Women's Safety and Justice Taskforce: Discussion Paper 3

Women and girls' experiences across the criminal justice system as victims-survivors of sexual violence and also as accused persons and offenders

Submission prepared by the Criminal Law Practice at Legal Aid Queensland

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Legal Aid QUEENSLAND

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Women's Safety and Justice Task Force's (WSJT) third discussion paper reviewing themes and issues for consideration relevant to women and girls' experiences of the criminal justice system as victims-survivors of sexual violence and also as accused persons and offenders.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland* Act 1997. LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

In considering women and girls' experience within the criminal justice system, LAQ acknowledges that First Nations women and girls suffer violence at significantly higher rates than non-Indigenous women[1], and that non-disclosure rates are higher in Indigenous communities. Any review of our systems that may see improvement in this situation has our support.

In reviewing the discussion paper, we have called upon the expertise and experiences of our criminal lawyers across the State, including from our Criminal Law Services, several of our regional offices, our Youth Legal Aid division, Information and Advice division as well as a member of our First Nations Advisory Committee. We have responded to the questions most relevant to our areas of practice.

As the largest criminal law practice in the State, what concerns us in reflecting on the discussions posed by the WSJT is the effect of such discussions and proposals on the running of a fair trial and more fundamentally on the presumption of innocence. A common theme throughout our response is the preservation of these fundamental principles because it is in the interests of our disadvantaged clients, including the thousands of women and girls we assist through legal advice and representation every year, to preserve them and to not lose sight of them in the consideration of any reforms. This is consistent with our organisation's purpose statement, which is to maintain the rule of law, protect legal rights, contribute to the efficiency of the justice system and reduce the social impacts of legal problems.[2] It is also consistent

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1 Bryant & Willis 2008; Gordon, Hallahan & Henry 2002; Merrott et al 2001; Mouzos 2001; Wundersitz 2010.

2 Legal Aid Queensland Strategic Plan 2021-2025.

with our vision which is to be a leader in a fair justice system where people are able to understand and protect their legal rights.[3]

The principle of a fair trial inheres in the common law and is 'a central pillar of our criminal justice system'.[4] It is 'so elementary as to need no authority to support it',[5] but also susceptible to change.[6] There have been many significant cases in this country that have considered the concept of the fair trial. A series of the more significant cases are summarized in Annexure A. What is of interest is that none of these cases have modified the traditional, defendant-centric content of a fair trial. The High Court continues to cite the motherhood statements from cases like *Dietrich, Jago*, and *Carroll* with approval.

The underlying purpose of a fair trial is to prevent innocent people being convicted of crimes.[7] Ensuring fairness to the accused is the fair trial's *raison d'etre.*

Conceptually, this is reflected in Blackstone's precept, 'That it is better that ten guilty persons escape, than that one innocent suffers.' The rationale for this is that:

(a) the State marshals vastly superior power and resources to the Defendant; and
(b) the consequences of conviction, for example, the deprivation of liberty, are serious.[8]

The Accused is the intended primary beneficiary of fair trial principles because the concept is fundamentally linked to the presumption of innocence, the standard and onus of proof, and the rule of law.[9] In criminal proceedings, fair trial principles acknowledge the significant disparity of power between parties and serve as a check on executive power. Further, fairness gives a trial its integrity, moral legitimacy, and authority.[10]

This is confirmed in domestic and international instruments. Annexure 1 also sets out International Charters and *Human Rights Act 2019* provisions relevant to the concept of a fair trial.

The HRA, despite its recent enactment, does not mention the public's right to protection or the vindication of victims as aspects of a fair trial. It does not contain any 'explicit' fair trial rights for victims nor the general public. Likewise, Article 14 of the *ICCPR* is exclusively directed to people convicted of a criminal offence.

It is in everyone's interest when accusations are made and prosecuted by the State that the rule of law and human rights are preserved and upheld to the highest standard. The HRA recognises a body of rights, albeit of a different nature, that are relevant to victims and individuals generally. These are outlined in the body of our response below.

LAQ recognises that regard be had in these considerations to existing victims and witnesses' rights, which may nonetheless bear on pre-trial, trial, and post-trial processes. However, the notion of a fair trial has and should continue to be about ensuring fairness to the person in the proceedings who is accused and whose liberty is at stake. They are concepts that have existed for a significant period of time to protect all citizens who are accused, no matter what their gender, race, sexual orientation, political persuasion or financial circumstances. It is a principle that should be at the forefront of the minds of policy makers and

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3 Ibid.

4 *Dietrich*, 292, 298 (Mason CJ and McHugh J).

5 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 541-542 per Issacs J.

6 *Dietrich*, 300 (Gaudron J).

7 Australian Law Reform Commission, 'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws' 276. See also *Jago v District Court (NSW)* (1989) 168 CLR 23, 30 (Mason J).

8 *R v Carroll* [2002] HCA 55; 213 CLR 635 at 643 [21] citing Blackstone, W, *Commentaries* (1769, 1966 reprint) Bk 4, c 27, 352.

9 *Woolmington v Director of Public Prosecutions (UK)* [1935] AC 462 at 481-482.

10 Above n 15, 276.

legislatures. In our view there is room for reform that can strike a balance between a variety of interests without setting reforms in motion that would be difficult to reverse and lead to injustices.

At this point in our history, the fundamental principle and human right of a fair trial should be respected and protected.

Submission

Part 1: Cross-cutting issues

Overrepresentation of Aboriginal and Torres Strait Islander women and girls in the criminal justice system as both victims and offenders

What are the drivers of First Nations women and girls' overrepresentation as victims of sexual violence? What works to reduce this overrepresentation? What needs to be improved? (Question 1)

Drivers

There are many drivers of First Nations women and girls' overrepresentation as victims of sexual violence, they include:

- Overrepresentation in the Child Safety system and sexual violence that occurs in that setting. Children are removed based upon neglect, but then often placed in situations where there is more harm and danger;
- Overcrowding in houses and a lack of appropriate housing resulting in opportunity for abuse;
- A higher percentage of First Nations women and girls having vulnerabilities including poverty, homelessness, addiction and mental health issues. Poverty can keep First Nations women and girls locked into situations where they are sexually abused, often violently;
- Intergenerational trauma: Experiences passed down from grandmother to mother to daughters. If there is awareness of sexual violence present in families and the pattern is not broken, this can be transmitted to future generations as being a woman's lot in life;
- Sexual violence can break a woman's resilience, her sense of self, her belief that she can be safe in any situation, and it can reduce her to lock away her anger and sink into addictive or depressive states. First Nations women and girls who are victims of sexual violence having low self-image which is compounded by the use of social media being used to share intimate images without their consent. Women and girls being powerless to control the circulation of these images and the resulting shame that follows from not knowing who in the community has viewed the images;
- The power imbalance that exists between First Nations women and girls and participants in the Justice System, in particular police. First Nations women and girls not understanding their rights or having the confidence to assert them;
- Issues in the family unit (for example, exposure to domestic violence) causing girls to flee their homes and stay elsewhere in unreliable and/or unstable living environments, increasing the opportunity of abuse;
- Pressure from family not to speak up;

- Cultural reasons, including cultural barriers against speaking up due to shame. For example, for Torres Strait Islander women sex is not spoken about at all, it is taboo. This causes a lack of understanding about consent, reluctance to speak;

- Religious beliefs about forgiving leading to not making a complaint to police;

- Community and family attitudes that a woman or girl has bought it upon themselves due to the way they dress; act; drink.

- Issues of trust arise where a First Nations woman or girl may not realise the danger in situations where they accept rides or assistance from a male person who they may know and this then turns into a bad situation.

  Case Study:

  A young Aboriginal woman accepted a lift home from the brother of the man she was going out with. She had known this man for some time; been in the family home with him, her partner and other members of the family; knew his friends and he knew hers. He did not take her home but to an isolated area outside of the regional city. He then demanded that she have sex with him because as he had "heard that she was playing around with other men."

  The young woman got angry and demanded that he take her home immediately and that he had no right to be asking her these questions and asked if his brother knew what he was doing.

  She managed to talk herself out of the situation and once they got back into the town, she demanded he stop the car and let her out. He did this and she walked home.

  She never told her partner or his family. But she never trusted the brother and was never alone with him again.

  All parties were Aboriginal.

  Issues that confronted the young woman were:

  - Anger-how dare he treat her like this.
  - Shock-how could he do this to her.
  - Powerlessness-how to get out of this situation without injury or attack.
  - Fear-would he try something anyway and there was no-one around.
  - Anxiety-would he turn the story around to cover up his actions and paint her as the initiator.
  - Revenge-report him or tell someone but how would that play out for her.

What works to reduce the overrepresentation?

There should be a multifaceted approach to reducing the over-representation of First Nations women and girls as victims of sexual violence. As a starting point, programs designed to address sexual violence (both in education around consent and counselling services for survivors) need to be run by people from the local communities and be culturally appropriate.

Educational resources need to be introduced into the education system at an early age and in a culturally appropriate way.

The Love Bites program (respectful relationships program) and Blurred Boarders kits (legal kits to assist with communications with First Nations clients) have been simple but effective tools of communication and information. They should be incorporated into practices and updated to be Queensland specific. A Sexual Violence themed Blurred Boarders kit should be created.

Truth telling in the stories and histories/herstories of what has happened to Aboriginal women and girls since colonisation. While we say that many white Australians don't know the story of this country many Aboriginal & Torres Strait Islander people don't know it as well.

What needs to be improved?

The following resourcing issues need to be improved to reduce First Nations women and girls' overrepresentation as victims of sexual violence:

- More resources need to be allocated to legal service providers and community groups in remote and regional areas;
- More culturally appropriate education around human rights, consent and what sexual violence means should be prioritised and delivered;
- More support needs to be offered to families e.g., early intervention services for families identified as being at risk. A supportive not punitive approach should be adopted by these services;
- The health system including Aboriginal Medical Services should have training and support people who can work with patients who report sexual assault and provide them with appropriate counselling and advice. Confidentiality and privacy are two key concerns for victims and any agency that is there to represent the victims should make sure that they have staff who can maintain the confidentiality and privacy of victims;
- More access to appropriate housing in remote and regional communities needs to be prioritised and there needs to be community consultation about the appropriate type of housing for the area. There must also be better maintenance provided for the housing sector;
- There should be better access for First Nations women and girls to culturally appropriate counselling services both in custody and in the community;
- There should be better co-ordination between the support services who assist First Nations women and girls in custody and the support services who assist them when they are released back into the community. For example, if it is sought, First Nations women should have alternative accommodation to return to upon their release from custody, that is away from the abusive partner they lived with previously;
- More First Nations women trained as first responders when a sexual assault or violence has occurred;
- If required, First Nations women who are separated from their children due to being in custody should be linked in with a Family Lawyer who can assist them in monitoring contact and getting the children back when they are released back into the community;
- Lawyers assisting First Nations women and girls need to provide more warm referrals to other community-based organisations and take the additional step of following those referrals up;
- There needs to be more cultural awareness training provided to police, tailored to the specific local community that they work in. The training needs to be ongoing and not just a one-off;
- Police need to be held accountable for poor behaviour in local communities. For example, police were recently caught bringing prohibited alcohol into Doomadgee, a small indigenous community with alcohol restrictions in place. This type of behaviour destroys relationships between police and local communities and discourages First Nations women and girls from trusting police and reporting sexual offences to them;
- Culturally appropriate education around consent needs to be readily accessible for First Nations men and boys, so they can address and reduce their offending against First Nations women and girls. The over representation of First Nations women and girls cannot be addressed without there being a focus on First Nations men and boys;

- It should be mandatory for persons charged with Domestic Violence offences who are remanded in custody to engage in rehabilitative courses such as respectful relationship courses. The courses should be tailored and culturally appropriate;

- There should be greater access to sex offender programs in custody. At present, in our experience, such courses are not available or have long waiting lists;

- Corrective Services need to remove any policies that prevent people who are on remand in custody (as opposed to serving a sentence) from accessing rehabilitative courses.

What are the drivers of First Nations women and girls' overrepresentation as accused persons and offenders in the criminal justice system? What works to reduce this overrepresentation? What needs to be improved? (Question 2)

Drivers

There are many drivers of First Nations women and girls' overrepresentation as accused persons and offenders in the criminal justice system including:

- Lateral violence: Disadvantaged/disenfranchised people turning on their own peers/community to take out their frustration / trauma;[11]

- Peer influence: Children forming strong connections with peers who also offend / have similarly disadvantaged circumstances at home;

- Issues in the home: Children escaping violence in the home. Children roaming the streets and then committing offences. Children being fearful of what they might find when they get home i.e. whether their mother will be alive when they return home?

- Transgenerational trauma: First Nations Women and girls growing up seeing family members assaulting each other and following in that cycle;

- Women being the victims of offences themselves and not seeking any support / counselling to address that trauma due to lack of access to support services, cultural barriers about speaking up. In previous studies (for example, the NSW Aboriginal Justice Advisory Council) high percentages of Aboriginal women surveyed linked previous experiences of abuse indirectly to their offending;[12]

- Cognitive issues, for example Fetal Alcohol Spectrum Disorder;

- High suicide rates in First Nations communities, the trauma that flows from that. Feelings of helplessness. Turning to alcohol / drugs to cope with that grief.

What works to reduce the overrepresentation?

The following things work to reduce First Nations women and girls' overrepresentation as accused persons and offenders in the criminal justice system:

- Education in young First Nations children. Separate classes for boys and girls;

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11 Chapter 2: Lateral violence in Aboriginal and Torres Strait Islander communities - Social Justice Report 2011

12 ALRC Pathways to Justice - Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples (Report 133) 11. Aboriginal and Torres Strait Islander Women - Drivers of incarceration for Aboriginal and Torres Strait Islander Women

- Engagement with First Nations women in custody and access to courses;
- Culturally appropriate counselling in the community to address trauma;
- Cultural mediation as a dispute resolution process should be increased as an option particularly for First Nations women and Girls as Defendants.

What needs to be improved?

The following things need to be improved to reduce First Nations women and girls' overrepresentation as accused persons and offenders in the criminal justice system:

- Social & Emotional wellbeing programs to be recommenced. These operated out of AMS's (Aboriginal Medical Services) and were funded by the Federal government. They provided support for many First Nations people;
- Training on awareness and prevention of sexual violence and assault for young men and girls is important but not in mixed groups. It is better to have separate groups as it will lead to more questions and ability to work with the groups. Young First Nations women would feel embarrassed and ashamed to talk about these things in front of males and vice versa;
- Training on awareness of lateral violence: its definitions and how it can determine how people see themselves and how their community, family, friends and wider society see them;
- More training for police in identifying who is the real victim and how to communicate appropriately with First Nations women and girls;
- Resources for sexual assault services that are 24/7. The offences often occur at night or weekends and if services are not available they may not be reported or seek help;
- improved quality of legal service delivery across the State;
- increase in the number of First Nations legal practitioners and barristers assisting First Nations female accused through the criminal justice system;
- Improved communication to First Nations clients regarding their choice of legal representatives;
- Cultural capability training for lawyers;
- Holistic approach applied by legal practitioners. Funding of broader scaffolding around the representation service (for example through social workers, youth workers, paralegals) to assist with broader issues that effect First Nations defendants, for example assistance with birth certificates for example.

How can the diversity of First Nations women and girls' experiences be better reflected and supported in their experiences as victims and accused persons and offenders in the criminal justice system in Queensland? (Question 3)

The diversity of First Nations women and girls' experiences can be better reflected and supported in their experiences as victims and accused persons and offenders in the criminal justice system in Queensland by:

- More culturally appropriate practices being fostered and encouraged for stakeholders in the criminal justice system who work with survivors of sexual violence.

- Pre-sentence reports presenting a full history and background of the person appearing before the Court. Funding being allocated for the preparation of those reports.
- Funding for positions for First Nations persons to fulfill field officer roles at Court.
- Better handling of conflicts of interests. More service providers being available to assist.
- Holistic approach applied by legal practitioners. Funding of broader scaffolding around the representation service (for example through social workers, youth workers, paralegals) to assist with broader issues that affect First Nations defendants, for example assistance with birth certificates for example.

What are the experiences of women and girls with multiple and complex intersecting needs as accused persons and offenders in the criminal justice system? What works? What needs to be improved? (Question 5)

LAQ has outlined the experiences of our lawyers with some complex female clients through a number of case studies in Annexure B to respond to this question.

Protecting and promoting human rights

What are your experiences or observations about how the rights of women and girls who are involved in the criminal justice system as either victims-survivors of sexual violence or accused persons or offenders are protected and promoted? What works? What could be improved? (Question 9)

LAQ notes the significant increases in protections for victim survivors by way of legislative reform in Queensland over the past few decades.

It is acknowledged there must be a balancing exercise between protecting the rights of the accused to fair trial and the protection of vulnerable witnesses, to avoid disadvantage to the parties and maintain the integrity of the judicial process. Our adversarial justice system presents many challenges to achieving this balance.

This response notes that our clients often fall into both categories - that of victim-survivor and accused.

The HRA contains protections which are gender neutral. It promotes and recognises important rights which are equally applicable to women and girls in the criminal justice system. These include:

- Section 15: The right to recognition and equality before the law: to have the equal protection of the law without discrimination.
- Section 17: Protection from torture and cruel, inhuman or degrading treatment.
- Section 25: Privacy and reputation.
- Section 26: Protection of families and children: including that every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.
- Section 29: Right to liberty and security of person.

There are rights expressly applicable to an accused person which are dealt with below.

Victim-survivors

Legislative reform in Queensland over the past few decades has seen improvements to protecting and promoting the rights of women and girls as victim-survivors (although the reforms are not gender specific.)

These include: expanding the definition of rape, the introduction of s9(4) of the *Penalties and Sentences Act 1992* (PSA) in sentencing for a sexual offence against a child under 16, the introduction of grooming offences, presumptions against bail for domestic violence offenders, and evidentiary reform to reduce trauma to vulnerable witnesses in the taking of statements and giving of evidence, and the introduction of sexual assault counselling notes privilege.

The more recent amendments to s348 of the Code and the insertion of s348A,[13] following the QLRC's review of consent laws and the mistake of fact defence, are examples of further clarification of existing rights for victim survivors. The amendments provide clarification to what was already the existing law. The Benchbook has also been amended to reflect these new provisions and provide further clarity to juries when directed.

LAQ criminal defence practitioners observe the current protections built into our legislation, being invoked regularly. The most commonly invoked are as follows:

Presumptions against bail

General provisions within the *Bail Act* 1980 which protect victim-survivor safety. In particular, the provisions which place an accused in a show cause position if charged with a relevant offence. This includes an offence punishable by a maximum penalty of at least 7 years imprisonment if the offence is also a domestic violence offence, and choking in a domestic setting, stalking, injuring animals, threatening violence, and deprivation of liberty, if the offence is also a domestic violence offence, and certain offences against the *Domestic and Family Violence Protection Act 2012* (DFVPA).[14]

Specific Protections for witnesses giving evidence

Applications for a special witness declaration under s21A of the *Evidence Act 1977*, are regularly made and in our experience, are rarely challenged by an accused. Numerous orders and directions can be made by the Court to assist a witness in giving evidence before an accused.

In addition, a self-represented accused cannot cross-examine a 'protected witness'.[15]

A protected witness may be:[16]

- A witness under 16.
- A witness with an impairment of the mind.
- An alleged victim of a prescribed special offence.
- An alleged victim of a prescribed offence who would likely be disadvantaged as a witness, or to suffer severe emotional trauma.

Prescribed offences include the Criminal Code's Chapter 32 offences (Rape and sexual assaults), wounding, common assault, assault occasioning bodily harm, deprivation of liberty, grievous bodily harm and torture.

The provisions of Division 4A of the *Evidence Act* 1977 also operate to preserve the integrity of the evidence of affected child witnesses and to limit the trauma and distress the taking of that evidence can cause.[17]

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13 Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021, No 7 of 2021 which commenced on 7 April 2021.
14 Ibid s16(6).
15 Ibid s21N.
16 Ibid s21M.
17 Ibid s21AA.

Additional protections include:

- Questioning of a complainant as to their sexual history is not permitted, except if leave is granted in particular circumstances.[18]

- The Court may disallow improper questions, defined as being "a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive, or repetitive".[19] This provision is echoed in Rule 61 of the Barristers' Conduct Rules 2011 as amended. That rule governs proceedings for sexual assault, indecent assault and the commission of an act of indecency in which the alleged victim gives evidence. There are also provisions which outline the appropriate approach in dealing with a child witness.[20]

- The Queensland Intermediary Scheme currently operating in Brisbane and Cairns for witnesses in child sexual offence cases stemming from the introduction of Division 4C of the *Evidence Act 1977*.

LAQ does not support the removal of the taking of evidence of chief and cross-examination from the hands of the defence and prosecution, for young children and victims with an intellectual disability, and placed into the hands of independent examiners. Models such as that adopted in Norway,[21] work within an inquisitorial system and modifications to suit our judicial system are not workable solutions.

Our adversarial system has protections built into it to assist in the taking and testing of evidence of vulnerable witnesses. The removal of the right of cross examination, and to test the witness's account, is inconsistent with preserving the accused's right to a fair trial.

The accused has the right to put their case to the witness, challenge their evidence and put forward their case to a witness. As outlined above, there are several protections available to vulnerable witnesses within the system. Introducing a third-party examiner into the process is not a workable solution in the Queensland jurisdiction.

Sexual assault counselling privilege

The introduction of legislation in 2017[22] placed significant limits on the access of sexual assault counselling notes. A person now cannot be compelled to produce protected counselling communications to the court without the Court's leave, known as sexual assault counselling privilege.[23]

In deciding whether to grant leave, the court must have regard to several matters, including the need for victims to seek counselling, that the effectiveness of counselling is likely to be dependent on maintaining confidentiality of that relationship, the public interest in ensuring victims receive effective counselling, and if the disclosure is likely to infringe a reasonable expectation of privacy.[24] The court may also consider a statement of the counselled person outlining the harm they are likely to suffer if the application is granted.[25] Recent decisions primarily from the District Court, demonstrates that the counselling communications process is being considered very seriously by the Courts. The application of these provisions is dealt with in more detail in our response to question 66.

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18 Section 4, *Criminal Law (Sexual Offences) Act* 1978.
19 Section 21(4) *Evidence Act* 1977.
20 Ibid s9E.
21 Bowden, Henning, and Platter, '*Balancing fairness to victims, society and defendants, in the cross-examination of vulnerable witnesses: an impossible triangulation?*'(2014) 37 Melbourne University Law Review 558 at 563.
22 *Victims of Crime Assistance and Other Legislation Amendment Act* 2017 (Qld).
23 Part 2, Division 2A, *Evidence Act* 1977.
24 Ibid s14H(2)(a) - h).
25 Ibid s14F(3).

Admissibility of evidence

- Relevant evidence of the history of a domestic relationship between an accused and victim is admissible in relation to particular offences, including assaults, homicide, unlawful striking causing death, offences endangering life of health.[26]
- Section 132A of the *Evidence Act* also provides that similar fact evidence cannot be ruled inadmissible on the ground that it may be concocted. Our experience is that similar fact and propensity evidence is often admitted at trial and the test is not impossible to meet. This is addressed in detail in our response to questions 61 and 62.

Jury directions

LAQ notes one of the recommendations contained in the Victorian Law Reform Commission's Report, "Improving the Justice System's Response to Sexual Offences" (2021), was for more directions to the jury in sexual offence trials to counter misconceptions about sexual offences.

In our experience, juries in Queensland are currently carefully directed during trial with every effort to avoid reference to outdated stereotypes and irrelevant circumstances leading to sexual offending.

Sexual offending has many specific Criminal Directions Benchbook directions which are given at trial, including preliminary complaint, delay in prosecution and significant forensic disadvantage,[27] and evidence of other sexual and discreditable conduct of the accused.

Recent legislative amendments in Queensland, have further promoted the interests of victim witnesses in sexual offences trials[28] and directions have been consequently amended to reflect these changes.

It is our observation that the recent reforms to legislation have added complexity to criminal trials for sex offences. The purpose of these reforms is to protect victim complainants who are most commonly female. Queensland has a strong and robust appeal system to ensure trials and sentences are conducted fairly and according to law. Anecdotally, appeals have been argued on the basis of the misapplication or interpretation of this legislation. Concerns are held further reforms may lead to a consequential increase in appeals. Although a complainant is not directly involved in the appeal process, it prolongs the matter and could result in a further retrial. Further complexity may increase court time required for trials and therefore increased costs.

Victim rights in general

Despite the fact that no legal rights are conferred by *Victims of Crime Assistance Act* 2009 (VOCA), it provides an important framework for recognising the rights of the victim in the criminal process. Victims of a violent offence are eligible to apply for financial assistance to cover certain expenses to assist in recovery. It significantly, allows the opportunity to provide a victim impact statement to the sentencing court.[29]

Part 10B of the *Penalties and Sentences Act 1992*, governs the use of victim impacts statements in the sentencing of offenders for an offence against the person of someone, a domestic violence offence, and offences of contravention of domestic violence order, police protection notice and release conditions under the *Domestic and Family Violence Protection Act 2012.*[30] The prosecutor can request that the person preparing the victim impact statement or the prosecutor, be permitted to read it aloud to the court. This must be allowed by the Court unless it is considered inappropriate to do so.[31] The Court can

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26 Ibid s132B.
27 Ibid, s132BA.
28 See *Criminal Code Qld*, s348A and *Evidence Act 1977*, s.132BA.
29 PSA, s179K.
30 *Victims of Crime Assistance Act 2009, section 6*
31 *Penalties and Sentences Act 1992*, Section 179M

direct that special arrangements be in place for the reading, including obscuring the offender from the reader's view.

Eligible persons under VOCA can also make written submissions to the parole board under the *Corrective Services Act 2006* about granting parole to an offender.[32].

In terms of therapeutic and practical support, there are several witness support services which currently operate in Queensland courts, such as Victim Assist Queensland and the volunteer Court Network service (although this service has recently experienced funding cuts). The ODPP also provides Victim Liaison Officers to assist a witness navigate the court process.

In terms of support for children, Protect All Children Today ("PACT") is a non-profit organisation committed to supporting child victims and witnesses who have to give evidence in the criminal justice system. It has existed for over 35 years, and for the last 21 years has been specifically focused on supporting child victims and witnesses who give evidence in the Queensland criminal justice system.[33]

PACT supports around 1800 children through legal proceedings each year.[34] In 2020/2021, 66% of these children were female.[35]

The PACT support process is detailed on page 11 of the PACT annual report 2020/2021.

PACT reports that the key benefits of its services are:

- Emotional, mental and physical wellbeing benefits for the child victims and witnesses it supports;
- Child victims and their families are less anxious and better prepared;
- Children are better prepared to give evidence;
- Increased quality of evidence given by child witnesses;
- Support for the workload of victim liaison officers;
- Support for investigating police officers through PACT's support of victims;
- Reduced delays in court proceedings.[36]

PACT provides resources for child victims and their families, including:

- Welcome packs for new clients;
- Counselling guide, detailing available counsellors, psychologists, therapists and other support services;
- Giving evidence books for parents and carers;
- Giving evidence books for children.[37]

PACT is attempting to expand its services to include a new service to support adult victims in vulnerable situations on a case-by-case basis.[38] It is also considering the use of dogs for emotional support and reassurance for children as they give evidence and are exploring a pilot program with Guide Dogs Queensland where children can have a dog beside them when they give evidence.[39]

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32 *Victims of Crime Assistance Act 2009*, Schedule 1AA Charter of victims' rights, Part 2.
33 Protect All Children Today annual report 2020/2021, page 2.
34 Protect All Children Today annual report 2020/2021, page 10.
35 Protect All Children Today annual report 2020/2021, page 18.
36 Protect All Children Today annual report 2020/2021, page 12.
37 Protect All Children Today annual report 2020/2021, page 20 to 21.
38 Protect All Children Today annual report 2020/2021, page 30.
39 Protect All Children Today annual report 2020/2021, page 7.

Right to Privacy

Queensland's restrictions on public reporting on sexual offending and domestic and family violence operates to protect a victim's right to privacy. This is addressed in detail in our response to questions 32 - 35.

Victim-Advocate

As per our previous submission, LAQ supports further research for appropriate victim/witness representation, to better inform and provide support through the judicial process. With respect to the giving of evidence, LAQ recognises the value in a support person (already a feature in sex offence trials) being present with appropriate directions existing to safeguard against prejudice and other forms of victim support particularly appropriately funded support services.

As identified above, the QIS is currently in operation in Brisbane and Cairns. Its purpose is to assist vulnerable witnesses in child sexual offence cases overcome communication barriers and create a more accessible justice system by facilitating the communication of evidence. Its aims include reducing trauma to vulnerable witnesses and improving the quality of evidence given in these proceedings. In its pilot phase it is restricted to prosecution witnesses in child sexual offences who are under 16, or have an impairment of the mind, or have difficulty communicating.

The QIS strikes a balance in that there is no advocacy or legal role, and it contains measures for accountability and to preserve the integrity of the evidence.

The Scheme has been operating since July 2021, in its initial two-year pilot program. An evaluation of this program and its operations should be undertaken at its conclusion to inform any further reform in this space including whether the scheme be expanded to include other offences, as in the ACT.

LAQ is however cautious about the introduction of a victim advocate with legal standing in criminal proceedings. The extent of such a role would be difficult to define and strict conditions would need to apply to preserve the integrity of a witness's version. Breaches could lead to miscarriages of justice, appeals and potential retrials, causing further trauma to a victim-survivor witness.

Further legislative protections

The rights of girls are further promoted by sentencing provisions such as s9(4) of the PSA when an accused is sentenced for offences of a sexual nature against a child under 16 years. The sentencing court must impose a term imprisonment unless there are exceptional circumstances.

For offenders who commit a repeat child sex offence, a mandatory life sentence must be imposed under s161E of the Criminal Code of Qld.

The *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (DPSOA), also operates to protect the community from persons who have committed serious sexual offence/s and who the Court finds would be a serious danger to the community if released in the absence of a supervision order. The court can make a continuing detention order if evidentiary thresholds are reached. There are no women subject to continuing detention or supervision orders in Queensland.

Supervision orders under the DPSOA are intensive and imposed for a minimum of 5 years. In our experience the average duration of an order is 10 years, and this can be extended upon application by the Attorney-General.

The Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (CPOR) also provides a post sentence supervision regime for offenders, not just those imprisoned for sexual offending against children, but other serious offences against children, such as manslaughter.

There are criminal penalties for contravention of both supervision orders under the DPSOA and failure to comply with reporting requirements under CPOR.

Section 9(10A) of the PSA operates to promote the rights of women and girls who appear as victim-survivors before the courts, by treating a domestic violence offence as an aggravating factor on sentence. This gives explicit recognition within the Act to the seriousness of this prevalent offending. The exception

is included to avoid capturing those who would otherwise unfairly be included[40] and is highly relevant to victim-survivors who are also accused.

Matters relevant to legislative reform to promote female rights, regarding the issue of consent and mistake of fact are dealt with in our response to questions 50 - 53.

LAQ notes that in the case of victim-survivors who suffer emotional abuse or are subject to coercive control, this does not meet the definition of "violence against another person" in s9(2A), to enliven s9(3) PSA. In *R v Barling*,[41] de Jersey CJ rejected the Crown's submission that the provision be broadly construed to include emotional disturbance, "especially because the provision potentially affects the level of punishment".[42]

LAQ does not support a broadening of the definition to include such examples of harm. There is recognition already for this type of harm within s9(2)(c)(i) PSA. This requires the court to consider the nature and seriousness or the offence, which includes mental or emotional harm to a victim. This includes harm mentioned in information given to the court under s179K PSA.

Accused women and girls

The rights of accused women and girls include the inherent rights within the HRA which apply to all persons, such as:

- Section 31(1): Fair hearing

A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

- Section 32: Rights in criminal proceedings, including the presumption of innocence and right to trial without undue delay.

Children have particular rights under s33, including the right to be segregated from detained adults, if they are detained, to be brought to trial as quickly as possible and if convicted, to be treated in a way that is appropriate for their age.

The HRA also provides for the humane treatment of all persons deprived of liberty and specifically addresses the rights of those on remand. Section 30 provides that an accused person who is detained must be treated in a way that is appropriate for a person who has not been convicted.

LAQ supports increased resources be allocated to women and girls who are on remand, who would ordinarily not be eligible for programs to address substance abuse or other criminogenic needs. Interventions and treatment programs initiated at an early stage can assist in long term rehabilitation. Access to education and vocational opportunities is key to providing skills for women to gain confidence and reach economic independence.

Women and girls are entitled to access appropriate health services to meet treatment needs, including mental health needs. Access to legal advice and where required, representation, is also a fundamental right.

LAQ does not support the continued practice of strip-searching women in detention. The advances of modern technology allow for improvements to routine search practices, and this require urgent reform.

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40 Ibid, see examples of exceptional circumstances to s9(10A).
41 [1999] QCA 016.
42 Ibid at page 8.

LAQ holds concerns for children in detention centres who are denied access to schooling and exercise. Our staff report inadequate staffing has resulted in children being locked in rooms on "night-mode". LAQ considers this a grave breach of human rights requiring urgent consideration.

In addition to the above, fundamental rights exist in relation to procedural fairness, natural justice and due process. The independence of the judiciary, an essential part of the rule of law, is also fundamental to the concept of a fair trial.

Since the enactment of the HRA, LAQ has been able to refer to some of these provisions in our legal arguments, although they are not gender-specific arguments. These include bail applications, applications by the prosecution to adjourn matters, and applications by defence for disclosure of material in the prosecution case. This has enhanced our ability as advocates to argue for access to just outcomes for accused people.

Protections during the sentencing process

The protections afforded to women and girl's rights during the sentencing process are dealt with in our response to question 81, where we address how existing sentencing principles, factors and options apply to women and girls.

LAQ supports a sentencing regime that allows the court to retain discretion as to the weight to be placed on all relevant factors when arriving at a just sentence.

With respect to girls, the sentencing principles of the *Youth Justice Act 1992* (YJA) require the sentencing court to take into account the nature and seriousness of the offence[43] and any impact of the offence on a victim. The court must also have regard to the youth justice principles which underpin the YJA[44] including upholding the rights of children and to consider the child's age and maturity in making decisions under the Act.[45]

The age of criminal responsibility

One area of legislative reform in Queensland which would further promote and protect the rights of all children, relates to the age of criminal responsibility. The 2019 Report on Youth Justice prepared by Bob Atkinson AO, APM ("the Atkinson Report") recommended that the Government support raising the minimum age of criminal responsibility through a national process. The Atkinson Report also recommended that the Government legislate to ensure children aged 10 and 11 years old cannot be remanded in custody or sentenced to detention (except for very serious offences) in the interim.

While the Atkinson Report recommended raising the age to 12 years old, this was based on the United Nations Committee on Rights of the Child, which has since revised the benchmark for a minimum age of criminal responsibility from 12 to 14 years old.[46]

The Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 is currently before the Queensland Parliament. This Private Member's bill proposes to amend the Criminal Code and the *Youth Justice Act* 1992 (Qld) to raise the age of criminal responsibility to 14 years. The proposal is consistent with current medical understanding of child development and contemporary human rights standards.[47]

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43 *Youth Justice Act* 1992, s150(1)(d).
44 *Youth Justice Act* 1992, s150(1)(b).
45 Charter of youth justice principles, Schedule 1 *Youth Justice Act* 1992, 2 and 13.
46 United Nations Committee on the Rights of the Child (2019). *General Comment No. 24 (201x), replacing General Comment No. 10 (2007): Children's rights in juvenile justice.*
47 Explanatory notes, page 1.

The Explanatory Notes to that Bill outline the compelling reasons for raising the age of criminal responsibility. Briefly,

- Raising the age of criminal responsibility would, by removing children aged 10 to 13 from detention, reduce the number of children in detention (and therefore also from time to time the number of children in watch houses in Queensland). If the age of criminal responsibility were to be raised to 14 years old, around 130 children aged 10 to 13 would be diverted from detention each year.[48]

- Raising the age of criminal responsibility may reduce recidivism, as research suggests that diverting more children away from the criminal system and providing support to address their individual needs will mean these children are less likely to continue to engage in criminal behaviours throughout their lifetime.[49] The Atkinson Report stated:

  > "For children, even a short episode of remand has been associated with future remand episodes. The seriousness and numbers of charges also tended to escalate following the first remand episode, presumably in part due to the criminogenic nature of custody. This is consistent with research from the Pathways to Desistance studies in the United States that found that for some youth incarceration may actually raise the level of offending."[50]

- Medical and neuroscientific evidence indicates that many problematic behaviours engaged in by children under 14 reflects their incomplete capacity to plan, foresee consequences and control impulses, consistent with their prefrontal cortex still developing.[51] The prefrontal cortex gradually develops from ages 10 to 17, and the amygdala is also developed in early adolescence.[52] Consequently, certain behaviours by children should not be characterised as 'criminal' in the same way those actions by an adult should be.[53]

- The current age of criminal responsibility in Queensland is not consistent with the global standard.[54]

- Various legal, medical, human rights and Indigenous justice experts and advocacy organisations support raising the age of criminal responsibility.[55]

Raising the age of criminal responsibility may also force the consideration of more appropriate responses to this particularly vulnerable group of children, rather than there being a criminal response. We would however advocate for significant review of current funding and resourcing of support services for those under 14 throughout the State prior to any reform to ensure appropriate and adequate framework is available to support children, address criminogenic needs and limit the risk to the community.

Access to Legal Aid

In our response to Question 78 we have outlined how women and girls can access our legal advice and representation services. It is noted at p23 of the Discussion Paper 3 issues with our funding models have posed challenges for women seeking to have their criminal cases legally aided.

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48 Explanatory notes, page 5; Youth Justice annual summary statistics: 2015-16 to 2019-20, Detention Centre Data.
49 Explanatory notes, page 12; Allard, T. et al. (2010). Police diversion of young offenders and Indigenous over-representation. Trends & issues in crime and criminal justice, no.390.
50 Atkinson, B. (2018). Report on Youth Justice.
51 Explanatory notes, page 4.
52 Explanatory notes, page 4.
53 Explanatory notes, page 4.
54 Explanatory notes, page 14.
55 Raise the Age Campaign Alliance website – Organisations.

The overall funds available for legal assistance limits the ability to fund certain types of matters. Legal Aid funding is therefore allocated having regard to various priorities. The issue raised at p23 highlights the need for additional funding to support services that women are more likely to apply for.

Traditionally women require less assistance in crime than family law because more men than women are charged with criminal offences. On LAQ's current funding priorities there is less funding of less serious, criminal cases dealt with summarily. Our duty lawyer services across the State service over 100 Magistrates and Childrens Courts and provided services on over 90,000 occasions in the last financial year[56], including thousands of women and children. However, ongoing representation through LAQ in the Magistrates Courts is limited. Our guidelines and means testing limits what grants of legal assistance are provided and then further what individuals are entitled to the grants.

Despite the figures presented for family law and civil matters outlined in the paper, the hurdles for family and civil law funding (principally women) are more substantial than crime – requiring aid for a matter that is a priority, meeting guidelines which are quite prescriptive, means tests and finally the merits tests. The statistics are probably higher due to the fact as stated above more women as a proportion of the population are affected by these matter types.

Resourcing, investment and value for money

What are the impacts and implications for women and girls who are accused persons or offenders if matters are delayed across the criminal justice system? What works? What needs to be improved? (Question 11)

LAQ acknowledges that many of the impacts experienced by accused persons or offenders when matters are delayed across the criminal justice system affect both male and females, however there are additional factors unique to women and girls that effect the way they navigate the system.

In our experience, accused women often have overlapping legal issues, incorporating child safety and domestic violence matters. They are also often tied to their co-offenders through their relationships, so if a matter is delayed, it means that women are connected to these problematic relationships for a longer period of time. Where matters are delayed as a result of forensic backlogs, delays with co-offenders, or other court delays such as those experienced during the Covid-19 pandemic, it has the potential to increase the consideration of pleading guilty to resolve their criminal matters, in order to avoid that further delay.

Women on bail may be subject to a number of bail conditions, which, over a period of time can become particularly onerous when matters are delayed. They may impact on work and lifestyle, create further practical or psychological barriers to removing themselves from domestically violent relationships. Further, as they are often the primary caregivers (not just for children, but for aged parents and extended family), conditions can impact on their ability to transport children, attend medical appointments, find alternative care arrangements, and other parental responsibilities. Attendance at court, particularly in the arrest courts or large call-over courts, can mean that an accused may need to attend almost all-day. This can be particularly concerning if a woman has had to make care arrangements for their child and they are delayed beyond what they anticipated.

While the progress in use of technology has been welcomed by many in the past two years, it is the experience of many practitioners in regional or non-centralised courts that the technology in place is unable or ill-equipped to allow the remote appearance of more than one party, which has contributed to delay in finalising matters. The inability for both a practitioner and prisoner to appear by video-link (particularly as a result of Covid-19 delays, or court commitments elsewhere), means that often matters

[56] LAQ Annual Report 2021-2021

are adjourned to another day to either facilitate the transport of the accused in person, or to accommodate an in-person hearing. In encouraging the upgrading and use of technology, and the continued and increased use of remote appearances, this may assist in increasing the efficacy of proceedings.

While it is LAQ's experience that many Courts and prosecutors encourage the amendment of bail conditions with the consent of prosecuting bodies in writing, it is our experience that a number of Courts will not, or are hesitant to, have this as a 'default' position. There should be further encouragement of permitting variation requests to be made in writing, which would allow these to be dealt with in a more timely manner and may assist women in domestically violent situations to be more confident being able to take advantage of assistance without significant barriers in place.

Delay in proceedings can result in an accused being unable to take up educational and work opportunities due to the uncertainty surrounding the resolution of their case. As women are more likely to be in a lower socio-economic position than a male defendant, this also has the consequence of increasing these disadvantages. There should be further focus by both prosecution and defence as to whether a matter should be further delayed awaiting a co-offender's committal or application, or whether there is scope to progress a matter.

A study by the Australian Institute of Health and Welfare in 2020, based on data from the National Prisoner Health Data Collection, found that around 85% of incarcerated women report having been pregnant in their lives. This includes women who may not have had a live birth (for example, miscarriage, abortion), and those whose children were no longer dependent. More than half (54%) of the prison entrants surveyed reported having at least 1 dependent child.[57]

Imprisoned women who are pregnant are a high-risk obstetric group, with both the mother and baby more likely to have problems and poorer outcomes (WHO 2014). This is likely because women in prison are often from disadvantaged backgrounds and have a history of drug use.[58]

Delay in the criminal justice system may mean that a woman who is remanded will give birth in custody or potentially her children will reach an age when they cannot remain in the jail with their mother. If the child has never been in custody, it could also affect where they were placed during the period of imprisonment. This potentially creates trauma for both the mother and the child. Delay may also impact a woman's ability to access prenatal care when they first enter a correctional facility, including their ability to access termination services.

Queensland has five women's correctional facilities.[59] Despite a number of programs aimed at maintaining familial contact,[60] given the location of some of these centres, some women cannot have visits with their children or family, and delays in proceedings often extend these difficulties, and amplify the effects of incarceration. Delays generally impact on those awaiting conclusion of their case while in custody on remand. In addition to the above limitations on health and childcare options while in custody, remand prisoners have access to limited educational and vocational courses. Further, LAQ acknowledges the over-representation of indigenous females in the criminal justice system, and that they are likely to be imprisoned at over 14 times the rate of non-indigenous women.[61]

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57 AIHW - Infocus: The health and welfare of women in Australia's prisons - November 2020
58 AIHW - Infocus: The health and welfare of women in Australia's prisons - November 2020
59 Brisbane Women's Correctional Centre, Helana Jones Centre, Numinbah Correctional Centre, Southern Queensland Correctional Centre, and Townsville Women's Correctional Centre.
60 Annexure 11: Taskforce Paper 3.
61 Australian Bureau of Statistics, 'Prisoners in Australia' (2021)

Impacts and implications for girls if matters are delayed

Expeditious resolution of matters must be a priority for children charged with offences, particularly for children who are in custody pending finalisation of their proceedings. When matters are not finalised quickly, some young people will remain in custody on remand for extended periods.

The *Youth Justice and Other Legislation Amendment Act 2019* made amendments to the YJA. The amendments were in part a response to the 2019 Report on Youth Justice prepared by Bob Atkinson AO, APM ("the Atkinson Report"), and recognised the need to reduce the period in which proceedings in the youth justice system are finalised, encourage timely finalisation of proceedings for children and reduce demand pressures on youth detention centres and watch houses.

Delay can have the significant adverse consequence of a child being sentenced as an adult (and consequently commencing an adult criminal history) pursuant to sections 140 and 141 of the YJA.

Delays in finalisation of proceedings have other detrimental impacts on accused children in a variety of ways.

The Atkinson Report found:

> *"Many legal stakeholders identified delay in court proceedings as a major contributor to remand of children in custody. There are a number of factors that may contribute to delay in any particular case, such as the need for legal advisors to have good information about the circumstances of the child and their offending before advising them; availability of a parent to attend court for the matter to be heard; time spent on assessments by professionals to provide information to a court about the child's mental health, disability and fitness to plead; time spent seeking information for a court on educational enrolment, attendance and achievement as well as any family risk factors such as domestic violence or child protection history. Unfortunately, while these processes are in train, children can sit in detention centres waiting, often in circumstances where they will never receive a custodial sentence.*
>
> *We were told that the closer the consequence to the offence the more meaningful it is for a child and the more likely that it will have a deterrent effect. This is well-recognised in child development research and is reflected in the Charter of Youth Justice Principles contained in the Youth Justice Act 1992. Principle 11 states: A decision affecting a child should, if practicable be made and implemented within a timeframe appropriate to the child's sense of time.*
>
> *We hope that some of the proposals in this report will go some way towards reducing delay in children's criminal proceedings, either by diverting them away from court proceedings or streamlining the court process."* [62]

Despite these amendments, we have observed no tangible reduction in the timeframes for resolution of Childrens Court matters.

Particular contributors to delays include the time taken to prepare a brief of evidence for indictable matters and time required by Youth Justice to prepare pre-sentence reports. We continue to observe issues with delay in regional and circuit courts, with some circuit Childrens Courts only sitting once per month being a barrier to expeditious finalisation.

Whether or not a child is remanded in custody pending finalisation of their proceedings, they often experience an interruption to education. Children can be suspended from school due to being charged and are unable to return to education until their matters are finalised. This increases the likelihood that

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62 Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence, Version 2, 8 June 2018 at page 53.

they will become completely disengaged from education and that they will meet the criminal justice system again in the future. As a case example, LAQ represented a young girl who was suspended from school due to being charged, and the school principal refused to cancel her enrolment which would allow her to receive funding to undertake courses at another institution. This decision was contested, but the significant delays in bringing her complaint and resolving the issue meant the girl missed out on the course and ended up not pursuing a path of education.

As The Atkinson Report identified, delay is a major contributor to remand.

Through the Youth Legal Aid Childrens Court of Queensland bail referral program and recent published decisions of Magistrate Mac Giolla Ri,[63] we are aware that some children spend days or weeks in adult watch houses. It is no secret that watch houses are terrible and highly inappropriate environments for children, where they are largely deprived of opportunities for education and therapy services, and unable to engage in physical activity.

We are also aware of the use of detention centre management arrangements including "night mode" and/or "continuous cell occupancy" said to be the result of operational difficulties including staffing issues.[64] The effect of these techniques is that the centre is effectively in lockdown and children lose opportunities to engage in education, therapeutic interventions, physical activity, family contact and social interaction.

In *Commissioner of Police v Leo Horan (a pseudonym)* [2022] QChCM 2, Magistrate Mac Giolla Ri stated in relation to a child that had been subject to these type of arrangements that:

> *"he has endured detention where there has been ongoing periods of time where he has literally not been allowed out of his cell for 24 hours at a time and where, when he is let out, it is often simply four at a time for limited times during the day into the day area of his unit. I have visited [this particular] Youth Detention Centre, the cells are perhaps, in the ordinary course of events, one could describe them as towards the minimum of what might be acceptable for a child, and I find the same in relation to the day area of the unit"* [65]
>
> *"I accept that it is not for me, as a judicial officer, to decide what the appropriate type of accommodation is [this particular] Youth Detention Centre, or any youth detention centre, but I am concerned that [this] Detention Centre is falling below the standards it ordinarily operates at, and those standards must already be seen, I would say, as the bare minimum of what might be acceptable in a civilised society, are now falling short of that. My reasons should not be understood to say that children cannot be sentenced to detention at [this] Youth Detention Centre as it is, but I have regard to the circumstances there in making my decision here, which is that, I will attach the main penalty to the unlawful use on 20 December 2021, the most serious offence, because it was committed so soon after being released from detention."* [66]

In that case, Magistrate Mac Giolla Ri stated that in the ordinary course of events he would have sentenced the child to six months in detention to serve 50%, but taking into account the arrangements he had been subject to whilst in custody, reduced the sentence to three months in detention with immediate release on a conditional release order.[67]

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63 *Commissioner of Police v Leo Horan (a pseudonym)* [2022] QChCM 2; *Jimmy Mansfield (a pseudonym) v Commissioner of Police* [2022] QChCM 1

64 *Commissioner of Police v Leo Horan (a pseudonym)* [2022] QChCM 2 at [12]

65 *Commissioner of Police v Leo Horan (a pseudonym)* [2022] QChCM 2 at [18].

66 *Commissioner of Police v Leo Horan (a pseudonym)* [2022] QChCM 2 at [20].

67 *Commissioner of Police v Leo Horan (a pseudonym)* [2022] QChCM 2 at [18] to [21].

In *Jimmy Mansfield (a pseudonym) v Commissioner of Police* [2022] QChCM 1, Magistrate Mac Giolla Ri when deciding an application for bail again made statements about the appropriateness of such detention centre arrangements:

> *"I raised with the parties on 27 January 2022 that the Court has been advised through other channels that staff shortages at CYDC mean that children detained there are spending 70% of their time either locked in their cells for 24 hours a day or locked in their units and only able to socialise with 3 others for a couple of hours at a time. In these conditions children cannot access recreation or education…. It has been established to my satisfaction that, if refused bail, Jimmy will be detained in profoundly inappropriate conditions."* [68]

Further, we have represented children who have reported that they were not doing any schooling or programs in detention due to lack of staff, and that some days they have been allowed out of their room for only one hour. Parents have been worried about how their children are coping. We provide a case example of an incident where a 14-year-old child attempted to self-harm by tying a shirt around his neck when his rotation out of his room was cut short during a phase of "continuous cell occupancy".

Remand inevitably means separation from family and country. Remand can also have the effect of tying girls to co-offenders and assisting them to form anti-social relationships. We are aware of circumstances where a girl met her now-boyfriend while remanded in youth detention and is now the aggrieved in a Domestic Violence Order where he is the respondent. He has repeatedly been charged with breaches of that order.

Additionally, there are issues of housing for girls in Brisbane Youth Detention Centre ("BYDC") that need to be urgently addressed. At BYDC, there is only one section for girls. We understand that this section is split into two sides when there are active COVID cases. We understand that during one period where COVID was present in BYDC, all positive covid cases were housed in Side A, and non-covid cases were in Side B. This set up is problematic when girls need to be moved due to conflict issues with other children. For example, we are aware of a girl who did not have COVID and was being housed in Side B. Due to conflict, it was deemed unsafe for her to remain in Side B and it was decided that she needed to be moved. The only option the detention centre could come up with was to move her into the COVID-positive Side A. This exposed her to COVID and restricted her movement because she was then subject to strict lockdown rules which were being enforced due to being in the COVID-positive area. It also meant she was unable to access any therapy services or education whilst on remand.

What works for girls, and what needs to be improved?

The only real cure for delay is expeditious resolution of matters.

Youth Legal Aid's Childrens Court of Queensland bail referral program is attempting to reduce the time spent on remand for children pending resolution of their matters by identifying matters that have merit for CCQ bail applications, regardless of whether Legal Aid Queensland act for the child in the substantive matters.

We have found that the regular presence of a representative of Queensland Education at court can assist in mitigating the disruption to education caused by court proceedings for children on bail. However, more must be done by Education Queensland to provide support for girls to remain in the education system during and following their involvement with the youth justice system. This includes addressing the issue of girls being suspended or excluded from school as a consequence of being charged.

It is recommended that there is a need for more cultural-led programs such as those run by Sisters Inside who connect girls with cultural healing, cultural art therapy, and cultural camps.

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[68] *Jimmy Mansfield (a pseudonym) v Commissioner of Police* [2022] QChCM 1 at [30]

It is recommended (and this is also canvassed in the response to Question 12) that there be more funding of and better access to therapeutic services specifically targeted at young girls prior to their matters being resolved. In particular, we see a need for programs in relation to domestic violence and healthy relationships targeted at young girls, designed to assist them before they become entrenched in either a violent relationship or the criminal justice system. Further, we see a need for more girl-only housing options for those on bail or who wish to apply for bail.

We see a need for more funding of and better access to rehabilitation facilities for children. We provide an example of one girl who was ineligible for any rehabilitation service in Queensland due to her age, and ultimately attended a rehabilitation facility in Western Australia. The consequence of this relocation is that she was removed from her family and home environment.

How can women and girls who are involved in the criminal justice system be better supported to reduce recidivism and benefit the community? (Question 12)

This response to the third discussion paper covers topics such as the benefits of diversionary options, bail support programs, improved options under community-based orders, improved access to courses while in custody on remand and higher level of support for women and girls released from custody. Each of these areas require significant resourcing to be optimal.

Many are not available in regional and/or remote communities, correctional centres and detention centres. For instance, the Queensland Drug and Alcohol Court (QDAC - whose operations are outlined in relation to Question 77) is only available for women, to apply, if they reside in the district of the Brisbane Magistrates Court (Brisbane and Greater Brisbane postcodes). Court Link, a Magistrates bail support program connecting participants with treatment and support services, is more broadly available than QDAC, but has limited services outside of southeast Queensland.

Murri Court again is more broadly available to women and girls, but there are fewer options in courts north of Maroochydore and outside of regional centres. Justice mediation referred to in Question 67 of this submission, is currently limited (both in the nature of the matter and geographically) and underutilised. All of these programs are only available in the Magistrates Courts.[69] Support while on bail in higher courts in Queensland is not instigated, set up or supervised by courts.

The Court Liaison Service (CLS) set up to assess mental illness and fitness issues with a view to allowing for the dismissal of matters early in the system where defendants after psychiatric assessment present with unsoundness of mind defence or as unfit for trial. In our experience there are huge backlogs in waiting for assessments across the State. Assessments are not always successfully conducted predominantly due to the nature of the clientele (failing to turn up to appointments), however limited supports are in place to ensure attendance. Assessments in COVID have also been challenging.

Incarceration has significant impacts on a woman and girl's relationships with her family, and her social and economical circumstances. Further, many incarcerated women come from backgrounds littered with domestic violence, substance addiction, lack of education, and sexual, emotional and physical abuse.

Many incarcerated women are mothers, and in our experience are often the primary carer to their children. The separation of women from their children due to imprisonment can contribute to mental health problems for her.[70] A primary motivator for incarcerated mothers is reunification with their children. Achieving reunification can often be complicated by short-term, or inappropriate housing options available to them upon release. Without suitable, stable accommodation, child safety authorities are less likely to facilitate longer term contact and reunification with the children.

LAQ considers there is space for improvement in relation to the consideration of familial responsibilities, and a greater focus on sentences that allow women to remain in the community where possible, and a

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69 Limitations on suitability criteria in essence cancel out many higher court matters.

70 AIWH - Infocus: The health and welfare of women in Australia's prisons - November 2020

greater emphasis on being able to take into account the best interests of a dependent child.[71] Women have higher rates of successfully completing community-based orders, particularly ones that identify and treat their specific needs.[72] This would particularly benefit Aboriginal and Torres Strait Islander Peoples, who are greatly overrepresented in custody, by reducing disruption to family and community bonds, and cultural connections.[73]

LAQ would support further analysis of the implementation and use of home detention and weekend detention, though acknowledges that caution needs to be exercised in domestic violence situations to ensure a woman is not trapped in an abusive environment.

Many women identify that support following release from custody, is integral in re-integrating into the community.[74] However programs need to be specifically designed for female participants, encouraging cultural mentorship,[75] education, and family-focused services. For example, in our experience, properly supported and funded bail programs, such as the Caxton Legal Centre's Bail Support Program for Men on Remand at Arthur Gorrie Correctional Centre, Brisbane Correctional Centre, and Woodford Correctional Centre, can better support and reduce recidivism while on bail.

How can girls be better supported?

The 'Working Together Changing the Story – Youth Justice Strategy Action Plan 2019-2021' identifies that:

> *"We need to do things differently for girls and young women if they are to benefit from reforms to the youth justice system.*
>
> *There is a growing number of girls and young women in the youth justice system and they often have very complex needs. Most of our responses in the youth justice system have been designed for boys, but we know that young women's communication and relational styles are different to young men.*
>
> *The problem behaviours of girls and young women are more closely linked to interpersonal relationships, trauma and abuse, mental health issues and developmental transitions. We know that girls and young women are likely to have better outcomes when they have healthy and supportive family and peer relationships, develop empathy and learn ways of positive coping."*[76]

Despite this, the 'Working Together Changing the Story – Youth Justice Strategy 2019-2023' contains no reference to any supports or services that are gender-responsive or meet the particular needs of girls in the criminal justice system as accused persons and offenders.[77]

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71 Anti-Discrimination Commission Queensland, *Women in Prison 2019: a human rights consultation report* (2019) Recommendation 18.

72 Queensland Sentencing Advisory Council, *Community-based sentencing orders, imprisonment and parole options* (Final report, 2019) 35.

73 Australian Government (Productivity Commission) *Australia's prison dilemma* (Research paper, October 2021) Productivity Commission: Canberra, 68.

74 Factsheet: The needs of mothers before, during and after imprisonment - Summary findings from Workshop Series 1

75 *Wiyi Yani Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (2020), 208.

76 'Working Together Changing the Story – Youth Justice Strategy Action Plan 2019-2021' at page 10

77 'Working Together Changing the Story – Youth Justice Strategy 2019-2023'

There appears to be significant room for improvement in terms of the priority placed on supports and services tailored to the particular needs of girls, and the ability of girls to access those supports and services at an early stage to support girls to reduce recidivism and benefit the community.

Interventions available through Youth Justice that are tailored to meet the particular needs of girls appear limited to:

- *Girls… Moving On*
- *Black Chicks Talking*

Girls…Moving On is "a comprehensive intervention designed specifically for at-risk girls between the ages of 12-21 years. The program helps girls increase their motivation and provide them with new skills and personal resources." [78] The program is 27 sessions in length.[79] If a child were to report to Youth Justice once weekly on a probation order, even perfect compliance with reporting would mean it would still take around seven months to complete this program. We understand the length of the program is effectively a barrier to entry into the program, as only girls who offend to such an extent that they are placed on lengthy supervised orders could be candidates. Anecdotally, it is understood that the time commitment and length of supervised orders imposed on girls create a barrier to this program even being proposed by the Youth Justice caseworker of a child under supervision, let alone completed.

Further, much of this program occurs in a group setting. Given trauma and/or being a victim of sexual abuse is such a precursor to a girl entering the criminal justice system, we foresee issues with girls being reluctant to address such issues in a group setting, particularly in small communities where the girl and/or perpetrator of the abuse may be known to other participants.

Black Chicks Talking is "a Cultural program for Aboriginal and/or Torres Strait Islander girls that has been adapted to support cultural connections to community and identity and explore cultural histories through storytelling, yarning circles and adventure activities." [80] The target group is 12- to 18-year-olds who identify as female and are "moderate to very high risk." [81]

We understand these programs are available both in detention and in the community, however, program availability is dependent on capacity to run the programs, having adequately trained staff and in respect of *Black Chicks Talking* having access to female indigenous staff members in Youth Justice service centres.

It would appear that neither *Girls… Moving On* or *Black Chicks Talking* are early intervention strategies. They are targeted at moderate to very high-risk offenders.

The Atkinson Report took the issue of access to programs further, stating:

> *"We were told that there are limitations on the extent to which children remanded in custody are currently able to participate in therapeutic programs targeted at the criminogenic factors that led to their offending, as they have not yet been found guilty of the offence. It appears from what we have been told, that it is not unusual for a child to be arrested, to exercise their right to silence, be detained by police and remanded in custody by the court, and when their matter comes on for hearing, to plead guilty and to be sentenced to no further time in detention, having never participated in a program or intervention that addresses their offending behaviour.*
>
> *"The limited provision of services and programs for children who have not yet been convicted and who are remanded in custody for a short period of time was recognised in the Victorian Youth Justice Review and Strategy, which noted a reluctance to deliver*

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78 *Gender-responsive: Girls…Moving On brochure 2020*
79 *Gender-responsive: Girls…Moving On brochure 2020*
80 *Black Chicks Talking summary diagram*
81 *Black Chicks Talking summary diagram*

programs which involve a risk of potential disclosure of evidential information about the offences. They proposed protections for any disclosures by a child when undertaking rehabilitative programs whilst remanded in custody as a way forward, to ensure the child can obtain the programs and service they need to support them to reduce their risk of reoffending, whilst not compromising their legal rights. We would support measures in Queensland that ensure a child's legal rights are protected whilst also enabling immediate relevant therapeutic interventions that are targeted at their behaviour and support their rehabilitation" [82]

The Youth Advocacy Centre model

We recognise the need to increase funding for multi-disciplinary services working with young women and girls who offer early intervention and prevention programs and support. One example of this type of service is the Youth Advocacy Centre ("YAC"). YAC is a multidisciplinary organisation which provides legal services, youth support, family support and other services to young people who are involved in, or at risk of becoming involved in the youth justice system and child protection systems. YAC operates largely in the greater Brisbane area and works with young people aged predominantly 10 to 18 with some exceptions up to age 25 (homeless and youth support).

YAC recognises that children who become involved in the youth justice system have significant social welfare issues. As a multidisciplinary organisation YAC assists young people navigate their legal matters whilst offering the support services to address the reasons why they have become involved in the youth justice or child protection system in the first place. Working in this holistic way means that the young person does not need to attend multiple agencies and continually repeat their story, thus reducing trauma. With the consent of the young person, appropriate information sharing within the one organisation enables a client-centred and coordinated approach to addressing the issues which contribute to the offending behaviours and can often lead to rapid response and a decrease in unnecessary delay. [83]

We recognise the need for increased funding for services to aid young women and girls who are involved with the criminal justice system and impacted by domestic and family violence. Of the young people involved in the Queensland Youth Justice System, 63% of those have been impacted by domestic and family violence.[84] Between 2020 and 2021 YAC operated a 12 month Domestic and Family Violence Project to provide advice and representation to young people affected by domestic and family violence in Queensland. During the project YAC identified that there were 385 young people aged 10 to 17 with Domestic and Family Violence protection orders in Queensland. The YAC project was unable to continue beyond 2021 due to a lack of funding, and there has not been another service identified in Queensland who is able to provide this level of support to young people experiencing domestic and family violence.[85] Increased funding to services such as YAC to assist young women and girls involved in the criminal justice system who are also experiencing or exposed to domestic and family violence is required to reduce recidivism and benefit the community holistically.

We recognise the need for continued and increased funding of support services which offer culturally appropriate and targeted therapeutic support for First Nations girls either involved in or at risk of involvement in the youth justice system, such as those currently provided by Sisters Inside.

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82 Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence, Version 2, 8 June 2018 at page 53 to 54.

83 https://www.yac.net.au/wp-content/uploads/2021/11/YAC-Annual-Report-2020_FINAL.pdf

84 Department of Youth Justice, 'Youth Justice Pocket Stats 2018–19'; Queensland Family and Child Commission, 'Changing the Sentence Overseeing Queensland's youth justice reforms' (2021) p. 33

85 Youth Advocacy Centre Inc Submission to Women's Safety and Justice Taskforce in relation to *Discussion Paper 1: Options for legislating against coercive control and the creation of a standalone domestic violence offence, July 2021*

Appropriate governance and accountability mechanisms

What are your experiences and observations of prosecutors and criminal defence lawyers in cases concerning women and girls who are victims of sexual violence or an accused person or offender? (Question 18)

Experiences and observations of *prosecutors* in cases concerning women who are *victims* of sexual violence:

While the Director of Public Prosecutions has significant discretionary powers, including the ability to decide whether a criminal case should proceed and how it will be prosecuted, the reality is that victims have no control or ability to challenge prosecutors' decision making.[86] The decisions by prosecutors' effect not only how the matter proceeds but how long it takes to proceed.

There is a real reluctance in prosecutors to discontinue sex offences, even when the evidence is clearly insufficient.

CASE EXAMPLES

- In one matter, a complainant wished to withdraw a complaint of rape as she no longer wished to participate in the court process, yet she was subpoenaed to attend court.
- In another case, a prosecutor requested a warrant be issued for a complainant who failed to attend a committal hearing in relation to a charge of choking, suffocation or strangulation in a domestic setting. The Magistrate did not issue the warrant.

Circuit courts

- In regional circuit towns, it appears to be common practice that the complainant is only contacted by the prosecutor in the week prior to a trial listing. This is because prosecutors are extremely busy on circuits, leaving insufficient time to properly liaise with complainants or to build rapport and gain trust.
- There is a level of community distrust of police in remote indigenous communities. There also appears to be a lack of cultural competency training for police and a lack of cultural liaison officers for First Nations people, especially in remote communities.

Experiences and observations of *prosecutors* in cases concerning women who are accused persons or *offenders*?

There is sometimes a tension between police on the beat and police prosecutors in court. Police on the beat can be disgruntled when police prosecutors discontinue charges in court, resulting in toxic relationship. Prosecutors can be scathing of investigations done by arresting officers and openly state that in court. Tension can also exist between police prosecutors and the DPP.

Crown prosecutors who should discontinue charges against women based on inherent weaknesses in the evidence may refuse to do so. Because they personally do not have to conduct the trial, they may act to avoid criticism rather than take an objectively legal and pragmatic approach.

There is sometimes a reluctance by prosecutors to deal with children by way of protected admissions under the *Youth Justice Act*, especially for serious charges.

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[86] Discussion Paper 3 page 31.

Experiences and observations of *defence lawyers* in cases concerning women clients who are *victims* of sexual violence:

Cultural reasons may make First Nations women hesitate to talk to their defence lawyer (or anyone) about past sexual abuse. Cultural competency training for lawyers is vital.

Case Examples

- 18-year-old First Nations client who disclosed for the first time to a counsellor in custody that she was a victim of sexual violence as a child, something not previously disclosed to her lawyer.

- First Nations client who was charged with numerous violent and disorderly offences disclosed that she was the victim of sexual abuse. When asked if she'd ever sought counselling she replied, "black people don't do that."

Conduct of criminal defence lawyers in court – cross examination

Advocacy training has for many years now impressed upon the advocate the importance of:

- The use of simple, unambiguous language.
- Adopting a measured, respectful and non-aggressive tone.
- Questioning directed towards the issues in contention.
- Eschewing a disrespectful, sarcastic or intimidating tone.

This mode of cross examination is the accepted model for training purposes, especially for cases involving sexual offences or offences of violence. Deviation is discouraged. For a modern-day trained advocate, a deviation may occur in a rare case but likely never in a trial for a sexual offence or a trial involving allegations of violence.

There may still exist advocates who tactically adopt a disrespectful, sarcastic, or intimidating tone, contrary to current training. If that occurs, the trial judge has the power to disallow improper questioning under s 21 of the *Evidence Act 1977*. In our experience, Judges do not hesitate to exercise this power.

An improper question is defined as a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive.

Section 9E of the *Evidence Act*, outlines principles for dealing with a child witness, defined as a child under 16 years. The following general principles apply:

(a) The child is to be treated with dignity, respect and compassion;
(b) Measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence;
(c) The child should not be intimidated in cross examination;
(d) The proceeding should be resolved as quickly as possible.

Section 21A of the *Evidence Act* allows for protective measures to be adopted for special witnesses, who are complainants for sexual offences or offences of violence. Section 21N prohibits cross examination by the alleged perpetrator.

The existing legislative framework is highly protective for witnesses who are complainants in trials for sexual offences or offences of violence.

Part 2: Women and girls' experiences as victim-survivors

Community understanding of sexual offending and barriers to reporting

Do community attitudes and rape myths impact women and girls' experience of the criminal justice system? If so, how? (Question 20)

A general observation on rape myths and community attitudes

At 8.3, the QLRC noted that some commentators contend that false preconceptions, sometimes called 'rape myths', influence jury decision-making and the verdicts of sexual assault trials.

At 8.8, the QLRC noted that some researchers acknowledge that:

> A large majority of the empirical research relating to both rape myth acceptance and gender role conformity has been conducted within the 1980's and early 1990's and there is, therefore, a lack of contemporary research focusing on the impact of these factors on rape blame attribution. This is an area which would benefit from current academic investigation to explore whether the impact of these factors is still valid within our society today.

At 8.9, the QLRC stated that recent research conducted of jurors in England, Wales and Northern Ireland refutes the claim that many jurors hold false preconceptions which would influence their decision-making.[87]

At 8.28, the QLRC stated that it is very difficult to determine whether false preconceptions have an effect upon jury verdicts. This has been an evolving area of research and understanding, but both the 2017 NCAS and recent research with jurors suggest that the influence of some of the 'rape myths' may be overstated.

As noted in the WSJT Discussion Paper 3 at page 37, it may be accepted that there is some contention as between commentators regarding the extent to which 'rape myths' influence jury verdicts.

Nevertheless, the QLRC's view was based upon the best evidence available, which primarily involved the survey of actual jurors immediately post-verdict.

Impact on experience

The extent to which community attitudes and 'rape myths' impact women's and girls' experience of the criminal justice system is a matter of subjective experience. In a broader sense, there is contention about the extent to which rape myths inform present day community attitudes.

The Criminal Law Practice does not express a view on these issues.

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[87] The findings of the research are set out at 8.17 to 8.19 in the QLRC report.

Do the current restrictions in Queensland on the publication of information about victims or accused persons relating to sexual offences and domestic and family violence adversely impact either victims or defendants/respondents? If so, how? (Question 32)

Public reporting on sexual offending and domestic and family violence[88]

The current restrictions in Queensland do not adversely impact either victims or defendants/respondents.

Naturally, where publication of a defendant's name is permitted there will always be an adverse impact upon that person's reputation.

If Queensland were to relax restrictions on reporting of sexual violence and/or domestic violence cases, for example by adopting legislation similar to New South Wales and Victoria, what would be the risks and benefits? (Question 33)

Any legislative changes should occur within a human rights framework:

- Right to privacy and reputation[89]
- Protection of families and children[90]
- Right to a fair hearing[91]
- Rights in criminal proceedings[92]

The dangers in not striking the right balance could lead to unintended consequences such as:[93]

(a) Hardship to a defendant, or the defendant's family including children.
(b) Case suspicion on a person unrelated to the defendant causing undue hardship.
(c) Aggravate or cause unnecessary hardship to the victim or close associates of the victim.
(d) Jeopardise a fair trial.
(e) Risk of identifying another person whose name may be suppressed by a court order.
(f) Prejudice current or future investigations.

In summary, the general benefits to improved publication and access are:

(a) Expose institutional abuse within a safe public environment.
(b) Empower other victim-survivors to come forward and make complaints.
(c) Give agency to survivors to tell their story.
(d) Educate society, to reflect the shifting views and understanding in relation to sexual, and domestic and family violence offences.

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88 In November 2021, Legal Aid Queensland submitted a comprehensive policy paper to the Attorney-General and Minister for Justice, Minister for the Prevention of Domestic and Family Violence: Public access to, and reporting of, sexual offences and domestic and family violence matters
89 s25 *Human Rights Act* 2019 (Qld).
90 s26 *Human Rights Act* 2019 (Qld).
91 s31 *Human Rights Act* 2019 (Qld).
92 s32 *Human Rights Act* 2019 (Qld).
93 There concerns were raised about s 200 of the *Criminal Procedure Act 2011* (NZ), where there is a discretionary prohibition on publication of the identity of the defendant: taken from Tasmania Law Reform Institute (2013). Protecting the Anonymity of Victims of Sexual Crimes, Hobart, University of Tasmania.

(e) Educate to promote a shift away from the myths and stigmatisation that surround 'victims' of sexual, and domestic and family violence.
(f) To assist in the healing process. The ability of a victim-survivor to have their story told and heard can have valuable therapeutic benefits.

General risks to increased publication and access include:

(a) Significant risk and prejudice to a fair trial. At the end of a proceeding, it could permit the victim survivor to tell their story in the public domain and earn increased public sympathy or support. The risk of tainting a jury pool is very real for future prosecutions of similar matters.
(b) If publication occurred at any stage during a proceeding the risk and prejudice to a fair trial is high. If prejudice leads to a miscarriage of justice, there may be a re-trial. The ongoing financial cost and burden on the public purse of re-trials cannot be ignored.
(c) Victim-survivors could tell their story in writing via Facebook, Twitter or Instagram. Alternatively, they could broadcast their story via video on YouTube or publish a podcast. This could cause a significant amount of public sympathy both publicly and internationally.
(d) There could be risks to the impact on a proper investigation of sexual matters.
(e) Complainants could post information about their story while police are investigating matters. This could impact evidence from preliminary complaint witnesses or people who are said to have seen events occur. These issues could potentially have the most impact on historical offending, often where witnesses struggle to remember relevant events due to the passage of time.
(f) Complainants may risk defamation proceedings in which the truth of the allegations (to a different test and standard of proof of course) would be relitigated.
(g) In providing another version, complainants could be unwittingly providing information that would assist defendants in trials and committal hearings to contradict their sworn statements. Similarly, if complainants are permitted to tell their story after conviction, applications for re-trials in the Court of Appeal could be prompted unwittingly by the versions provided by complainants in their self-published story.
(h) A risk of increased exposure to acts of vigilantism particularly as they relate to sex offences.
(i) Identifies victims who otherwise wish to remain anonymous.
(j) May promote false complaints.
(k) Safeguards currently exist to potentially protect victims of sexual offences from the consequences which may flow from media publicity. In *R v Age Co Ltd* [2000] TASSC 62 Evans J. stated:

> "The Act, s103AB, contains no provision allowing a victim to consent to his or her identity being publicised. There are good reasons for this. Such a provision may encourage representatives of the media to pester victims to consent to publicity. It is undesirable to expose victims to this pressure at a time when they are likely to be in considerable emotional turmoil and may be ill-equipped to weigh up and assess the consequences of publicity. One benefit of a provision such as s103AB is community knowledge that those who make complaints about sexual offences are protected from publicity. This protection encourages people who might otherwise have been deterred from reporting sexual offences to come forward.

The perception that victims are protected from publicity would be diminished if the media was able to publish details of victims who consented to that course."

(l) Creating a public culture of assumption that information regarding perpetrators of domestic and family violence will be available may create a false sense of security for victim-survivors if there is no public record of their abuser's history. Not all perpetrators of domestic and family violence face systemic responses or criminal charges.

In comparing the States and Territories, the approach in the Northern Territory appears to attempt to strike the right balance. Such legislation provides an avenue for victims to tell their stories and to have control of their own narrative. Legislation allowing public access to and reporting of their stories at the end of all proceedings, strikes the balance between open justice and minimises any risk to interfering with the running of a fair trial.[94]

LAQ opposes changes to the extent of the Victorian model which allows adult and children victim-survivors regardless of the stage of the criminal proceedings (if any) to publish their stories. The only exception in that legislation is preventing publication of the identity of another victim survivor who wishes to remain anonymous and is identified.

Any amendment in the legislation ought to be carefully considered with a balance in the primary considerations being a person's right to a fair trial, the right to privacy and a victim's right to remain anonymous or ultimately tell their story as part of their recovery process.

Of primary importance is ensuring that the details are published at the conclusion of proceedings. This includes allowing sufficient time for any appeal proceeding to be finalised. To this end, the Northern Territory laws are preferred which strike the right balance importantly for all parties by delaying any public story telling until after the criminal process has been finalised.

If restrictions on publication of information about sexual assault or domestic and family violence cases were relaxed, what measures (if any) should be put in place to protect and promote the rights of victims? (Question 34)

If restrictions were relaxed, the legislation should ensure that any consent expressly states in writing what the stated document or evidence is (that is being made available) and that the person consenting to the publication has had an opportunity to seek legal advice about giving that consent.

Should there be a discretion for courts to allow the publication of the identity of a child convicted of rape or sexual assault with the victim's consent? (Question 35)

While it is accepted that there is a shift in community attitudes regarding the interests of victims to allow them to tell their stories, the current provisions allow for appropriate protections striking a reasonable balance between privacy considerations and a fair trial. In view of this, any changes should not interfere with the right to a fair trial or weaken any of the existing protections, for example in matters involving children. We oppose any amendment which alters existing restrictions on the publication of the identity of child offenders.

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94 *Sexual Offences (Evidence and Procedure) Act (NT)* 1983 – s6.

Regarding the child victim

It is overwhelmingly our experience that the victims of sexual offending by children are themselves children. Further, they are often children who come from backgrounds that are at least as prejudicial as that of the offender, and perhaps have some familial or other relationship to the offender.

To consent to such publication may mean that the victim child is irrevocably identified as a victim of a sexual offence.

The ability of the victim to provide informed, free and voluntary consent to such a matter must be seriously considered. There must be examination of whether the victim child grasps the concept and ramifications, is at risk of being re-traumatised if they can be identified as the victim, and can make the decision freely without the influence of parents, guardians or other involved persons.

Further, there must be consideration of whether a child victim is in a position to consent.

For any child victim, would there need to be an assessment conducted or ordered by the court to confirm they are fit to consent, somewhat akin to a fitness for trial assessment? Who would be qualified to conduct such an assessment, and what would it involve? There would in our view be a significant risk that such an assessment would re-traumatise the victim, but also a question of whether the court can be confident the victim has provided informed, free and voluntary consent without it.

If the victim were a child aged under 10, would they be asked to consent in circumstances where the legal position is that they do not themselves have (or, by extension, comprehend) the ability to be held criminally responsible for their own actions?

If the victim were aged under 14, would they be asked to consent in circumstances where the presumption of *doli incapax* exists?

If the victim were aged under 16, would they be asked to consent in circumstances where they at law they cannot consent to sexual intercourse?

And for any victim aged under 18, would they be asked to consent in circumstances where they have not yet reached the age of majority?

Regarding the child offender

The effect of sections 234 and 301 of the YJA is that the starting point is that a defendant child must not be publicly identified during the course of the proceedings and following their finalisation.

We have been unable to locate empirical evidence to support the contention that publicly identifying child offenders will deter children. On the contrary, the 2008 report of the New South Wales Standing Committee on Law and Justice titled "The prohibition on the publication of names of children involved in criminal proceedings" showed that such youth crime reforms may both fail and further add to the problem of childhood offending.[95]

That report explained the rationale for treating children differently within the criminal justice system, stating:

> *"The existence of separate juvenile justice systems is based on the recognition that children warrant different treatment to adults involved in criminal proceedings. Children, due to the continuing development of the frontal lobes that does not culminate until the early to mid-twenties, exhibit behavioural and emotional deficits compared to adults. They have less capacity for forward planning, delaying gratification and for regulating impulse. Impulsivity*

[95] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008.

is a commonly observed element in juvenile offending and raises questions as to the culpability of juveniles in relation to criminal behaviour." [96]

As such, publication of the identity of a child offender is unlikely to act as a deterrent to offenders or would-be offenders.[97]

This is particularly so when our experience is that many instances of sexual offending by children indicate a need for education around consent and sexual boundaries, rather than an entrenched attitude of criminal behaviour. Further, Peter Muir, Deputy Director General (Operations), Department of Juvenile Justice, stated in evidence before the New South Wales Standing Committee on Law and Justice that the notion of specific deterrence through public identification of offenders was largely redundant as most children offend only once:

"The vast bulk of young people who offend only ever do so once … [They] have some sort of commitment to the mainstream values, laws and mores of our community once they are caught the act of being caught is a sufficient deterrent to them." [98]

Reasons for the conclusion that publication of the identify of a child offender should not be permitted included that such identification:

- could lead to stigmatisation, alienation and undermine both short and long term attempts at rehabilitation and reintegration, potentially leading children into isolation and causing bitterness towards their community resulting in further criminal behaviour;[99]
- could sabotage employment opportunities;[100]
- could lead to vigilante action;[101]
- could be counterproductive in that children may consider the label as a "badge of honour" and start competing for notoriety, leading to a reinforcement of deviant behaviour and an increase in offending;[102]
- would result in children being labelled as a criminal, which may lead them to identify with that label and increase recidivism by strengthening a child's bonds with criminal subcultures;[103]
- the family (including siblings) of the identified child could be placed in a vulnerable position.[104]

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[96] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008 at page x in the Executive Summary.
[97] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008 at page 33.
[98] Mr. Muir, Evidence, 18 February 2008, pp 8-9
[99] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008 at pages 41, 15, 17, 21
[100] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008 at pages 22 to 23.
[101] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008 at page 32.
[102] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008 at page 24 to 26.
[103] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008 at page 38.
[104] The prohibition on the publication of names of children involved in criminal proceedings, New South Wales Standing Committee on Law and Justice, 2008 at page 3.

The 2006 report updating the Human Rights and Equal Opportunity Commission's activities, *An Update on the Work of the Human Rights and Equal Opportunities Commission*, also argued that naming further punishes children to the detriment of their rehabilitation:

> *"In practice, the consequences of 'naming and shaming' juvenile offenders are often far worse than the punishment imposed by the court. Naming young offenders can jeopardise their prospects of future employment, inflict psychological damage and lead to verbal or physical abuse. In short, 'naming and shaming' juvenile offenders can deal a knock-out blow to the prospect of rehabilitation."* [105]

Further, in relation to the impact of publication of a child's identity on rehabilitation, the Northern Territory Court of Appeal in *MCT v McKinney & Ors* (2006) NTCA 10 at 20 stated:

> *[T]he fact now almost universally acknowledged by international conventions, State legislatures and experts in child psychiatry, psychology and criminology, [is] that the publication of a child offender's identity often serves no legitimate criminal justice objective, is usually psychologically harmful to the adolescents involved and acts negatively towards their rehabilitation.*

To publish details of a child's identity is in breach of Article 16 (right to privacy) of the United Nations Convention on the Rights of the Child, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").[106]

The Charter of Youth Justice Principles as set out in Schedule 1 of the YJA is specifically designed to balance public safety and the need to hold child offenders accountable for their actions, taking into account the special vulnerability of children and the need to prevent entrenching offending behaviour. To publish the identity of a child offender would be at odds with a number of Youth Justice Principles.

Relevant Court of Appeal authorities in Queensland appear to have favoured non-publication.

In *R v SBU* [2011] QCA 203, the Court of Appeal set aside the sentencing judge's order permitting publication of information which identified a child convicted of murder. The Court of Appeal held that considerations of the child's rehabilitation weighed against the making of the order as the community had an interest in the child's rehabilitation, which would likely be prejudiced by allowing the publication of identification information.

In *R v SDK* [2020] QCA 269, the Court of Appeal set aside the sentencing judge's order permitting publication of information which identified the applicant, who was 17 years old at the time of committing an offence of intentionally doing grievous bodily harm. As McMurdo JA noted:

> *"It is evident that the power under s 234(2) is reserved for very serious cases. Not only must there have been a life offence, which involved the commission of violence against a person and which was a particularly heinous offence in all the circumstances, but also the Court must be satisfied that notwithstanding the impact of publication on the child's rehabilitation, there are countervailing considerations which warrant the order being made.* [107]

> *"This power must be exercised according to the terms of s 234, and also in the context of the principles prescribed by s 150 of the Act, which place a particular sentencing*

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[105] John von Doussa, HREOC, 2006, An Update on the Work of the Human Rights and Equal Opportunities Commission, last updated 1 November 2006, as cited in the NSW report at 2.72

[106] United Nations Standard Minimum Rules for the Administration of Juvenile Justice

[107] *R v SDK* [2020] QCA 269 at [19]

importance on the rehabilitation of the offender which may not exist in the case of an adult offender." [108]

Are there other issues relating to public reporting of sexual offences that impact women and girls' experience of the criminal just system? (Question 36)

No.

Legal and court processes for sexual offences

In responding to Questions 50 – 59 LAQ has had regard to the following:

- QLRC's *Review of consent laws and the excuse of mistake of fact report*;
- LAQ's submission in relation to the QLRC review (previously provided to WSJT)
- LAQ's response to the WSJT Discussion Paper 2 – Annexure C to this submission.

Should Queensland's laws on consent be amended again before the impact of amendments recommended by the QLRC can be properly evaluated? (Question 50)

The law should not be again amended before there is proper evaluation of the impact of the reforms recommended by the QLRC which have been enacted into legislation. The QLRC conducted a comprehensive review of consent laws and the excuse of mistake of fact. The QLRC extensively reviewed trial transcripts and appeal decisions, with a view to achieving an evidence-based analysis of how the laws were operating in practice.[109] That analysis informed the QLRC's recommendations for reform.

Are there risks in Queensland not adopting an affirmative consent model as exists in New South Wales and will shortly be adopted in Victoria? Can these risks be mitigated while maintaining an accused person's right to a fair trial? If so, how? (Question 51)

There are no risks in **not** adopting an affirmative consent model as exists in New South Wales.

In Chapter 5 of Report No. 78 of 2020, the QLRC conducted a comprehensive analysis of consent and affirmative consent. LAQ relies upon the analysis of consent law at 5.3 to 5.8 and respectfully adopts the Commission's observation at 5.9 that:

> "To the extent that the law in Queensland requires the 'giving' of consent and confirms that an absence of objection is not consent, the current definition of consent in section 348(1) has attributes of an 'affirmative consent model'."

The code and common law jurisdictions differ significantly in the way criminal responsibility for serious offences is structured. At 5.22, the QLRC stated:

> "As discussed in Chapter 7 below, in the common law jurisdictions the question of whether a defendant took steps to ascertain the consent of the complainant is a matter relevant to an element of rape and sexual assault, which each require knowledge of absence of consent on the part of the defendant. In Queensland and the other code jurisdictions, where knowledge of absence of consent is not an element of the offences, the steps taken by a defendant to ascertain the consent of the complainant are relevant to whether the defendant acted under an honest and reasonable, but mistaken, belief that the complainant was consenting."

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[108] *R v SDK* [2020] QCA 269 at [20]
[109] QLRC Report No 78 of 2020 at [13] – [16].

LAQ reiterates its submission to the QLRC in the following terms:

> "As demonstrated in Annexure 1, the wording of section 348(1) and (2) ensures consideration of the concepts behind the "affirmative consent" model within our current laws. The suggestion of someone saying nothing and/or doing nothing equating to consent will have little traction when regard is had to what is not "freely and voluntarily given" in section 348(2), nor when addressing the reasonable element of a defendant's belief under section 24. Silence will mean different things in different contexts and juries need to be allowed to consider and interpret silence in the circumstances. What a defendant honestly believes is taken out of his/her hand and comes down to a jury's assessment of reasonableness. The "reasonable" element acts as a safeguard to ensure community standards are upheld." [110]

The summary of cases in Annexure 1 of our submission to the QLRC demonstrates that the current provisions operate in a way that accords with community expectations and standards as to the meaning of consent.

Broad non-exhaustive provisions, with mistake limited by an objective component of reasonableness, allows the community's representatives in the court room (the jury) to have regard to the context and all the circumstances of a particular case.

We reiterate our previous submission to the QLRC at 5.3:

> "Where it is operative, the current provisions allow a jury to determine the facts and context of the actions having regard to all the circumstances in each case. The use of the general phrase 'freely and voluntarily given' in conjunction with the non-exhaustive, broad list of circumstances ensures the trier of fact can apply the definition in section 348 in a flexible and meaningful way … the current provisions provide a suitable framework within which actions can be appropriately measured against community standards on a case-by-case basis."

The risk in adopting an affirmative consent model lies in the unintended consequences that come with attempting to overregulate and second guess human behaviour that is familiar to members of a jury – ultimately such overregulation may result in the conviction of innocent people. If an affirmative consent model is adopted, in our view there will be difficulties in mitigate this risk without the introduction of cumbersome, complex provisions.

LAQ respectfully adopts the QLRC's observations at 4.72 and 4.119:

> "In relation to the definition of consent for sexual offences, those Commissions cautioned that 'legislation alone is too blunt a tool to effectively inform community understandings, attitudes and beliefs about appropriate sexual interactions', and that legislative reform should be 'supported by community education'.
>
> However, there are limits to what the criminal law is practically and properly able to achieve in terms of changing social practices. Sexual offences occur within a broad social context and raise complex issues that go beyond the criminal law on consent. Legislative amendment is only one means of addressing these issues."

A more appropriate way to bring about social change is through targeted community education.

A further unintended consequence is that an affirmative consent model could trigger the need for more rigorous and extensive cross examination of complainants. This may also lead to delays and longer trials as well as the risks of inadmissible evidence and mistrials occurring.

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[110] Annexure 1 of our submission as provided to the QLRC.

Do Queensland's current laws on consent impact on the victim during the court process? If so, how? (Question 52)

If the issue of consent is in contention at trial, it is an inevitable consequence that current laws on consent impact upon a complainant during the court process.

Short of abolishing the trial process and acting on or accepting the untested testimony of a complainant, there is no possible amendment to consent law which can mitigate this impact. Any further mitigation will undermine an accused person's right to a fair trial, which must include an ability to properly test the evidence against him or her.

What are the risks or benefits of further reform such as the alternatives discussed above? (Question 53)

- Redrafting the definition of consent so that consent must be 'agreed' rather than 'given'.

  LAQ respectfully adopts the QLRC's view at 5.72 – 5.77 that there should not be such an amendment, especially noting:

  > … the current definition of consent already reflects a communicative model in that the definition requires consent (as a state of mind) to be 'given' (that is, communicated) to the other person. The current position in this regard is clear and settled. The introduction of a new term like 'agreement' would not substantially change the operation of the law and may create uncertainty in interpretation. (5.75)
  >
  > … Absence of consent is proved by asking the complainant whether the complainant consented to the sexual act on the occasion in question. This focus on the complainant's state of mind is the means by which control over sexual autonomy is respected. Any approach that shifts the focus away from the complainant's state of mind is undesirable. (5.76)

- Including a provision that provides a non-exhaustive list of circumstances where consent does not and cannot exist.

  Section 348 (2) currently provides a non-exhaustive list of circumstances where consent does not and cannot exist. The definition of consent in s 348 (1) is sufficient to capture any circumstance in which consent does not and cannot exist.

  We agree with the view of the QLRC at 6.28 that one of the core strengths of the criminal law in Queensland is the combination of certainty and flexibility that comes from the relationship between the Criminal Code and the significant body of case law that applies and interprets its provisions.

  We respectfully adopt the Commission's view at 6.29 to 6.31.

- Removing the ability for a defendant to rely on self-induced intoxication as a reason for having an honest belief as to consent.

  This issue was comprehensively canvassed by the QLRC. Prior to the recent legislative amendment, Queensland courts had held that voluntary intoxication negated the availability of the excuse of mistake of fact under section 24 because a mistaken belief induced by voluntary intoxication was not reasonable.[111]

[111] See QLRC at 7.117 – 7.119.

LAQ notes the QLRC's conclusion at 7.132 that the law relating to an intoxicated defendant's mistaken belief as to consent is well established. Voluntary intoxication is not relevant in determining whether a defendant's mistaken belief that the complainant gave consent was reasonable.

Upon the recommendation by the QLRC, and by 2021 amendment, s 348A (3) now states that in deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person.

The issue of any further amendment was considered by the QLRC and rejected. LAQ reiterates our submissions to the QLRC at 7.131 that further amendment is unnecessary and would make no substantive change to the law in Queensland.

LAQ respectfully adopts the view of the QLRC at 7.135, which implicitly rejects any notion that the law should be amended beyond a statutory recognition of the pre-existing case law.

- Amending s348A(2) to provide that regard must be had (rather than may) to anything the defendant said or did (or did not say or do) to ascertain consent when considering whether they had an honest and reasonable belief about consent.

  There is no benefit to such a reform, but there are risks as identified in the QLRC report.

  At 7.108 the QLRC recommended that the Criminal Code be amended to include a provision to the general effect that, for offences in Chapter 32, in deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, regard may be had to what, if anything, the defendant said or did to ascertain whether the complainant gave consent. The Commission did not consider that such an amendment changed the current law, but that it would give clear expression to the law as it stood.

  LAQ adopts the submissions made to the law reform commission at 7.99 that:

  > "… there is no need for such changes in that 'a jury may already take into account any steps taken by the defendant as part of the circumstances surrounding whether the belief of the defendant was reasonable'.
  >
  > … 'given the very wide variety of factual circumstances under which the law is meant to operate and be applied to sexual relations, there is strength and logic and flexibility in this approach'."

  An amendment from 'may' to 'must' risks importing a pre-requisite that unless 'steps' were taken by the defendant to ascertain consent, mistake is excluded.

  LAQ reiterates our submissions to the QLRC at 7.100:

  > … that inclusion of a 'steps' requirement may have the effect of 'imposing a structure' onto human relationships, in particular onto 'all lawful sexual conduct'. It could 'also apply unfairly to people who are immature, impaired or unsophisticated who may not be in a position to understand this level of regulation'.
  >
  > … it would be prescriptive and would risk criminalising consensual sexual activity. … such an approach would do more than simply shift the focus of inquiry to the defendant's actions, it would shift 'the evidentiary onus to the defendant to show that they made reasonable efforts to ascertain consent'. This would … be a significant change, which would not necessarily improve the experiences of victims.

Should stealthing be explicitly referenced in Queensland law? If so, should stealthing be a stand-alone offence or incorporated into the existing law in the definition of consent or in a provision such as section 218 of the Criminal Code, Procuring sexual acts by coercion? (Question 54)

LAQ agrees with the QLRC's recommendation at 6.143 that s348(2) of the Criminal Code should not be amended to include specific circumstances where the defendant sabotages or removes a condom without consent.

As observed by one respondent at 6.141, 'such circumstances would constitute a conceptually different offence to rape and sexual assault and should therefore properly form a separate and distinct offence.'

As for enacting a stand-alone offence, we would caution against attempting to address every concerning societal problem with the blunt instrument of the criminal law.

How are victims supported and their needs met during court processes for sexual offences? Should more be done and if so, what? (Question 55)

We refer to our submission in response to Discussion Paper 2, at pages 17 - 21.

Are the needs of women and girls from diverse backgrounds being met in the court process for sexual offences? Should more be done and if so, what? (Question 56)

We refer to our submission in response to Discussion Paper 2, at pages 17 - 21.

How can criminal court processes for sexual offences be improved to protect victims from harm while providing a fair trial for the accused person? (Question 57)

We have addressed this in our response to question 9 of this Discussion Paper. There are a range of particular protections in place to reduce trauma to victim complainants during trial which are regularly invoked throughout the process. LAQ does not support reform which would further erode the rights of the accused's right to a fair trial.

What are the risks and benefits of video-recorded interviews between police and victims of sexual offences for use as evidence-in-chief in trials? (Question 58)

We refer to our submission in response to Discussion Paper 2, at page 24.

Do key participants in the court process for sexual offences understand and respond appropriately to the trauma experienced by a victim? (Question 59)

We refer to our submission in response to Discussion Paper 2, at pages 17 - 18.

How is similar fact and propensity evidence being considered in Queensland? Could the law in Queensland be improved to ensure that a fair trial for the accused takes into account the 'triangulation of interests' of the accused, the victim and the public? If so, how? (Question 61)

Legal Aid Queensland supports the consideration of reforms to the criminal justice system designed to better support participants, including protecting the victims of sexual offending against the risk of further trauma.

Legal Aid Queensland does not support any reform which has the effect of eroding or compromising well established protections embedded in our criminal justice system.

There is an inherent tension between the understandable concern to protect victims of sexual offending from further trauma and the important protections enshrined in our criminal justice system including the

presumption of innocence, the onus and standard of proof, and the rationale underpinning the rules of evidence.

The Royal Commission into Institutional Responses to Child Sexual Abuse noted, *"Many survivors have told us that they feel that the criminal justice system is weighted in favour of the accused…."* [112] as a matter in support of reform. The reality is that the criminal justice system is weighted in favour of an accused by very deliberate design and for good reason.

In our view some of the commentary that came out of the Royal Commission's Criminal Justice Report which has been subsequently raised when discussions on concepts of similar fact and propensity occur do not align with our experience in criminal courts. Evidence of this nature is routinely admitted into criminal proceedings involving sexual offences.

The existing admissibility tests for what would be classified as tendency or coincidence evidence recognise the prejudicial nature of such evidence and require a strong degree of probative force to admit such evidence. They are high but not impossible standards. Over time there has been a watering down of the safeguards that originally existed with this body of evidence and the common law has seen a shift from similar fact to similar allegation.

In Queensland the threshold for these principles has been lowered by the broadening of admissibility of relationship evidence, uncharged acts, the assumption of truth of the allegations (*Pfennig*) and removal of the suggestion of collusion from the joinder issue (section 597A(1AA)). On the issue of collusion section 132A of the *Evidence Act 1977* has legislated that similar fact evidence is not to be ruled inadmissible on the grounds of collusion.

To the extent myths and prejudices persist in the community, they are more appropriately addressed by community education. It is not appropriate to tweak the trial process to compensate for any failure in community education. The very essence of trial by jury is to harness the knowledge and attitude of members of the community, not shape them.

Community attitudes have evolved and improved significantly over time. It is expected that positive change has been reinforced by the #metoo movement and the recent events in Australian politics.

The advantage of trial by jury is that the persistent misconceived perceptions of a minority are unlikely to hold sway amongst a (potentially) diverse group of 12.

What impact, if any, does the present law about similar fact and propensity evidence have on the experience of victims of sexual offences? (Question 62)

LAQ adopts our response to the WSJT Discussion Paper 2 (Annexure C) in response to this question.

There is insufficient evidence to warrant a reform of laws concerning similar fact and propensity evidence in Queensland.

Any proposed reform should be referred to the Queensland Law Reform Commission ("QLRC") for detailed consideration. The QLRC has not considered the issue since 2005.[113]

To the extent the Royal Commission into Institutional Reponses to Child Sexual Abuse recommended reforms to "facilitate more admissibility and cross-admissibility of tendency and coincidence evidence and more joint trials in child sexual abuse matters',[114] there is no evidence regarding the Queensland experience.

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[112] Criminal Justice Executive Summary and Parts I – II, at p10

[113] A Review of Jury Directions. Report, Report 96, Volume 2 (April 2009).

[114] Recommendation 44

As regular advocates in the Court of Appeal, our lawyers are not witnessing increasing trends of miscarriages of justice brought about by the admissibility rulings and directions associated with this type of evidence that would justify such a shift in our existing laws as is presented in the proposed reforms.

A review of recent appellate decisions and pre-trial rulings demonstrates similar fact and propensity evidence is routinely admitted and trials concerning multiple complainants routinely joined.

DECISION	EVIDENCE	OUTCOME
R v Thompson [2022] QCA 36	Multiple complainants	Evidence admitted Appeal dismissed
R v SDP [2022] QCA 17	Multiple complainants	Evidence admitted Appeal dismissed
R v PWE [2020] QDCPR 132	Sexual activity	Evidence admitted
R v Lawton [2021] QCA 36	Multiple complainants	Evidence admitted Appeal dismissed
R v ABF; R v MDK [2021] QCA 240	Sexual interest	Evidence admitted Appeal dismissed
R v Smith [2021] QCA 105	Prior sexual assault	Evidence admitted at trial New trial ordered on other ground.
R v Harris [2021] QCA 96	multiple complainants	Evidence admitted Appeal dismissed
R v LAS [2021] QCA 221	multiple complainants	Evidence admitted Appeal allowed – inadequate directions as to use.
R v Nathaniel [2021] QDCPR 77	multiple complainants	Evidence excluded
R v WBN [2020] QCA 203	multiple complainants	Evidence admitted Appeal allowed on other grounds. Fraser and McMurdo JJA finding the counts should not have been tried together.
R v SGW [2019] QDCPR 74	other sexual activity	Evidence admitted

The matter of *R v Nathaniel* [115], identified as an example of a matter in which similar fact evidence was ruled inadmissible is atypical in that it involved a 15-year-old accused. The trial judge noted, "However,

[115] [2021] QDCPR 77.

caution must be exercised when looking at a situation where the offender himself is a child or a young adult. In situations where an offender and the victim are close in age, the feature of an unnatural interest in young people does not exist." [116]

The common law, as modified by s132A *Evidence Act* 1977, governs the admissibility of similar fact or propensity evidence in Queensland. The common law developed to strike a balance between the proper admission of evidence and protecting an accused against the prejudice of improper propensity reasoning. There is no cogent evidence that the concerns for the fairness of the trial process that underpin the development of the common law are either misapprehended or exaggerated.

The common law has evolved with improved community awareness of the dynamics of sexual offending and abuse. This is reflected in the weight of recent decisions favouring admissibility. Concerns expressed regarding the rules for the admission of similar fact and propensity evidence reflect an understanding of the law which is somewhat dated.

The relatively recent decision of *R v McNeish* [117] provides a comprehensive statement of the law in Queensland. A thorough consideration of the decision demonstrates Queensland courts are alive to the dynamics of sexual abuse and framing the law responsively.

In summary similar fact and propensity evidence is admitted:

1. As relationship evidence, the express purpose of which is to protect a complainant witness against a suggestion their evidence as to an isolated incident or incidents is implausible. The court observed,

> "Such evidence is admitted because the interests of justice require that the jury be able to understand the Crown case by seeing the case in its true factual context and not within an unrealistically truncated form. If such evidence were to be excluded, the jury would be denied the real factual basis upon which to understand aspects of the case that the complainant's and the accused's actual history might explain, such as the existence in the appellant of peculiar sexual urges that are not shared by most of the population, the possible reasons for a complainant's particular reactions or lack of reactions, the explanation for a complainant's failure or delay in complaining or for an offender's apparent risk taking and brazenness in offending."[118]

2. To demonstrate a sexual attraction and motive. The court observed,

> "In cases involving sexual offences against children a more accurate term than "motive" might be "urge" or "desire". Many motives in circumstantial cases are really constituted by emotional urges rather than by well-considered reasons, whether the motive is greed or lust or something else of that kind. Sexual offending against children may be the product of an offender's lust for a particular child or it may be the result of a lust for children generally."[119]

3. To demonstrate an accused was prepared to act on a sexual interest because. "he had committed similar offences against the complainant or others previously"

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[116] [2021] QDCPR 77 at [8], Richards, DCJ
[117] [2019] QCA 191 (see also R v Thompson [2022] QCA 36
[118] Ibid at [33]
[119] Ibid at [34]

4. To identify the offender.

5. The "Pfennig test" reflects the test that applies to other circumstantial evidence.[120]

6. The "Pfennig test" will almost invariably result in the admission of evidence of uncharged sexual offences against a single complainant. The reasoning is the same that applies in the Uniform Evidence law jurisdictions.[121]

7. In cases involving uncharged acts against other persons other than the complainant, "the logic of probability reasoning dictates that there must ordinarily be some feature that links the two sets of evidence together." That statement of principle was derived from the High Court in *R v Bauer.*[122] Bauer was an appeal concerning the *Victorian Evidence Act*.

8. "However, in sexual offence cases, it is not necessary that the particular acts that constitute the uncharged offences and the particular acts that constitute the charged offence be of the same kind. Evidence of uncharged sexual offences may be relevant and highly cogent even if the acts that constitute those offences are different from the charged offence."[123]

9. A sexual interest in girls under 16 and a preparedness to act upon that interest may in itself provide a sufficient connection even though the physical acts of abuse are disparate in nature.[124]

10. "….the real question that is posed is not whether probative value "outweighs" prejudicial effect but whether the interests of justice require the evidence to be admitted despite the risk of its misuse. Whether it is called a weighing of probative value against the risk of prejudice to the accused or whether it is called a consideration of the interests of justice, the task remains the same."[125]

Those same principles were confirmed in the very recent decision of *R v Thompson.*[126]

The case for reform is not apparent having regard to the current state of the law in Queensland.

Legal Aid Queensland does not support any model that incorporates the test in Western Australian legislation, "such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial." The test ignores the complexities of the issue which challenge judges and lawyers. It leaves open an interpretation that could result in the de facto abolition of protections for defendants against impermissible propensity reasoning.

Legal Aid Queensland does not support the provisions of the model bill as currently drafted in that the provisions inappropriately fetter the court's regard to competing considerations relevant to the exercise of a discretion. There is no evidence Queensland Courts are exercising that discretion inappropriately.

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120 Ibid at [36].
121 Ibid at [37].
122 [2018] HCA 40.
123 [2019] QCA 191 at [40].
124 Ibid at [41], citing *Hughes v R* [2017] HCA 20.
125 Ibid at [56], citing *Pfennig v The Queen* (1995) 182 CLR 461, per McHugh J at 513, 515.
126 [2022] QCA 36.

Are there misconceptions about sexual offending in Queensland and do jury directions currently effectively address them? (Question 63)

Jurors make decisions based on their knowledge, experience, attitudes, biases and expectations. It is not feasible for jurors to come to a trial completely free of preconception or opinion, but this does not mean that they will be 'partial' in coming to a decision.[127]

It is fundamental that for an accused to have a fair trial the jury should reach their verdict by reference only to the evidence admitted at trial.[128] It is the experience of LAQ practitioners that juries are carefully directed to avoid reference to outdated stereotypes and irrelevant circumstances. For example, in *R v Cotic* [2003] QCA 435 the Court of Appeal thought the comments from the trial judge set out below were appropriate and the appeal was dismissed:

> "But I would comment to you that there are no rules about how people who engage in sexual abuse of children behave and no rules about how their victims behave. I would hope – and obviously most of you have never been in a position of a 14-year-old boy who is subject to this sort of sexual abuse – I hope that it doesn't apply to any of you and it is difficult to know how anybody who hasn't been in that position can really say how someone who is in that position is expected to behave afterwards.
>
> For example, the law for a long time assumed that if someone was a victim of a sexual abuse that such a person would promptly complain. But we now know that there are numerous victims of sexual abuse, particularly children, who say nothing about it for months or years or decades afterwards. They just go on living their lives in the same way as if nothing was happening. Now this shows how dangerous it is to make assumptions about how people in this position should behave, either generally or in a particular case. So consider carefully about the extent to which any of you are really in a position to assess whether behaviour of this nature by someone in such a position really is inherently improbable."

In *R v Davari* [2016] QCA 22 it was remarked that it is the experience of criminal courts that "people may react differently to sexual offences and there is no typical or proper response."[129]

LAQ refers the Taskforce to our submission on Questions 25 of the Queensland Law Reform Commission's review of consent laws and excuse of mistake of fact (page 10). In particular, the notation that there are already several protections which go towards dispelling old myths regarding rape complainants, including:

- Highly restricted cross-examination of prior sexual history;
- Expanded admissibility of preliminary complaint evidence;
- Change regarding admissibility and directions on corroboration;
- Limit on cross-examination at committal;
- Sexual assault counselling privilege;
- The change in the definition of rape and consent;
- Protections under the *Evidence Act* 1977 regarding how complainants give evidence (for example special witness); and
- Broader basis to admit relationship and uncharged acts.

Annexure B to those submissions contains the provisions relevant to those protections.

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[127] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020 at page 208

[128] *Murphy v The Queen* (1989) 157 CLR 94, 98 (Mason CJ and Toohey J).

[129] *R v Davari* [2016] QCA 222 at 55.

In compiling their final report on the matter, the QLRC identified that research indicates to some degree the existence of false preconceptions in the community.[130] It further acknowledged the study by Cheryl Thomas was provided to them prior to publishing and peer review.

Thomas' study was not the only research relied upon by the QLRC: with an Australian study conducted in 2017[131] also acknowledging that the proportion of people who have false preconceptions in the community were low and in decline.[132] This led the QLRC to opine that the influence of some rape myths may be overstated.[133]

While there is a divergence in academic opinion as to the methodology and conclusions drawn by Thomas in her research,[134] it can only be expected that with the increase of movements such as 'Me Too' and increased public awareness campaigns, that public preconceptions regarding the experience of rape victims will decline.

It is LAQ's view that any concern in relation to preconceptions or misconceptions about sexual offending in Queensland are better overcome by broad public awareness campaigns and education programs.

What are the risks and benefits in introducing:

- **legislation for jury directions based on those in Victoria and NSW and as recommended by the VLRC**
- **legislative amendments to enable expert evidence to be admitted about sexual offending as in Victoria? (Question 64)**

There is insufficient evidence to support this reform. The Taskforce appropriately acknowledges that further evidence is required regarding the "impact of jury directions on jurors".[135] The Victorian Law Reform Commission also concluded more research was required noting, "There are gaps in what we know about jury directions."[136]

There is no evidence cited to support the contention, "In Queensland jury directions about misconceptions about consent and sexual assault are not commonly given."[137] We have cited two authorities in our response to Question 63, in which those directions were given.

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130 Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020 at page 204 – 205.

131 National Community Attitudes towards Violence against Women Survey, which is the world's longest running survey of community attitudes towards violence against women

132 Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020 at page 204; Summary of findings from the 2017 National Community Attitudes towards Violence against Women Survey

132 Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78).

133 Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78), June 2020 at page 209.

134 Ellen Daly et al. 'Myths about myths? A commentary on Thomas (2020) and the question of jury rape myth acceptance' (2021) *Loughborough University. Journal contribution.*; Chalmers, Fiona Leverick and Vanessa Munro, 'Why the jury is, and should still be, out on rape deliberation'. (2021) *Criminal Law Review* 9, 753-771.

135 Women's and Justice Taskforce, Discussion Paper 3, page 60.

136 Victorian Law Reform Commission, Improving the Justice System Response to Sexual Offences, September 2021 at [20.22] – 20.26].

137 Women's and Justice Taskforce, Discussion Paper 3, page 60

The QLRC did not recommend "any change to existing laws to deal with perceptions that jurors might harbour false preconceptions."[138] having reviewed trial transcripts (including directions to the jury), appellate decisions and research.

Major reform (if any) of jury directions should be properly informed by the findings of the additional research identified as required and not proceed until that evidence is available.

The proposed reforms are informed by a desire to address a perceived need to afford complainant witnesses greater fairness in the trial process. It is properly acknowledged that it is important to preserve a defendant's access to a fair trial. It should be borne in mind that the features that make proof of (particularly word on word) allegations of sexual offending challenging to prove also limit the means available to a defendant to test those allegations. In that context, reforms that have the effect of bolstering the credit of a complainant can have a dramatic impact of a defendant's access to a fair trial.

Jury directions in Queensland are largely a function of the common law as modified by statue. This framework allows for flexibility and adaptability. It allows a trial judge to tailor directions to the relevant facts of a case to best assist a jury. There is a concern legislating jury directions will be unduly restrictive.

The provisions of the *Victorian Jury Directions Act* 2015 are unnecessary or problematic. The provisions variously:

1. Prohibit comment that complainants in sexual offence matters are an unreliable class of witnesses or so considered by the law or less credible if there is delay in making a complaint.[139]

   s632(3) Criminal Code 1899 expressly provides, in respect of all trial matters, "…the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses". An advocate is not permitted to state or suggest that the evidence of a class of witnesses requires special scrutiny unless that position is supported by law.[140] There is no such principle of law in Queensland that applies to complainants in sexual offence trials.

   Queensland law prohibits a trial judge directing a jury the evidence of a complainant is less reliable only because of delay in making a complaint.[141] That has been the law since 2003.

   The statements and practice of Queensland courts reflect an appropriate understanding and recognition of previous misconceptions about the relevance of delay in sexual offence matters. The Court of Appeal observed:

   > "[53] Reasoning of this kind is now well recognised as being without proper foundation and failing to allow for the reality that the making of a complaint of sexual assault for any complainant, let alone a child, is a harrowing experience. Indeed, the inappropriateness of giving judicial imprimatur to such reasoning was made plain by the legislature in 2003 by the insertion of s 4A in the *Criminal Law (Sexual Offences) Act* 1978…" [142]

2. Mandates a direction, with prescribed content, when delay is raised as an issue at trial.[143]

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[138] Queensland Law Reform Commission, Review of consent laws and the excuse of mistake of fact, Report No78, June 2020,
[139] s51, *Victorian Jury Directions Act* 2015
[140] For example, Supreme and District Courts Criminal Directions Benchbook, 38 Accomplices and 51 Identification.
[141] s4A(4) *Criminal Law (Sexual Offences) Act* 1978.
[142] *R v MCJ* [2017] QCA 11 Henry J (McMurdo O and Gotterson JA agreeing).
[143] s52, *Victorian Jury Directions Act* 2015.

These matters, including that delay is common and that there is no typical reaction to sexual violence, are routinely addressed by trial judges and noted in the cases cited above and in our response to Question 63.

The form of direction provided for by the Victorian provision lacks balance in that the content only invites a jury to consider why delay or lack of complaint may be explained away and omits any reminder that it is ultimately a matter for a jury to determine what relevance they attribute to delay in the circumstances of the case.

The provision as framed is particularly problematic given the provision permits the direction to be given before the evidence, at any time during a trial and to be repeated. The repetition of any direction, with the judicial imprimatur it carries, will tend to affect the balance of fairness in a trial.

In Queensland after consideration of the Criminal Justice Report stemming from the Royal Commission into Institutional Responses to Child Sexual Abuse, the *Evidence Act* was amended to include s.132BA which reformat the Longman Direction, requiring a higher standard of proof of disadvantage and removal of aspects of the direction traditionally helpful for the accused related to the impacts of delay.[144]

3. Mandates a direction, with prescribed content, when differences in a complainant's account are raised as an issue relevant to credibility and reliability.[145]

   This provision goes well beyond restoring the credibility of a complainant witness.

   It creates a limited class of complainant witnesses who enjoy a level of credibility which is, as a matter of law, less impeachable in the face of inconsistent accounts. No other witness the victim of trauma, complainant, defendant or otherwise is afforded that special status.

   The content of the direction communicates that as a matter of law "experience shows" that it is, "common" for there to be differences in accounts of a sexual offence". The direction obliges a jury to commence their consideration of the evidence on the basis inconsistency is to be expected, and it follows may well be of less moment. The reference to common experience is devoid of any nuance as to the extent and frequency of inconstancies said to be commonly encountered.

   The direction tends to distract a jury from the requirement to consider not only the credibility, but also the reliability of the evidence of a witness.

   Any direction of this nature should be limiting a jury to consider matters that might be relevant, such as age, or trauma, to its assessment of inconsistencies on an otherwise neutral basis.

Legislative amendments to enable expert evidence to be admitted about sexual offending as in Victoria?

LAQ endorses the conclusion of the QLRC that Queensland evidence law should not be amended to allow the admission of a special category of expert evidence ("counterintuitive evidence") in trial for sexual offences.[146]

To the extent they persist, which is not settled, community misconceptions about the behaviour of victims of sexual offending are best addressed by community education rather than reforms to the trial process. Otherwise, proposed reform should be evidence based.

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144 *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020*
145 s54D, *Victorian Jury Directions Act* 2015.
146 Queensland Law Reform Commission, Review of consent laws and the excuse of mistake of fact, Report No 78, June 2020, at 8.72 – 8.77.

If, despite the considered conclusion of the QLRC, it is determined to proceed with reforms to address misconceptions, the preferable mechanism is the use of jury directions, rather than expert evidence adduced at trial.

The admission of a special category of expert evidence in sexual offence trials is liable to create additional delay and conflict in the trial process to the detriment of both complainants and defendants as well as additional cost to the community.

Potential issues include:

1. The availability of suitably qualified experts and consequential delays in listing trials to accommodate availability.

2. More pre-trial applications to determine the admissibility or scope of the expert evidence again creating delay.

3. Longer trials as a result of the need for experts to give evidence and be cross-examined, and the potential for competing expert evidence to be adduced in a defence case.

4. The risk of trials aborting, or convictions being set aside on appeal as a result of issues with expert evidence. The process of adducing oral evidence at trial can be unpredictable. Inappropriate questions or answers can, and do, give rise to points of appeal.

New Zealand has a common law model developed from the interpretation of s25 *Evidence Act 2006* (NZ) which allows the admission of expert evidence, in all proceedings, if, "…the fact finder is likely to obtain substantial help from the opinion."

The New Zealand Court of Appeal has developed clear and appropriate guidelines for the admission of counterintuitive evidence, an examination of which supports the conclusion a jury direction will achieve the same outcome, as follows:[147]

- "The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. The witness should make it clear that the witness is not commenting on the facts of the particular case.

- The evidence must be relevant to a live issue in the case. Evidence about features in other cases of sexual abuse that are not raised in the particular case will not be relevant or substantially helpful in terms of s 25 of the *Evidence Act*. Having said that, it must be acknowledged that when the expert's brief of evidence is being prepared before a trial, it may not be apparent which matters involving counter-intuitive reasoning will arise in the trial.

- The witness should make it clear that the evidence draws on generic research in cases of sexual abuse and says nothing about the case in which evidence is being given. The witness should also make it clear to the fact finder that the purpose of the evidence is limited to neutralizing misconceptions which may be held by the fact finder.

- Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use

[147] *DH v R* [2015] NZSC 35 at [30].

> of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred"

The New Zealand guidelines provide a template for standardised jury directions carefully drafted to address misconceptions based on "generic research in cases of sexual abuse.". Jury directions are a more efficient mechanism.

If legislation is drafted to allow the admission of counterintuitive evidence, a similar framework for the admission of the evidence should be expressed in the legislation.

Victoria has a statutory model. s338 *Criminal Procedure Act* permits the admission of expert evidence about:

(a) the nature of sexual offences; and

(b) the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that he or she has been the victim, of a sexual offence including the reasons that may contribute to a delay on the part of the victim to report the offence.

A model that contemplates the admission of such a broadly and loosely defined category of evidence should not be favoured as it invites additional litigation and delay. Any reform should afford the participants in the trial process certainty. The New Zealand model provides a degree of certainty.

The Victorian Court of Appeal has observed that the Victorian provision would rarely allow expert evidence "as to the actual behaviour of the victim…"[148] a similar limitation as provided for in the New Zealand guidelines.

Research suggests that jurors find expert evidence, which is (appropriately) general in nature and does not directly address the conduct of a witness, of limited assistance.[149]

Discussion Paper 3 refers to an additional category of expert evidence noted by the Victorian Law Reform Commission ("VLRC"), namely, "How memory works (including when and how people repress or recover memories)". The Victorian legislation would not permit evidence of that nature.

In New Zealand, where a wider of range of expert evidence may be admitted, the Court of Appeal has taken a cautious approach to the admission of memory evidence, noting "Memory is a developing science, which may increase the risk inherent in expert evidence"[150] among other concerns.

Where permitted, expert evidence as to memory is not just called in aid of a complainant's evidence, but also in the defence case to challenge the reliability of a complainant.[151]

In recent Queensland cases expert evidence relating to hypnotherapy received by a complainant was permitted in the context of those cases.[152]

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[148] *MA v R* [2013] VSCA 20, at [100].
[149] Horan, Jacqueline; Goodman-Delahunty, Jane --- "Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned" [2020] UNSWLawJl 24; (2020) 43(2) UNSW Law Journal 707.
[150] *M (CA68/2015) v R* [2017] NZCA 333 [2 August 2017] at [28].
[151] For example, *R v BDX* [2009] VSCA 28 (childhood amnesia).
[152] *R v Pardon* [2020] QCA 290; *R v BDM* [2021] QCA 108.

Should the use of preliminary complaint evidence be extended to offences beyond sexual offences, including to the recommended new offence of coercive control? (Question 65)

LAQ does not support the extension of the use of preliminary complaint evidence to non-sexual offending.

Currently preliminary complaint evidence can only be used as it relates to the complainant's credibility. It is used to demonstrate consistency in the evidence given by the complainant.

It's an exception to the longstanding rule that hearsay evidence is not admissible. This rule has been developed over time based on sound reasoning. It should not be eroded further without due cause. The Discussion Paper does not identify any need which an expansion would address. Admitting evidence of preliminary complaint will increase the length of the trial, thereby increasing the costs and court time required. It also increases the risk juries will misuse this evidence as proof of what occurred, despite the judicial directions.

At page 61 of the Discussion Paper, an example is provided of using body worn camera footage taken by police with the victim, as potential preliminary complaint evidence. The use of this evidence in that way, could be problematic. Such footage is generally captured at a time which finds a victim complainant at their most vulnerable. It may not form a complete or even very accurate record of all relevant parts of the complaint. A victim complainant should have some agency over how their version is given and be afforded the opportunity to give that version on the record at a time when they feel ready to provide all relevant details. There are multiple reasons why a victim may not give a consistent or complete account in front of a police officer in the height of such a situation, not least of which is that their abuser is often present. There are also complicating features which can impact on the reliability of a preliminary account. These include mistrust of police and authority figures, communication barriers in terms of language and mental health or cognitive impairments. This is particularly the case amongst First Nations women and girls and those from CALD communities.

Elements of this type of evidence can be highly prejudicial not only to the defendant, but also the complainant. It's unstructured and often includes portions of inadmissible, irrelevant statements.

Is the legislation protecting counselling communications for victims operating effectively in Queensland? (Question 66)

The provisions of the *Evidence Act* s14H are sufficient to cover the range of considerations the court must have regard to in deciding an application for leave to access such communications. The court is further entitled to take into account any other matter is considers relevant in the exercise of the discretion.

A raft of decisions primarily from the District Court demonstrates the counselling communications process is being considered very seriously by the courts, that the provision of protected counselling communications is subject to rigorous scrutiny, and the requirement that the communications will have substantial probative value is being held to a high standard:

- *R v JML* [2019] QDCPR 23 – application for the production of protected counselling communication refused
- *R v DP* [2019] QDCPR 49 – application for the production of protected counselling communication refused in part and otherwise allowed with conditions
- *R v CDJ* [2020] QDCPR 115 – application for the production of protected counselling communication refused
- *R v Kay* [2021] QDCPR 10 – application for the production of protected counselling communications refused.

Further, practice directions have now been issued in an attempt to streamline the application process and resolve procedural issues that have arisen during the implementation of the legislation since it was enacted:

- Supreme Court Practice Direction 15 of 2021

- District Court Practice Direction 5 of 2021

The Supreme Court decision of *TRKJ v Director of Public Prosecutions (Qld) & Ors*: *KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 reiterated several difficulties previously identified with Division 2A of the Act. While the primary decisions were delivered prior to the practice direction, *TRKJ* identified certain difficulties that could not be addressed by a Practice Direction, including:

- The standing of the legal representatives for the counselled person at the leave stage (s14H) is a matter of the court's discretion rather than statutory standing.[153]
- The role of the prosecution, and the assistance required by the court in determining applications for leave.[154]

These issues are inextricably linked. As Applegarth J noted in TRKJ, s14L confers standing on the counselled person or counsellor on a question of whether a document or evidence is a protected counselling communication, and there is no equivalent provision when considering an application for leave.[155] Section 14H is considering the evidence by outlining a range of considerations when determining whether leave ought to be granted, allows the counselled person to provide evidence in the form of a written or oral statement outlining the harm likely to be suffered if the application is granted.[156]

However, a practice has developed of the prosecution not making submissions in an application which would otherwise benefit from submissions as to 'substantial probative value'.[157] As Applegarth J remarked,

> "legal representatives of counselled person have had roles and responsibilities thrust upon the by which they assist judges in deciding leave questions, including questions about "substantive probative value" about which prosecutors provide no assistance to judges. The appearance of legal representatives of counselled persons at the leave stage is a matter of the court's discretion rather than statutory standing.'[158]

While there is no criticism of the quality of assistance provided by legal representatives for the counselled person, the provision requires submissions in relation to the substantive probative force, which raises concerns canvassed by Judge Clare SC in R v MFJ [2021] QChC 34:

> "While the counselled person would otherwise be a beneficiary of the privilege, there are important policy reasons why Parliament would not confer standing for the whole application. Prosecutorial independence is one of the pillars of our criminal justice system. The substantive application for leave is under s14H. It focuses on the relevance and weight of evidence and the defence case, as well as the balance of public interest. Assessments of that nature are an integral part of prosecuting. On the other hand, the counselled person is not best placed to make objective submissions on the broader public interest. Moreover, the counselled person is likely to be a key witness in the trial. A process which encouraged

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[153] *TRKJ v Director of Public* Prosecutions *(Qld) & Ors: KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 at [44], [201].

[154] *TRKJ v* Director *of Public Prosecutions (Qld) & Ors: KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 at 202].

[155] *TRKJ v Director of Public Prosecutions (Qld) & Ors: KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 at [44].

[156] S14H(3) *Evidence Act 1977* (Qld).

[157] *TRKJ v Director of Public* Prosecutions *(Qld) & Ors: KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 at [26], [37], [38] and [40].

[158] *TRKJ v Director of Public* Prosecutions *(Qld) & Ors: KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 at [201].

> the complainant to participate in a forensic analysis of the whole case prior to testifying would be fraught with risk."[159]

In fact, the position of the counselled person in providing the required assistance has at one point been described as 'likely to be substantially inferior to that of the prosecution and to be largely, if not entirely, dependent on information provided by the prosecution.[160]

Further, Applegarth J remarked "the informed determination of that issue (insubstantial probative value) advances the interests of justice and the public interest in securing a fair trial for the accused [which is] one of the objectives of the statutory regime."[161]

The concerns that Judge Clare SC noted in *R v MFJ* [2021] QChC 34, are shared by LAQ. Any amendment which Parliament might consider to confer statutory standing to a counselled person or their legal representative on an application for leave, is not favoured by LAQ. There are risks that would attend that approach, which would tend to undermine prosecutorial independence and invite a complainant victim to engage in an evidentiary analysis of the matter before giving evidence.

Recognition of the need to balance the competing interests is reflected in s14H(3) of the *Evidence Act* 1977. We submit that any assistance to the court which may be gained by extending standing to the counselled person in section 14H of the *Evidence Act* 1977, is outweighed by the need to preserve the integrity of the proceedings and not in the public interest.

In any event, the absence of statutory standing does not preclude the court from granting leave. LAQ notes that each matter will turn on its own facts, and as the recent cases have demonstrated, the court will consider the relevant issues on a case-by-case basis.

Given judicial comment and the complexities the cases have identified in applying these provisions, LAQ supports a review of these provisions, including the impacts of the recent practice directions on the process. It is LAQ's view that this should be considered in a dedicated review, separate from the responses that may arise from the Taskforce's Discussion papers.

While it is clear that parliament intended to alter the balance of the rights of the accused to a fair trial with the interests in preserving the confidentiality of counselling communications,[162] LAQ expresses concern that moves to amend the *Evidence Act* 1977 (Qld) will further erode both the public interest, and the accused's right to secure a fair trial.

LAQ notes the increasing judicial commentary that the objective of the balancing exercise remains directed at the "interests of justice in the proceeding to which the prosecutorial functions and duties are directed".[163]

Alternative justice models

Should restorative justice approaches for sexual offences be expanded in Queensland? (Question 67)

LAQ has responded to this question from the perspective of children and adults investigated or charged with sexual offences.

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[159] *R v MFJ* [2021] QChC 34 at [10].
[160] *R v CDJ* [2020] QDCPR 115 at [72].
[161] *TRKJ v Director of Public* Prosecutions *(Qld) & Ors: KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 at [198].
[162] *TRKJ v Director of Public* Prosecutions *(Qld) & Ors: KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 at [173], [177].
[163] *R v CDJ* [2020] QDCPR 115 at [72]; *R v MFJ* [2021] QChC 34 at [5], [10]; *TRKJ v Director of Public Prosecutions (Qld) & Ors: KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297 at [192].

Children

There does not appear to be a need for restorative justice approaches for sexual offences to be expanded in relation to children as restorative justice approaches are, theoretically, available in relation to all sexual offences where a child is the defendant.

Under the YJA, a sexual offence (or any offence) may be referred to a restorative justice process by police instead of starting a proceeding provided the child admits the offence.[164] The criteria for referral are set out in section 22 of the YJA.

A sexual offence may also be referred to a restorative justice process by a court following a plea of guilty or a finding of guilt following trial.[165] That referral can occur under section 24A or 162 and 163 of the YJA.

Under section 162 of the *Youth Justice Act*, a court must consider referring the offence for a restorative justice process if a child enters a plea of guilty.

A Restorative Justice Order can also be imposed as a sentence order under section Part 7 Division 6A of the YJA providing certain preconditions are met under s192A:

> 192A Preconditions to making restorative justice order
>
> (1) A court may make a restorative justice order against a child only if—
>
> (a) the court considers the child is informed of, and understands, the process; and
>
> (b) the child indicates willingness to comply with the order; and
>
> (c) the court is satisfied that the child is a suitable person to participate in a restorative justice process; and
>
> (d) having regard to the following, the court considers the order is appropriate in the circumstances—
>
> (i) a submission by the chief executive about the appropriateness of the order;
>
> (ii) the deciding factors for referring the offence.
>
> (2) In this section — deciding factors, for referring an offence, means—
>
> (a) the nature of the offence; and
>
> (b) the harm suffered by anyone because of the offence; and
>
> (c) whether the interests of the community and the child would be served by having the offence dealt with under a restorative justice process."

The statistics published by Youth Justice in relation to the use of restorative justice for child offenders indicate there would be some benefit to the expansion of restorative justice approaches in the adult jurisdiction.

Youth Justice statistics indicate that victims and children who commit offences are positive about restorative justice conference processes and outcomes. For example, in an evaluation conducted by Youth Justice in 2018 reviewing feedback from restorative justice conferences over a 12-month period in 2016, 89% of victims were "satisfied with the outcome of the conference" and over 70% of victim

[164] Section 11 and 22 of the *Youth Justice Act*.
[165] Sections 163, 164 and 175 of the *Youth Justice Act*.

respondents reported the conference process would help them to "manage the effects of crime."[166] This is consistent with our experiences over years of practice.

Further, there is evidence from the same evaluation that restorative justice for child offenders has been shown to reduce re-offending:[167]

- 59% of children and young people who completed a conference between 1 July 2016 to 31 December 2016 did not reoffend within six months of their conference.
- 7% showed a substantial decrease in the magnitude of their re-offending.
- 11% showed a slight decrease in the magnitude of their re-offending.
- In total, 77% of children and young people either did not re-offend or showed a decrease in the magnitude of their re-offending.

If these statistics are broadly accurate in relation to sexual offending, and were to translate to the adult jurisdiction, the use of restorative justice processes could improve the experience of victims of sexual offences whilst holding those responsible accountable. There appears to be merit in expanding diversionary alternatives for adults such as restorative justice processes, with opportunities for referral to be provided at all stages of the criminal justice system as is provided for child offenders under the YJA.

Adults

The use of a restorative justice approach for adult defendants is limited in Queensland to Adult Restorative Justice Conferencing (formerly Justice Mediation), although there is almost no legislative framework for Adult Restorative Justice Conferencing.

Section 88 of the *Justices Act* provides, "(1B) The power to adjourn a hearing conferred upon justices or a justice by subsection (1) includes power to adjourn a hearing to enable the matter of a charge of a simple offence or breach of duty to be the subject of a mediation session under the *Dispute Resolution Centres Act 1990*."

Section 31 provides:

> " (1) Attendance and participation are voluntary, and a party can withdraw at any time.
>
> (2) An agreement is not enforceable unless the parties agree that it will be."

There is no legislation that defines the interaction between adult restorative justice and the criminal justice system.

The Director's Guidelines[168] include, among many other factors, "the availability and efficacy of any alternatives to prosecution;" (4(ii) (h)).

The Queensland Police Service Operation Procedures Manual (OPM) expressly addresses referrals to Adult Restorative Justice.

The OPMs note the process is only available in respect of matters before the following courts:

(i) Brisbane City;
(ii) Holland Park;
(iii) Ipswich;
(iv) Gold Coast;
(v) Coolangatta;

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166 'Working Together Changing the Story – Youth Justice Strategy 2019-2023' at page 9.
167 'Working Together Changing the Story – Youth Justice Strategy 2019-2023' at page 9
168 Guidelines issued by the Director of Public Prosecutions to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice.

(vi) Cleveland;
(vii) Richlands;
(viii) Townsville; and
(ix) Cairns.

Currently in our experience, as demonstrated from the OPMs above, there are limited options outside of greater Brisbane.

The OPMs also preclude referrals for strictly indictable offences and any offence involving a breach of domestic violence order or associated with an application for a domestic violence order, unless approved by the Officer in Charge of a prosecution corps.

The preferred policy within the OPMs is to discontinue proceedings if an agreement is reached during the restorative justice process. The policy is expressed as follows:

> "The completion of a restorative justice conference (RJC), including finalisation of all terms of the agreement, should result in the discontinuation of the investigation or prosecution of a matter. Continuation of an investigation or prosecution despite a successful RJC outcome may undermine the value of Adult Restorative Justice Conferencing.
>
> Upon being notified by the Dispute Resolution Branch, Department of Justice and Attorney-General the restorative justice conference (RJC) has been successful, the investigating officer or prosecutor is to finalise the matter in the public interest (see s. 3.4.3: 'Factors to consider when deciding to prosecute' of this chapter).
>
> Continuing the investigation or prosecution of the matter despite a successful restorative justice conference should only occur if there are exceptional circumstances." [169]

Though not a legislative requirement, in practice the courts will not refer a matter for restorative justice unless the prosecution support the referral irrespective of a complainant's attitude.

Through the adult restorative justice conferencing program that sits within the Department of Justice and Attorney-General (DJAG) there is no restriction on when (before, during or after a court proceeding) a matter might be referred for restorative justice. Referrals to the program (in relation to mediating offences) can be made by courts, police, prosecutors, corrective services, victims or defence lawyers. The program determines what is appropriate for conferencing. In our experience offences of violence beyond minor assaults are rarely mediated. It is predominantly low-level summary offending considered appropriate.

Putting aside the proposal relating to expansion into application to sexual offences, there is room for improvement generally on restorative justice conferences as an option within the criminal justice system. A legislative framework and improved resourcing of this option, in our view, could address low referral rates, greater uptake as a diversionary option from the criminal justice system, increase the nature of matters mediated, and improve the availability of the service across the state.

LAQ is encouraging of reforms that are supported by substantial and reliable evidence. Given the information available in the youth justice jurisdiction from evaluations of their restorative justice models (in our experience consistent over the years of practice) there is real value in recognizing this process in legislation to require consideration of it by police as a diversionary option, and as a pre-sentence or sentence option for courts. There is also widespread support for the expanded use of restorative justice amongst stakeholders including victims and victim advocates.

These types of changes would require significant investment in a properly resourced DJAG program to take on and facilitate a wide variety of matters to be designed to allow access to all participants in the

[169] 3.3.6 of the OPMs.

criminal justice system irrespective of geography. The use of readily available video conferring software should be explored if in person services cannot be facilitated.

The concerns that are raised against restorative justice are valid but can and should be managed by implementing an appropriate framework that supports and protects participants whose choice to engage must be informed and voluntary. Much could be learnt from the youth justice system in how they prepare and scaffold attendees to avoid retraumatizing victims and overcoming reservations of defendants.

Whilst it may be useful to assess proposed reforms in the context of sexual offences, reforms should be applied consistently across the criminal justice system or at least to offences of personal violence and domestic violence, with protections adequate to meet the needs of all victims of crime.

The Victorian Law Reform Commission identified[170] two concerns:

1. That recourse to restorative justice will create a perception, "sexual violence is unimportant and a private concern". This can be addressed, in part, by applying the reform broadly across the criminal justice system and supporting the victims. Any reform should be supported by with appropriate community education.
2. The risk of a victim of being re-traumatised. A victim will never be compelled to participate in a process. Protocols should be established to ensure a victim's participation is truly voluntary and that they are supported and protected during the process.

The Victorian Law Reform Commission has proposed a model. New Zealand has a well-established model as does the state of Vermont.

A draft model should be developed for consultation. Issues to be considered in drafting a proposed model include:

1. Whether a restorative justice process operates as a diversionary scheme or a matter to be taken into account on sentence or in the alternate subject to defined guidelines. The extent to which the wishes of a victim, supporting diversion, complainant might inform that decision.
2. If participation in restorative justice is a matter to be taken into account on sentence what, if any, framework is appropriate to ensure sufficient weight is given to participation so as to incentivise engagement.
3. To the extent a proposed model suggests engagement in treatment programs form part of restorative justice outcomes, the practical availability of those programmes, extent to which those programmes are realistically available.
4. In the context of the criminal justice system, the efficacy of a restorative justice process absent a substantial admission of liability. The concern that recourse to restorative justice will create a perception, "sexual violence is unimportant and a private concern", is in part addressed by applying the reform broadly across the criminal justice system. Any reform should be supported by appropriate community education.

How could the use of restorative justice processes improve the experience of victims of sexual offences whilst holding those responsible accountable? (Question 68)

Children

Our response to Question 67 outlines the evidence from recent Youth Justice evaluations of restorative justice processes. These results suggest generally these processes offers an opportunity to improve the experience of victims while holding offenders accountable.

[170] In its '*Improving the Justice System Response to Sexual Offences*' report.

Adults

We acknowledge there are stakeholders much better placed to speak to the experience of victims and how they might improve.

The Victorian Law Reform Commission has produced a significant body of work suggesting restorative justice if managed well can be an empowering process for victims of crime.

The express framework for any restorative justice process should promote healing for a victim (to the extent that is possible) and an offender taking responsibility for their actions.

What changes can be made in court case management and processes concerning sexual offences to improve the experiences of victims of sexual offences? (Question 70)

The court case management systems and court processes could be adapted to accommodate the specific interests of victims of sexual offences as compared to other offences, through the court listings and review processes, by adopting more formal measures to ensure that:

- The proceedings are expedited as much as they can be, recognising the increased trauma that ongoing delays can cause to a victim of a sexual offence, but balancing this against the need to ensure that defendants are provided sufficient time to engage representation and prepare their defence;
- Early allocation of trial prosecutors;
- Trials involving a sexual offence are allocated a priority trial listing within a given sittings;
- Prosecutors have complied with their victim-liaison obligations particularly in relation to information provided as to the progress of a matter;
- Prosecutors have the capacity and resources to consider and facilitate appropriate referrals to victims over the course of a matter.

LAQ supports the consideration of a modified case management and listings process for sexual offences, similar to that which has been set up in the pilot court programs in Auckland and Whangarei (discussed in question 71) as long as this does not modify the current trial processes in Queensland or otherwise prejudice a defendant in preparing and presenting their defence. LAQ does not believe any such changes would require legislative reform – the current measures set out in the *Evidence Act* 1977 exist to protect the interests of victims through the court process. A more structured court process may help to ensure that these measures are appropriately planned and applied for well in advance of the trial date and that victims are provided with timely updates on court events and processes, and the matters expedited.

In our experience, even in the absence of a formal case management system, in practice these matters are given priority in efforts to expedite, prioritise and list.

This is supported in some instances in relation to affected child witnesses:

- Magistrates Court Practice Direction No 2 of 2004 which provides guidelines for fast tracking committal hearings in matters involving affected child witnesses and intellectually impaired complainants.[171].
- District Court Practice Direction No 8 of 2019 (which supersedes an earlier related PD) which provides guidelines to expedite the giving of evidence by affected child

[171] Committal Matters Requiring Evidence from Child and Intellectually Impaired Complainants of Sexual Abuse "Fast Tracking".

witnesses and outlines the management of the recording, storing and editing of the evidence.[172]

Should a special sexual violence court be trialled in Queensland? What would be the risks and benefits? (Question 71)

We have considered the New Zealand trial of a court of this nature.

A NZ Law Commission Report from 2015 included in one of its recommendations that a specialist court for sexual violence be implemented as a pilot with the objection of minimising the risk of secondary victimisation of complainants.[173]

From December 2016, the District Courts at Auckland and Whangarei, in the North Island of New Zealand, piloted new court processes for sexual violence cases. The pilot was evaluated in June 2019 by Gravitas Research and Strategy Limited, for the Ministry of Justice.[174]

Whilst the New Zealand model wasn't a separate sexual violence court per se, it trialed having a separate list within the District Courts for cases where there were serious sexual violence allegations, where the defendant denied the charges and elected jury trial.

The Chief District Court Judge in 2016, Judge Jan-Marie Doogue, said judges had listened to concerns about the court process for people involved and timeliness was clearly an issue.[175]

In the New Zealand model, there was pre-trial case management by a judge with specialised training in sexual violence offending. The training program had emphasis on educating Judges about barriers faced by sexual violence complainants in reporting sexual offences and during a trial, communication assistance and use of expert evidence to assist juries in sexual violence trials.

The aims of the pilot were to reduce delays and improve the courtroom experience for complainants, while preserving the rights to a fair trial for defendants.[176]

The evaluation in 2019 found that judges had no significant challenges in following the guidelines although each region added processes in fitting with the environment in each court, such as having firm trial dates (not listing matters as back up trials) and having dedicated courtrooms within their existing court buildings for sexual violence cases. In Whangarei, there had already been protocols put in place for two years prior, so the pilot was seen as an extension of what was in place and there wasn't significant adjustments required.

The evaluation overview concluded that complimenting these practices, the use of separate entrances into court rooms and secure waiting spaces, communication assistances, pre-trial meetings with the presiding judge and existing practices of pre-trial court education visits, assistance from independent victims' advocates and support from Sexual Violence Victims' Advisors (SVVAs) operating within the court, have reduced the risk of secondary victimisation through the justice process for complainant witnesses.[177]

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[172] Evidence Act – Division 4A Evidence of Affected Child.

[173] Law Commission Te Aka Matua O Te Ture (2015) The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes. Wellington. p 12.

[174] Allison, S and Boyer, T, Gravitas Research and Strategy Limited (for the Ministry of Justice, NZ) *Evaluation of the Sexual* Violence *Court* 2019.

[175] Media Release – McNicholas, M Office of the Chief District Court Judge (NZ) *District Courts to Pilot Sexual Violence Court*, 20 October 2016.

[176] Allison, S and Boyer, T, Gravitas Research and Strategy Limited (for the Ministry of Justice, NZ) *Evaluation of the Sexual Violence Court* 2019 p1.

[177] Allison, S and Boyer, T, Gravitas Research and Strategy Limited (for the Ministry of Justice, NZ) *Evaluation of the Sexual Violence Court* 2019 p3.

It was considered there were overwhelming positives of the pilot that this model should continue, such as the reduction in time to trial. However, negatives or challenges that the model provided included:

- sufficiency and reliability of technology
- physical building design constraints and space
- areas where there are a small pool of defence counsel
- inconsistencies around cross-examination questioning protocols
- Gap in independent support provided to complainant witnesses.

We would not be opposed to a sexual violence court being of the type that is being modelled in New Zealand, that is, it is a separate list operated in the criminal court, not a separate court.

There are many protocols that underpin the NZ pilot that are in place already in Queensland District and Magistrates Courts.

Whilst there is not currently a separate list for matters involving sexual violence, where there are cases involving child witnesses, or special witnesses, pre-recording hearings are given priority listings, some of which are outlined in our response to Question 70.

The *Evidence Act 1977* provides protocols around evidence to be taken not only by alleged victims of violence but also now includes sexual assault counselling privilege outlined in our responses to other questions, in particular Question 9.

Practice Directions, and the Judges' Benchbook, outline procedures and gives guidance as to the directions to juries on matters involving witnesses in sexual violence cases.

The challenges identified in the running of these trial (such as the physical building designs of many courts, sometimes causes difficulties in giving sufficient privacy to vulnerable witnesses, and reliability of technology) are experienced in our jurisdiction.

Managing these matters through a separate list may take the priority and expediating already undertaken in our system one step further and devote a list time to these types of matters.

This could only be seen as a benefit to all those involved in these type of allegations. It would require a lot of support from court staff to coordinate the trial lists in Magistrates and the higher courts.

Less delay in these matters is beneficial to defendants, because they suffer detriment like remand in custody for this type of matter. Even those on bail suffer loss of employment, friends, and family due to the nature of these allegations. There is also an impact on defendants' mental health. There have been examples of defendants having to move interstate to escape the stigma of being charged with this type of offence, or a defendant's family having to leave the country to live with family as the defendant lost employment and a means to pay rent, living expenses, due to this type of charge. Reducing the delay in these matters would benefit defendants.

Legislative reforms and court practice in Queensland have developed to provide improved support and protection for complainants and victims in sexual offence proceedings including sexual assault communication privilege, pre-recording of evidence, the availability of a support person, and remote witness facilities. If further or better funded support is required for complainants and victims, it should be more cost effective to meet those needs within the existing system rather than incurring additional and duplicated costs establishing a specialist court.

Consideration could be given to the New Zealand model of appointing a Sexual Violence Victim Adviser (SVVA) to support complainants. The SVAA is usually appointed early in the proceeding after a defendant's firs appearance. The role is described as including:

- Providing information about the court process, rules and regulations – including delivering court education.

- Providing a 'touch point' within the court from first appearance to case disposal – someone the complainant witness can contact to have questions answered or to be kept updated on court proceedings.

- Keeping the complainant safe from the offender whilst in the court building, including meeting the complainant witness on arrival.
- Providing a waiting environment – and waiting experience – that is as positive as possible for the complainant witness and their supporters prior to them giving their evidence.
- Keeping the complainant witness as calm as possible whilst in the court environment.
- Being available to talk through the days' court proceedings.

The evaluation of the New Zealand Sexual Violence Court Pilot noted a concern that participation in a specialist court might have adverse "psychological and emotional impacts on all parties working exclusively in the area of sexual violence."

A review of the New South Wales Child and Sexual Assault Specialist Jurisdiction Pilot found a, "…lack of evidence of any real benefits produced by the specialist jurisdiction beyond the use of the remote witness suite..." (J Cashmore and L Trimboli, NSW Bureau of Crime Statistics and Research, 2005). Remote witness facilities are commonly used in trials in Queensland.

An alternate model

The model proposed by the New Zealand Law Reform Commission ("NZLR") (2012 issues paper. Alternative Pre-Trial and Trial Processes: Possible Reforms) for a specialist court for sentence proceedings for offences of sexual violence could be explored.

The NZLRC recommended,

"The key features of the proposed specialist court and its process would be:

- A guilty plea, informed victim agreement, and the suitability of the offender for participation in some form of intervention would be the governing criteria for whether the case was dealt with in the specialist court.
- Following entry of a guilty plea in the criminal court, the court would refer cases that appeared to meet the governing criteria to the specialist court for consideration.
- The referral would be assisted by a victim impact statement that would indicate the victim's views regarding the impact of the offending on them, but might also include reasons why they support referral to the specialist court in this particular case.
- Once referred to the specialist court, the judge would remand for a full assessment by a team of specialists to ensure suitability of the case for the specialist court process.
- Any cases not meeting the criteria or otherwise being found unsuitable would progress to sentencing in the usual way.
- After assessment, a report addressing the suitability of the case for the specialist court process and the development of an intervention plan would be delivered to the court; the intervention plan would comprise a tailored set of actions for the individual to complete, to enable them to take responsibility for their behaviour and address its causes, and could include treatment, education, reparations, apologies or other actions as appropriate to the case.
- If the specialist court judge was satisfied on the basis of the specialist report that the case was suitable for the specialist court process, the offender would be offered entry into the court and asked to commit to the proposed intervention plan

- Supervision of the intervention would be the responsibility of the specialist team who would have the ability to bring the case back before the court at any time should concerns about the offender's compliance with the plan arise.

- The specialist court judge would also have discretion to seek periodic reports on the offender's progress with the intervention plan and bring the offender back before the court.

- If the offender was declined entry to or refused to commit to the intervention (or entered but later withdrew his agreement to participate), the case would proceed to sentencing in the usual manner.

- All counsel appearing in the court would be required to undergo specialist training.

- At the conclusion of the intervention, the offender would receive a sentence that would reflect his participation in and progress after the intervention, which may or may not involve imprisonment."

A restorative justice process could be incorporated into the model.

The model incentivises offenders to accept responsibility for their conduct and in turn reduce the exposure of victims to the criminal justice processes.

The model should include a mechanism to refer appropriate cases pre-committal to reduce delay.

Research indicates that treatment is more effective when delivered in a community setting and in a timely fashion. Delivering treatment in the community should be more cost effective.

The protection of the community is better achieved by effective treatment than incarceration and temporary incapacitation.

The model will necessarily require significant investment. The investment is readily justified. We note:

1. There is no evidence increasing long periods of imprisonment:

   (a) achieving the goals or general and specific deterrence;
   (b) protect the community beyond a period of incapacitation.

2. The cost of imprisonment is prohibitively expensive and provides the community no return on that investment.

3. The best opportunity to protect the community is offender accountability and treatment.

4. The is little or no community based intensive sexual offender treatment available to offender's pre-sentence.

5. Sexual offender treatment programs in custody are usually delivered very late in a sentence or not at all in the case of shorter terms of imprisonment.

6. Any proposed reform said to facilitate the protection of the community must include a candid assessment of the availability and effectiveness of treatment options.

By analogy, Deloitte Economics analysed the respective costs of drug rehabilitation in custody as against residential rehabilitation (An economic analysis for Aboriginal and Torres Strait Islander offenders – prison v residential treatment National Indigenous Drug and Alcohol Committee, Australian National Council on Drugs, August 2012.) and concluded:

> "The total financial savings associated with diversion to community residential rehabilitation compared with prison are $111,458.00 per offender.

> The costs of treatment in community residential rehabilitation services are substantially cheaper than prison. Diversion would lead to substantial savings per offender of $96,446.00, based on a cost of community residential rehabilitation treatment of $18,385.00 per offender). Even if the high side estimate of the cost per offender for residential rehabilitation treatment was used ($33,822.00), the saving would still be substantial at around $81,000.00
>
> Community residential treatment is also associated with better outcomes compared with prison — lower recidivism rates and better health outcomes, and thus savings in health system costs. The savings associated with these additional benefits of community residential treatment are approximately $15,012.00 per offender.
>
> In addition, treatment of Indigenous offenders in the community rather than in prison is also associated with lower mortality and better health-related quality of life. In monetary terms, these non-financial benefits have been estimated at $92,759.00 per offender.
>
> As the residential treatment scenario is lower cost and is associated with better outcomes than incarceration, it is clearly the more advantageous investment."

Another model was the NSW Pre-Trial Diversion of Offenders Program (Cedar Cottage) established by the *Pre-Trial Diversion of Offenders Act* 1985 established. The program provided for the diversion of defendants charged with sexual offences against their children or stepchildren.

An offender assessed as suitable was diverted form the criminal justice system on providing an undertaking to complete a course of community-based treatment.

The Act provided for no further proceedings against a defendant who completed the program in accordance with the undertaking.

The program was the responsibility of NSW Health. The program is described as follows:

Program Objectives

The Program's objectives were:

- To help child victims and their families resolve the emotional and psychological trauma they have suffered;
- To help other members of the offender's family avoid blaming themselves for the offender's actions and to change the power balance within their family so the offender is less able to repeat the sexual assault;
- To stop child sexual assault offenders from repeating their offences.

The Program provided treatment to the victim and non-offending family members including family and individual support and counselling, as well as a support group and mother-daughter workshops. There was a focus on strengthening the bond between the child victim and their non-offending parent (typically the child's mother).

Program eligibility

In order to be eligible for the Program, offenders were required to:

- Satisfy an eligibility test based on strict criteria, including no previous convictions for sexual assault offences, and that the offender was in a parental relationship with the child victim;
- Plead guilty to all offences;
- Demonstrate suitability for treatment during a rigorous 8-week assessment process.

During their 2–3-year mandated treatment, Program Participants were required to adhere to strict conditions regarding their accommodation, employment, travel arrangements and contact with children.

Offenders were not permitted any form of direct or indirect contact with their victim or other children without the written permission of the Program Director, and only under very specific circumstances.

Throughout their participation in the Program, offenders were required to adhere to an 'exclusion zone', which meant that they were not permitted to enter any geographical area frequented by their victim or the victim's family. The purpose of this condition was to provide the victim and their family with physical and emotional safety.

An evaluation of the program in November 2009 by Professor Jane Goodman-Delahunty of Charles Sturt University, found a significant reduction in the rates of recidivism as between those accepted onto the program (12% and those not 5%), from 2003.

How can trauma-informed approaches be better embedded in court processes in Queensland to improve the experiences of victims of sexual offences? What works? What needs to be improved? (Question 72)

LAQ recognises that a trauma-informed approach is required to understand the experiences of women in the criminal justice system.

A trauma informed approach "…involves moving beyond the 'victim-offender binary' and ensuring that responses are tailored to the particular needs and social contexts of victimised women".[178] LAQ recognises that many of our female clients have also been the victims of crime and a trauma-informed approach may assist in achieving better sentencing outcomes for these women. "Unresolved trauma may also lead to the retention of coping mechanisms that may have been protective in the short term but are maladaptive in adulthood, such as hypersensitivity to triggers and perceived threats. Chronic, ongoing trauma leads to significant "changes in mind, emotions, body, and relationships … including severe problems with dissociation, emotional dysregulation, somatic distress [and] relational or spiritual alienation". Because Australian Aboriginal people are also dealing with the cumulative impacts of historical, collective and intergeneration trauma, direct experiences of complex trauma are often compounded by intergenerational trauma".[179]

In relation to victims of sexual offences LAQ acknowledges that "there is general consensus in the literature that the criminal justice system is not designed to accommodate people affected by trauma. This may, at least in part, explain the high levels of attrition for sexual assault cases."[180]

What Works?

As stated in Discussion Paper 3 "Queensland courts offer a number of options to support vulnerable witnesses (children, victims of sexual assault and people with intellectual disability) such as: the ability to have a support person in court; pre-record evidence or give evidence from a remote witness room; have a screen placed so the accused person is not visible to the witness; and have the court closed to the public and media."[181] Some of these options are also outlined in our response to Question 9.

Taken from LAQ's Response to Discussion Paper 2

LAQ considers there are a number of procedures which interact with legislative reform to ensure the fair treatment of complainant witnesses at trial. It is LAQ's experience that the defence counsel engaged are regularly observant of their professional obligations and very conscious of the sensitivities of sexual offence trials. This framework should be considered as part of any broad review of the treatment of victims in the current system.

The rules and standards of professional conduct are set out in the *Barristers' Conduct Rules 2011* as amended, to promote and ensure the administration of justice. Rule 61 governs proceedings for sexual

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178 Discussion Paper 3 page 65.

179 Using a Trauma-Informed Practice Framework to Examine How SA Judges Respond to Trauma in the Lives of Aboriginal Defendants

180 Discussion Paper 3 Page 19.

181 Discussion Paper 3 Page 19.

assault, indecent assault or the commission of an act of indecency in which the alleged victim gives evidence:

(a) a barrister must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

(b) a barrister must take into account any particular vulnerability of the witness the manner and tone of the questions that the barrister asks.

Defence counsel must also seek to confine cross-examination to identified issues which are genuinely in dispute and are not permitted to ask improper questions in cross-examination. The *Evidence Act s. 21* invests a discretion in the court to disallow an improper question, defined as a question that "*uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive*."

Further, defence counsel must not act as their client's mere mouthpiece.

There are also protections that operate to disallow questioning of a complainant as to their sexual history (*s. 4 Criminal Law (Sexual Offences Act) 1978)* except if leave is granted in particular circumstances.

The court can also place limitations on questioning in relation to special witnesses with respect to time and the number of questions on a particular issue.

LAQ's experience is that prosecutors are proactive in utilising the existing legislative mechanisms available to protect victims when giving evidence.

LAQ acknowledges that complainants report being re-traumatised by the trial process which is, by its nature, adversarial. Many reforms have been introduced to assist how complainants are treated by police and by the courts and to minimise the impact of the system on these witnesses. These include:

- pre-recorded police statements of children and those of impaired mind (*Evidence Act* s93A);
- pre-recorded evidence for special witnesses (*Evidence Act* s21A), and affected child witnesses (*Evidence Act* Division 4A);
- special considerations of how witnesses categorised as special witnesses give evidence, including remotely.
- exclusion of people from a court room when a complainant in proceedings for a sexual offence is giving evidence;[182]
- prohibition of the publication of identifying particulars of a complainant;[183] and
- as outlined above, prevention of the cross-examination of certain witnesses by self-represented defendants (*Evidence Act s21O*).

There are also significant limitations in place with respect to cross-examination of witnesses at committal hearing. The *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* provided for amendments to the *Justices Act 1886*. Cross-examination as a matter of right in committal hearings was removed and is only permitted upon application and if it can be demonstrated that substantial reasons exist in the interests of justice.[184]

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[182] s5 *Criminal Law (Sexual Offences) Act* 1978.
[183] Ibid, s6.
[184] *DC v Queensland Police Service* [2018] QMC 3.

LAQ supports further research into the merits of appropriate complainant witness representation, to better inform and provide support through the judicial process, but also to avoid miscarriages of justice through inappropriate coaching or obstruction. It is a fine line. In our view in the absence of further relevant research the more appropriate approach is properly resourced scaffolding services to assist victims through the process from start to finish.

With respect to the giving of evidence, LAQ recognises the value in a support person (already a feature in sexual offence trials) being present with appropriate directions existing to safeguard against prejudice.

Support systems do exist, including through Victims Assist Qld. Victim Liaison Officers are also available through the ODPP to assist victims to navigate the trial process.

The Queensland Intermediary Scheme (QIS)[185] was also recently introduced to run as a two-year pilot program in Brisbane and Cairns. The QIS currently applies to prosecution witnesses in child sexual offences who are under 16, or have an impairment of the mind, or have difficulty communicating. Intermediaries are not legal practitioners but have a therapeutic background. LAQ supports consideration as to whether the use of intermediaries ought to be expanded to assist all vulnerable witnesses, following evaluation of the pilot.

Given the QIS is in its infancy, in our view it would be preferable for the pilots to run their course to see if such reforms improve the treatment and experiences of complainants in the course of a trial before embarking on such significant systemic change as representation for victims within a trial. There are also cost implications potentially to LAQ as to how such representation is facilitated and would therefore require additional funding to support any such program.

What needs to be improved?

LAQ would support training for those working in the criminal justice system, Judges, Prosecutors and Defence Lawyers, along with police officers, corrective services officers and bailiffs about trauma informed practices.

LAQ would support training for the Judiciary about the impact of trauma from sexual abuse leading to offending and the role that such trauma should play in sentencing (for offender victims). Therefore, using a trauma informed framework when sentencing defendants and the use of plain English and trauma informed language by the Judiciary and practitioners.

Consideration could be given to listing 'trauma' a specific consideration under section 9 (*Penalties and Sentences Act*).

As discussed in Question 71 the introduction of a specific callover/lists for sexual matters may also assist with expediting matters.

Part 3: Women and girls' experience of the criminal justice system as accused persons and offenders

Why women and girls come into contact with the criminal justice system as accused persons and offenders

What are the drivers of women girls' offending in Queensland? (Question 73)

LAQ has considered the drivers of both adult and juvenile offending with a review of the available data in these areas and consideration of the experiences of our lawyers. In addition to the below, we also reference our responses to Questions 2 and 75.

[185] Division 4C *Evidence Act* 1977.

Women

In relation to adult female offenders LAQ identified the following matters:

- Between 70% to 90% cent of women in prison have experienced trauma and abuse prior to entering prison, including family violence and sexual abuse.[186]

- Queensland Corrective Services reported in 2019 that 87% of women in custody have been victims of child sexual abuse, physical violence or domestic violence. Sixty-six percent of those women have been victims to all three types of abuse.[187]

- Social and economic disadvantage are strongly associated with imprisonment, for both men and women. Women in prison have higher rates of mental ill-health, substance abuse and homelessness.[188]

- Women are also less likely to have committed violent offences and are more likely to be criminalised due to issues associated with drug dependence or poverty.[189]

- LAQ lawyers have represented women for offences of Centrelink fraud, who were motivated to commit the offence in order to provide for their family in the context of an abusive partner who was using family resources for alcohol or drugs.

- LAQ lawyers have represented many women for offences of unauthorised dealing with shop goods and stealing, where the motivation was largely to provide for them and their children, that is linked to poverty.

- Disruptions to childhood and family life are factors contributing to later offending for girls and women.[190]

- The majority of women in Australian prisons are parents, with 85% having been pregnant at some point in their lives, and 54% having at least one dependent child.[191] Parental involvement with the criminal justice system also has the potential to trigger intergenerational offending.[192]

- Intergenerational traumas and inequalities as the main drivers of Aboriginal and Torres Strait Islander women and girls.[193]

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[186] LC LSIC Inquiry into Victoria's Justice System: Submission 094 - Smart Justice for Women Redacted copy referring to H Johnson, Drugs and Crime: A study of incarcerated female offenders, Research and public policy series, 2004; Justice Health & Forensic Mental Health Network, 2015 Network Patient Health Survey report, 2017; M Wilson et al, Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia, SAGE Open, January 2017.

[187] Discussion Paper 3 at page 65

[188] Australian Institute of Health and Welfare, The Health of Australia's Prisoners, July 2020.

[189] Inquiry into Victoria's Justice System: Submission 094 - Smart Justice for Women Redacted copy referring to Crime Statistics Agency, Characteristics and offending of women in prison in Victoria, 2012-2018, November 2019.

[190] Discussion Paper 3 page 64.

[191] LC LSIC Inquiry into Victoria's Justice System: Submission 094 - Smart Justice for Women Redacted copy referring to Australian Institute of Health and Welfare, The Health of Australian Prisoners, 2018, pp. 14 and 72.

[192] Discussion Paper 3 page 65.

[193] Discussion Paper 3 page 65.

- The children of women prisoners are at increased risk of criminalisation, with one study finding that the children of prisoners are 5 times more likely to end up in prison than other children. This may be due to the number of children taken into state care as a result of their mother's (even brief) imprisonment and the associated increased risk of youth and adult criminalisation.[194]

- Contact with the Child Protection system is also a driver of offending in Queensland.

Girls

Statistics published by Youth Justice indicate that the children who come into the Youth Justice system generally come from tough and often traumatic family backgrounds, and many have issues and problems that affect their behaviours, lifestyles and decisions.

- A significant proportion of youth offenders are subject to child safety reports before they commit offences and come into contact with the Youth Justice system.[195]
- Girls involved in the youth justice system are more likely to have been involved in the child protection system, which reveals this to be a particularly gendered issue.[196]
- 31% have a parent that has been held in adult custody.
- 58% had a mental health or behavioural disorder diagnosed or suspected.
- More than half used two or more substances.
- 52% were totally disengaged from education, employment and training.
- Almost 1 in 5 were homeless or had unsuitable accommodation.
- 51% also had some involvement with Child Protection.
- 33% of children and young people in detention have used Ice or other methamphetamines.
- 17% of children and young people had a disability diagnosed or suspected.
- Aboriginal and Torres Strait Islander children and young people are 31 times more likely to be held in custody compared with their non-Indigenous peers.
- Children who have experienced trauma and maltreatment, particularly in cases of severe neglect or abuse, may experience developmental issues and reduced resilience, along with immaturity and impulsivity. These factors increase the risk of offending and re-offending.
- Risk taking behaviour in children is exacerbated when peer pressure is added. Contact with other children and young people who are offending increases the likelihood of further offending.

  Source: 'Working Together Changing the Story – Youth Justice Strategy 2019-2023'

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194 Women in Prison in Australia - Panel Presentation by Debbie Kilroy 2016

195 see, for example 'Crossover Kids': Vulnerable Children in the Youth Justice System Report 2: Children at the Intersection of Child Protection and Youth Justice across Victoria

196 "Girls in juvenile detention: Deprioritised and re-traumatised" (2018) 147 Precedent 14.

Why are women and girls offending at increased rates? (Question 74)

Domestic and family violence is a significant factor behind much of the offending involving women and girls. In the experience of LAQ criminal lawyers, most women and girls who find themselves before courts as offenders have a history of a traumatic childhood, including exposure to domestic and sexual violence in the household as well as being victims of violence themselves.

The prevalence of domestic and family violence in the community, coupled with a lack of appropriate and effective mechanisms to address trauma arising from childhood exposure to it, can help to explain the increase in offending rates of women and girls.

Women and girls who are exposed to domestic and family violence as a child will often find themselves in violent relationships when they are adults. Many women and girls who are represented by LAQ in relation to more serious offending – including drug trafficking, robbery, serious assaults and murder – are charged with a male co-offender who they are (or were at the time of the alleged offending) in a relationship with. In situations like this, women and girls are often subject to coercion and control in relation to the subject offending and also during the course of proceedings. It is very rare that the level of coercion is such that the defence of duress[197] would be available to them, and it can only generally be used to mitigate penalty on a plea of guilty (assuming there is sufficient evidence to support it).

It is also the experience of LAQ criminal lawyers that recent attempts to strengthen the domestic and family violence laws[198] coupled with an increased and 'zero tolerance' approach to policing this type of offending can have unintended consequences for women and girls involved in domestic violence incidents.

Police attending an incident may attend at a time when the female partner of the (real) perpetrator is acting out in response to prolonged acts of domestic violence committed against her that are unseen by the attending police. The perpetrator is observed to be composed and rationale whereas his female partner is in a heightened emotional and irrational state and does not respond well to police presence. In situations like this, there is a risk that police will take action against the perpetrator's female partner (by issuing a police protection notice)[199] rather than the perpetrator himself, believing that he is the person requiring protection under the Act. This exposure to the civil remedy of a police protection notice can lead to an introduction to the criminal justice system if the order is subsequently breached, and the threat of reporting a breach is often used to inflict further trauma on women and girls by a male perpetrator of domestic and family violence.

It is the experience of LAQ criminal lawyers (and particularly those appearing in the Southport Specialist DFV Court since it commenced operations in 2015) that women and girls appearing on domestic violence breaches are generally charged with less serious 'technical' breaches of an order. Sometimes the breaches can be tied up to situations where the alleged offender has been left homeless as a result of

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[197] Section 31 Criminal Code Qld – Justification and excuse – compulsion. Does not apply to all offences e.g murder.

[198] The enactment of the *Domestic and Family Violence Protection Act 2012* (DFVPA) expanded the definition of 'domestic violence' (section 8) by specifically incorporating other behaviours that did not involve a physical act of violence. The Act (section 100), coupled with changes to the Police Operational Procedures Manual, also placed additional obligations on police officers when investigating a domestic violence incident.

[199] Part 4 Division 2 DFVPA.

being named on an order and returns to a place contrary to a 'no contact' or 'not approach' condition on the order after unsuccessful attempts at securing suitable alternate accommodation.

Another significant factor in the rate of offending involving women and girls is the use of illicit drugs, particularly highly addictive and damaging drugs like methamphetamine. In the experience of LAQ criminal lawyers, drug addiction is often linked to experiences of childhood trauma and mental illness. The offending ranges from simple drug possession matters, to drug driving, to property offending undertaken in order to finance ongoing drug addiction.

The lack of appropriate sentencing options can lead to a cycle of repeat offending: a person with a significant addiction may end up breaching a community-based order, ending up in court again for breach proceedings, or they may find themselves the target of increased police attention once they have started to accumulate a criminal history. Women and girls with substance abuse issues often form abusive relationships with men who are also drug users and who manipulate them and encourage them to commit offences to help finance their joint drug use.

How are women and girls at risk of entering the criminal justice system currently supported to prevent them from offending?

The risk of women and girls entering the criminal justice system can be identified where drivers (for example lack of housing and homelessness; poverty; mental health; addictions; family and domestic violence and previous trauma) are prominent in their lives. We have outlined non exhaustive lists of drivers behind women and girls entering the criminal justice system in Question 2 and 73.

Girls who are clients of youth justice and child protection may have a history of getting involved in youth offending and can be acknowledged as risks of entering the criminal justice system.

Working with women and girls who have multiple complex needs can mean that they are working with numerous agencies who can fail to communicate or coordinate what is happening for the client.

Women specific services can offer holistic programs, but women need to know that these are there and how to access them.

Women who engage in offending often lead very isolated lives.[200] This isolation may mean that they don't know about or are reluctant to access services. They are fearful of their business being known to others particularly in regional and remote communities.

Cultural differences also determine whether First Nation women and girls access mainstream services.

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[200] *Restorative Justice with Female Offenders: The Neglected Role of Gender in Restorative Conferencing*" Linnea Osterman and Isla Masson in Feminist Criminology 2018 Vol 13(1) 3-27. Rumgay, J (2004 June). *When victims become offenders: In search of coherence in policy and practice*. Paper presented at the Fawcett Society & Nuffield Foundation Conference, London England.

How are 'at-risk' women and girls identified in the first place and who coordinates how they can be assisted to stop them entering the criminal justice system? (Question 76)

A gender-specific approach to reduce offending and reoffending is necessary to address the needs of those who are at risk of falling through the cracks and ending up in criminal justice systems.

Youth services such as Brisbane Youth Services work with young people who are marginalised and who experience many of the drivers identified as leading to being at risk of entering the criminal justice system.

Micah Projects have programs targeted at young women and young mothers. These are important as this is a vulnerable group who can experience lack of supports for them and their children. They can also be at risk of losing their children to the child protection system.

Services such as MARA and Sisters Inside provide valuable assistance to women in custody to help reintegration into the community.

MARA is a service for females in the custodial centres in Southeast Queensland that provide a service based on a trauma-informed approach. They provide both pre-release and post-release support such as helping women link into services that can assists to support them once released from custody, to help transition to community living, but also in other areas of need, such as housing and child protection.

Sisters Inside provide support to women in custody in many ways – with visits, programs and linking women to additional support services. They advocate to bring about law reform to assist women.

Queensland Drug and Alcohol Court

Another avenue to assist female offenders is within the court system – a sentencing option that is a diversionary court. The criminal practice at LAQ has a team who are one of the main players in the Queensland Drug and Alcohol Court (QDAC).

It is one of three specialist courts in Queensland that is overseen through the Courts Innovation Program at the DJAG.

QDAC, Courtlink and Murri Court are all initiatives involving a collaboration of many agencies – including government departments, non-government agencies and groups. QDAC brings together Legal Aid Queensland, Queensland Corrective Services, Queensland Police Service, and Queensland Health in a judiciary-monitored order, in the Brisbane Magistrates Court.

QDAC is a court that was designed to help adult offenders who are seeking sentence, and facing imprisonment for their offences, who are assessed as having a severe substance use disorder (drugs and/or alcohol).

LAQ provides representation services in QDAC (and the former Drug Court). In our experience our female QDAC clients almost always have a background involving some form of violence or trauma, with most of those having been abused sexually by a partner or another adult in their life.

As part of the Queensland Drug and Specialist Court Review (Final Report)[201] provided in November 2016, the researchers of that report (commissioned to develop options for the reinstatement of a drug court in Queensland) identified the need to ensure that disadvantaged groups were provided with equitable opportunity to access, participate and complete the drug court program.[202] Women were identified as one of the groups. Aboriginal and Torres Strait Islanders were identified as another.

Since commencing in 2018, QDAC has had the flexibility to consider the cohort of offenders and develop programs and pathways in QDAC to assist and encourage female offenders to recover from substance abuse and build strong relationships and support to have the best chance at long term recovery and transition from a treatment order into community living, without court or agency supervision.

Initiatives developed in QDAC for the female participants since commencement of QDAC include:

- Having court reviews for female participants separately – having a separate court list and time (no male participants, or associated males, allowed in the courtroom, without prior court approval).
- Having a dedicated Corrections Case Manager for the female participants.
- Having female-only programs and groups.
- Training for drug court staff who have contact with participants, regarding culturally appropriate practices and trauma informed practices.

There was overwhelming positive feedback about the introduction of a female-only participant court list; with the advantages being that the female cohort could feel safe discussing any issues regarding domestic violence, or physical or mental health issues with the court, without judgment or fear of humiliation from the male participants. A side effect of this list was also it then created a more supportive understanding environment within the female group of their fellow female participants.

A good example of this flexibility QDAC offers, and adapting to assist female participants needs, has been a recent case of one woman who came to QDAC several months pregnant. After consultation and discussion with all agencies and the participant, noting the participant was struggling to meet requirements (appointments) and had many medical commitments, the court agreed to suspend her conditions on the treatment order just before the baby was due, for a month, so she would have time to focus on the baby and get settled after giving birth, before she would be called upon to recommence her order conditions. This re-commencement included the flexibility to have some appointments over the phone, rather than requiring her to travel to Brisbane city to attend in person several days a week. Since giving birth, the participant has demonstrated a high level of compliance to her order conditions, where before the suspension of the order, she was non-compliant and feeling overwhelmed.

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[201] Freiberg, Emeritus Professor Arie et al 2016 *Queensland Drug and Specialist Court Review – Final Report*, Queensland Courts.

[202] Freiberg, Emeritus Professor Arie et al 2016 *Queensland Drug and Specialist Court Review – Final Report*, Queensland Courts, pp 270-272

A feature of QDAC that has also assisted participants to reduce their future contact with the criminal justice system is the willingness of Queensland Health to offer aftercare. That is, continue to engage with clients after their treatment order has ended, whether that is through a graduation, completion (of the two years on the order) or revocation of order.

In the past Queensland drug court, and in QDAC, the intensive nature of a court order from this specialist court can be a challenge for a lot of women.

Experience by our lawyers in drug courts over the years sees us note that most female participants do not often reach graduation in drug court. Perhaps because they find themselves in a position where they are feeling they have to make a choice between family and/or child commitments (child in their care or even not in their care) or court/order commitments, and they will choose the family bonds over and above other matters in their life, even if it could mean admonishment in QDAC for non-compliance.

Tailoring drug court orders to each individual has better met the needs and circumstances of drug court female participants, but the number of appointments and expectations for progress remain similar for everyone on orders. Some female participants who are given flexibility (such as being able to suspend their order for a period) know that that also means being unable to progress at the same rate as their male counterparts who might start the order at the same time as them, and therefore they will likely experience disappointment and frustration due to this setback, even though they are relieved the

pressure has been reduced.

There is a large body of research that shows that women perform better in gender-specific substance abuse treatment groups, or programs that offer gender-specific services.[203]

QDAC tries to provide an environment that offers strong support to female offenders by providing an individualised rehabilitation plan that can include some flexibility for personal circumstances that can arise, whilst trying to balance that against the basic requirements of an order needed to successfully achieve graduation within 2 years.

Are women and girls being diverted from the criminal justice system? If so, what are their experiences? (Question 77)

LAQ supports increases to diversionary options for women, and an increase in resourcing of existing diversionary options for women and girls.

We refer to our responses to Questions 12, 67, 75 and 81 regarding diversionary options and their benefits.

We note the list of options outlined on page 70 of Discussion Paper 3, endorse the introduction or expansion of each and would be happy to be part of any future consultation by government on proposed models for each.

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[203] Freiberg, Emeritus Professor Arie et al (2016) *Queensland Drug and Specialist Court Review – Final Report,* Queensland Courts p 271.

Engagement with police and the legal system

What are women and girls' experiences of access to legal advice? (Question 78)

Are there any barriers to women and girls accessing good quality legal advice, support and services? (Question 79)

LAQ provides free legal advice by telephone, video link or face-to-face at one of LAQ's 14 offices throughout Queensland. In 2020/21, LAQ provided 44,019 legal advice and minor assistance services to disadvantaged Queenslanders. LAQ also provides legal advice services to people in Queensland's prisons via the LAQ Prison Advice Service, and various specialist clinics for example: NDIS, employment law, and traffic legal issues. From first contact to booking with these clinics is normally the next day, though some specialist clinics may take slightly longer for an appointment.

Additionally, LAQ offers a number of legal advice and assistance services that are tailored to meet the needs for specific client groups. The 'Your Story Disability Legal Support' service, is a trauma informed service that helps people share their experiences with the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. The Youth Advice Hotline provides young people with improved access to early legal advice with the aim of increasing the likelihood of their issues reaching an early resolution, promoting police diversionary options in the appropriate cases. Other LAQ advice services include consumer advice, anti-discrimination and employment law advice clinics.

There are a number of referral pathways to LAQ advice services – for example, from courthouses, police, social workers, and health professionals – though 58% of the referrals are initiated directly by the client[204] which is indicative of the level of recognition that LAQ has in the broader community. Additionally, clients are referred from Courts, private lawyers, Police, support workers and Centrelink.

There are some limitations in the level of legal assistance that LAQ provides which impact on all of its clients, including women and girls seeking legal assistance. Funding constraints mean that the highest level of assistance – which is generally representation in a court or tribunal – cannot always be provided. The gap can sometimes be bridged by offering minor assistance (also known as task services), where clients can be provided with assistance beyond the provision of advice (for example by assisting in the preparation of documentation for court). But this model has limitations in the level of ongoing support and assistance that can be provided over the course that a matter takes through the relevant court or tribunal.

Access to LAQ advice services can also be impacted by other internal and external factors. Clients in remote areas are unlikely to have the option of face-to-face legal advice and their ability to access the advice remotely can be limited by the availability of reliable technology. The current COVID pandemic has also placed some significant challenges to clients in accessing legal advice (particularly face-to-face advice). Even without such extraordinary external pressures, the availability of advice appointments can be limited depending on demands and staff availability at a particular point in time, and this can lead to delays in obtaining an appointment.

The LAQ Prison Advice Service (PAS) which offers services predominantly by video conference facilities, noted the impacts of COVID when in-person visits to prisons were cancelled resulting in an increased demand for video conference bookings and significantly increased wait times for links. PAS is a small team consisting of 2 lawyers and 2 support staff, that provides information and advice services, including assisting with legal aid applications, to all Queensland Women's prisons. It also manages Video conferencing bookings for most in-house and private lawyers to Queensland prisons. Anecdotally 70% of clients are referred to this service via our contact centre. Additional referral sources include Sisters Inside, Prisoners Legal Service, or private lawyers.

[204] LAQ 2022 client satisfaction survey

In addition to the factors that broadly impact on a person's ability to access good quality legal advice and support services, LAQ has made the following observations in relation to women and girls who require assistance:

- The level of education of some woman and girls results in limited legal literacy and ability to navigate the justice system or identify issues.
- In relation to women and girls in custody – while LAQ provides advice to correctional facilities, there may be delays depending on the availability of video link appointments. This may be a bigger issue for women and girls who are in custody in watch-houses / prisons in regional areas.
- Women with children – particularly sole carers – will have responsibilities in caring for younger children, picking up / dropping off older children, and balancing this with employment making it difficult to attend appointments (even telephone appointments). This is exacerbated where they live in regional / remote areas or where they are involved in caring for children (or parents / other family) who have special needs. This can often mean having to access the advice and assistance remotely which can be difficult (or impossible) if there is no access to the appropriate technology.
- Parenting and employment responsibilities can make it difficult to access quality legal advice which is generally only offered between 9 and 5 Monday to Friday. The issues with accessing timely and quality legal advice are exacerbated in regional areas, particularly in small towns without a permanent courthouse. Women and girls who are charged with criminal offences may have restrictive bail conditions which set up a further impediment to obtaining advice.
- Women and girls in a domestic violence relationship and who are subjected to controlling / monitoring behaviour will be reluctant to take time out to seek advice for fear of retribution.
- Women and girls can sometimes be 'conflicted out' on domestic violence or family law matters (particularly in regional areas) by a vindictive partner who (arguably deliberately) seeks assistance from a number of lawyers. This situation was noted on a number of occasions at the Southport Specialist Domestic and Family Violence Court where the rostered duty lawyers were unable to assist an aggrieved because they had seen the respondent. In those situations, LAQ was able to organise an additional preferred supplier practitioner to attend court, but this would be much more difficult in a smaller regional area.
- Women and girls who are working may not be eligible to receive free legal advice or a grant of legal aid if they do not satisfy the LAQ means test (though the test is less stringent in respect of advice matters). If they do not have the financial resources to pay for a private lawyer, or family members who they are able to loan the money from, this can cause significant disadvantage if the other party in a domestic violence or family law dispute has control of the finances and is able to afford private representation.
- Lawyers who do not understand the dynamics of domestic violence may not be well placed to provide advice of sufficient quality on domestic violence or inter-related family law issues and may not demonstrate appropriate communication strategies and empathy. This may be even more evident in regional areas.
- Some lawyers do not have the skill and training to adapt their communication strategies when dealing with First Nations clients, clients who do not speak English as their first language, or clients who are affected by a cognitive deficit or mental health issues.
- Support persons for girls (who are often JPs) may not provide the appropriate support in a police interview. They may encourage them to participate in an interview and make admissions when it is against their interests to do so.
- Women and girls in regional areas have reduced options for legal services to choose from, or they may not know they have the option to choose which legal service they would like to access (i.e. First Nations women and girls may mistakenly think they must use ATSILS)

- There are issues in being able to find the staff to fill funded positions in regional areas. The most vulnerable and disadvantaged clients often live in the most regional areas and have the least amount of access to support services, which are plentiful in metropolitan areas.
- Women and girls can be impacted by language and cultural barriers. In Western Queensland there are many clients from the Northern Territory who speak First Nations languages and it can be very difficult to find an appropriately qualified interpreter. Many First Nations women and girls do not feel comfortable talking to male lawyers

The youth perspective

Recent amendments to the *Police Powers and Responsibilities Act* appeared to attempt to make access to legal advice easier for all children. The *Youth Justice and Other Legislation Amendment Act 2019* inserted a new provision into the *Police Powers and Responsibilities Act* which requires police, before questioning a child in relation to an indictable offence, to contact a legal aid organisation to advise that child is in custody for the offence, to encourage legal representation to be arranged early for the child.

The Explanatory Notes to the *Youth Justice and Other Legislation Amendment Bill 2019* stated that:

> *"This amendment is necessary to ensure that a young person who is being questioned by police in relation to an indictable offence is provided with legal representation as soon as possible, which may assist in informing police decision making about appropriate diversion or charge options as well as the decision to detain a child in police custody."*[205]

Despite it seemingly having been envisaged that this would provide girls with earlier access to legal advice and representation, our experience on the Youth Hotline is that many calls are "notification only" and do not result in legal advice in fact being given. A further amendment requiring police to obtain legal advice for children would be supported.

It is our observation that girls in regional and remote areas experience difficulty accessing legal advice, support and services. This may largely be due to a lack of choice about legal representative, preferred supplier or service provider, or lack of knowledge about their right to choose (especially in the case of First Nations women).

It is our experience that many legal practitioners attend the Childrens Court on a casual basis. There is room for improvement in relation to the quality of legal advice, support and services available to children. The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory – Findings and Recommendations report stated in Recommendation 25.31 that:

> *"All legal practitioners appearing in a youth court be accredited as specialist youth justice lawyers after training in youth justice to include child and adolescent development, trauma, adolescent mental health, cognitive and communication deficits and Aboriginal cultural competence."*[206]

While this has formed the basis for Legal Aid Queensland's Youth Certification Project, it is only mandatory for those practitioners who provide legally aided assistance.

Case Studies:

- **Case Study 1**: A First Nations client lived in a remote regional town in North-West Queensland near the Norther Territory boarder. She was charged with a violent offence against her partner and the police opposed her bail. She was put into the police vehicle and transported almost 200kms to the closest town with a watchhouse and regularly sitting Court,

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[205] Youth Justice and Other Legislation Amendment Bill 2019 - Explanatory Note, at page 15
[206] Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory – Findings and Recommendations at page 44.

to appear before that Court the following day. The Magistrate in that town ultimately granted her bail, however, included a condition that she must not return to her hometown, in an attempt to mitigate risk of her reoffending against her partner and also for her own safety, as her victim's family wanted retribution. Unfortunately, the client had no family or connections whatsoever in the town she had been taken to and was ultimately bailed to reside in. She was also heavily pregnant and had left 3 younger children behind in her hometown. The client's legal representative linked her in with local support providers in the town she has been bailed to, but of course this is a far from ideal position for this vulnerable woman to find herself in.

- **Case Study 2:** A 44-year-old culturally and linguistically diverse woman contacted LAQ for legal assistance and support. There was a background of sexual assault perpetrated a former partner upon ending a relationship, which was reported to the police and was highly traumatised by the experience, the police response and the ongoing court processes. Advice was provided about a potential discrimination matter regarding one officer's investigation of the sexual assault. The lawyer providing advice identified that there were compounding vulnerabilities of mental illness, low English literacy and cultural and linguistic diversity that were creating barriers to her accessing the legal system. A referral was made to the Client Assistance Service (CAS) within LAQ, which is targeted to assist vulnerable client groups to access and engage with complex legal systems. The client reported that she was fearful that her experience would be minimised, and the thought of re-telling her story was too distressing. She felt disbelieved, unsafe, and was provided with contradictory information. The CAS assisted her for two months, and ultimately referred her to a specialised domestic violence unit for legal and psycho-social support. Throughout our engagement, the client spoke about her experiences with the legal and court systems while she navigated life after the sexual assault.

- **Case Study 3**: A 56-year-old woman from a regional town was charged with sexual assault offences against her former partner. She self-referred CAS who had previously assisted her. She had a history of mental instability and was an involuntary inpatient at a mental health facility when she contacted our service. There were multiple vulnerabilities including mental illness, disability, and homelessness. She reported feeling embarrassed about the nature of the charges especially due to how society views women charged with sexual offences, and anger at the police response as she felt that she was the true victim but was not believed or listened to by the investigating officers. She said she did not fit the mould of a "good victim" and that people minimised her experiences because of how her disability presented. She said that "the law system does not understand or see the full picture due to the police reactions and lack knowledge of mental health". She was initially feeling reluctant to seek legal assistance from LAQ for fear of judgement and shame. She was comforted that she would not have to repeat her story to various sections of LAQ, and that she felt understood. CAS assisted her to obtain a grant of aid via the Means Test Special Circumstances process.

How are women and girls who are involved in the criminal justice system supported and their needs met? (Question 80)

We have outlined in response to a number of question above (in particular Questions 12, 67 and 75) procedural, resources and protective protections currently in place to reduce the trauma of participating in investigations and court proceedings The support mechanisms for women and girls who are defendants in the criminal justice system are less clear-cut.

What Works

- Women's Domestic Violence support services in jail often link-in with women and provide support and assistance and can liaise with their lawyers to assist in the legal process (for example, providing support letters for court).
- Sisters inside provides programs to support women in custody.
- Provision of duty lawyer and other 'wrap around' counselling services at Domestic and Family Violence Specialist courts – not just for women who are an aggrieved in civil proceedings but also for those who are charged with criminal offences.
- The LAQ Information and Services division currently operates the Client assistance service. The CAS is a client focused social work service within LAQ designed to help vulnerable clients access and navigate LAQ processes (see case studies 2 & 3 outlined in Q78). It is based on trauma informed service principles. Clients with vulnerabilities such as psychological or cognitive disability, homelessness, family violence, remotely located, where interpreting or translating is required, and people of Aboriginal and or Torres Strait Islander descent need the assistance of a support worker to understand LAQ processes and legal processes. Often clients have multiple issues that cannot be resolved through regular channels. The CAS liaises with other sections of LAQ, spends time with the client to understand their needs, assists the client through their next steps, and helps the client connect with LAQ resources and lawyers and/or assists with applying for legal aid. This service has a high degree of success in resolving these issues for vulnerable clients. This service is currently very limited in staffing and has limited capacity to take referrals given the funding, although the need is high.
- LAQ in conjunction with partners such as NLA and NATSILS the 'Your Story Disability Legal Support' service, and DAVLS (Defence and Veterans Legal Service) to support people with legal issues engaging in those royal commissions. All of these services are trauma informed services. Trauma informed best practice means that our staff in these services are trained to understand the complex trauma backgrounds of our clients, and devise strategies to support clients through legal processes. It aims to understand more than the immediate legal issue and consider a client's issues holistically and provide support in that context. This means ensuring clients are physically, emotionally and culturally safe, making adjustments to how the service is delivered, including promoting trust and reliability, liaising with supports, and providing choice and empowerment. Trauma informed services work well and consideration should be given to more broadly to the implementation of this approach.

What Could Be Done Better

- More training for lawyers, police, prosecutors and judicial officers in how to practice in a culturally competent way
- More incentives for people working with women in the criminal justice system (lawyers and non-lawyer positions) to work in regional areas.
- An expansion of the trauma informed approach may assist in providing greater support not just for women and girls who are victims of offences, but also for women and girls who are both victims and defendants. If the Judiciary and practitioners receive training about the impacts of trauma from abuse leading to offending and the role that such trauma should play in sentencing of offender / victims, this would arguably lead to more effective and tailored sentencing outcomes.
- Some consideration could be given to providing greater access to programs offered via community-based orders and transition from imprisonment orders which are designed to improve educational and employment opportunities.
- Harness technology such as videoconferencing and online resources to enhance access advice and information.

Sentencing women offenders

How are Queensland's existing sentencing principles, factors and options applied to women and girls? What works? hat needs to be improved? (Question 81)

LAQ notes the ever-increasing complexity of the sentencing process. The existing principles in section 9 of the PSA and section 150 of the YJA are generally broad enough to apply to the specific needs of women and girls.

For women who are also victim-survivors, there is provision within section 9(2) of the PSA to allow the sentencing court to have regard to the factors which are often present at sentence. These include: the extent to which the offender is to blame for the offence,[207] the offender's character, age and intellectual capacity,[208] the presence of any aggravating or mitigating factor concerning the offender,[209] and if the offender is an Aboriginal or Torres Strait Islander person, any submissions made by a community justice group representative that are relevant to sentencing the offender.[210]

If the offence enlivens s9(3) of the PSA, the Court must have regard to particular factors, which are primarily focused on ensuring community protection. In the case of a victim-survivor who is also an accused woman, the principle of imprisonment as a last resort, and for preference for a sentence that allows her to remain in the community, is no longer an option.[211]

A mitigating factor which is most unique to women is the primary care of children. Separation of women and their children upon incarceration, can lead to poorer outcomes. There is scope within the current sentencing guidelines to have regard to this, but it is limited. Common law principles have long applied to the effect that hardship on an offender's family cannot be given weight which overwhelms the usual principles of deterrence and punishment.[212] The Courts have however had regard to the impact of imprisonment on an offender's children in appropriate cases.[213]

In LAQ's view this could be explicitly recognised within the section as a relevant consideration if it was found to be in the interests of justice and to protect the rights of the dependent child. The general sentencing principles in the *Crimes Act 1914* (Cth) contain a provision that requires the sentencing court to have regard to the probable effect that any sentence or order under consideration would have on any of the person's family or dependents.[214] A similar consideration is contained in section 33(1)(c) the *Crimes Sentencing Act 2005* (ACT).

The impact of childhood deprivation and trauma, although not unique to women, is also recognised as a significant mitigating factor, and given appropriate weight by a sentencing court.[215]

In our experience, it is not uncommon for a female accused to instruct they have previously taken the blame for a criminal offence (usually a drug offence) when seeking instructions on their criminal history. This is done to protect an intimate partner/perpetrator with often a more serious criminal history who may be facing jail. There has often been significant pressure placed upon the woman to "take the blame" for such an offence. It is accepted as part of being involved in that relationship and done to preserve "the

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207 *Penalties and Sentences Act* 1992, s9(2)(d)
208 Ibid, s9(2)(f).
209 Ibid, s9(2)(g).
210 Ibid, s9(2)(p).
211 Ibid, s9(2)(a).
212 *Le v R* [1996] 2 Qd R 516 at 522.
213 *R v Boyle* (1987) 34 A Crim R 202.
214 *Crimes Act* 1914 (Cth), s16A(2)(p).
215 See *R v Bugmy* [2012] NSWCCA 223.

peace" in many cases. When they return before the Court with more serious offending, this previous conviction can then be regarded as an aggravating factor[216] upon sentence.

In cases where an accused women is charged together with her abuser, it can be very difficult for her to extract herself from that relationship in order to fully advocate for herself and her rights. As criminal advocates, we can explain the legal process, options and rights to her, including the availability of section 13A and B of the PSA and negotiation options to secure the best outcome. It is our experience that women do not sometimes wish to betray their abuser or are in fear of retribution, so instruct to proceed on the basis that protects their abuser further, and often to their continued disadvantage.

Section 9(10A) PSA includes an exception to avoid capturing those who would otherwise unfairly be included within its scope.[217] This is relevant to an accused woman who faces sentence for an offence with this aggravating circumstance.

The introduction of this provision has resulted in more weight being placed on general deterrence in the sentencing process. The Queensland Court of Appeal has noted this in cases involving the application of the section for domestic violence offences involving the killing of a partner.[218] The application of the aggravating factor tends to lead to higher sentence outcomes.

Mandatory sentencing can also have disproportionate effect on women, particularly culturally and linguistically diverse and First Nations women. LAQ does not support mandatory sentence regimes. Mandatory sentences can reduce the sentencing court's ability to balance factors set out in s. 9 of the PSA and to give appropriate weight to mitigating factors which are specifically relevant to women. The Serious Violent Offender scheme is an example of a mandatory sentence regime that impacts on the ability of the court to sentence on a case-by-case basis and to apply all of the relevant sentencing principles with full discretion.

Queensland has the highest rate of incarceration of women as noted in the paper. Women in prison, "experience disproportionately high rates of homelessness, insecure housing, mental health issues, drug and alcohol dependence, chronic illness and trauma including sexual assault and domestic and family violence."[219]

These are factors that contribute to offending and recidivism. LAQ considers there is merit in sentencing reform to address these issues prior to the incarceration of women.

A 2019 review of sentencing options commissioned by the Queensland Sentencing Council concluded, that the criminogenic effect of imprisonment compared with probation is stronger for women than men, and is exacerbated by the presence of stress in family relationships.[220]

There is considerable inconsistency in the application of the criminal justice system to individual women for whom those factors should be a significant consideration on sentence because:

1. Diversionary programmes and services are available for some and not others.

2. The varying attitudes of judicial officers as to the extent those matters should influence the sentencing discretion.

The Queensland Drug and Alcohol Court (discussed in detail in Question 75), provides a stark example. For those women fortunate enough to qualify as eligible, the criminal justice system treats drug dependence as a health issue to be addressed by intensive support. For most women, the criminal justice

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[216] *Penalties and Sentences Act* 1992 s9(10).
[217] Ibid, see examples of exceptional circumstances to s9(10A).
[218] *R v Castel [2020] QCA 91* at [37] per Mullins JA
[219] Australian Government, Australian Institute of Health and Welfare, Infocus, The health and welfare of women in Australia's prisons (November 2020), 4.
[220] COMMUNITY-BASED SENTENCING ORDERS AND PAROLE, A Review of Literature and Evaluations across Jurisdictions, Dr Karen Gelb, Dr Nigel Stobbs, Professor Russell Hogg

system adheres to the principle that drug dependence is in no way a matter in mitigation, a principle that fails to account for the frequency with which antecedent issues of trauma and mental health are drivers of drug use.

Short periods of imprisonment are counterproductive to rehabilitation, disrupt family connections and lead to poorer overall outcomes. LAQ considers there would be benefit in the development of further innovative sentencing approaches or diversionary alternatives to those that exist, that maintain mother/child relationships, and connection to communities as a preference to custodial sentences. LAQ notes that alternative housing models would represent solutions to avoid the disruption of mother/child relationships without sacrificing community safety.

Diversionary options for women and girls should be supported and prioritised where appropriate.

An example includes considering the expansion of police drug diversion for minor drug offences to include methylamphetamine and to remove the disqualification from diversion if a previous diversion has been offered.[221]

The use of adult cautions should also be considered and encouraged when it is not in the public interest to continue to prosecute.[222] In our experience, this is an under-utilised option for women, particularly those charged with poverty type offences such as stealing food and essential health items for themselves and their children. In our experience, it is often up to a duty lawyer to negotiate for these outcomes when a woman is charged and brought before a Magistrates Court.

LAQ notes that the present approach to sentencing, prioritises orders intended to assist with rehabilitation after sentence in particular the imposition of probation orders, intensive correction orders, and release to parole, each managed by Probation and Parole.

This model has the following limitations:

1. Probation and Parole is:

    a. Not a dedicated provider of rehabilitation services capable of delivering catered assistance to vulnerable women.
    b. Tasked with enforcing court orders, a role that will often conflict with models for rehabilitation services.
    c. Not adequately funded to provide rehabilitation services.

2. Participation in rehabilitation programmes is mandated rather than voluntary.

3. Compliance is enforced by the threat of breach action, not positively incentivised.

4. Sentencing courts are often left to speculate about an offender's prospects of rehabilitation and risk of re-offending.

A better model is one that encourages offenders to address the drivers of their offending before sentence and directs them to specialist services subject to judicial oversight. Under this model a defendant's participation is voluntary and positive engagement is incentivised by a likely reduction in sentence.

Court Link

In 2017, Queensland introduced Court Link, a bail programme that adopts that model. Eligible defendants are, referred to available services to assist with issues of drug and alcohol dependency or misuse, physical and/or mental health issues, impaired decision-making capacity, homelessness or risk of homelessness.

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[221] *Police Powers and Responsibilities Act* 2000, s379(1)f)
[222] Queensland Police Service Operational Procedures Manual, 3.2

Participation is not dependent on a plea of guilty. The engagement is for approximately 12 weeks. Compliance is made a condition of bail but a failure to comply does not result in a further offence.

The programme is only available in Brisbane, Caboolture, Cairns, Ipswich, Maroochydore, Mount Isa, Redcliffe and Southport. That leaves much of Queensland without access to the programme.

Resourcing issues, often managed by imposing arbitrary geographic restrictions, limit the availability and utility of pre-sentence rehabilitation programmes.

Further stakeholder consultation could occur to consider the option of introducing a female specific court list such as in QDAC, to other diversionary courts such as Courtlink and Murri Court.

Legal Aid Queensland also proposes reforms to:

1. Expand the use of pre-sentence referral to suitable programmes and supports designed to address the drivers of offending by women.

   Geographical and resourcing issues could be overcome by empowering defendants and those who represent them to formulate and propose a form of rehabilitation plan for the court's consideration.

   Compliance could be made a condition of bail as with Court Link. Judicial officers should actively monitor compliance and progress. It would be preferable for the model to incorporate consideration of the public interest in rehabilitation as a primary consideration in determining how to respond to non-compliance.

   There should be no arbitrary time limit on the appropriate duration of a rehabilitation plan.

2. A new deferred sentence option as permitted by section 11 *Crimes (Sentencing Procedure) Act* (NSW)

The efficacy of both proposal is dependent on the availability of suitable programmes and support and the capacity of women and their representatives to access those services. It may be that government funding is most efficiently directed to establish a single register of services and support and creating a single contact point to assist with access, effectively a broker for available services.

The sentencing process for girls

Different sentencing considerations apply to children and young people, in recognition of their vulnerability, immaturity, to support their rehabilitation and minimise future offending.

LAQ was unable to locate any evidence that existing sentencing principles, factors and options are applied to girls in a gender-responsive way.

Our experience does note the lack of trauma informed responses to the preparation of pre-sentence reports. This can be an obstacle faced by these vulnerable girls upon sentence.

In our experience, girls can be disadvantaged by the gaps in mitigating material being presented to the Court upon sentence. One example is the absence of reference to physical and sexual abuse history by Youth Justice as part of the background to offending in court ordered pre-sentence reports. There is no appropriate framework to ensure this information is given to courts without leading to re-traumatisation of the child. Even when a girl volunteers this information it doesn't necessarily appear in the report because the perpetrator of the abuse is given the right of reply - and that person is often a family member. If the abuse is denied, then it is not included in the report. As a practitioner, this history may be unknown as the girl will not usually disclose it, even when that information is suspected by a trusted and experienced practitioner.

Generally, in relation to offending by children, evidence obtained by Youth Justice indicates that sentencing approaches and options that address factors that lead to offending are the most effective way of reducing offending.[223]

Prevention programs such as those that improve parenting, strengthen community, support families at risk, address mental illness, disability and substance abuse and respond to childhood delay and education problems are effective.[224]

While not a gender-responsive approach, Youth Justice opine that, for the majority of offenders, detention is not the best way to stop offending behaviour as children who have been through detention are at more risk of committing offences when they return to the community.[225]

Detention separates children and young people from important relationships including families, exposes children to negative peers and increases their risk of further custody.[226] Detention also makes it harder to return to education and limits future employment opportunities.[227]

As outlined in response to Question 67, Youth Justice statistics in relation to child offenders indicate that victims and children who commit offences are positive about restorative justice conference processes and outcomes, in that 89% of victims were "satisfied with the outcome of the conference" and over 70% of victim respondents reported the conference process would help them to "manage the effects of crime."[228]

Further, there is evidence that restorative justice for child offenders has been shown to reduce re-offending:[229]

- 59% of children and young people who completed a conference between 1 July 2016 to 31 December 2016 did not reoffend within six months of their conference
- 7% showed a substantial decrease in the magnitude of their re-offending
- 11% showed a slight decrease in the magnitude of their re-offending
- In total, 77% of children and young people either did not re-offend or showed a decrease in the magnitude of their re-offending

These statistics indicate there would be some benefit to the expansion of restorative justice approaches in the adult jurisdiction to improve the experience of women and girls as both victim-survivors and offenders. Opportunities for referral could be provided at all stages of the criminal justice system as is provided for child offenders under the *Youth Justice Act*.

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[223] Working Together Changing The Story – Youth Justice Strategy Action Plan 2019-2021' at page 8
[224] Working Together Changing The Story – Youth Justice Strategy Action Plan 2019-2021' at page 8
[225] Working Together Changing The Story – Youth Justice Strategy Action Plan 2019-2021' at page 8
[226] Working Together Changing The Story – Youth Justice Strategy Action Plan 2019-2021' at page 8
[227] 'Working Together Changing The Story – Youth Justice Strategy Action Plan 2019-2021' at page 8
[228] 'Working Together Changing The Story – Youth Justice Strategy Action Plan 2019-2021' at page 9
[229] "Working Together Changing The Story – Youth Justice Strategy Action Plan 2019-2021' at page 9

How can government funded supports and services be better coordinated and delivered to meet the particular needs of women and girls in the criminal justice system as accused persons and offenders? What works? What needs to be improved? (Question 82)

There are many intersecting issues which impact on rehabilitation and a holistic approach is essential to meet the needs of women and girls and provide better outcomes. LAQ considers a co-ordinated approach between stakeholders, including mental health professionals, disability services, housing and other providers is essential to provide stability and consistency across areas of mental health, substance abuse treatment, housing and employment.

LAQ also supports an increase in resources invested in community education to develop social and cultural change around the issues which predominantly affect women and girls as accused persons. These include primary issues of domestic violence and sexual assault.

The gender-specific approach created to assist female participants in QDAC, (discussed in our response to question 75 and 81) , is an example of a coordinated approach which has led to better outcomes.

There is a large body of research that shows that women perform better in gender-specific substance abuse treatment groups, or programs that offer gender-specific services.[230]

Broadly, we propose improvements across the following areas:

- Increased resourcing for gender-specific substance abuse programs, not only in South-East Queensland but in regional areas and Far North Qld, in custody and post-release.

- A multi-agency approach to supporting women and girls with mental illness, neuro cognitive impairments, intellectual impairments and disabilities to enable equitable access to prison programs and to have their health and treatment needs met.

- Assistance in custody to access educational opportunities, including economic assistance, and further investment in vocational training to assist women in gaining economic independence on release to support themselves and any children.

- More post-prison support initiatives for women particularly with respect to substance abuse and for those returning to identified vulnerable communities.

- Investment in stable and appropriate community accommodation upon release from jail, which would assist in reunification of women and their children who are often in the care of the Department of Children Youth Justice and Multicultural Affairs.

- The reduction of barriers to connection to communities and families, including reasonably priced telephone calls, and more assistance for family to visit prisons in remote locations. The innovative use of technology, such as the provision of virtual visits is an example of a successful initiative in this regard.

  Case Study: a female accused on remand at a regional prison reported weekly virtual visits with her best friend, gave her emotional support and greatly assisted her in maintaining her mental health during her lengthy period on remand. Such an initiative

[230] Freiberg, Emeritus Professor Arie et al (2016) *Queensland Drug and Specialist Court Review – Final Report,* Queensland Courts p 271.

led to a reduction in her needing to access Prison Mental Health Services for her deteriorating mental health whilst on remand.

There is also benefit in well-resourced and co-ordinated bail programs to assist women not only with applications, but to provide ongoing support to assist with compliance with conditions, similar to Caxton Legal Centre's program which is funded for men. The successful Supreme Court bail program offered to all women's correctional centres by Sisters Inside is an example of the value such a wrap- around service can offer.

LAQ's Client Assist Service operates effectively in this space to improve access to advice and co-ordinated support services for vulnerable women and girls. LAQ's contact centre can refer a client to the service as a warm referral and they can be linked in with services which can support them, including social workers, psychologists and other specialised services.

There is merit in expanding this type of service model to provide ongoing support to girls within the Youth Legal Aid space.

In our experience, other services that would benefit from this approach include the Court Liaison Service (CLS) provided to the Magistrates Court. Support workers to link in with mentally ill clients and assist them to attend assessments upon referral would improve outcomes. If assessments are missed this causes further delay. A support worker who could be engaged to ensure follow up would assist in the timely progression of those matters.

Issues specific to girls

In our experience, girls who offend or are at risk of offending have complex needs and the current service systems are often unable to meet those needs. Barriers to addressing complex needs include a lack of coordination and integration across service providers (including the Department of Child Safety and Youth Justice), limited information sharing, lack of capacity to work with children with multiple needs, limited specialised programs, service delivery modes that are inflexible, and long waiting lists for specialised services. There are considerable difficulties in accessing mental health services for children, with long waiting lists or narrow eligibility criteria posing problems. It is our experience that there are issues in terms of lack of safe accommodation for many children.

The 'Working Together Changing the Story – Youth Justice Strategy Action Plan 2019-2021' identifies that:

> *"We need to do things differently for girls and young women if they are to benefit from reforms to the youth justice system.*
>
> *There is a growing number of girls and young women in the youth justice system and they often have very complex needs. Most of our responses in the youth justice system have been designed for boys, but we know that young women's communication and relational styles are different to young men.*
>
> *The problem behaviours of girls and young women are more closely linked to interpersonal relationships, trauma and abuse, mental health issues and developmental transitions. We know that girls and young women are likely to have better outcomes when they have*

healthy and supportive family and peer relationships, develop empathy and learn ways of positive coping."[231]

However, the 'Working Together Changing the Story – Youth Justice Strategy 2019-2023' contains no reference to any supports or services that are gender-responsive or meet the particular needs of girls in the criminal justice system as accused persons and offenders.[232]

Interventions available through Youth Justice that are tailored to meet the particular needs of girls as accused persons and offenders appear to be limited to:

- *Girls… Moving On* – a program for at-risk and criminal justice-involved girls
- *Black Chicks Talking* – a cultural program for Aboriginal and/or Torres Strait Islander girls

There appears to be significant room for improvement in terms of the priority placed on supports and services tailored to the particular needs of girls.

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231 Working Together Changing The Story – Youth Justice Strategy Action Plan 2019-2021' at page 10

232 'Working Together Changing The Story – Youth Justice Strategy 2019-2023'

Annexure A: Caselaw, legislation and charters relating to the meaning of "fair trial"

Caselaw

'Fair trial' rights are embodied in the common law and, according to the principle of legality, cannot be displaced unless Parliament does so using 'clear and unambiguous language'.[233] In *Malika Holdings v Stretton*, McHugh J observed that it is a fundamental legal principle that 'a civil or criminal is to be a fair trial', and that 'clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend'[234] this and other fundamental principles.

Traditional 'fair trial' rights include:

Fundamental Rights
The right to: • equality before the law • the presumption of innocence • remain silent • be tried without undue delay; • legal counsel 'in any case where the interests of justice so require' and without charge if the defendant is without sufficient means; and • no prosecution for offences created retrospectively.
Pre-Trial
The right to: • adequate notification of criminal charges; • be informed of the right to legal assistance; • adequate time and facilities to prepare a defence and to communication with counsel of the defendant's choosing.
Trial
The right to: • a public hearing, subject to appropriate exceptional circumstances; • a competent, independent, and impartial adjudicator/tribunal; • defend oneself personally, or through legal counsel; • be present during the trial; • test the case against the defendant by way of witness examination; • require the attendance of witnesses in support of the defence on the same terms as the prosecution; • have an interpreter, at no cost, where necessary; • a process appropriate for juvenile defendants.
Post-Trial
The right to: • a review/appeal process; • compensation for punishment where there is conclusive evidence that the conviction was a miscarriage of justice; • observance of the rule against double jeopardy.[235]

[233] Above n 15, 284.
[234] *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28].
[235] Gans et al, *Criminal Process and Human Rights* (The Federation Press, 2011) 379.

Summary of Australian cases:

Jago v The District Court of NSW and Others [1989] HCA 46
Jago considered, inter alia, whether the common law of Australia recognises a 'right' to a speedy trial. 'In the safeguarding of the interests of the Accused in the manner I have described, the touchstone in every case is fairness … The test of fairness which must be applied involves a balancing process, for the interests of the Accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial ... *At the same time, it should not be overlooked that the community expects trials to be fair* and to take place within a reasonable time after a person has been charged.' (Mason CJ) This indicates that the public interest is multifaceted. The public expects 'guilty' people to be convicted of offences. As a necessary incident to that, and to uphold the rule of law, the trial must be fair. Fair trials give the Court legitimacy and moral authority.
Dietrich v The Queen [1992] HCA 57
Dietrich established that a person charged with a serious criminal offence is entitled to have their trial stayed until they obtain legal representation. The 'right' to a fair trial formed the basis of the Court's decision. Toohey J stated that, 'The right to a fair trial is engrained in our legal system.'[236] Mason CJ and McHugh J noted that Australia was a party to the ICCPR and endorsed it as containing 'minimum rights *of an accused*'.[237] Gaudron J stated: 'It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law. The expression 'fair trial according to law' is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognises that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with the law. Thus, the overriding qualification and universal criteria of fairness.'[238]
R v Glennon (1992) 173 CLR 592
This case concerned prejudicial media coverage, particularly by Derryn Hinch, about a Roman Catholic priest who was convicted of sexual assault. In a subsequent prosecution, Glennon argued that the trial should be stayed because it would be impossible for him to receive a fair trial. Ultimately, the contest in this case was between the community expectation that defendants charged with serious offences would be brought to trial, and the Accused's right to a fair trial. The High Court set aside the Court of Appeal's stay. Brennan J held that some degree of risk 'to the integrity of the administration of justice is accepted as the price which has to be paid'[239] to allow some freedom of public expression relation to crimes of public interest. Importantly, this case in no way suggests that the scales somehow tip in favour of the public interest. Rather, it supports the proposition that, despite prejudicial publicity, a fair trial for the Accused may nevertheless be possible. Mason CJ and Toohey J observed that possessing prior information about

[236] *Dietrich*, 59 (Toohey J).
[237] Emphasis added.
[238] *Dietrich*, 362 (Gaudron J).
[239] *R v Glennon* (1992) 173 CLR 592, 613 (Brennan J). See also 601 (Mason CJ and Toohey J).

a case, or forming a tentative opinion, does not necessarily lead to jury impartiality.[240] If the risk to a fair trial is minimal, a stay may not be appropriate.

Whether or not the Accused is able to receive a fair trial is still the critical question.

R v Carroll (2002) 194 ALR 1

The Accused sought a permanent stay of perjury proceedings on the basis that it substantially offended the double jeopardy principle. Gleeson CJ and Hayne J observed that:

> '[21] **A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of a crime. Many of the rules that have been developed for the conduct of criminal trial therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept 'that it is better that ten guilty persons escape, than that one innocent suffer' may find its roots in these considerations.'** [241]

Their Honours concede that different values inevitably pull in different directions:

> '[23] It is, nonetheless, important to recall that the four considerations which we have mentioned (the imbalance of power between prosecution and accused, seriousness for an accused of conviction, prosecution as an instrument of tyranny, and the importance of finality) are not the only considerations which find reflection in the criminal law system. At the very root of the criminal law system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are to be held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment.
>
> [24] Reference to the general propositions we have mentioned is important not because the answer to the issues now being considered can be found by deductive reasoning which takes any or all of them as a premise but because they are values to which the criminal law can be seen to give effect. They are values that may pull in different directions.
>
> There are, therefore, cases in which a balance must be stuck between them. To take only one obvious example, it is acceptable that in order to acquit the innocent, some who are guilty will go unpunished. But conversely, to punish the guilty, some who are innocent will suffer the very real detriments of being charged and tried for an offence they did not commit. It follows that to argue from any one of the considerations we have identified to some rule of universal application is to invite error.'

Cesan v The Queen (2008) 236 CLR 358; [2008] HCA 52

A trial was considered unfair because the judge was obviously asleep and inattentive during significant parts of the trial. There was also evidence that the jury were not paying attention to the evidence. The Accused's conviction was set aside on the basis that there had been a substantial miscarriage of justice. French CJ observed:

> 'If there be a flaw in a fundamental respect such that the appearance of injustice is indelibly stamped on the process and its outcome from the point of view of a reasonable and informed

[240] *R v Glennon* (1992) 173 592, 603 (Mason CJ and Toohey J).

[241] *R v Carroll* [2002] HCA 55; 213 CLR 635 at 643 [21] citing Blackstone, W, *Commentaries* (1769, 1966 reprint) Bk 4, c 27, 352.

observer, this may be expressed by saying that public confidence would be undermined if the conviction were allowed to stand.' [88]

This passage is important because it recognises that the Accused's right to a fair trial and the public interest are not opposing forces. The public interest is polycentric. While it is in the public interest that guilty people are convicted of crimes, it is also in the public interest that the Accused receives a fair trial. This ensures the public have confidence in the judiciary and the trial process.

Lee v New South Wales Crime Commission (2013) 302 ALR 363

This case considered whether a compulsory examination pursuant to the *Criminal Assets Recovery Act* 1990 (NSW) could be ordered while criminal proceedings for serious charges were on foot. The examination exposed Lee to questioning about matters relevant to his pending criminal charges. By a slim majority, the High Court confirmed the Court of Appeals decision, authorising the examination.

The following dissenting remarks by Kiefel J (with whom Hayne and Bell JJ agreed) are relevant:

> 'To ensure a 'fair trial', it has been said, by way of example, that: sufficient particulars of an alleged offence should be provided; the prosecution should make available material evidence; and a judge should give such directions to the jury as are necessary to a fair trial of the accused. Although regarded as a concept which is fundamental to the system of criminal justice in Australia and 'so elementary as to need no authority to support it', it is understandable that there has been no judicial attempt to list, exhaustively, the attributes of a fair trial. It may, however, be said that the concept is **not entirely one-sided**. The public interest in the administration of justice also requires that the process be fair to the prosecution. Thus, an accused is required to give notice of alibi and other evidence of particular kinds.'[242]

The expression 'not entirely one-sided' is telling. It implies that, to the extent a balancing process occurs, the balance lies in favour of the Accused. However, the balance is not 'entirely' one-sided.

Human Rights legislation and charters

Articles 10 and 11 of the *Universal Declaration of Human Rights* assert basic fair trial rights, including equality before the law.

Articles 14 and 15 of the *International Covenant on Civil and Political Rights* (ICCPR) articulate specific attributes of a fair trial.

Sections 31 to 35 of the *Human Rights Act 2019 (*Qld).

[242] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [190] (Kiefel J).

Annexure B: Case Studies in Response to Question 5

Case Study 1

Background to Defendant:

- Female, between 14 and 22 (age of defendant was in issue) when charged with multiple offences where the maximum penalty was 200 penalty units or 2 years imprisonment.
- No criminal History.
- Born in Afghanistan. Father executed when she was about 10 days old by members of Taliban. Mother fled to Pakistan with defendant's 2 sisters and brother.
- Lived in refugee camps and small houses in Pakistan.
- Brother murdered in Pakistan by Taliban for same reasons as Father.
- In 2012, defendant and remaining family members granted Woman at Risk subclass visa to Australia.
- Completed year 12 and subsequent TAFE course. Gained Entry into university.
- 2 years after arrival in Australia, experienced significant Domestic Violence from fellow student. Actual violence witnessed by Teachers. Significant concern held by police over reprisals from Afghan community.
- Defendant and family eventually relocated in 2016.
- Defendant grew up in Pakistan, fluent and comfortable in Urdu. Dari second language. English third language.
- Mother uneducated. Could only speak Dari. Unable to read or write in native language or English. Daughters required for all communication.
- Defendant seen as Duty Lawyer in call over, instructed that was not 18 years old at the time of commission of offence. Instructed that age ultimately unknown but certain less than 18. Defendant has medical material to support argument.
- Jurisdictional issue identified. Matter to be listed as directions hearing for determination of age. Magistrate adjourned matter for witness availability and disclosure directions.
- On next occasion, different Magistrate had concerns about the defendant's identity. Concerns that she was now flight risk and revoked her bail.
- She was taken by police at the Bar table and placed into the dock and then taken away to cells. Her mother became incredibly distraught – did not understand what was going on. Both defendant and her mother highly distressed.
- Supreme Court Bail was granted that afternoon.
- All subsequent proceedings were dealt with appropriately.

- Defendant was almost unable to attend mention dates for fear of being remanded in-custody by future Judicial Officers;
- Defendant was difficult at times in providing instructions given concerns that any information provided may result in incarceration;
- Mother and Defendant were petrified of Judicial System given experiences;
- The Magistrates Court Practice Direction regarding the appointment of interpreters (No 7 of 2010) as to the use of Interpreters were confusing and further more it felt courts were reluctant at times to use interpreters given the costs involved;

This experience failed to address the administration of Justice. The defendant was entitled to a hearing on the issue of her age. It is not an unusual circumstance; this was outlined before the presiding Magistrate that revoked her bail. The circumstances were incredibly, unfairly prejudicial and significantly impacted on the defendant's experiences in the criminal justice system.

Case Study 2

Female adult client charged with murder of her long-term partner was able to rely upon evidence of her long-standing domestic violence she was subject to by the deceased. There was sufficient information to engage in negotiations with the prosecution such that the crown accepted a plea to manslaughter on the basis of battered wife defence (s.304B Criminal Code – Abusive Domestic Relationship defence).

Whilst demonstrating the preparedness of the Office of Director of Public Prosecutions to have regard to evidence of domestic violence and allowing this client to be dealt with appropriately within the system, sadly this client never gave instructions to apply for bail, and made comments to that being in custody "was the safest she had ever felt." She thrived in custody, did an array of courses and education programs etc. It appeared that custody was the only place that she was able to get these opportunities after killing the man that had abused her for most of her adult life.

Case Study 3

Female defendant first became when she was 17 years old (she was deemed an adult in the CJS at that time). She was in the care of Department of Child Safety at the time. She transitioned to the Office of Public Guardian when she turned 18. She has remained a client continuously since then.

The client has autism, mild mental retardation and ADHD. She was in care from the age of 2. She had many foster placements home, then residential care. She has to live alone due to her behaviour, and she is provided with 24/7 care.

Her initial offending was assaults and wilful damage against her carers, and assault/obstruct police/street offending. She has no ability to regulate her behaviour.

She was assessed as being unfit for trial and had some minor summary charges dismissed under the (then) new section 172 of the *Mental Health Act* which facilitates psychiatric assessments in the Magistrates Courts (through the Court Liaison Service) giving reports and supporting discontinuance of charges in certain circumstances.

Her offending continued and she remained on bail with various conditions. The court was reluctant to remand her in custody given her clear impairments. After committing 2 Robbery offences, her matters were considered serious enough to be referred to the Mental Health Court (MHC).

Throughout the process, the client has had significant support from her medical treating team, the OPG, Legal Aid, Counsel and her care providers. Local police were generally understanding of her impairments and were aware not to interview the client. They would always contact Legal Aid if she was arrested.

There was a significant delay in the MHC and eventually in 2020 she was found fit to plead, with allowances to be made such as breaks and someone supporting her in court to explain each step.

There was no merit to appeal the MHC finding and her matters were listed for sentence. As an aside, Counsel attempted to negotiate that she be allowed to participate in Justice Mediation but this is unavailable in the regional area where the matters were proceeding, so prosecutions rejected that submission. While awaiting sentence, she committed an Arson offence (burned down her residential care facility in regional town where she lived).

She was placed into custody on remand for the first time and sent to BWCC. This coincided with the onset of COVID so she was subject to isolation. Her behaviours meant that she spent most of her time in an isolation cell in the mental health ward of the prison.

The client continued to offend in prison and assaulted some corrective services officers. She self-harmed. The prison psychiatrist stated that she should not be in mainstream prison - her impairment was for too significant for prison staff and prison mental health team to manage.

In November 2020 the client was sentenced in the Magistrates Court for numerous summary matters. The Court was accommodating of the support required, such as her solicitor sitting in the dock with her. She was placed on probation and given bail on the District Court matters (which she has continuously breached). She remains living in Brisbane in supported accommodation.

She was assessed on the Arson matter and found fit. The client awaits sentence in the District Court for the Robbery and Arson charges. She will almost certainly be sentenced to actual imprisonment given her continued offending. Breach proceedings are on foot for her Probation Order. She continues to self-harm – she tried to set herself alight while she was in hospital not so long ago and had to have skin grafts.

It is our view the appropriate way of the system dealing with the client is to place her on a Forensic Order (Disability). Unfortunately given the strict limitations of the MHC and limited alternative options, this has not occurred, and she will continue to be dealt with through mainstream.

Case Study 4

The Court of Appeal judgment in *R v Wallace* [2015] QCA 62 sets out in detail the facts of the offending in this matter.

Please find here the link to the Court of Appeal decision which details the offending, Ms. Wallace's experience of domestic violence, its relevance to her offending and how the appellate court was able to take into account new evidence on appeal to use the information in mitigation on her sentence.

Notably the psychiatric evidence presented on appeal explained that Ms. Wallace's actions were not as simple as defrauding as a means to end the violence, or that she had a compulsion to act that way, or that she was so disturbed as to deprive her of any of the capacities and afford her a defence. Her experience of domestic violence affected her ability to formulate a mature and sensible response to the issues before her. She was not operating with the same sense and composure of someone not in her circumstances, and her capacity to realise the full repercussions of her behaviour was impaired such that she held out the impossible hope that she would be able to repay all of the money. She exhibited symptoms of post-traumatic stress disorder, but did not fulfil the complete criteria to enable a diagnosis.

That evidence was relevant to her state of mind at the time of her offending, to her motivation, and to her level of moral culpability, and informed the Court such that it removed her offending from being in the worst category of fraudulent offending, where it had otherwise been placed. It provided context and explanation for aspects of her conduct which was otherwise regarded as callous or irrational.

Her personal circumstances, mental state, and motivation at the time of the offending are relevant to the need for specific deterrence, prospects of rehabilitation, and the need to protect the community from the applicant in future. That she acted under a degree of fear, rather than greed or malic, impacted on her moral culpability as well as her prospects of rehabilitation.

In our experience Ms. Wallace's experience in the criminal justice system is not unique. She found prison a relief, as she finally felt safe. While she raised her experience with her first solicitor, it was not acted on in a way that provided her with meaningful outcomes; whether that be due to an inability to advocate for herself, insufficient communication or understanding, or a fear that such information would be seen as an excuse or attempt to shift criminal culpability rather than ameliorate it. When her disclosure was acted

upon, Ms. Wallace not only had to recount her experience to her solicitor multiple times, but she also had to discuss those experiences with a psychiatrist she had just met (and within a custodial environment), and then be cross-examined on decisions she had made as a result of perception that her abuse did not play a causative part in her offending.

Case Study 5

Client in her early 30's, was the mother of the 2 complainant children, her daughters. She was charged and sentenced to serious sexual offending against her children, that is, two counts of maintaining a sexual relationship with a child and one count of making child exploitation material.

The client was born and raised overseas. English was not her first language. Prior to arriving in Australia from her birth country in Asia she met the co-accused through a dating site. The co-accused travelled to her birth country to meet with her and eventually her family and daughters. They soon married where her husband then applied for a visa on her behalf. She moved to Brisbane with her 2 children.

The client lived with her husband and her daughters for several months until the day she and her husband were charged with the offences against her daughters.

Her husband, who was charged as the primary offender, did not face punishment through the criminal justice system as he died in custody.

The challenges in dealing with the client's matter from the defence perspective was managing not only the context of the serious sexual offending against children but also reconciling the clients key attributing factors to the offending.

While married to the co-accused she reported domestic violent, being subjected to verbal, emotional and financial abuse. She reported herself being sexually assaulted by her husband.

She was diagnosed as having post-traumatic stress disorder (PTSD) which was a key factor in her offending. Her PTSD was noted to directly relate to her "meek and passive personality." It was noted "*there was a level of naivety that was promoting a belief that she could keep her daughters safe".*

There was a reluctance for the client to initially provide instructions and to understand the Queensland criminal justice system. She was isolated from family; she had no support network in Brisbane. She experienced overwhelming embarrassment in discussing the facts, she experienced great shame. An interpreter was required for conferences which often added to her shame. A female interpreter was always used.

She was initially distrustful with the process and how having legal representation would be to her benefit.

The client's children were removed from her care the day she was arrested and taken into custody. She was permitted little to no contact with her children. At the time of sentence, it was believed the children would remain in Australia and not be returned to their birthplace in Asia.

Client was sentenced to concurrent terms of ten years imprisonment for the maintaining counts and 3 years for the count of making child exploitation material.

The convictions for the maintaining were declared to be convictions of serious violent offences, with the consequences that the client wasn't eligible for parole until serving 8 years imprisonment.

Case Study 6

Female client in her early 30's, originally from African, initially charged with accessory after the fact to murder of her young toddler. The primary offender was her husband, who was noted to have mental illness.

She was well educated, and in Australia on a permanent resident visa. She came to Australia in her early 20's to study before returning back home to Africa. This was her second stint in Australia.

The client was well educated, spoke fluent English and due to earlier studies in Australia understood the legal system.

Her case was in the system for a period of 5 years. In this time, she faced at times heavy media scrutiny. She was well known in her home country.

After significant negotiations a plea of guilty was accepted to the charge of accessory after the fact to manslaughter. Josie received a term of imprisonment but wholly suspended.

An application to film the sentencing proceedings was denied, with the court accepting the death of her son, the perceived loss of her husband to mental illness would be painful for her to deal with, and importantly her 2 children should be entitled to privacy.

Following the sentencing proceedings, the media circled around her outside of Court, and asked her "how did she feel about the death of her son". There is no remedy in our system for this type of intrusion, and insensitive questioning.

At the time of her arrest, she had 2 other young children. They were taken into care of the Department of Child Safety. After several years of supervised contact and following sentence proceedings she was reinstated as the full-time carer of her children.

The challenges in this matter were dealing with the client's beliefs of "spirits" and "witchcraft". These concepts are completely foreign to the general population, but for the client still exist in African culture.

Although educated, she distrusted authority because of her own trauma experience as a young adult on her return to Africa. This distrust was present in her dealings with police.

In the course of the case, she painted the primary offender in a positive light, which to the police and prosecution demonstrated to them an alliance between the two. She was in fact scared of her husband and what would happen to her if she didn't keep the "spirits" happy. She did not want to be disrespectful to her husband in front of total strangers.

She was judged on her emotions or lack of emotions. This was evident at the scene when she was cradling her dead son. She was in a highly emotive state, anything likely to have been said (and potentially captured on body warn cameras) came from this state.

She spoke of being "gaslighted". She described feeling like a shell of her former self after the birth of her youngest child. She followed all directions of her husband; she did not feel she was in control of her own decisions. In dealing with a complex set of cultural factors and spiritual beliefs a psychiatric assessment was prepared to assist at sentence.

The traumatic death of their 4-year-old son was incredibility sad, nevertheless there was general sense from the prosecuting authorise they did not ever believe her, and there was a general lack of cultural understanding. She did not feel she was able to grieve for the death of her son, she did not feel "the system" allowed this to occur.

Annexure C:

Women's Safety and Justice Taskforce: Discussion Paper 2

Women and girls' experience of the criminal justice system

Submission by Legal Aid Queensland

Women's Safety and Justice Taskforce: Discussion Paper 2

Women and girls' experience of the criminal justice system

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission to the Women's Safety and Justice Task Force's second discussion paper reviewing themes and issues for consideration relevant to women and girls' experiences of the criminal justice system.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

In considering women and girl's experiences within the criminal justice system, LAQ acknowledges that First Nations women and girls suffer violence at significantly higher rates than non-Indigenous women[1], and that non-disclosure rates are higher in Indigenous communities.

We further acknowledge that First Nations women and girls have been victims and survivors of sexual offences since colonisation of Australia. Wurundjeri woman Sue-Anne Hunter spoke about how Indigenous people have for 233 years suffered gendered violence at the hands of colonisers stating:

> *"Aboriginal women have fought against gendered violence perpetrated by white men since day one. The allegations, cover-ups and silence on gendered violence in federal parliament*

[1] Bryant & Willis 2008; Gordon, Hallahan & Henry 2002; Memmott et al 2001; Mouzos 2001; Wundersitz 2010

is part of the same system of abuse and the same lack of legal and political consequences."[2]

Munanjahli-Yugambeh-South Sea Islander scholar Chelsea Watego draws attention to the multitude of examples where authorities have failed Indigenous women or further subjected them to violence[3]. Indigenous women and girls are not seen as victims or survivors. Rather they are not seen at all and the mindset is one of being responsible for the assault or that this is just something that happens to First Nations women so get over it. Why should mainstream media and Australia care what happens to you? Instead of focusing on the perpetrators, Indigenous women are portrayed as somehow deserving of such violence.

Any review of our systems that may see improvement in this situation has our support.

The discussion paper seeks feedback on several suggested themes for the taskforce to focus on when examining the second aspect of its terms of reference. We have addressed each discussion question from the paper below.

Should we explore any other cross-cutting issues?

LAQ supports the exploration of the cross-cutting issues identified by the taskforce, and how they affect women and girls' experience in the criminal justice system.

There is merit in focusing particularly on the intersectional disadvantages suffered by women as both victims and perpetrators of sexual violence.

However, further cross-cutting issues that should be examined include:

- Child protection and youth justice

  We know that a significant proportion of youth offenders are subject to child safety reports before they commit offences and come into contact with the Youth Justice system[4]. Approximately a third of children who come into contact with the Youth Justice system have a parent that has been held in adult custody[5].

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[2] https://womensagenda.com.au/latest/aboriginal-women-have-fought-against-gendered-violence-perpetrated-by-white-men-since-day-one/

[3] https://theconversation.com/no-public-outrage-no-vigils-australias-silence-at-violence-against-indigenous-women-158875

[4] see, for example 'Crossover Kids': Vulnerable Children in the Youth Justice System Report 2: Children at the Intersection of Child Protection and Youth Justice across Victoria (sentencingcouncil.vic.gov.au)

[5] Youth Justice Strategy 2019-2023, page 6 - https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/reform/strategy.pdf

We also know that girls involved in the youth justice system are more likely to have been involved in the child protection system, which reveals this to be a particularly gendered issue[6].

Further, women who experience abuse during childhood were more likely to experience violence in adulthood.

We consider there should be particular focus on whether there is any correlation between the engagement of a woman or girl, either throughout their childhood or as a parent, with the child protection system, and their experiences with domestic violence and their criminal justice journey.

- Education, employment and training

  We recommend that there be some investigation into whether a woman or girl's education attainment, employment, and training, affects her experience in the criminal justice system. Does it affect her access to support services, the likelihood of reporting victimisation, and her access to resources? This may be particularly focused on how her education contributes to her appearance as an 'ideal victim', whether it increases her likelihood of being a defendant, being incarcerated, and how that is reflected in her criminal justice experience.

  We also know that 52 percent of children engaged with the youth justice system are totally disengaged from education, employment and training[7].

  Further investigation should also be made as to whether there is a correlation between disengagement in education and training, and girls entering the criminal justice system, including through youth justice supervision.

- Mental health and disability

  Women who experience violence also report higher levels of severity of mental disorders, increased rates of physical disorders, greater mental health related dysfunction, general disability and impaired quality of life. We also know that 58 percent of children engaged with the youth justice system have a mental health or behavioural disorder diagnosed or suspected, and 17 percent have a disability diagnosed or suspected[8].

  When examining the impact of mental health, we consider it is also necessary to examine the experiences of those that suffer from cognitive impairments, and the wider

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[6] "Girls in juvenile detention: Deprioritised and re-traumatised" (2018) 147 Precedent 14

[7] Youth Justice Strategy, *loc.cit*.
[8] Youth Justice Strategy, *loc. cit*.

issue of access to health services. How does a cognitive impairment affect the way in which a woman or girl may be exposed to sexual violence, respond to trauma, and whether existing services and procedures provide adequate assistance for those with cognitive impairments to navigate the criminal justice system as either a victim or accused.

- Economics

  We consider there should also be focus on economic disadvantage and lack of economic independence. Economic marginalisation can impact on intergenerational trauma. Victims of violence will also need economic resources to provide for themselves and their families, achieve acceptable living standards, and maintain control over their lives. Poor economic standing is a compounding factor that will often contribute to homelessness but can also have an effect on accessing support, and potentially the quality of support, they can receive.

  Additionally, over a third of young people under youth justice supervision are from the lowest socio-economic areas[9].

  Particular focus should be given to how economic status affects women and girls' capacity to access support services and report victimisation, and whether this has any impact on their experience in the criminal justice system. There should be particular focus on rural and regional experiences and to what extent community-based services are adequately targeted and delivered in these areas.

- Cross-cultural issues and language barriers

  Lack of interpreters and paternalistic attitudes and the impact this has on women, particularly from cultures which are paternalistic in nature, should be a focus.

  Paternalistic attitudes are reflected in cultures where:

  - the male is seen as the head of the household and controls all of the household activity
  - teenage female children are expected to comply with their father's wishes with respect to marriage making it difficult, if not impossible, to make complaints of sexual assault against their husband or proposed husband and
  - when cultural norms are that sexual activity should occur when it is requested by the male and that the female is sinful if she does not comply.

  Lack of interpreters provided for cultural and linguistically diverse people attempting to make complaints of sexual violence poses challenges that are important to explore.

[9] Youth Justice in Australia 2019-20 report, page 14, Australian Institute of Health and Welfare

Given rates of victimisation are highest for women and girls with respect to sexual offences, within the time available, do you support the Taskforce focusing inquiries on sexual offending against women? If no, why not and what other offence types should the Taskforce focus on?

LAQ supports the taskforce focusing inquiries on sexual offending against women. This is particularly important in regard to First Nations women and girls who, as outlined above, have been victims and survivors of sexual offences since colonisation of Australia and are far more likely to experience violent victimisation and suffer more serious violence than non-Indigenous women.

In our experience there are few categories of offences where one gender is so disproportionately represented as victims as women and sexual offences.

We would also like to raise a similar disproportion in relation to the offence of Choking, suffocation or strangulation in a domestic setting found under s. 315A *Criminal Code*[10]. LAQ Criminal Law Services have observed since its introduction in a majority of cases women are predominantly the complainants, and men the defendants. We were unable to identify any other examples of such disproportion on a gender basis. Sentencing outcomes related to this offence were examined by the Queensland Sentencing Advisory Council in 2019[11], however, it may be another offence worthy of inclusion in this focused examination.

Given the relevance to offending behaviours as well as reporting, do you support the taskforce examining community attitudes to sexual offending against women and girls? If not, why?

LAQ supports the taskforce examining community attitudes to sexual offending against women and girls. Included in this could be a focus on the way in which attitudes are represented depending on the age, economic status and race of the woman or girl who has been offended against.

Given under-reporting of sexual offences, do you support the taskforce examining the barriers to reporting sexual offending against women and girls? If not, why?

LAQ supports the taskforce examining the barriers to reporting sexual offending against women and girls.

A focus on barriers for First Nations women and girls under this theme is important. The main reasons for non-disclosure by Indigenous women may be influenced by historical, social, cultural and pragmatic factors. The possibility of negative repercussions is a major barrier especially in small, interconnected, and isolated communities where anonymity cannot be maintained.

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[10] Introduced in 2016 following a recommendation made by the Special Taskforce on Domestic and Family Violence in Queensland

[11] Sentencing Spotlight on Choking, suffocation or strangulation in a domestic setting, May 2019

Indigenous victims fear stigmatisation and being ostracised from family and community and shame is seen as a major reason for not speaking up and reporting. In a report prepared by Robertson in 2000, it was said that "*Women are so fearful of the consequences of reporting an assault, have no alternative accommodation or must stay to protect their children, that choice is simply not an issue*."[12]

Indigenous women have knowledge and experience of the way in which police have interacted with them and their communities and family members. There is fear, distrust, anxiety and a belief that nothing will be done about their complaints or reports.

An examination of how to improve education strategies and curriculum to break down barriers would be of assistance, including:

- what primary through to secondary school curriculum programs are available or need to be developed by Queensland Education, Queensland Health, Legal and Queensland Police Service (QPS) advisors
- whether such strategies are included in mandatory aspects of the curriculum in state schools and what is required of private schools
- who is responsible for delivering such programs and whether there is specialist training provided to teachers responsible for delivering the curriculum
- issues in relation to:
    - consent
    - normal behaviour versus abnormal behaviour – for example in a case where a sexual assault was committed by an older step-brother, the victim said "I did not know what was normal behaviour and what was not normal behaviour although I felt uneasy about it"
    - cultural expectations – for example a victim said "I thought I was committing a sin if I refused to comply with his request for sex and I thought it was his right to demand anal sex"
    - protective behaviours
    - how to make a complaint and who to complain to
    - assertive behaviour
    - safety planning.
- an examination of education programs provided to police in relation to initial complaints – possible recording of interviews with all victim complainants, or at least those with culturally and linguistically diverse backgrounds, and clients with disabilities.

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[12] Robertson B 2000. *The Aboriginal and Torres Strait Islander Women's Task Force on Violence report.* Queensland: Department of Aboriginal and Torres Strait Islander Policy and Development

Given that the police currently act as a gateway to the criminal justice system for sexual offences, do you support the Taskforce examining the initial police response to reports of sexual offending against women and girls? If not, why?

LAQ supports the taskforce examining the initial police response to reports of sexual offending against women and girls. Engagement with the criminal justice system begins with the victim making a formal complaint to police. This first step presents significant challenges which can often be difficult to overcome and may prevent many victims from seeking justice.

Having a gateway/s that people are aware of and that are accessible is extremely important. If the gateway is not used or creates additional problems, then examination of alternative possibilities must be undertaken.

The Operational Procedures Manual (Issue 82) (OPM) provides guidance and instruction for operational policing. Specifically, s 2.6.3 lists additional responsibilities of first response officers and investigating officers when dealing with sexual offences. In addition, officers are to refer to the Response to Sexual Assault Guidelines when dealing with victims, as well as to ensure that information is provided to them about local support agencies.

Similarly, the Office of the Director of Public Prosecutions (ODPP) has issued guidelines to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice. Guideline 25 provides guidance for dealing with victims of crime and the ODPP's obligations.

LAQ recommends a review of the Operation Procedures Manual and the ODPP's guidelines to ensure there are not any inconsistencies or deficiencies. Given one major area of concern is police attitudes towards women and girls who are victims of sexual offences, there should be a review into whether the procedural manual and guidelines are being put into practice and whether/ how they are being regulated. Furthermore, there should be an investigation into whether first responders/investigating officers receive adequate training prior to engaging with victims, particularly in terms of their interviewing techniques which can have a significant impact on whether victims even proceed with a complaint. To that end, it may be worth examining complaints received pursuant to Schedule 1AA of the *Victims of Crime Assistance Act* 2009 (VOCAA) along with how they are dealt with and responded to.

The taskforce could also explore whether special measures are put into place for particularly vulnerable groups, including Aboriginal or Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, as well as victims with a disability. For example:

- Liaison officers to explain the process to people making complaints, with an allocation to all females making complaints. For example, a young female victim said: "I reported it to police and they said because it was my word against his word there was not enough evidence for him to be charged. I did not know I could ask for the interview to be recorded or how to get a second opinion about this".

- A requirement to provide an interpreter where English language skills are limited – for example a victim said: “the police made an assessment that my English was ok and that they did not need to get an interpreter. I did not understand what they were asking and they did not understand what I was saying so I just gave up”.

- A requirement for appropriate cultural support to people from First Nations or cultural and linguistically diverse backgrounds – for example a First Nations woman was incarcerated in prison for domestic violence offences that occurred against her partner explaining that he had broken her jaw, her cheekbone, one of her arms and raped her. Her offences occurred when she defended herself against him. No-one asked her about his offence of raping her or the extent of the injuries she had suffered.

Given the role police play in investigating and charging sexual offences, do you support the Taskforce examining the police attitudes towards and decision to charge in relation to sexual offending against women and girls? If not, why?

LAQ supports the taskforce examining police attitudes towards and decisions to charge in relation to sexual offending against women and girls.

Police responses to complainants vary widely based on the attitudes of the individual officer investigating the matter. Negative police attitudes towards a victim have been seen as a significant factor in cases not being investigated or charges being brought[13].

Further research into police culture and investigatory procedures may show just how much rape myths and stereotypes affect police decisions to properly investigate the complaint at the earliest stages. This could include further examination into police decisions not to charge an alleged offender or where charges have been withdrawn at an early stage. This may assist with the development of a specialist sexual assault training program which will help in initiating service wide cultural change.

Please refer to the response to the immediately preceding discussion question for more detail.

[13] Rebecca Scott & Heather Douglas, & Caitlin Goss (2017) Prosecution of Rape and Sexual Assault in Queensland’ Report on a Pilot Study

Given the role that specialist and mainstream services play, or could potentially play, in supporting victims and survivors of sexual violence offences, do you support the Taskforce examining the role and potential role of sexual violence and mainstream services? If not, why?

LAQ supports such an examination. Attention must be given to how culturally safe specialist and mainstream services are for Indigenous women and girls. It is the case that Indigenous women will use mainstream services if they feel that their privacy and confidentiality could be compromised by Aboriginal and/or Torres Strait Islander services. However, this should not be at the risk of enhancing their trauma because the service is not culturally safe, competent or sensitive. The taskforce should consider the range of Indigenous sexual violence and support services that exist in the community.

Sexual violence and mainstream services can play a role in providing legal advice and education about making complaints of sexual violence offences to both complainants and defendants. An example is the Domestic and Family Violence Specialist Court duty lawyer model where support is provided to both aggrieved and respondents. Provision of adequate resourcing for sexual violence and mainstream services is essential and could be directed towards early intervention programs for offenders and victims.

Is it appropriate for the Taskforce to consider the adequacy of Queensland's current sexual offences including provisions about consent and the operation of the excuse of honest and reasonable mistake of fact in the prosecution of sexual offences? If not, why?

LAQ supports the taskforce considering the effectiveness of Queensland's current sexual offences in the context of determining the merit of further legislative reform on aspects of the law that have not been the subject of recent reviews.

The Queensland Law Reform Commission's (QLRC) Review of consent laws and the excuse of mistake of fact conducted for more than six months in 2019/2020 culminated in its detailed report published in June 2020. Their terms of reference required the QLRC to conduct a review of the operation and practical application of the definition of consent and operation of the excuse of mistake of fact as it applies to the offence of rape and sexual assaults. This process included detailed qualitative and quantitative evidence-based analysis of how these laws operate within the Queensland criminal law framework, having regard to contemporary standards regarding sexual autonomy. In its commitment to evidence-based analysis, the QLRC examined a large number of rape and sexual assault trials and appeals, in particular:

- the transcripts of 135 criminal trials of rape or sexual assault offences completed in 2018
- the transcripts of a further 76 criminal trials identified by either judiciary, ODPP, LAQ or the Bar Association of Queensland in which consent or mistake of fact was raised
- analysis of relevant Court of Appeal decisions involving rape and/or sexual assault offences between 2000–2019
- detailed comparison of related laws in other Australian jurisdictions as well as international jurisdictions.

The QLRC received formal responses (a total of 87 submission) from a cross-section of legal stakeholders, academics, organisations representing the interests of victims, community legal centres and members of the public representing a wide range of views. As noted in the taskforce's Discussion Paper 2, varying views were shared regarding the need or desire for legislative reform and what those reforms should look like. LAQ recognises the enormous efforts of the QLRC to ensure issues relevant to their terms of reference were properly and carefully considered having regard to how the laws actually operate in Queensland. This was only possible due to the extensive review of the trial transcripts outlined above and the availability of the resources within the QLRC secretariat and oversight of its appointed members.

We are confident that the issues relevant to those terms of reference were adequately explored and are mindful of the limited time and human resources the taskforce has access to in its own very extensive terms of reference. In our view, there are substantial issues that have not recently been considered in a Queensland context that warrant closer and more detailed review.

Further, the legislation[14] giving effect to the recommendations from the QLRC review only took effect on 7 April 2021. It has not been given adequate time to demonstrate its value in bringing about reform. It is also in our view only one aspect of the picture which includes broad education and community awareness campaigns on the issue of consent. LAQ supports a closer examination of how such campaigns are being delivered in educational and community institutions and government agencies to ensure long term attitudinal change.

Given the role that the ODPP plays in the prosecution of sexual violence offences, do you support the Taskforce examining the role of the ODPP and their engagement with victims during the process? If not, why?

LAQ supports the examination of the role of the ODPP. Please refer to the response to the Taskforce examining the initial police response to reports of sexual offending against women and girls for more detail.

[14] The *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021*

Do you support the Task force examining the trial process with a focus on the particular needs of victims while ensuring the accused person has a fair trial? If not, why?

LAQ supports the examination of the trial process to focus on victim/witness needs while maintaining the integrity of the trial process for the accused. We do however consider that the trial process already contains a number of protections and procedures in place to support victims of sexual offences. Many of the legislative amendments referred to, which are designed to support vulnerable witnesses at trial, are regularly invoked in the trial process.

Specific considerations

- ***Whether the provisions of the Bail Act 1980* (Qld) *sufficiently protect the safety of victims of sexual offences***

  LAQ would encourage that any consideration of this issue has regard to the various current provisions of the *Bail Act 1980* (Bail Act) which exist to protect the victims' safety. These include provisions:

  - that require assessment of risk of reoffending, risk of endangering the safety or welfare of a person who is claimed to be a victim, or anyone else's safety or welfare; risk of interference with witnesses and obstruction of justice and failing to appear to answer the charge/s (s.16(1)(ii))
  - that require an assessment of the seriousness of offences (s.16(2)(a))
  - the breadth of bail conditions available to a court, including non-contact conditions, imposition of electronic monitoring (s.11)
  - the effects of the show cause provisions, in particular s.16(3)(g) which places an accused in a show cause position if charged with a relevant offence, which includes an offence punishable by a maximum penalty of at least seven years imprisonment if the offence is also a domestic violence offence under s.16(7)(b).

  As part of this examination it may be helpful to review the adequacy of the resources in place to police bail conditions and provide adequate information to a court determining the issue of bail.

- ***Jury directions to combat 'rape myths' and achieve greater consistency in the conduct of sexual violence prosecutions***

  LAQ supports a consideration of current jury directions to examine whether barriers exist to a fair trial, to combat rape myths, and to avoid re-traumatisation of victims.

  However, in our experience, juries in Queensland are currently carefully directed during trial with every effort to avoid reference to outdated stereotypes and irrelevant circumstances leading to sexual offending. Directions are also formulated to guard against miscarriage of justice for an accused and a balance must necessarily be struck. The relevant Criminal Benchbook directions include those regarding evidence of distressed condition (see *R v Williams [2010] 1 Qd R 276*), preliminary complaint, the "Robinson" and "Longman" directions, those relating to evidence of other sexual or

discreditable conduct of the defendant, and mistake of fact. Any such considerations should therefore include an examination of the Benchbook and other available guidance provided to judicial officers in the conduct of trials.

LAQ notes that any variations proposed to standard directions should be carefully scrutinised to avoid risk of unfair prejudice to an accused and potential miscarriages of justice.

- ***Modernising the rules of evidence for admission of similar fact and propensity evidence in Queensland***

  LAQ supports an analysis of the rules of evidence for admission of similar fact and propensity evidence subject to the below comments.

  In Queensland the current evidentiary rules allow for the admission of probative, relevant evidence and limit material that would unfairly prejudice the right to a fair trial. The prima facie position on admissibility and application of the common law test in *Pfennig v The Queen*[15], and *R v Bauer*[16], are by no means impossible hurdles to overcome. In our experience similar fact and propensity evidence is regularly admitted into criminal trials.

  As outlined in our response to the taskforce's first discussion paper, LAQ does not support extending the rules of evidence and rendering admissible evidence of the conduct of the defendant beyond the scope of the relationship with the complainant, to demonstrate a tendency on the part of the defendant to engage in certain behaviours. Such evidence must always be subject to the basic requirement of relevance and assessment of fairness. Because it is so prejudicial, it should also always be subject to discretionary exclusion by the trial judge where its probative value is outweighed by its prejudicial effect, and where its admission is not in the interest of a fair trial.

  Legislation that would abolish the common law principles governing admissibility of "propensity" evidence has significant implications for the administration of criminal justice beyond sexual offences and potentially beyond the terms of reference of the taskforce. Any consideration by the taskforce of proposed legislative amendments effecting changes to the rules of evidence should be referred for broader consideration and further consultation as part of a separate referral to the Queensland Law Reform Commission where the broader implications of the legislative amendments can be considered.

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[15] (1995) 182 CLR 461 at 483

[16] (2018) 92 ALJR 846, at 861-862

The system is adversarial and underpinned by the presumption of innocence. People accused of serious offences deserve the guarantee of a fair trial. It is now a recognised human right in Queensland.

- ***The appropriate use of police body-worn camera footage as evidence in criminal proceedings***

  Police body worn camera footage is often used as evidence in criminal proceedings, particularly with respect to offences of violence, as first responders arrive on a scene. It can form valuable parts of the objective evidence for all parties.

  LAQ considers if it is contemplated to use the footage to capture a victim's version at first instance, it be viewed as one part of that evidence and not necessarily a complete record. Any omission by the victim due to shock, embarrassment, fear of reprisal, or shame, could lead to a version that is subject to future criticism for inconsistency and affect the credibility of the complainant witness. This is compounded when the woman has particular vulnerabilities such as mental illness or cognitive impairments, or language or other communication barriers exist.

  If it is contemplated it be used to capture an adult victim's version to be utilised as evidence-in-chief at trial, that is more concerning. Removing the victim's right to have agency or control over their narrative and when and how they choose to give their version, is problematic.

  LAQ considers that if this evidence is to be admissible as a victim's version, to support evidence in chief, that safeguards be implemented to govern how body worn camera footage is edited, accessed and stored. This will ensure transparency of the process and fairness to the accused, who should be entitled to full disclosure of unedited versions. Similar to other recordings used in criminal trials, its content should still be subject to the general rules of evidence.

- ***Opportunities to learn from the family law system***

  <u>Restrictions on self-represented litigants cross-examining the victim in a matter involving allegations of violence and abuse</u>

  LAQ supports further consideration of the current restrictions, compared with the restrictions contained in *s. 102NA* and *s. 102NB* of the *Family Law Act 1975* (Cth) (FLA). It is further noted that a review into the operation of the FLA provisions is currently under way with a report to be provided to the Federal Attorney-General's Department by the end of August 2021.

  LAQ notes that there are current restrictions on self-represented parties cross-examining victims in higher court criminal matters pursuant to the *Evidence Act Division 6*, and similarly in *s. 151 Domestic and Family Violence Protection Act 2012* (Qld) (DFVPA) in relation to proceedings under that Act.

Evidence Act s. 21O prevents self-represented charged persons cross-examining 'protected witnesses'. In those circumstances, an order under *s. 21O(4)* for legal assistance is to be provided by LAQ.

A protected witness may be (pursuant to *Evidence Act s. 21M*):

- a witness under 16
- a witness with an impairment of the mind
- an alleged victim of a prescribed special offence or
- an alleged victim of a prescribed offence who would likely be disadvantaged as a witness, or to suffer severe emotional trauma.

A prescribed offence, or a prescribed special offence, includes *Criminal Code* offences that may be relevant to this taskforce of:

- threatening violence (*s. 75*)
- threats to murder in a document (*s. 308*)
- wounding (*s. 323*), common assault (*s. 335*)
- assault occasioning bodily harm (*s. 339*)
- serious assault (*s. 340*)
- kidnapping (*s. 354*)
- deprivation of liberty (*s. 355*)
- threats (*s. 359*)
- extortion (*s. 415*)
- a number of offences in *Chapter 22* (Offences against morality)
- grievous bodily harm (*s. 320*)
- torture (*s. 320A*)
- all offences in *Chapter 32* (Rape and sexual assaults).

LAQ considers there is some scope for assessment and possible improvement in relation to the provisions under the DFVPA, and whether provisions similar to that contained in *Evidence Act s. 21O* should be implemented and resourced in relation to charges proceeding summarily.

Initiatives and best practice principles

The Federal Circuit and Family Court of Australia (FCFCA) operates a number of initiatives to deal with matters which involve vulnerable litigants, for example:

- The Lighthouse Project plays a central role in the courts' response to cases which may involve family violence, by shaping the allocation of resources and urgency given to such cases. It is designed to improve the safety of litigants who may have experienced family violence and children who may have experienced associated risks such as child abuse.

- The Evatt List[17] is being trialed in Adelaide, Brisbane and Parramatta and has been created to ensure that families who are the most vulnerable are provided with appropriate resources and support which aims to strengthen safety and wellbeing. It is a case management system that responds to the particular needs of the family as efficiently and effectively as possible to minimise the risk of further trauma and harm to the family and it applies to applications for parenting orders only. The aim of the Evatt List is to have a case finalised within nine to 12 months of initial filing.

- The Magellan List involves case management for matters where allegations of serious physical abuse and sexual abuse are made in relation to a child. The overarching principles associated with Magellan include:

    - taking an inter-organisational approach (including Child Safety)
    - having a child-centred focus
    - placing priority on early intervention
    - using a judge-led, tightly managed and time-limited approach
    - using court-ordered expert investigations and assessments (from Child Safety and court-appointed counsellors)
    - using a multidisciplinary team (including judicial officers, an independent children's lawyer (ICL), court counsellors, and Child Safety).

  Magellan relies on collaborative and highly coordinated processes and procedures. A crucial aspect is strong interagency coordination, in particular with state and territory child protection agencies. This ensures that problems are dealt with efficiently and that high-quality information is shared. An ICL is appointed in every Magellan case. Child Safety's Magellan officer is located within Court Services.

- Family Violence Best Practice Principles which were designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise.

Similar initiatives could be considered for implementation in the Queensland state courts for dealing with matters involving sexual violence.

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[17] See Guide for practitioners in the Federal Circuit Court Evatt List and Guide for parties in the Federal Circuit Court Evatt List

- ***The treatment of victims appearing as complainant witnesses by lawyers appearing for the accused perpetrator of sexual violence, judicial officers and prosecuting lawyers***

  LAQ considers there are a number of procedures which interact with legislative reform to ensure the fair treatment of complainant witnesses at trial. It is LAQ's experience that the defence counsel engaged are regularly observant of their professional obligations and very conscious of the sensitivities of sexual offence trials. This framework should be considered as part of any broad review of the treatment of victims in the current system.

  The rules and standards of professional conduct are set out in the *Barristers' Conduct Rules 2011* as amended, to promote and ensure the administration of justice. *Rule 61* governs proceedings for sexual assault, indecent assault or the commission of an act of indecency in which the alleged victim gives evidence:

  (a) a barrister must not ask that witness a question or pursue a line of questioning of that witness which is intended:

      (i) to mislead or confuse the witness; or
      (ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

  (b) a barrister must take into account any particular vulnerability of the witness the manner and tone of the questions that the barrister asks.

  Defence counsel must also seek to confine cross-examination to identified issues which are genuinely in dispute and are not permitted to ask improper questions in cross-examination. The *Evidence Act s. 21* invests a discretion in the court to disallow an improper question, defined as a question that "*uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive*."

  Further, defence counsel must not act as their client's mere mouthpiece.

  There are also protections that operate to disallow questioning of a complainant as to their sexual history (*s. 4 Criminal Law (Sexual Offences Act) 1978)* except if leave is granted in particular circumstances.

  The court can also place limitations on questioning in relation to special witnesses with respect to time and the number of questions on a particular issue.

  LAQ's experience is that prosecutors are proactive in utilising the existing legislative mechanisms available to protect victims when giving evidence.

  LAQ acknowledges that complainants report being re-traumatised by the trial process which is, by its nature, adversarial. Many reforms have been introduced to assist how complainants are treated by police and by the courts and to minimise the impact of the

system on these witnesses. These include:

- pre-recorded police statements of children and those of impaired mind (*Evidence Act s. 93A*)
- pre-recorded evidence for special witnesses (*Evidence Act s. 21A*), and affected child witnesses (*Evidence Act Division 4A*)
- special considerations of how witnesses categorised as special witnesses give evidence, including remotely,
- exclusion of people from a court room when a complainant in proceedings for a sexual offence is giving evidence[18];
- prohibition of the publication of identifying particulars of a complainant[19]; and
- as outlined above, prevention of the cross-examination of certain witnesses by self-represented defendants (*Evidence Act s. 21O*).

There are also significant limitations in place with respect to cross-examination of witnesses at committal hearing. The *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* provided for amendments to the *Justices Act 1886*. Cross-examination as a matter of right in committal hearings was removed and is only permitted upon application and if it can be demonstrated that substantial reasons exist in the interests of justice[20].

Alternative processes such as restorative justice in appropriate cases, could be a step towards addressing this issue.

- ***Legal assistance and representation of victims appearing as complainant witnesses in prosecutions of sexual violence offences***

  LAQ supports further research into the merits of appropriate complainant witness representation, to better inform and provide support through the judicial process.

  With respect to the giving of evidence, LAQ recognises the value in a support person (already a feature in sexual offence trials) being present with appropriate directions existing to safeguard against prejudice. LAQ is however cautious about the extent of any legal representative role in this process and whether this solution is workable within our adversarial system.

  Support systems do exist, including through Victims Assist Qld. Victim Liaison Officers are also available through the ODPP to assist victims to navigate the trial process.

  The Queensland Intermediary Scheme (QIS)[21] was also recently introduced to run as a two-year pilot program in Brisbane and Cairns. The QIS currently applies to

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[18] s. 5 *Criminal Law (Sexual Offences) Act* 1978
[19] Ibid, s.6.
[20] *DC v Queensland Police Service* [2018] QMC 3
[21] Division 4C *Evidence Act 1977*

prosecution witnesses in child sexual offences who are under 16, or have an impairment of the mind, or have difficulty communicating. Intermediaries are not legal practitioners but have a therapeutic background. LAQ supports consideration as to whether the use of intermediaries ought to be expanded to assist all vulnerable witnesses, following evaluation of the pilot.

The question of independent legal representation is more vexed. It could provide greater confidence and assurance for a complainant witness who would benefit from an advocate with specialised legal training. It could lead to empowerment and a sense of more control in the process. The presence of a legal representative may serve to promote a more respectful treatment of the victim.

Of main concern is the imbalance it would create in an adversarial criminal justice system if an independent legal representative were a party to trial proceedings. An accused person would essentially be required to defend themselves against not only the prosecution, but the complainant victim's representative. Such a role does not align itself easily to our criminal trial jurisdiction.

A narrowing of the role of representative to pre-trial applications for example, could have merit. For example, since 2001 in Ireland, complainants in rape and aggravated sexual offence trials have been entitled to separate legal representation for applications that are made with respect to questioning on sexual history. Further research on jurisdictions that have successfully engaged such representation in an adversarial system such as ours, is worth conducting.

LAQ considers that clearly defined parameters are needed in order to maintain the integrity of the complainant witness version in relation to all representatives engaged in the trial process. There would also need to be contemplation of measures to overcome any prejudice against the accused in providing broad standing in a criminal trial to a legal representative for the complainant.

It is contemplated that questions of legal privilege would also arise and would necessarily attach to communications between legal representatives and the complainant witness. Whereas conference notes between prosecutor and complainant are disclosable to an accused prior to trial, communications between a legal practitioner and complainant client would not be, unless waived.

Given the QIS is in its infancy, in our view it would be preferable for the pilots to run their course to see if such reforms improve the treatment and experiences of complainants in the course of a trial before embarking on such significant systemic change as representation for victims within a trial. There are also cost implications potentially to LAQ as to how such representation is facilitated and would therefore require additional funding to support any such program.

- ***Whether the legislative provisions should be amended to prescribe that victims who are special witnesses are entitled to give evidence in a remote room, unless the victim herself chooses to give evidence in the courtroom***

  The *Evidence Act* recognises the vulnerability of particular witnesses in giving evidence in sexual offence matters and provides for special measures to assist them in that process.

  A witness can be declared a special witness upon application by a party to the proceedings or by the court of its own initiative [4].

  A special witness is[5]:

  (a) a child under 16 years; or

  (b) a person who, in the court's opinion—

  (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or

  (ii) would be likely to suffer severe emotional trauma; or

  (iii) would be likely to be so intimidated as to be disadvantaged as a witness;

  if required to give evidence in accordance with the usual rules and practice of the court; or

  (c) a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a participant in a criminal organisation; or

  (d) a person—

  (i) against whom domestic violence has been or is alleged to have been committed by another person; and

  (ii) who is to give evidence about the commission of an offence by the other person; or

  (e) a person—

  (i) against whom a sexual offence has been, or is alleged to have been, committed by another person; and

  (ii) who is to give evidence about the commission of an offence by the other person.

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[4] *Evidence Act* s. 21A
[5] *Evidence Act* s. 21A(1)

A complainant in a sexual offence is automatically captured within these provisions.

Once a witness falls within the category of special witness, then orders can be made for various measures to assist them in the giving of their evidence. These include[6]:

- for a screen between the witness and accused if giving evidence in the same room;
- for a support person to be present during evidence;
- for their evidence before the trial to be given by audio visual link from a remote room;
- that the court be closed to the public during the giving of evidence (*Evidence Act s. 21A(2)*);
- a direction about rest breaks for the special witness;
- a direction that questions for the special witness be kept simple;
- a direction that questions for the special witness be limited by time; and
- a direction that the number of questions for a special witness on a particular issue be limited.

The experience of LAQ Criminal Law Services is that an application for the giving of remote evidence is often made utilising these provisions on a reasonable basis and as such is rarely contested by defence. It is our experience that Crown prosecutors are proactive in making such applications and appropriate orders for the remote giving of evidence are routinely made.

LAQ considers the current provisions of the *Evidence Act* are drafted in a way that sufficiently address this issue. There is no need to make this section prescriptive in nature or in making this the default position. There is a preference for courts to retain discretion to decide on applications based upon the particular features that are present in the individual case.

It is widely recognised that a victim has the right to be protected at court from unnecessary contact with the accused, their family and friends, in accordance with the Victims' Charter of Rights.

- ***Whether the current legislation sufficiently addresses issues concerning privileged counselling communications where there is or has been an allegation of a sexual offence made by the victim***

  The provisions of the *Evidence Act s. 14H* are sufficient to cover the range of considerations the court must have regard to in deciding an application for leave to access such communications. The court is further entitled to take into account "any other matter it considers relevant in the exercise of the discretion".

[6] *Evidence Act s.* 21A(2)

A raft of recent decisions primarily from the District Court, demonstrates that the counselling communications process is being considered very seriously by the courts, that the provision of protected counselling communications is subject to rigorous scrutiny, and the requirement that the communications will have substantial probative value is being held to a high standard:

- *R v JML* [2019] QDCPR 23 – application for the production of protected counselling communication refused
- *R v DO* [2019] QDCPR 49 – application for the production of protected counselling communication refused in part and otherwise allowed with conditions
- *R v CDJ* [2020] QDCPR 115 – application for the production of protected counselling communication refused
- *R v Kay* [2021] QDCPR 10 – application for the production of protected counselling communications refused

Recent practice directions have been issued to streamline the application process and resolve procedural issues that have arisen during the implementation of the legislation since it was enacted:

- Supreme Court Practice Direction 15 of 2021
- District Court Practice Direction 5 of 2021.

Given the recency of the reforms, LAQ supports a review of how the legislation is being applied and the impact of the recent practice directions on the process. We also support a consideration as to whether there is any scope to improve the experience of women and girls throughout this process.

It is acknowledged that appellate guidance in relation to the interpretation of the provisions would assist in achieving consistency, although in practice there is little scope for this. LAQ acknowledges the considerable disruptions to processes and court lists that interlocutory appeals would cause. However, as part of the Taskforce's examinations LAQ recommends that consideration be given to reviewing some aspects of the legislation that have resulted in a lack of clarity due to a difference in interpretation in single judge decisions; in particular:

- the application of the *Division 2A Evidence Act* provisions to complainants who are victims or alleged victims of a sexual assault offence, as defined in *s.14B Evidence Act* but where the proceedings themselves are not technically sexual assault offences. The question should be asked if a complainant is not empowered to make an allegation of sexual assault due to vulnerabilities, but the allegation is made out in the evidence, then should sexual assault counselling privilege apply?

  For example, in one case involving LAQ Counselling Notes Protect the complainant was a victim of sustained physical violence over 48 hours by the

accused. The acts engaged in by the accused included coercive, controlling behaviours. The acts also included the complainant being made to take off her clothes and pose in certain positions and the accused pointed at her breasts and genitals with a knife. The accused was charged with torture, common assault, grievous bodily harm and deprivation of liberty, but there were no charges of sexual assault. The complainant also did not want to make any allegations of sexual assault against the accused as she was concerned about their family's reactions and how this would affect her children. She also had difficulty understanding that what was done to her was a sexual assault. The complainant wanted her counselling records protected. The court made a ruling that the sexual assault counselling legislation did apply following submissions from the parties, with the reasoning that an allegation of sexual assault was made out on the complainant's statement. Different judicial officers have indicated their disagreement with this decision and that their view is that the privilege would only apply if the complainant actively made the allegation.

It is the view of LAQ Counselling Notes Protect that the privilege over counselling records should apply where there is evidence of an allegation regardless of whether or not it is actively alleged by the complainant. To ensure that this position also is covered in the event that a separate offence of coercive control is created, it is the position of LAQ Counselling Notes Protect that an amendment of Division 2A *Evidence Act* should also be considered to include the new offence.

- do the considerations under *Evidence Act* s.14H(2) apply at the stage of giving leave for subpoenas to issue or not? This issue was raised in a case where the accused was charged with sexual assault and applied to access the complainant's counselling records. When determining the issue of whether leave should be granted to issue subpoenas for the production of records, the judicial officer found that the court is not required to consider the harm that may be caused to the counselled person by the production of records, as the records were not being admitted into evidence at this stage. It is the view of LAQ Counselling Notes Protect that this does not appear to be in accordance with Parliament's intention in enacting the sexual assault counselling privilege legislative scheme. Other judicial officers have found that the court is required to consider whether or not production of the records would cause harm to the counselled person.

- consideration of the merits of legislative change to allow the counselled person and their legal representatives to be able to access protected counselling communications after court proceedings have commenced so that legal advice with respect to these records can be provided to the counselled person.

- the standing of the counselled person with respect to an application for leave to access protected counselling communications. In some instances the sexual assault counselling privilege legislation has been interpreted in a way that means the counselled person only has standing with respect to whether or not a record is a protected counselling communication. In these cases the court has refused

to allow the counselled person to make submissions as to whether or not the test for leave pursuant to the *Evidence Act s. 14H(1)* applies.

- ***Whether recorded interviews with trained police officers should be admissible evidence for all victims of sexual assault***

  The *Evidence Act s. 21A* provides for application for the pre-recorded evidence of a special witness to be viewed and heard at trial in lieu of direct oral testimony. *Evidence Act s. 21AK* governs the pre-recording of the evidence of an affected child witness.

  Similar provisions exist under the *Evidence Act* s. 93A in relation to children or those with an impairment of the mind. These generally take the form of a police interview that is often relied on as the evidence in chief of the witness at trial.

  Expanding these provisions to permit the admissibility of complainant witness versions in police interviews to all victims of sexual assault bears further consideration of the advantages and disadvantages.

  An advantage could be that it provides an opportunity for greater transparency in the process of the taking of the evidence. An interview allows for scrutiny as to how the information from the complainant was elicited, as opposed to a statement in a brief that does not deliver that context. It can uncover leading questions and other poor interview practices.

  Another obvious benefit is the interview process would generally be less stressful than giving evidence-in-chief at court. The less formal environment could be more conducive to obtaining an accurate and comprehensive version.

  Pre-recorded evidence in this way may also reduce opportunity for any witness intimidation by an accused as the version has already been captured well in advance of trial.

  A best practice framework would need to be implemented to govern the process of taking evidence in this way. There is concern that an interview may result in the inclusion of irrelevant matters to the issues, or inadmissible evidence that is prejudicial and not probative, or that the interviewer could contain sympathetic responses which could indicate bias.

  Further, evidence which could be elicited by a skilled prosecutor in evidence in chief, may be overlooked by a police officer. The role of an officer as impartial investigator at an interview stage necessarily differs from the role of a prosecutor who is charged with proving the matter in court.

  There is also some concern that live testimony has greater force and impact than a recorded version. The latter concern is perhaps less prevalent than it was, as the use of video recorded evidence and technology in general becomes more commonplace and less of a novelty to jurors.

  Significant resourcing would be required to deliver appropriate training to officers conducting such interviews, to avoid potential legal arguments (causing further trial delay) regarding editing and admissibility, to ensure the integrity of the complainant

witnesses' version and to avoid any overall potential miscarriage of justice to the accused.

Do you support the Taskforce examining the needs of victims following the prosecution of a sexual offence and whether the establishment of a Victims of Crime Commissioner is appropriate for Queensland? If not, why?

LAQ supports further examination of these issues, including consideration of the expansion of the role of existing services/agencies to support victims and provide a greater coordinated oversight of available support networks applicable to the criminal justice system.

Do you support the Taskforce examining alternative ways of delivering justice for victims such as through the establishment of specialised courts or through restorative justice? If not, why?

Yes. Solutions to violence developed by Indigenous people are likely to focus on community responses. Effective approaches for Indigenous communities are more likely to focus on healing and enable victims to deal with their pain and suffering. Responses need to recognise and respect female victims cultural and family obligations rather than aiming to separate women from families and communities.[22]

Indigenous approaches can involve customary law and principles of restorative justice and healing and only involving the criminal justice system in the most serious of cases.

LAQ supports the taskforce examining alternative ways of delivering justice for victims.

There is merit in a focus on:

- expanding diversionary alternatives for adults such as restorative justice conferencing, with opportunities for referral to be provided at all stages of the criminal justice system (as is provided for juvenile offenders under the *Youth Justice Act 1992*)
- examining the availability of funded, accessible, and culturally appropriate community-based offender treatment and rehabilitation programs to complement the restorative justice approach
- examining models of restorative justice conferencing established in other jurisdictions such as New Zealand.

[22] https://www.aic.gov.au/publications/tandi/tandi405

Do you support the Taskforce focusing on the underlying factors that are contributing to the increasing levels of women and girls coming into contact with the criminal justice system with a particular focus on Aboriginal and Torres Strait Islander women and girls? If not, why?

Yes.

- Estimates suggest that up to 90 percent of incidents of violence perpetrated against Indigenous women go undisclosed.
- Indigenous women living in regional and remote communities face additional challenges when dealing with their experience of violence, compared to those in metropolitan areas.
- Addressing the perpetration of violence by Indigenous men is made complex by their disproportionate contact with the legal system. This can affect women's willingness to report violence in the first place. It can also create difficulties facilitating accountability and change, if the key mechanism for doing so (the criminal justice system) is also a source of harm[23].
- Where the perpetrator is non-Indigenous and the victim is Indigenous, there is a power imbalance and belief that the predominantly white systems will listen to the white perpetrator before the Indigenous victim.

Do you support the Taskforce focusing on the role of the police in relation to women and girls accused of offences? If not, why?

LAQ supports the taskforce focusing on the role of the police in relation to women and girls accused of offences.

LAQ acknowledges that many women and girls accused of offences come from complex trauma backgrounds and their interactions with police are complicated by cross-cutting issues such as disability, mental health issues and linguistically diverse backgrounds. LAQ acknowledges that Aboriginal and Torres Strait Islander women and girls are over-represented in this cohort.

LAQ supports the taskforce considering co-response models and the role that police may have in referring accused women and girls to expanded diversionary alternatives as outlined above. A

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[23] *Improving family violence legal and support services for Aboriginal & Torres Strait Islander peoples:* Key findings and future directions. Regional and cross border experiences in Albury-Wodonga and Mildura ANROWS December 2020: https://www.anrows.org.au/publication/improving-family-violence-legal-and-support-services-for-aboriginal-and-torres-strait-islander-peoples-key-findings-and-future-directions/

review of the QPS Operational Procedures Manual, and how they are being put into practice, may assist.

Do you support the Taskforce focusing on women and girls' experiences in the legal system when they have been accused of committing offences? If not, why?

In our experience, the cross-cutting issues outlined in the discussion paper[24] and above in our response to that aspect, impact significantly on whether or not a woman or girl has contact with the criminal justice system and what their experience is once they have contact with the system.

LAQ therefore supports the taskforce focusing on the experience of accused women and girls.

In addition to the issues raised in the discussion paper, we would ask that consideration be given to the effects of unintended consequences of recent legislative reforms focused on being "tough on crime" but potentially contributing to the increased incarceration of women and girls. Those reforms would include:

- amendments to the show cause provisions of the *Bail Act*[25]
- amendments to sentencing guidelines of the *Penalties and Sentences Act 1992*[26]
- amendments to the *Youth Justice Act 1992*[27].

Do you support the Taskforce focusing on women and girls' experience of incarceration and release and in particular the progress towards implementing the recommendations of Women in Prison 2019? If not, why?

LAQ supports the focus on women and girls' experience of incarceration and release, as proposed.

A broad range of recommendations are contained in the *Women in Prison Consultation Report 2019* (qhrc.qld.gov.au). LAQ supports an examination of the progress made since its publication, with a particular focus on diversionary measures and justice reinvestment, as identified in the report.

Female incarceration has increased over the last decade, with the majority imprisoned for short periods of time but with broader reaching adverse social impacts from the disruption caused. LAQ

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[24] Pages 8 and 9
[25] For example brought about by *Bail (Domestic Violence) and Another Act Amendment Act 2017* and *Community Services Industry (Portable Long Service Leave) Act 2020.*
[26] For example, *Criminal Law Amendment Act 2014*, *Criminal Law (Domestic Violence) Amendment Act* (2015 and 2016), *Criminal Law Amendment Act 2017, Criminal Code and Other Legislation Amendment Act 2019, Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020.*
[27] For example brought about by the *Youth Justice and Other Legislation Amendment Act* (2019 and 2021).

supports an examination of the progress made to improve long term outcomes for women and girls who are or have been incarcerated.

LAQ acknowledges an over-representation of First Nations women and girls in custody and a disproportionate cohort with mental illness and disability. Backgrounds of trauma feature strongly. LAQ supports trauma-informed approaches to the support of women and girls within the custodial system and continuing upon transition to the community. The custodial system is traditionally male-oriented. An examination of how responsive that environment is to females who enter that system with backgrounds of trauma, is key to implementing better outcomes. The response needs to be culturally informed and appropriate.

There is merit in a focus on:

- the development of further innovative sentencing approaches or diversionary alternatives to those that exist, that maintain mother/child relationships, stable housing, employment and connection to communities as a preference to custodial sentences; LAQ notes the housing models in Victoria and the United States of America referenced in the report as representative of solutions to avoid the disruption of mother/child relationships without jeopardising community safety
- progress towards further resourcing in substance abuse programs, not only in south east Queensland but in regional areas and far north Queensland, in custody and post-release
- progress in the resourcing of appropriate, timely and adequate support for women and girls with mental illness, neuro cognitive impairments, intellectual impairments and disabilities to enable equitable access to prison programs and to have their health and treatment needs met
- progress in removing traditional barriers (including economic barriers) to gaining educational qualifications, and further investment in vocational training to assist women in gaining economic independence on release to support themselves and their families
- progress in transitional and post-prison support initiatives for women particularly with respect to housing and substance abuse and for those returning to identified vulnerable communities
- issues which arise in applying for parole, including delay, which result in poorer outcomes for women who may be released at full time without any parole program support in place
- the experience of women who are mothers in custody, the supports in place for care of their children in that environment and for contact with children, who are separated from their incarcerated mothers, including greater use of technology .

The *Human Rights Act 2019* (HRA) provides for the humane treatment of all persons deprived of liberty and specifically addresses the rights of those on remand. *HRA s. 30* provides that an

accused person who is detained must be treated in a way that is appropriate for a person who has not been convicted.

LAQ supports the examination of this distinction in the treatment of women and girls in the three correctional centres and the youth detention centres, where remandees are incarcerated with those who have been sentenced. This is in distinction to the Arthur Gorrie Correctional Centre at Wacol which serves as a remand and reception centre for men in south east Queensland, who are generally transferred upon conviction to another centre to serve their sentence.

LAQ is of the view that an examination of the relevant issues referred to above will necessarily involve scrutiny of any unintended consequences of legislative reform to the criminal law as a response to domestic violence including to the *Bail Act*. LAQ would welcome further consultation on this aspect in particular, as a potential driver leading to an increase in female incarceration.