Women's Legal Service Qld

Submission in response to 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

Women's Legal Service Qld www.wlsq.org.au
Address: 8 Ponsonby Street (cnr Ipswich Road) Annerley Qld 4103 | PO Box 119, Annerley Qld 4103
Administration Line: (07) 3392 0644 | *Fax:* (07) 3392 0658
Helpline: 1800 WLS WLS (1800 957 957) | **Email:** admin@wlsq.org.au

FOREWORD

In 2003, the then Attorney General of Tasmania, Mrs Jackson (Denison- Attorney- General and Minister for Justice and Industrial Relations- 2R)

The Tasmanian Criminal Code Amendment (Consent) Bill 2003 (no.12) amended the definition of consent to "free agreement" to import a notion of mutuality and reciprocity into the notion of 'consent', and included setting down particular circumstances where, as a matter of law, the accused's mistake cannot satisfy the requirements of being honest and reasonable in the context of sexual offences. The amendment also required a judge to direct a jury that the definition of consent as 'free agreement', and displace any assumptions that silent, passive acquiescence or lack of resistance equates to consent.

The Attorney-General, Mrs Jackson, goes on to observe that the Bar Association, the DPP, and the Law Society did not agree with the proposed amended, because they thought it might be "... taking away or making it more difficult to argue for their clients."

However, Mrs Jackson said, "I make no apology and the government makes no apology for bringing it into this house because we believe it will assist the victims of sexual assault.

"If some people do not like that, I do not apologise for what I am trying to do. It has been said by some of those people who are opposed to what we are doing that it is more feminist propaganda or feminist policy or whatever; I totally reject that too. If as a female Attorney-General I cannot bring in legislation that gives women the most protection possible, then I do not think I should do this job." (4 December 200339)

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

ABOUT WLSQ

Women's Legal Service Queensland (WLSQ) is a specialist community legal centre, established in 1984, which provides free legal and social work services and support to Queensland women impacted by domestic and sexual violence, and family law matters.

WLSQ provides state-wide assistance through our domestic violence legal helpline, and has a designated rural, regional and remote priority line to increase women's access to our service in non-metropolitan regions. We undertake outreach work at the Brisbane Women's Correctional Centre, Gatton Prison and at Family Relationship Centres in Brisbane. We also conduct domestic violence duty lawyer services at three Courts: Holland Park, Caboolture, and Ipswich. Our specialist domestic violence units in Brisbane, the Gold Coast and Caboolture provide intensive case work and Court representation for our most vulnerable clients.

Since 2017, the Queensland Government has funded the Women's Legal Service to provide the Counselling Notes Protect (CNP) service in partnership with Legal Aid Queensland. The CNP service provides advice, minor assistance and court representation to victim-survivors whose counselling records are being sought by a party in a legal proceeding. This service is the implementation of Recommendation 130 from the Not Now: Not Ever Report, to establish a sexual violence counselling privilege in Queensland.

The CNP service and underlying legislation is innovative in Queensland as it provides sexual assault survivors the ability to have their own legal advice and representation, and gives them legal standing at least in some part of the proceeding. Since the WLSQ received funding for the CNP service, we have had 495 clients, and nearly 10% of these clients were Aboriginal and Torres Strait Islander women, either in the criminal justice system as complainant victim-survivors or seeking information and legal advice regarding their legal options in response to their experiences with the criminal justice system as victim-survivors. The legal advice, information and support provided to these very vulnerable and traumatised women is extremely important and women have reported it to be life-changing. The legal expertise and support provided by our sexual violence lawyer is immeasurable and assists in women's understanding of the justice system and helps with their ongoing healing. One woman explained that having the Counselling Notes Protect legal representation was the "first time she felt heard", in the whole three years of her legal proceedings.

This submission provides responses to the particular questions over which WLSQ has some expertise because of the services we provide and how those issues affect our clients. To that end, our submission broadly recommends the following:

1. The adoption and implementation of the Hear Her Voice recommendations with the inclusion of 'sexual violence' in the terms of reference.
2. Specialist victim-survivor legal representation in criminal proceedings - especially in related hearings addressing substantive entitlements.
3. Further amendments to the Crimes Act and Evidence Act in relation to:
    i. Mistake of Fact;
    ii. Definition of Consent;
    iii. Similar Fact and Propensity Evidence.
    iv. Objections to harassing questions.

CROSS-CUTTING ISSUES

WLSQ recognise that women and girl's experiences across the criminal justice system as victim-survivors of sexual violence is affected by the intersecting experiences of disadvantage.

About 10% of the Counselling Notes Protect clients are Aboriginal and Torres Strait Islander women, who are victim-survivors of sexual offences and are complainants in existing proceedings. A common feature of many of these women is the high levels of intervention and involvement of various government departments in their lives, for example; Department of Child Safety, hospital, and mental health services. As explored in this paper, and echoed in the Taskforce Discussion Paper 3, some of the overwhelming issues for victim-survivors and our First Nations clients in the criminal justice system, aside from the legacy of colonisation and distrust of the legal system, is the lack of culturally sensitive and relevant information and support regarding the legal process, her rights within that system as a complainant, and being supported to exercise her agency.

Women and children who experience multiple and complex intersecting needs report being treated with suspicion to the extent that they are reluctant to engage with the criminal justice system at all. Research shows that survivors of trauma are likely to have complex and possibly challenging behaviours and coping strategies, which often makes it difficult for the Queensland Police Service (QPS) to take their complaints seriously. WLSQ does not agree that the QPS consistently "conducts investigations of reports of [child] sexual abuse, ... in accordance with the following principles: ...

> ... be[ing] non-judgemental and recognise that many victims of [child] sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record."[1]

Victim-survivors and their advocates have very little confidence in the outcome of a report to police, due to significant inconsistencies in police responses to victim-survivors. This is particularly so in relation to those who are First Nation, have a disability, or are from regional, rural or remote communities. Victim-survivors report that their own safety can be compromised by the police investigation if the police do not charge the accused because according to his version of events it was "consensual sex", even if it got a bit rough. CNP

[1] Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse, June 2018, page 100-101.

client's report the QPS appear to favour the version provided by the accused especially if there is no other evidence except her accusation, and his denial. For our clients who experience multiple and intersecting disadvantage, they report feeling that their right to be free from sexual violence is not as important as the right to be right to be free from sexual violence in the broader community.

Aboriginal and Torres Strait Islander women are already part of a marginalised and over-policed community. There is a very high risk that this demographic will be misidentified as offenders and criminalised if they come to the attention of the police. Aboriginal and Torres Strait Islander women often challenge QPS notions of the how the "right victim" should look and behave, having most often difficult histories with multiple governmental interventions, especially the criminal justice system, already. This leads to reluctance and mistrust of the legal system.

In regional, rural and remote communities, victim-survivors have concerns about the lack of anonymity, especially in attending court either as a victim or offender resulting in embarrassment and possible detrimental consequences in their communities and families. WLSQ had a client victim-survivor who taught at a local faith based high school in regional Queensland. She expressed fears of reporting and her employer becoming aware of the court process because 'everyone knows your business' in a small town. She spoke of possible consequences to her employment because of the attitudes her employer may have about her being a victim-survivor who was going through the criminal justice system. In regional communities, survivors report being scared because the accused may live in the same town, and when police go to speak to him during their investigation process, victim-survivors say that feel vulnerable as there is nothing in place to protect her from him. One survivor talked about being raped by a neighbour. After QPS preliminary investigations, no charges were laid. When she contacted WLSQ she was terrified of the repercussions her report to the Police was going to have on her, and her safety as the accused now knew of her complainant. Whilst this may be a common occurrence, the victim-survivor was not told of the Police decision, and felt completely abandoned. Victim-survivors in regional and remote communities have advised that they have had to sit next to family and friends of the accused during court proceedings and will sometimes even be in the same area of the court with the accused if he is not in custody.

Recognising and responding to trauma

How can the impacts of trauma be better recognised and responded to at each point across the criminal justice system?

WLSQ submits that providing a system of trauma informed practice at each point of the criminal justice system would involve –

Police:

- **Specialist training** – Police at the front counter need training and resources to appropriately respond to victim-survivors who attend police stations and report their experience of sexual violence. Victim-survivors should be offered privacy, and have the reporting process explained and provided support service referrals. This is the stage where a victim-survivor should be provided a victim's advocate/ support person – and note that the provision of Sexual Violence Liaison Officers (SVLO) as trialled in

Townsville and Logan is expected to be established state-wide. The SVLO should be re-enforcing that the priority for the SVLO is the wellbeing of the victim-survivor, and linking the victim-survivor into safety and support services. The SVLO should explain the reporting process and be the central contact point for victim-survivors. WLSQ have been advised that victims need to ask if they can have a support person and/ or female officers and that these requests are treated like a drama and dilemma – as if the victim-survivor is being difficult. WLSQ has been contacted by sexual assault support services who have attempted to support their clients during the reporting process, who have been advised by police that they can not come into the room whilst the statement is being taken from the victim-survivor. The counsellors do not know why this happens, and the victim-survivor is not provided any alternatives in relation to having a support person.

- **Designated Police officers/ SVLO's** – a specific point of contact should be available to answer questions, and follow up and stay involved with the victim-survivor, whilst the victim-survivor is deciding whether to report, and during the criminal process. The designated officer needs to provide their contact details in writing, as well as a written summary of the police investigation and court process. WLSQ has used the Court Network publication 'A guide to supporting victims of crime through the court process', which should also be available in a more condensed summary and in different languages. Victim-survivors need to be told when they can contact that designated officer, and the channels through which they might do this (e.g. by telephone/ email/ in person). Victims may not remember this information because they will be emotionally heightened and experience trauma responses, which impacts upon memory. WLSQ have been advised that, in some cases, after making a report, clients do not hear anything about the reporting process and police do not follow up for months afterwards. WLSQ is routinely told by clients that they do not know who the officer in charge of their complainant is, they do not know how to contact them and they do not know the stage of the investigation. If the accused is charged, the designated police officer should explain bail conditions of the accused to the complainant, so that she knows and can feel safe. The police should explain the process of reporting breaches of bail, as well as how to report any possible future harassment by the accused. One of the aims of having a designated officer is to minimize the amount of times that the victim-survivor needs to re-tell their story.

- **QPS recruitment** – need to specifically include strategies to identify inappropriate attitudes of candidates. Candidate's attitudes in relation to gender, race, culture, ability and sexuality should be taken into account in assessing their appropriateness for employment in the police service.[2]

- **Provision of interpreters** - at every interaction with the police the appropriate communication support should be provided, and it should be provided to women from CALD communities, First Nations women and women with different abilities. With any interpreter service, great care needs to be taken to ensure that the interpreter does not

[2] Report of the Taskforce on Women and the Criminal Code, Office of Women's Policy, https://www.parliament.qld.gov.au/documents/TableOffice/TabledPapers/2000/4900T3494.pdf, Queensland, 2000, page 89.

know the victim-survivor or the accused as a consequence of being in the same community. WLSQ had a client who was part of the Rohingyan muslin community, as was the accused. It was very important for the client to have an interpreter who was not also in this community, especially someone who had links to the accused's family here in Brisbane. One of our client's who is originally from Asia, and spoke English, had the experience where her complaint of sexual assault was not prosecuted because the QPS spelt the CALD accused's name incorrectly. The error was only identified by a CALD police officer who spoke the accused's language and could see the spelling mistake.

- If Police raise the option of the victim-survivor engaging in a **pretext call**, then proper support should be provided before, during and after, keeping in mind that talking to an abuser can be very distressing. The option to participate in a 'pre-text' call should be up to the victim-survivor. Many clients report feeling pressured by police to make the pre-text call, and being very traumatised by speaking to their abuser.

- The victim-survivor needs to be advised if and **when the accused is charged**, because this has direct impact on her sense of safety and possibly interactions with her family and friends.

- The focus of the Police should be upon the **complaint and not the complainant**. Her personal characteristics and features should not be given more weight that the actual complaint. WLSQ is aware of Police describing complainants as having "buyer's regret". This term refers to circumstances where the Police believe that the allegation is fabricated in order to preserve an existing relationship, and as a way of explaining previous infidelity. WLSQ knows of victim-survivors who have told the Police that they were intoxicated, or possibly drug affected, and they have been advised that because she was drunk, it is understandable that she may not recall the incident accurately, and it will be a "word on word" case, where her memory of events will be compromised because of her intoxication, and therefore less able to provide credible evidence.

- QPS officers should attend a victim-survivors home to obtain consent for issues relating to the investigation, like consent to obtain medical records. Clients report feeling pressured, and intimidated by this conduct. Importantly, there is a risk that victim-survivors will agree with whatever the Police are asking for, it has been reported to WLSQ that this occurs because they say they do not want to appear unhelpful to the Police and their investigation.

Prosecution Authorities including Police and the ODPP.

- **Victims Liaison Officers (VLO)** – a VLO needs to be available as soon as a victim-survivor presents to the police about a sexual offence. The victim-survivor needs to have a consistent advocate and support person, separate to the police, who can advocate in the justice system and explain to their client the legal process, her options and her rights. Currently victims receive confirmation of having a VLO via an email when a matter is referred to the District Court, which is too late. WSLQ has been regularly told by victim-survivors that they do not know the difference between the VLO, the Legal

Officer at the DPP, the investigating officer and the Crown prosecutor. We are further informed that VLO contact is infrequent and heavily email dependent. Practitioners at WLSQ have been working specifically in the sexual assault counselling privilege role since November 2017 and report that all of the clients of this service would have a designated VLO as part of the ODPP procedural protocols. The practical experience however, is that when clients are asked about their VLO's, they often do not know who their VLO is, , and report both that they have had a number of different VLO's, and that many of whom the victim-survivor has been unable to contact. This is of particular concern, given that the majority of this cohort of clients are under the age of 16.

- Client's often do not understand what they are being told by legal officers because of being unfamiliar with legal and court processes, and their own post-traumatic stress responses to novel and stressful situations. The client needs to be advised a number of times, and in different ways – over the phone, via email, etc., especially in an environment that does not also have trauma memories , for example, where the victim-survivor provided their statement, or where the victim-survivor experienced the offending (their home).

- Correspondence from the DPP and police should not include the defendant- accused's name in the subject heading of the correspondence, and or email. Every time the victim-survivor see's the name of the defendant could be re-traumatising and all correspondence from the police, DPP and VLO's usually has the name of the case, and therefore the name of the accused as the first thing the victim-survivor sees.

Lawyers

- All legal practitioners who are associated or have contact with victim-survivors need to be provided with training in relation to trauma informed work practices. This is especially true for defence lawyers and barristers.

- WLSQ supports the Taskforce recommendation that legal professionals should receive on-going education and training about issues relating to gender, race, culture, disability and sexuality, which starts at university and continues throughout their legal careers.

Judicial Officers

- Judicial officers need to have ongoing training and education in relation to sexual violence and the effect that the criminal justice system has on victim-survivors. Judicial officers should be receiving regular training in relation to the affects of trauma on people, and how that trauma can manifest in the presentation and memory of a victim-survivor.

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?

Charter of Victim's Rights

The Qld 'Charter of Victim's Right' more closely resembles a statement of standards, with no power to enforce compliance with resolution process and outcomes. Most victim-survivors using the CNP service are not aware of the Charter of Victims Rights in Queensland. For example, victim-survivors are rarely told about the progress and outcome of the investigation. Some of the clients of WSLQ have reported not hearing back from the police about their complaint for 6 or more months. One client reported that the investigation into the complaint and prosecution had been on foot for three years, however two days before the trial, the investigating officer contacted her and sought a witness statement from her partner. Her perspective of this was that the police had years to obtain statements and further evidence, but had left this exercise to the last minute, which compromised the evidence available in the substantive proceeding.

In this same matter, the investigating officer sought evidence from the complainant about the specific addresses where the complainant had lived as a child, where she alleged the offending had occurred, two weeks before the trial. Again, the investigation had been on foot for years, so she had to rush to provide this information, at the very last minute. This experience was extremely upsetting to the victim-survivor who was already feeling very overwhelmed and scared about the trial, and then needed to pull together further evidence for the prosecution by visiting the places where she had been abused as a child.

Importantly in that case, the complainant had originally made a complaint about being sexually offended against by her grandfather and her uncle. The client reported that the police recommended that charges be pursued against the grandfather first, because of his age and infirmity. The client was also referred to Victims Assist Queensland to obtain financial assistance for trauma counselling. The grandfather died before investigations concluded and therefore no charges were laid against the grandfather. The police then charged the uncle. During the trial against the uncle, the defence lead evidence about the "delay in relation to the complaint" against the uncle, the lack of successful prosecution of the grandfather (motive to lie), and the application for financial assistance to Victims Assist Qld (motive to lie). The police could not provide any evidence to the court to support the victim-survivors memory that she had only done what the police had advised her to do, because the police could not find the officers who had taken her original complaints 6 years beforehand in the 24 hours before the court case started, the first time they had attempted to find that evidence. Again, the lack of corroboration of the complainant's evidence was used effectively by defence to raise doubts about her reliability and credibility.

WLSQ provided minor assistance to this client to submit a complaint under the Charter of Victims Rights. It was only after WSLQ made a direct call to VAQ 12 months after the complaint was filed, and advised VAQ that they should contact the client via email (instead of attempting to

ring her), that the client obtained a meeting with a representative of the police who apologised for the way her matter had been investigated, and indicated that her experiences would be taken into consideration for future training.

Human Rights Act 2019

Victims should also have rights to a fair criminal trial

The Human Rights Act ("the HR Act") does not grant victims a right to a fair trial, while the rights of the defendant to a fair trial have been elevated. This results in significantly curtailing avenues for improving justice outcomes for victim-survivors in the criminal justice system. The HR Act itself, does not recognise the 'triangulation' of interests of the public, the accused and the victim, to achieve fairness on all sides. WLSQ argues that the rights of the victims do not need to come at the expense of the rights of the accused person, and notes that in other jurisdictions – victims have a legally enforceable and recognised right to be interviewed without unreasonable delay and as few times as necessary, minimizing delays (which is currently a right for the accused). WLSQ submits that victims of crime have an inherent interest in the criminal justice process, as a participant even if they are not recognised as a party.

The HR Act may have unintended negative consequences for victims-survivors of sexual violence in Queensland particularly because-:

- The HR Act requires every new Bill introduced into the Queensland Parliament to be scrutinised for consistency with the rights as set out in the Act and each Minister will need to prepare a statement of compatibility of Human Rights for each new piece of legislation. (Section 38).
- All legislation will need to be interpreted by judges and decision makers in a way compatible with the HR Act (Section 48).

Without a counterbalance to the rights of a fair trial for criminal defendants by also recognising the rights of victims, it may become more difficult in Queensland to pass victim sensitive legislation in the future or for legislation to be interpreted in a victim sensitive way. This is especially true for any law reform that affects women and children disproportionally like domestic, sexual and family violence.

WLSQ recommends the following amendments:

- Section 31 (1) currently sets out that a person charged with a criminal offence has a right to a fair hearing. This should be amended to expressly recognise the rights of victims *as participant's* in criminal proceedings also having a right to a fair hearing.
- An amendment to Section 32 is required that particularises victim's rights in the criminal process. For example,

    - The right to be provided with information about the criminal process in a reasonable and timely manner,
    - a right to privacy and confidentiality of information,
    - a right to safety from the perpetrator,

- a right to an interpreter if the person does not speak English
- a right to have free assistance of specialised communication tools and technology and assistants, if a person has communication or speech difficulties that require assistance.
- a right to obtain legal information about the process.
- a right to have the matter proceed without unreasonable delay.

Child victims

WLSQ recognises the lifelong impacts on the social and mental health of women who have been sexually abused as children. There are also specific amendments required regarding the rights of child complainants in criminal trials, as follows:

- S32(3) be amended to refer to *any child* charged with or a victim of a criminal offence has the right to a procedure that takes account the child's age and the desirability of promoting the child's rehabilitation, both child accused and child victim.
- S33(2) be amended to 'a child accused of and a child victimised by a criminal offence must have trial proceedings brought as quickly as possible.'
- S33(3) be amended to 'a child who has been convicted of an offence and a child victimised by a criminal offence must be treated in a way that is appropriate for the child's age'.

Advocacy groups should be given opportunity to intervene

We note the HR Act provides for possible intervention by the Attorney General and/or the Human Rights Commission but WLSQ submits that the right to intervene should be extended to advocacy groups, with leave. We therefore also seek an amendment to sections 50 and 51:

- That advocacy groups with the specialised skills and expertise also have the ability to intervene in matters concerning Human Rights, if granted leave by the Commission.

Additional rights

We are also supportive of a general right to freedom from violence, abuse and neglect and that the current economic, social and cultural rights that recognise the right to education and health be extended to legal assistance and safe housing.

Resourcing, investment and value for money

What are the impacts and implications for women and girls who are victim-survivors of sexual assault if matters are delayed across the criminal justice system?

Clients postpone their lives waiting for the 'court case' to be over. The CNP service at WLSQ has had a number of clients who are waiting for the sexual assault trial to be finalised so that they

can engage in therapy knowing that once the court case is over, no one will be able to access their records. We have clients who are not engaging with EMDR therapy because of the risk that EMDR type therapy has on the credibility of her evidence and accusations of false memories. Victim-survivors put their lives on hold – they don't move, or start that new course, or apply for a new job, because their focus is on getting through and surviving the court case.

The length of the delay, which is usually years from first complaint, means that the evidence is no longer at front of mind for the complainant, and other Crown witnesses. This delay has real implications for the quality of the evidence that can then be provided at trial, and therefore the criminal justice outcomes.

Appropriate governance and accountability mechanisms

How are services and responses to meet the needs of women and girls who are victims-survivors of sexual violence coordinated in Queensland?

Currently the services and responses to meet the needs of women and girls who are victim-survivors of sexual violence are not coordinated in Queensland. WLSQ supports the establishment of a Victims of Crime Commissioner, or similar, who could provide access to justice and enhanced participation for Queensland victims while preserving the adversarial character of the criminal justice system – an important role (as exists in other jurisdictions) is responding to victim complaints about their treatment.

Accountability for the judiciary

WLSQ supports the implementation of recommendations from the Taskforce that a Qld Judicial Commission be established – performing both professional development coordination and complaints handling.

Director of Public Prosecutions and Police Prosecution Corps

The ODPP should update and revise their complaint-handling systems, particularly in regard to the office's culture, guidelines, engagement with local services and engagement with victims.

Right to Review

Since 2015, victims of crime including close relatives of a deceased or incapacitated person, parents of a child or businesses have had a right to request a review of certain decisions made by the police or Crown Prosecutions Service, in England and Wales. WLSQ supports the establishment of a similar 'Right to Review' police and Crown Prosecution Service decisions in Qld for victims of crime, that has legally enforceable remedies.

Conduct of Lawyers

WLSQ support the establishment of an independent Judicial Commission, to take complaints about how a judicial officer may have acted, or failed to act, in the course of a trial. WLSQ has represented a client in the Magistrate's Court who disclosed in her application for a domestic and family violence order that she had been raped by the respondent, and the Judicial officer

put to her that she was silly for staying with him if he treated her like that. These kinds of comments and attitudes from the Judiciary need to be addressed.

Police Accountability

WLSQ refers the Taskforce to the responses provided in this submission in relation to the Charter of Victims Rights in Qld and how police responses could reflect trauma informed work practice. WLSQ's clients have attempted to make complaints about police conduct and treatment, to internal Ethical Standards, and the CCC. Notably, the process can be lengthy and there are instances where the investigating officers are on secondment from the police. This creates the potential that the officer being complained of may connected to the officers who are investigating the complaint. Such a situation may result in either actual bias, or the perception of bias in relation to the complaints handling process.

WLSQ clients have reported the following:

- Evidence being lost – records of earlier complaints that might have been discontinued at the time, however when the client seeks to re-enliven the complaint the original complaint cannot be located by the QPS. This has been important in relation to arguments about timeliness of complainants, preliminary complaint evidence and the credibility of the complainant. In one matter, because the original complaint was not 'found', the defence suggested that the complainant had never made the earlier complainant, and that she was unreliable.
- Investigating officers discontinuing and closing investigations without reference to the victim-survivor. In one matter, the victim-survivor advised WLSQ that she believed that the investigation was discontinued because evidence was lost by the police.
- Police not handling the investigation of the matter professionally and in a timely manner (making a joke about the size of the accused penis to the victim-survivor), or arriving at the complainant's home with documents to be signed or seeking information.
- Victim-survivors not knowing what is happening with the complaint.
- Information that the police had previously advised would be anonymous and confidential being made available in a legal proceeding in a totally unrelated matter because of the disclosure obligations towards the accused. In this case, the victim-survivor only provided the information to the police because she was advised that it could not ever be accessed by the accused.
- Phone calls not being returned.
- Police actively discouraging victim-survivors from proceeding with complaints or having a support person.

In line with the first Taskforce report, WLSQ recommends that an independent commission of inquiry be established to examine widespread cultural issues within the QPS, including the investigation of sexual offences, and whether Queensland should establish an independent 'Law Enforcement Conduct Commission' similar to New South Wales.

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

Barriers to reporting sexual violence

Personal crime is substantially underreported to police

"Research suggests that a significant proportion of personal crime goes unreported to police and that the degree of underreporting varies by offence type. While overall levels of underreporting have not been quantified, self-report data indicate that sexual offences and domestic and family violence (DFV) offences are particularly likely to go unreported (ABS 2017; Birdsey and Snowball 2013; Voce and Boxall 2018). For example, a survey of Australians aged 15 years and over found that three in ten (30.1%) of those who had experienced sexual assault in the year prior to the survey reported the most recent incident to the police (ABS 2021a).

Reasons for underreporting of sexual and DFV offences include; fear of not being believed, fear of retribution, concern for negative impacts on family, a distrust of the legal system, and economic dependency on the offender (Lievore 2003; Voce and Boxall 2018). Some population groups, especially Aboriginal and Torres Strait Islander women and women from culturally diverse backgrounds, may face additional barriers in reporting these types of offences to police, particularly when residing in small communities. Additional barriers include cultural considerations, a lack of awareness or access to services, and a fear of intervention from authorities (Fiolet et al. 2019; Memmott 2010; QPS 2016; Taylor and Putt 2007; Willis 2011).[3]

According to the Report of the Taskforce on Women and the Criminal Code, Qld, published in 2000, "[A] number of studies and reports have identified various reasons why women do not choose to access the criminal justice system –

- Victim and offender know each other;
- Fear of negative police contact;
- Fear of loss of privacy (especially the reaction of family and friends);
- Lack of faith in the system (it doesn't do any good to report);
- Guilt, shame, embarrassment;
- Fear of not being believed;
- Fear of retaliation by the offender;
- No communication paths available;
- Concern that don't fit the stereotype of 'real rape victim'
- Emotional and psychological impact of the assault or rape; and
- Fear of secondary victimisation by the criminal justice system (for example, badgering and victimisation of complainants).[4]

Reporting, Investigating and charging of sexual offences

---

[3] Crime Research Report, Victimisation from personal crime in Queensland 2008 – 09 – 2018-19, Queensland Treasury, page 2 – 3.

[4] page 215

Victim's experiences of reporting sexual violence to police in Qld.

Responses to this Discussion Paper topic has already been provided within this submission.

Legal and court processes for sexual offences

Adequacy of current sexual offences in Queensland

Consent and Mistake of Fact

In 2000, a Taskforce was established by the Attorney-General and the Minister for Women's Policy of Queensland, which was a broad-based consultative group tasked to consult widely on the Criminal Code and its impact upon women. The published 'Report of the Taskforce on Women and the Criminal Code', is available online through Griffith University. This report recommends that "... the accused should not be able to use the fact that the complainant did not resist as the basis for his claimed belief that the complainant consented. ... It is suggested by the Taskforce that the accused, in raising the [mistake of fact] defence should have to demonstrate what steps were taken or what factors he considered in forming his belief in consent." [5] Since 1998, the Report of the Task Force on Sexual Assault and Rape in Tasmania recommended that the law be amended to require the accused to take actual and reasonable steps to check that the complainant is consenting, and that the definition of consent be based on an affirmative model of consent. These amendments were introduced by the then AG Mrs Judy Jackson in 2004.

The Queensland law on consent and mistake of fact should be amended further because the recent amendments have not altered the definition of 'consent' and operation of mistake of fact in Queensland to reflect a model of affirmative consent, and the operation of the mistake of fact excuse still remains available when there is no evidence of the accused taking reasonable steps to ascertain consent. The recent amendments, in line with the QLRC recommendations, only codified existing definitions of consent and mistake of fact as it was already in case law. Consequently, there will be little to evaluate.

The risk of not adopting an affirmative consent model as exists in New South Wales, and will shortly be adopted in Victoria, is Queensland having the highest rates of discontinuation of sexual assault reports by the police, in the country. As exposed by the ABC's Rough Justice: How Police are Failing Survivors of Sexual Assault (2020), one in five reports of sexual assault in Queensland are "unfounded" as compared to one in twenty in New South Wales.[6] The term "unfounded" in this context, is where the Queensland Police Service discontinue their investigations into the allegations and close the file on the complaint. This "inaction" rate is the higher than all the other states, with the exception of the Northern Territory who did not submit data for the purpose of this ABC report. As observed by Nicholas Cowdrey (Former NSW Director

---

[5] Report of the Taskforce on Women and the Criminal Code, Office of Women's Policy, https://www.parliament.qld.gov.au/documents/TableOffice/TabledPapers/2000/4900T3494.pdf, Queensland, 2000, page 236

[6] Rough Justice: How Police are Failing Survivors of Sexual Assault. http://mobile.abc.net.au/news/2020-01-28/ how-police-are-failing-survivors-of-sexual-assault/118771364?nw=&pgmredir=sm.

of Public Prosecutions) after these Qld "discontinued sexual offence allegation" statistics were put to him, "...something is going on here."

The existing (recently amended) consent and mistake of fact laws in Queensland directly affect how and why the QPS accept, continue with charges, and maintain the prosecution of a reported sexual offence. The existing law dictates how the QPS police respond to a complainant who reports being raped, especially if the sexual offence occurred in the context of being in a relationship with the accused, having consented to similar sexual acts with the accused before, being intoxicated, or having a complex mental health history, or any other features that the QPS might consider will have an impact on the ability to secure a conviction. WSLQ acknowledges that the QPS are usually trying to protect the victim from the consequences of the existing criminal justice system.

All too frequently, the QPS appear intent on influencing a victim to not pursue a complaint, or discontinue a complaint. It may well be that this is motivated by the knowledge of how she will be treated in the witness box. The QPS are undoubtedly aware of the prevalence of the use of mistake of fact, the exclusion of evidence, and attacks on character in relation to credibility and reliably and the impact of these factors on the likelihood of a conviction. The risk for Queensland is that the status quo in relation to charges being laid by police, and low conviction rate will continue. It is of great concern to WSLQ that the rates of charges being laid and successful convictions are so low in Queensland. WSLQ is of the strong view that victims of sexual assault in Queensland ought to expect the same access to justice as those in other states.

As recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, 2017, and accepted in principle by the Queensland government "...the criminal justice system should be reformed to ensure that the following objectives are met:

a. The criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused
b. Criminal justice responses are available for victims and survivors
c. Victims and survivors are supported in seeking criminal justice responses."[7]

The police are a vital first step to the reporting process, and if Queensland law is not amended to a "affirmative model of consent", and the application of 'mistake of fact' only in circumstances where reasonable steps were taken, Queenslanders will continue to experience the 'trickle down' impact from court outcomes which directly affect police decisions made at the front counter. This is where the really impact of the existing law of consent, and the application of the mistake of fact excuse have the most obvious and clear repercussions.

The QLRC has not recommended the amendments that have been adopted by NSW, and soon Victoria, and have been recommended to be Qld law since 2000. In this regard, WLSQ submits that the recommendations of the QLRC admit and continue the significant injustice toward the complainant, their position being contrary to the approach to a fair trial that is described by Lord Steyn, when he stated:

---

[7] Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse, June 2018, pg 98.

> There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.[8]

To ensure that the law adequately reflects the totality of consent, WSLQ recommends a broader review to specifically address conduct known as "stealthing". Other states and territories in Australia have recognised the difficulty in dealing with the non-consensual removal of a condom during sex under existing provisions. This issue has been addressed in various ways including specifically including a reference to misrepresentation about the use of condom or clarification that consent for a sexual act where there was an agreement to use a condom would be negated by removal of the condom.

Victims' experiences of the Court process

Women who are clients of WLSQ and within our community routinely describe the experience of court in relation to sexual offences as a further trauma. WLSQ agrees with the VLRC recommendation that everyone in the criminal justice system receive training in trauma-informed practices. WLSQ strongly supports the amendment that the Court 'must' disallow improper questioning of the witness.

Cross Examination regarding sexual history

WLSQ has observed the operation of section 4(3), the Criminal Law (Sexual Offences) Act 1978, where the court has granted leave for defence to cross examine a complainant regarding sexual history and prior sexual activity. In WLSQ experience, the court has granted leave for a 13 year old girl to be cross examined about being raped by her grandfather when she was 7yrs old, where the grandfather was convicted of this offence.

WLSQ has also acted in a matter where the Court granted leave for the complainant to be cross-examined on prior sexual history, when the prior sexual history related to being sexually abused by her step-father, and her obtaining counselling notes about the impact of that trauma on her. WLSQ submits that these provisions have had perverse applications in Court, and if they were designed to protect the complainant from being subjected to degrading and humiliating questions, then they have failed.

WLSQ supports any measures that reduce the number of times victim-survivors need to re-tell their stories, and notes the suggestion to introduce video-recorded interviews with police and victims. WLSQ cautions that such a practice relies upon the quality of the police interviews, training and supporting resources. As noted in the 2020, Evaluation of the Victoria Police trial of Digitally Recorded Evidence-in-Chief Family Violence: Final Evaluation Report, legislative change will only be effective if matched by:

---

[8] 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. 2021. Page 54.

> "...developing police capability to work effectively with these technologies that significantly change the role of police when interviewing family violence victims. Besides changing the medium by which police take a statement, recorded statements are taken typically in a different place than paper statements, in a private residence, at a different time, immediately after a family violence incident, in a different legal context, requiring formal consent, and for a different purpose, as evidence-in-chief. "[9]

WLSQ strongly supports the adoption of independent victim advocate models – to provide support for victim-survivors to navigate legal processes, access practical support, information and advice, and make key decision.

Currently prosecutions will seek a letter, or similar supporting documents, when making an application for special witness arrangements. Victim-survivors are told to obtain this documentation from their counsellors, who willingly comply in the interests of supporting their client. This letter is then provided to defence and the Court, because it usually describes the special harm that the victim-survivor would experience if certain arrangements were not made for them whilst they are providing evidence, or being cross examined. This letter or document is usually 'protected counselling communication', a factor which routinely ignored by all the parties to the proceeding. More importantly, it will normally trigger an application for 'protected counselling communications' records. It is often the case that the representatives for the defendant are able to convince the Court that the records 'will have substantial probative value', because the letter of support provided by the counsellor will often detail the impacts of the offending, to justify the special witness arrangements – and the defence lawyers will point to this as evidence of the counsellors records containing material of 'substantial probative value'. WLSQ seeks changes to the legislation so that the Court, on its own initiative or on application by a party to the proceeding, may make orders that such special witness measures **not** be used – but only if there are special reasons and the interests of justice require that the victim's evidence not be given that way.

The use of 'Victim Impact Statements' – again sought by prosecutors, provided to the parties, and once so disclosed, trigger defence to seek records from the complainant's counsellors. Victim-survivors are never told that the content of their Victim Impact Statement can and will trigger an application for their counselling records. If they were advised, at least they would be aware and might re-phrase their victim impact statement accordingly.

As recommended in the VLRC's 2021 report, WLSQ also recommends a pilot scheme for separate legal representation for victims of sexual assault.[10] The victim-survivor should have their own separate legal representation to explain, exercise their rights and protect their interests in relation to:

a. Their rights and legal options in relation to applications for their counselling records;

---

[9] McCulloch, J, Pfitzner, N, Maher, J, and Segrave, M, Victoria Police Trial of Digitally Recorded Evidence in Chief – Family Violence. Final Evaluation Report. 2020, Monash University, page 15.

[10] Improving the Justice System Response to Sexual Offences, Victorian Law Reform Commission, 2021, pg 268.

b. Special Witness arrangements applications;
c. Applications for ground rule hearings.
d. Representation in relation to applications for sexual history information;
e. Representation when they are providing evidence and being cross-examination, especially being able to object to improper questions.
f. Their options in relation to compensation, both civil and criminal compensation, including through Victims' Assist.
g. Restorative justice options, and implications of those.
h. The drafting of their Victim Impact Statement.

The admissibility of evidence for sexual offences

WLSQ recommends and supports the adoption of the Model Bill which implement the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, in particular Recommendation 44:

> "In order to ensure justice for complainants and the community, the laws governing the admissibility of tendency and coincidence evidence in prosecutions for [child] sexual abuse offences should be reformed to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials."[11]

The Royal Commission into Institutional Responses to Child Sexual Abuse was far ranging and comprehensive in its consultation and considerations. WLSQ is aware that the impact of the existing exclusion of similar fact and propensity evidence is counter intuitive to community standards of justice. These evidential rules apply so that juries can not hear evidence about offending towards different victim-survivors unless there is no rational view of the evidence that is consistent with the innocence of the accused. In practice, this has meant the evidence is not admitted about a defendant when the offending has slight differences, like gender of the complainant, mode of grooming, or sexual act. WLSQ supports any amendments to this legislation that makes the test a lower threshold.

Evidence about the accused's past criminal convictions and past acts need to be made available to the jury and Court. Again, the community expectation that someone with convictions of similar offending should be excluded makes no rational sense. WLSQ has had a client where the defendant was charged with Breach Domestic Violence Order x 2 (one of these charges was texting the complainant hundreds of times over a 24 hour period), Assault and Rape x 2. The Defendant pleaded guilty to all the other charges except the rape charges. The paucity of the Crown case in relation to the rape charges resulted in an acquittal on both charges.

Expert Evidence

WLSQ supports the introduction of 'Expert Evidence' in sexual offence trials, such as medical practitioners, clinical psychologists, academics and scientist. WLSQ submits that the same

[11] Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report, June 2018, page 112.

information as potential "jury directions" could be lead from an expert, however, in a manner that is a better fit for the circumstances of each particular case.

Protected Counselling Communications

An application to access and otherwise use a victim-survivors 'protected counselling communication', is often made very late in the substantive criminal proceedings, as previously discussed, when a special witness application is made, or the Victim Impact Statement is served. As the criminal justice process is often lengthy – usually between two and three years, complainants are often in the position of having to choose between opposing applications to access their counselling records and delaying proceedings further, or waive their privilege and see if the substantive proceedings can be resolved as soon as possible.

Most of the CNP clients are distressed by the knowledge that the defence can make an application for their counselling records at all. Organisations that provide support and counselling to their client, whose records then get subpoenaed are also often disappointed that the 'Sexual Assault Counselling Privilege' legislation still allows the counselled person's records to be obtained and possibly used in the legal proceedings. Many support service providers are disappointed that the Court may grant leave for subpoenas to be issued, their clients records produced to the court, and then allow parts of their records to be accessed and otherwise used..

As well as the significant delay the applications for records (anywhere between 3 to 6 months) cause to the resolution of the substantive proceedings, there is also the wide and varied procedural approaches to the application of the legislation that make providing sensible legal advice near impossible. Recently there has been considerable divergence in the Courts opinion as to whether or not the counselled person has standing to make submission in relation to the s14H matters that the Court must be satisfied of before granting leave to access the 'protected counselling communications'.

Sometimes the Court will grant leave for all information that may have probative value to be released to the parties in the proceedings, even though the first s14H test is articulated as leave being granted if the material "will have" substantial probative value. WSLQ practitioners have witnessed court proceedings where parts of the records taken by the counsellor have been determined to " have substantial probative value', even though the counsellor had not taken any steps to confirm with their client that what they had recorded accurately reflected the exact details of the offending according to the client. In these circumstances, the version of events recorded by the counsellor is provided as an "inconsistent statement" because it might be slightly different or not as detailed as the version provided to the police.

As identified in the Women's Safety and Justice Taskforce Discussion Paper 3, "[t]he physiological impacts of trauma can disrupt memory storage and retrieval processes in many ways."[12] And yet, the existing test for whether or not material contained in 'counselling records' is able to be accessed and otherwise used in the court proceeding is whether the

[12] 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, 2022. Page 18.

material shows impaired memory performance, inconsistent versions, fragmentation and dissociation. These are standard responses and effects of trauma, in fact the very purpose of therapy is exactly what defence use to cast the complainant as unreliable and lacking in credibility. The court determines that this information is exactly what will be of substantial probative value. Routinely, applications for counselling records are made on the basis that the defence seek information that goes to the complainants 'credibility and reliability', because she was going to counselling when the offences where happening, or because she has a history of attending counselling or she is going to counselling now – and has probably disclosed to the counsellor details of the offending. In all of those circumstances, the court will grant leave to subpoena – then once the records are before the Court, leave is granted for the information that is usually exactly what one would expect from a trauma survivors: flashbacks, nightmares, intrusive thoughts, diagnosis of disassociation, to be made available.

Alternatives to court

The criminalisation of rape and sexual violence offences and getting the law and court processes right should not be at the expense of considering a myriad of options that may be available to victims in pursuing justice and perpetrator accountability that may be outside formal processes. This is a challenging area and any work and consideration of alternative and innovative justice responses to sexual violence must be victim led and by experts in sexual violence. Some of these alternative processes may be attractive in particular to First Nation's women and should obviously be inclusive of their voices and community driven.
WSLQ believes the follow resource may provide a useful starting point for these considerations: https://aifs.gov.au/publications/conventional-and-innovative-justice-responses-sexual-violence/introduction.

Ground Rules Hearings

The WLSQ supports the adoption of 'ground rule hearings' in criminal matters involving sexual offences. Importantly, ground rule hearings should be available to a victim-survivor, and the information used to support the ground rule hearing and attendant arrangements should not form the basis of later applications for disclosure of treatment and counselling material.

Women and Girls experience of the criminal justice system as accused persons and offenders

WLSQ provides face to face, legal advice and assistance to women in the areas of domestic violence, family law and child protection at the Women's Correctional Centre and Gatton Prison. WLSQ lawyers have been providing the legal advice and assistance to women who are incarcerated, for years, and provide the following observations to the Taskforce in relation to the experience of women and girls in the criminal justice system as accused persons and offenders.

What are the drivers of women and girls' offending in Queensland?

WLSQ note that a common factor in women and girls' offending is the desire to please others (predominately partners), and the need to protect others . Other contributing factors noticed by WLSQ is women being coerced by their partners into committing or assisting with committing offences (co-accused) because the partners tell them that if they don't commit the offending then they will end the relationship, or if she tells the police, he will harm her family members in custody.

Are there any barriers to women and girls accessing good quality legal advice, support and services? What works? What could be done better?

WLSQ submits that a significant barrier to women and girls accessing good quality legal advice, support and services is the delay in processing Legal aid applications, which often take over a month, and longer to get through prison mail exchange. Also the lack of resources within the correctional centres themselves means that legal visits are time restricted and hard to secure, and there are often long wait lists even to secure a telephone appointment. There have also been times when clients have been transferred to other centres and this has not been conveyed to solicitors until the day of a telephone booking – this has created a significant delay as a result of a need to wait for an available at the new centre. Advanced, or timely, notification of the transferring of prisioner's would be of great assistance to women and their lawyers.

How do women and girls maintain relationship with family while incarcerated in Queensland? What is working well? What could be improved?

The ease or success of women and girls maintaining relationship with their families while they are incarcerated depends on the quality of the relationship with their family prior to incarceration as contact relies on the family providing funds for calls etc. Family members have advised that the wait on administration in the correctional centres to upload funds and the process for doing so is lengthy and protracted. The only way to provide funds to their family member in custody is via bank deposit which takes time to clear in the centre's account before being processed. WLSQ suggests that family members being able to provide funds via EFTPOS could prevent unnecessary delays.

If you require further information, please do not hesitate to contact WLSQ.

Regards

Nadia Bromley
CEO
Women's Legal Service Qld

Julie Sarkozi
Practice Director
Law Reform and Education