidence should be inadmissible in all circumstances, and sexual experience evidence should only be admissible in very limited circumstances.

Cross-examination and the law of evidence

Improper, inappropriate, or aggressive questioning

67. In the experience of Women's Legal Services, improper, inappropriate, or aggressive questions are regularly asked of complainants and are not always challenged by lawyers and judges.
68. There is a role for independent legal representation for complainants to help ensure that legislative protections are being complied with during cross-examination and re-examination, for example by objecting to unlawful questioning. Research suggests that independent legal representation can help to overcome barriers to reporting and engagement with the criminal justice system, such as fears of improper, inappropriate, or aggressive questioning by the accused or defence counsel, and the potential distress and trauma this may cause.³⁹ Having a lawyer present at trial may decrease victims' feelings of stress and anxiety and improve their confidence when testifying.⁴⁰

Recommendation 10

Protections for complainants from improper, inappropriate, or aggressive questioning should be strengthened, alongside increased access to independent legal representation.

Ban on personal cross-examination by the accused

69. In 2010, the Australian Law Reform Commission recommended that Commonwealth, state and territory legislation should prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in sexual assault proceedings; and provide that any person conducting such cross-examination is a legal practitioner representing the interests of the defendant.⁴¹ Many state and territory jurisdictions have already implemented this reform.
70. At the Commonwealth level, under section 15YG of the *Crimes Act 1914* (Cth) the court can give leave for an unrepresented defendant to cross-examine a 'vulnerable person'. We recommend reform to the *Crimes Act 1914* (Cth) to ban cross-examination of a victim-survivor

³⁹ Dr Mary Iliadis and Kersin Braun, 'Sexual assault victims can easily be re-traumatised going to court – here's one way to stop this', *The Conversation*, 25 March 2021 < [Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this \(theconversation.com\)](https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-here-s-one-way-to-stop-this)>

⁴⁰ *Ibid.*

⁴¹ Australian Law Reform Commission (2010), 'Family Violence – Improving Legal Frameworks', ALRC CPS 1, < [Cross-examination | ALRC](https://www.alrc.gov.au/reports-and-publications/family-violence-improving-legal-frameworks)>

by an accused by removing the power of the court to give leave. Similar legislative reforms should be adopted in all jurisdictions across Australia.

71. The failure to provide adequate protections and safeguards for complainants and witnesses, particularly during cross-examination, is a significant barrier to victim-survivors reporting sexual, domestic, and family violence and abuse, and engaging in criminal legal processes.

Recommendation 11

Defendants should be prohibited from personally cross-examining any complainant or other witness in sexual violence proceedings, and legal assistance services should be funded to conduct any cross-examination on behalf of the defendant.

Interpreters

72. Each year Women's Legal Services nationally assist thousands of women from culturally and linguistically diverse backgrounds who have been sexually assaulted or raped, often by an intimate partner or former partner. Migrant women who experience violence face additional barriers to reporting violence to police and engaging with the criminal legal system, including their temporary visa status, lack of access to services and supports, and language barriers.
73. Interpreters are also vital for supporting women with disability to engage with criminal justice processes, particularly given women with disability are twice as likely to experience sexual violence as women without disabilities.⁴²

Personal information

Protecting access to confidential counselling and medical records

74. All state and territory jurisdictions recognise that there are confidential or protected communications by a complainant with counsellors or medical practitioners that should not necessarily be disclosed to the other party or to the court. This is generally referred to as the 'sexual assault counselling privilege' or 'sexual assault communications privilege'.
75. In some jurisdictions across Australia, some complainants in sexual violence matters have legal standing or can seek leave to appear in relation to sexual assault counselling privilege to seek protections for their confidential counselling records. For example, in Queensland complainants have standing under section 14L of the *Evidence Act 1977 (Qld)* but the complainant is not a party to the proceeding. Women's Legal Service Queensland and Legal Aid Queensland are funded to deliver the 'Counselling Notes Protect' service to support complainants to engage with these protections.

⁴² [Brownridge, D. (2006) 'Partner violence against women with disabilities: Prevalence, risks and explanations', *Violence against Women*, vol. 12, no. 9, pp. 805–22.

76. Despite legislative provisions in each jurisdiction recognising that there are circumstances where communications should be protected, these provisions are often unclear, discretionary in application, and are applied inconsistently.
77. WLSA is concerned that protections for therapeutic records are constantly being overridden during sexual assault trials resulting in sensitive records being accessed by the perpetrator. This fundamentally prejudices the victim-survivor and furthers harm. The defendant will often try to obtain therapeutic records to intimidate victim-survivors, and the prosecution are rarely able to limit subpoenas. Harm also occurs when trials are delayed while parties debate the probative value of therapeutic records.
78. Victim-survivors often avoid counselling for fear that their records will be subpoenaed and weaponised against them⁴³ which undermines the provision of therapeutic care.⁴⁴ It is broadly reported that the very possibility of disclosure will encourage patients to restrict what they say to counsellors, psychologists or psychiatrists or avoid seeking counselling altogether.⁴⁵
79. For women who are already in counselling, the therapeutic relationship risks erosion when the victim-survivor is exposed to what has been recorded about them from the therapist's perspective.⁴⁶ Often, a victim-survivor does not want the perpetrator to know the impact of their behaviour as it empowers the perpetrator and further fuels power misuse. Many victim-survivors experience a perpetrator accessing their sensitive records as court sanctioned violence and abuse.
80. WLSA's view is that existing legislative protections should be clarified and strengthened by all Commonwealth, state and territory governments and it must be clarified that the intention of these provisions is to ensure people who have been sexual assaulted are not discouraged from seeking therapy to assist in their recovery or from reporting to police due to fear of their counselling records being shared with the accused.
81. Legislative protections could also be strengthened by oversight and accountability mechanisms, including regular statutory review provisions to ensure the protections are working as intended. The current laws need to be more effectively implemented including through guidance for courts about how they should be applied, alongside regular education for police, prosecutors, legal practitioners including defence counsel, and judicial officers. There should also be mechanisms to ensure early referrals to specialist legal advice and representation for victim-survivors to support engagement with these provisions.

Recommendation 12

Protections for confidential counselling or health records should be strengthened, and complainants should have standing in proceedings in relation to this evidence.

⁴³ Women's Legal Service Queensland, *Submission in response to Discussion Paper 3: Women and girls' experiences across the criminal justice system as victim-survivors of sexual violence and also as accused persons*, 2022, p. 20.

⁴⁴ John Levy, Gary Galambos and Yvonne Skarbek (2014), *The erosion of psychiatrist-patient confidentiality by subpoenas*, *Australasian Psychiatry*, Vol.22(4).

⁴⁵ The Royal Australian and New Zealand College of Psychiatrists (2016), *Patient-psychiatrist confidentiality: the issue of subpoenas*, *Position Statement No. 83* <<https://www.ranzcp.org/confidentiality>>.

⁴⁶ Carolyn Jones (2016), *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*, Women's Legal Service New South Wales, p. 34 <[http://www.lawfoundation.net.au/ljf/site/templates/grants/\\$file/WLS_SandS.pdf](http://www.lawfoundation.net.au/ljf/site/templates/grants/$file/WLS_SandS.pdf)>.

Specialisation and training of judges and counsel

Specialisation

82. WLSA supports measures to increase the specialisation of the response system for sexual violence, including specialist judges, court staff, prosecutors, police, legal assistance, and support services. These measures should be accompanied with adequate investment to ensure specialist responses are available and accessible to people based in rural, regional and remote locations.
83. The report commissioned by the Australasian Institute of Judicial Administration and the Commonwealth Attorney-General's Department, 'Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review', provides useful insights into options for enhancing specialisation.⁴⁷

Training of judges and court staff

84. Judicial officers and court staff are often not aware of the impacts of court proceedings and process on victim-survivors. For example, victims report that their court experience was "...disrespectful of their dignity as human beings"⁴⁸ and that they found the process "humiliating", "brutal, abrupt and traumatising", "aggressive and insensitive" and "damaging and grueling".⁴⁹ Mandatory judicial training in trauma-informed practice, gender-based violence, supporting victim-survivors, and the complex dynamics of sexual violence within the context of domestic and family violence must be a priority.
85. Women's Legal Services regularly hear concerns from clients about having to wait in common areas near the perpetrator (particularly in the lower courts or in regional areas) and needing to request a screen in court to block-out the perpetrator (which should be standard practice). Clients are also often concerned about how they will be treated during cross-examination, particularly given that it is well-known how victim-survivors are often treated by defence counsel, and that judges will often be slow to interject or respond to aggressive behaviour.
86. In New South Wales for example, the Criminal Justice Sexual Offence Taskforce recommended a number of changes to improve experiences at court, including specialist case management hearings, specialist judges, specialist prosecutors, proactive case management, separate entrances to the court room, and access to CCTV.⁵⁰ Similar reforms have been recommended and implemented across other jurisdictions, however there is more work to be done.
87. The Australian Human Rights Commission's (AHRC) Respect@work 2020 report contains a comprehensive review of the national training and resources available to the judiciary on sexual assault, sexual harassment and domestic and family violence.⁵¹ We note that there are different regimes in place across states and territories.
88. WLSA endorses the recommendations of the AHRC but notes a lack of research and little available data on the effectiveness of existing judicial training for sexual assault cases. For

⁴⁷ Australasian Institute of Judicial Administration (August 2023), *Specialist Approaches to Managing Sexual Assault Proceedings: an Integrative Review* < [Specialist-Approaches-to-Managing-Sexual-Assault-Proceedings_An-Integrative-Review_05.pdf \(aija.org.au\)](#) >

⁴⁸ Victorian Law Reform's *Victims of Crime report in 2016* in Louise Milligan, *Witness: An investigation into the brutal cost of seeking justice* (Hachette Australia, First Edition, 2020) p. 120.

⁴⁹ *Ibid.*

⁵⁰ Women's Legal Service New South Wales, *Submission to NSW Law Reform Commission review into consent in relation to sexual assault offences – Draft Proposals*, 18 November 2019, p. 12 < [Consent in relation to sexual offences - Draft proposals \(wlsnsw.org.au\)](#) >.

⁵¹ Australian Human Rights Commission (2020), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, pp. 585-587 < [Respect@Work: Sexual Harassment National Inquiry Report \(2020\) | Australian Human Rights Commission](#) >.

example, WLSA has not been able to identify any information on the number of judges or magistrates who receive existing training and the jurisdictions or courts they preside over, the length of any particular training and how often judges or magistrates are required to participate in training, whether training is compulsory, regular or one-off and whether judges in regional areas receive adequate training (noting that 53% of all sexual assault cases are in the country lists).⁵²

89. This research gap is particularly significant given what we know about the inadequacies of the justice system process for victim-survivors. There is an undeniable need for research to be carried out on the effectiveness of existing training for the judiciary with a view to creating a national set of best-practice training guidelines for the judiciary in sexual assault trials.
90. The need for a better understanding of the effectiveness of judicial training falls squarely within overarching 'Priority 3: Research and Collaboration' identified in the Meeting of Attorneys-General 'Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027' (**Work Plan**).⁵³ We also encourage the Work Plan focus to develop a national approach to education of common myths and misconceptions about sexual assault amongst judicial officers.⁵⁴

Recommendation 13

Judicial training on the complexities of sexual violence and trauma.

Alternatives to the criminal legal system

91. Alongside improvements to the criminal legal system to increase conviction rates and improve outcomes for victim-survivors of sexual violence, WLSA supports increasing access to alternatives such as restorative justice, civil litigation, and victims' compensation schemes. It is vital that victim-survivors have access to specialist legal assistance to understand the range of options available and to support them to navigate these.

Stronger models of affirmative consent

92. WLSA is concerned about the inconsistent use of consent law terminology across jurisdictions. The Commonwealth Government should work with State and Territory Governments to ensure that all jurisdictions establish nationally consistent, strong models of affirmative consent. A uniform national approach to affirmative consent will send a powerful message to the community about appropriate sexual conduct, contribute to cultural change, and will better serve victim-survivors and deter perpetrators.
93. We support a definition of consent that refers to 'free and voluntary agreement' and a requirement to 'say or do something' to check whether there is consent. We also support legislation which recognises that consent can be vitiated in the context of family and domestic

⁵² *Ibid*, p. i.

⁵³ Attorney-General's Department (2022), *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-27*, Australian Government, p. 11 < [MAG Work Plan on Criminal Justice Responses to Sexual Assault 2022-2027](#) >.

⁵⁴ *Ibid*, p.9.

violence, particularly where sexual activity is submitted to as a result of fear, harm, coercion or intimidation, regardless of when it occurs or whether it is a single incident or part of an ongoing pattern.

94. Victoria, New South Wales, Northern Territory, South Australia and Tasmania define consent in terms of 'agreeing' to sexual activity.⁵⁵ The Australian Capital Territory defines consent in terms of the 'informed agreement' of the participants that is freely and voluntarily 'given'.⁵⁶ Western Australia and Queensland provide that consent must be freely and voluntarily 'given' and set out some circumstances in which that is not the case.⁵⁷ England, Wales and Northern Ireland define consent as occurring when a person 'agrees by choice, and has the freedom and capacity to make that choice'.⁵⁸
95. Consent defined in positive terms has been the focus of reform in recent years. The Australian Law Reform Commission (**ALRC**) and the New South Wales Law Reform Commission (**NSWLRC**) have recommended that all federal, state and territory sexual offence provisions "include a statutory definition of consent based on the concept of free and voluntary agreement".⁵⁹ The VLRC recommended that Victoria should move towards a stronger model of affirmative consent which goes further than requiring 'free agreement'. The Senate Inquiry into current and proposed sexual consent laws in Australia recommended the ALRC includes an affirmative consent standard in any proposal to harmonise Australia's sexual consent laws and taking into account the evidence of the operation of recently adopted affirmative consent laws.⁶⁰
96. WLSA considers that the 'mistake of fact' defence has the potential to undermine affirmative consent models. Although the law in most jurisdictions provides that a failure to offer physical resistance does not of itself constitute consent, a perpetrator could still argue that because the victim-survivor did not resist they had reason to believe they were consenting, and that in light of the lack of resistance their belief was reasonable.⁶¹ This creates a concerning defence loophole. An analysis of 2018 sexual assault trials in Queensland by the Queensland Law Reform Commission found that the mistake of fact defence had been invoked in one in three trials.⁶² An estimated 66% of perpetrators who use the mistake of fact defence in Queensland were acquitted.⁶³
97. We note that in Western Australia, Queensland and Tasmania, a perpetrator's mental state is relevant to the mistake of fact defence.⁶⁴ Victoria does not have an excuse of mistaken belief as to consent. Rather, a jury will consider whether the accused person's belief as to consent was reasonable. The Victorian law provides that 'a person must reasonably believe that another person is consenting to an act'.⁶⁵ This belief will not be reasonable if they do not say or do anything to find out whether there is consent, unless they have a cognitive impairment or mental impairment which is the substantial cause of them not saying or doing anything.

⁵⁵ *Crimes Act 1958 (Vic)*, s 36(1), amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic)*, s 5, *Crimes Act 1900 (NSW)*, s 61HI(1), *Criminal Code Act 1983 (NT)*, s 192(1), *Criminal Law Consolidation Act 1935 (SA)* s 46(2) and *Criminal Code Act 1924 (Tas)* s 2A(1).

⁵⁶ *Crimes Act 1900 (ACT)*, s 50B.

⁵⁷ *Criminal Code Act Compilation Act 1913 (WA)*, s 319(2) and *Criminal Code Act 1899 (Qld)*, s 348(1).

⁵⁸ *Sexual Offences Act 2003 (UK)*, s 74; *The Sexual Offences (Northern Ireland) Order 2008 (NI)*, s 3.

⁵⁹ *Australian Law Reform Commission and NSW Law Reform Commission (2010), Family Violence – A National Response (Final Report)*, Rec 25-4, p. 37 < [Microsoft Word - 0 Front pages.docx \(nsw.gov.au\)](#)>.

⁶⁰ *Senate Legal and Constitutional Affairs References Committee, Inquiry into current and proposed sexual consent laws in Australia (Final Report)*, September 2023 < [Current and proposed sexual consent laws in Australia – Parliament of Australia \(aph.gov.au\)](#)>.

⁶¹ Hayley Gleeson, 'Mistake of fact defence: The legal loophole stopping Queensland rape complainants from getting justice', ABC News (Online, 13 May 2019) < [Mistake of fact defence: The legal loophole stopping Queensland rape complainants from getting justice - ABC News](#)>.

⁶² Justice Jackson, Judge (now Chief Judge) Devereaux and Margaret Wilson QC (2020), *Review of consent laws and the excuse of mistake of fact, Queensland Law Reform Commission*, pp. 38-39 < [qlrc-report-78-final-web.pdf](#)>.

⁶³ Amy MacMahon, 'Response to the Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020' (Media Release, 25 March 2021) < [Response to the Criminal Code \(Consent and Mistake of Fact\) Amendment Bill 2020 - Amy for South Brisbane 2020 \(amymacmahon.com\)](#)>.

⁶⁴ *Criminal Code Act Compilation Act 1913 (WA)*, s 24; *Criminal Code Act 1899 (Qld)*, s 24; *Criminal Code Act 1924 (Tas)*, ss 14-14A.

⁶⁵ *Crimes Act 1958 (Vic)*, s 36A.

98. WLSA is also concerned that the current models of consent in many Australian jurisdictions fail to adequately address the nature of sexual violence where it occurs in the context of domestic and family violence. Interpretations of 'consent' have been narrow, incident-based and contingent on proximity or immediacy of force as evidence of sexual assault. This interpretation does not work in the context of coercive control dynamics. Models of consent must capture sexual violence that occurs in the context of force, harm, shame, and punishment. Otherwise, it is easier for perpetrators to argue that they had a 'reasonable belief' that consent was given or that they 'took steps' to ascertain consent.
99. Models of consent must respond to the complexities of how consent functions in the context of domestic and family violence. This includes ensuring that legislation responds to the impacts of sexual coercion and force that can occur and cumulate over time. For example, including a non-exhaustive list of examples of circumstances and factors to demonstrate where consent is negated, such as the approach taken in Victoria.
100. Models of consent must also appropriately respond to women who are experiencing impaired capacity or different abilities which can impact their ability to exercise consent. Women with different abilities experience high rates of sexual violence, within and outside care relationships,⁶⁶ and are particularly disadvantaged by systemic neglect with respect to participation in the justice system.

Recommendation 14

Nationally consistent, strong models of affirmative consent.

Immunity from defamation

101. Defamation law is commonly used as a tool to intimidate, silence and control victim-survivors. All victim-survivors of sexual violence should be able to report their experiences to appropriate authorities without fear of reprisals. This includes reporting to police and other complaint-handling bodies, to medical/health professionals, to employers and other relevant agencies or services. The threat of defamation acts as a deterrent for victim-survivors to report sexual violence.
102. Women's Legal Services have advised many clients who have received correspondence threatening defamation or who have had defamation proceedings commenced against them. Women's Legal Services also see employers making reference to potential defamation actions. Although the likelihood of a defamation action is small, the threat is a serious deterrent to victim-survivors speaking up about their experience and in particular, in reporting the sexual violence.
103. WLSA supports amendments in all jurisdictions to provide absolute immunity for sexual harassment, sexual assault and rape allegations reported to police or other complaint-handling bodies and medical/health professionals, consistent with Model Defamation Reform and the

⁶⁶ 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) < [Alarming rates of family, domestic and sexual violence of women and girls with disability to be examined in hearing | Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#)>.

Guiding Principles for Jurisdictions to determine whether to extend absolute privilege to matter published to a complaints-handling body.⁶⁷ WLSA also supports consideration of whether absolute immunity should extend to complaints to employers and other relevant agencies and services.

104. As well as extending absolute privilege, defamation laws should provide for a speedy determination of a vexatious or unmeritorious complaint in a form that minimises the cost and evidentiary burden on the respondent to such proceedings.

Recommendation 15

People who make sexual violence complaints to police or other complaint-handling bodies and medical/health professionals should have absolute immunity from defamation.

⁶⁷ Standing Council of Attorneys-General, *Guiding Principles for Jurisdictions to determine whether to extend absolute privilege to matter published to a complaints-handling body*, September 2023 < [Attachment: Model Defamation Reform – Guiding principles for Part B of the Stage 2 Review of the Model Defamation Provisions](#)>