Submission to the Women's Safety and Justice Taskforce
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

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This submission refers to and is based on the submission to the Taskforce made by Women's Legal Service Queensland (WLSQ) authored by Nadia Bromley (CEO) and Julie Sarkozi (Practice Director). 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 understands first-hand the lived experiences of women and girls across the criminal justice system. Their submission responds to the particular questions over which WLSQ has expertise as a result of the services they provide and how those issues affect their clients.

I echo WLSQ's broad recommendations:
1. The Hear Her Voice recommendations should be adopted and implemented.
2. Specialist victim-survivor legal representation should be provided in criminal proceedings.
3. Further amendments should be made to the Crimes Act and Evidence Act in relation to:
(a) mistake of fact;
(b) the definition of consent;
(c) similar fact and propensity evidence.
(d) objections to harassing questions.

Cross-Cutting Issues
Women and girl's experiences across the criminal justice system as victim-survivors of sexual violence is affected by the intersecting experiences of disadvantage.
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 how a victim should look and behave, often having difficult histories with multiple governmental interventions, and commonly having had previous interaction with the criminal justice system. 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.

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?
Providing a system of trauma informed practice at each point of the criminal justice system would involve the following:

- Specialist training and resources to support police at the front counter to appropriately respond to victim-survivors who attend police stations and report their experience of sexual violence.

- State-wide resourcing of Sexual Violence Liaison Officers (SVLO) as trialled in Townsville and Logan.
- Designated police officers/ SVLO's.
- QPS recruitment processes to specifically include strategies to identify inappropriate attitudes of candidates.
- Provision of interpreters and appropriate communication support for every interaction with the police and particularly for women from CALD communities, First Nations women and women with different abilities.
- Ensuring that victim-survivors are advised if and when the accused is charged, because this has a direct impact on her sense of safety and possibly interactions with her family and friends.
- A policing focus on the complaint and not the complainant.
- Victims Liaison Officers (VLO) should be available as soon as a victim-survivor presents to the police about a sexual offence and the victim-survivor needs to have a consistent advocate and support person, separate to the police, who can advocate for her in the justice system and advise her.
- Provision of clear and accessible advice and information about legal and court processes, and professional support for victim-survivors in understanding their own post-traumatic stress responses.
- Correspondence from the DPP and police should not include the defendant- accused's name in the subject heading of the correspondence, and or email as this is re-traumatising for the victim-survivor.
- Training should be provided to all legal practitioners who are associated or have contact with victim-survivors so that they can practice in trauma-informed ways. This is especially important for defence lawyers and barristers.
- The Taskforce's recommendation that legal professionals should receive on-going education and training about issues relating to gender, race, culture, disability and sexuality is supported.
- 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.

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?

The following issues are raised in response to this question:

- The Queensland 'Charter of Victim's Rights' should be more than simply a statement of standards and provide powers to enforce compliance with resolution process and outcomes.
- The Queensland *Human Rights Act* ("the HR Act") should be amended to ensure that victims have a right to a fair trial, and the rights of victim-survivors should not be subjugated to the rights of the defendant to a fair trial. This could be achieved by amending section 31 (1) to expressly recognise the rights of victim-survivors as participants in criminal proceedings to a fair hearing. Section 32 could also be amended to particularise the victim's rights in the criminal process. For example, the following victim's rights could be included: a 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 specialised communication tools and technology and assistants, if a person has communication difficulties; a right to obtain legal information about the process; and a right to have the matter proceed without unreasonable delay.

- The lifelong impacts on the social and mental health of women who have been sexually abused as children must be recognised by the criminal justice system.
- The following specific amendments to the HR Act should also be considered in terms of the rights of child complainants in criminal trials: section 32(3) should be amended to refer to any child charged with a criminal offence or who is a victim of a criminal offence having the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation, both child accused and child victim. Section 33(2) should be amended to read: 'a child accused of and a child victimised by a criminal offence must have trial proceedings brought as quickly as possible'; section 33(3) should be amended to read: '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'.
- Sections 50 and 51 of the HR Act should be amended to allow advocacy groups with relevant specialised skills and expertise to have the ability to intervene in matters concerning Human Rights, if granted leave by the Commission.
- A general right to freedom from violence, abuse and neglect should be included in the HR Act. The current economic, social and cultural rights that recognise the right to education and health should 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?

- Delays have significant impact on women and girls who are victim-survivors of sexual assault. The WLSQ submission refers to their understanding that their clients often put their lives on hold as they wait for the 'court case' to be over. Some delay engaging in therapy because they know that once the court case is over, no one will be able to access their records. WLSQ submits that some of their clients don't move house, start a new course, or apply for a new job, because their focus is on getting through and surviving the court case.
- Long delays, which are not uncommonly years from the first complaint, also negatively impact the quality and efficacy of available evidence which in turn impacts 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?

- The WLSQ submission refers to a current lack of satisfactory coordination of services and responses that are intended to meet the needs of women and girls who are victim-survivors of sexual violence.

- A Victims of Crime Commissioner, or similar, should be established to provide access to justice and enhanced participation for Queensland victim-survivors in the criminal justice system.
- The Taskforce's recommendation that a Queensland Judicial Commission be established is supported to provide both professional development coordination and complaints handling.
- The ODPP should update and revise their complaints-handling systems, particularly in regard to the office's culture, guidelines, engagement with local services and engagement with victims.
- Victims of crime should have a right to request a review of certain decisions made by the police or Crown Prosecutions Service.
- Improvements are needed to police accountability processes. WLSQ's submission refers to their clients' experience when attempting to make complaints about police conduct and treatment, to internal Ethical Standards, and the CCC. They note that the process can be lengthy and there are instances where the investigating officers are on secondment from the police. Such a situation can result in either actual bias, or the perception of bias in relation to the complaints handling process.
- An independent commission of inquiry should 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

Adequacy of current sexual offences in Queensland

Consent and Mistake of Fact

This submission supports the position of Monash University's Rape and Sexual Assault Research and Advocacy (RASARA) on these issues and the advocacy and scholarship of Professor Jonathan Crowe of Bond University's Faculty of Law. An affirmative consent model as exists in New South Wales should be introduced and the mistake of fact defence's application in rape and sexual assault matters should be revised.

My own submission to the QLRC's Review of Consent Laws and the Excuse of Mistake of Fact, dated 30 January 2020, read as follows:

In liberal democratic legal systems such as we have in Australia, principles of good government, justice and civil order are grounded in the ideal of the rule of law.

AV Dicey identified three main tenets of the rule of law. First, the State can only justify punishing a person if it is proven in court that the person has breached a law; that is, State punishment of the citizenry cannot be arbitrary. Second, everyone is equal before the law and no one is above the law; that is, the law applies to every citizen, without regard to their social, economic or political status. Third, the fundamental rights of citizens should arise from the ordinary law.

Sir Ninian Stephen, a judge of the High Court of Australia and Australia's 20th Governor-General, would add that the rule of law requires that those who administer the law (such as the executive and judiciary) must be independent from the legislature; and the citizenry must have appropriate access to the courts. Lord Bingham of Cornhill, an eminent British judge and jurist, would add further that the law must be accessible, intelligible, clear; laws must afford adequate protection to human rights; those in authority must exercise their power reasonably and without exceeding their limits; and any adjudicative procedures provided by the state should be fair.

When considered together these elements of the rule of law essentially point to a fair and accountable legal system. For this reason, the rule of law is the paradigm within which we justify the appropriate and ethical operation of the law and of legal processes and practice. Whilst the rule of law is by no means a paradigm that translates perfectly to practice, in the words of Lord Bingham, it is nevertheless 'the foundation of a fair and just society, a guarantee of responsible government, an important contribution to economic growth and it offers the best means yet devised for securing world peace and co-operation'.

The principle of fairness in the rule of law is key. Tom Tyler, a Yale Law School professor of psychology and law, said in a 2003 article that 'the public's law-related behavior (is) powerfully influenced by people's subjective judgments about the fairness of the procedures through which the police and the courts exercise their authority'. Principles of fairness in criminal justice include, for example, the right to silence, the presumption of innocence, the right to a fair trial and the right to a trial by jury for indictable offences.

The mistake of fact defence is an important general criminal defence that sits well within the paradigm of the rule of law and its sub-paradigm - procedural justice. Whilst ignorance of the law is no excuse, section 24 of the Queensland Criminal Code recognises that if a person commits a crime as a result of an honest and reasonable mistake, then it is fair that they avoid conviction for that crime. As Barwick CJ acknowledged in Pemble v R ((1971) 124 CLR 107, 117), the mistake of fact defence is a critical tenet for securing a fair trial according to law.

Consider, for example, a situation where a person honestly and reasonably believes (incorrectly) that they are not married. They go ahead and get married. However, it turns out that they are in fact at the time of that marriage, legally married to someone else. They made a big mistake – but it was an honest and reasonable mistake. For this reason, the law says the mistake constitutes a defence to the offence of bigamy. I would suggest that a poll of people in the street would think this was fair and just. It would be unfair to convict a person of bigamy in these circumstances. It is equally fair that some offences, for example, vehicle offences involving liquor and drug use, specifically exclude the operation of the defence for obvious public policy reasons.

The test for the operation of the mistake of fact defence contains two distinct elements that should contribute to its fair operation. The subjective test of honesty, but also the objective test of reasonableness. This constitutes a double protection of fairness. Not only must the accused honestly make the mistake, but on an objective analysis of the facts and circumstances their mistake must be considered reasonable. Under the rule of law, this ensures that the defence is balanced and fair.

However, like the paradigm within which it operates, the mistake of fact defence is not perfect in the way it manifests in practice. There are some contexts in which it doesn't work well. One of these contexts is rape and sexual assault. This assertion is not based on a presumptive guess, it is based on an evidence-base, including the lived experience of rape survivors, which cannot be ignored.

Jayne recently shared her story with The Courier-Mail for an article published on 13 July entitled 'Battered by Twin Traumas'. The person accused of raping Jayne was acquitted. This was despite evidence that she had repeatedly asked for him to stop, had told him that what he was doing was hurting her, and in fact at the time could smell the blood resulting from his violent actions. Putting yourself in the shoes of the accused, do you think mistaking this situation for consent is reasonable? Surely a reasonable person in these circumstances would understand that there was no consent. In such circumstances, the rule of law calls for the defence not to apply, because its application is unfair. It is unfair that a man who ignores a woman who says no so clearly is regarded as having made a reasonable mistake as to the presence of consent. Such a failing of fairness in a liberal democracy grounded in the rule of law undermines the legitimacy of the system more broadly. For the sake of the efficacy of the rule of law in the Queensland legal system, reform of the mistake of fact defence in the context of rape and sexual assault is necessary.

Jayne's story is just one of many. Ms Bri Lee and Professor Jonathan Crowe have gathered together a significant body of evidence to show that the mistake of fact defence is not operating in the context of rape and sexual assault as the rule of law would have it. Their research shows that the defence is resulting in unjust acquittals. They have analysed every reported Queensland appeal decision dealing with the defence in rape and sexual assault cases and found, amongst other things, that there are significant problems with the analysis of whether the mistakes claimed in such cases were in fact reasonable. For example, they found a series of cases in which the mistake of fact defence was successful because the complainant failed to resist in a sufficiently robust or sustained manner. However, this fails to acknowledge the common phenomenon when experiencing trauma, extreme fear or terror of paralysis – or freezing, also known as 'tonic immobility'. Indeed, there are many diverse contextual explanations as to why a complainant may not fight back per see even though she does is in other ways communicate that she is not consenting.

How can we get the rule of law principle of fairness back into the mistake of fact defence in the context of rape and sexual assault? Ms Lee and Professor Crowe, along with Women's Legal Service Brisbane, rape and sexual assault survivors and workers, and many others, have long advocated for reform. Concerted recent efforts have achieved a referral to the Queensland Law Reform Commission (QLRC). Ms Lee and Professor Crowe's report, which was part of achieving this referral, does not advocate for a complete abolition of the defence in rape and sexual assault contexts. Rather they seek a narrowing of the defence, consistent with the law in Tasmania, which goes to the issue of establishing if the mistake is a reasonable one or not.

The narrowing of the defence to ensure that the objective requirement that the mistake is a reasonable one is consistent with the rule of law's principle of fairness. And yet there are zealous opponents within the legal profession, mostly criminal defence lawyers, who despite the extant evidence-base, ignore the potential unfairness and injustice resulting from the operation of the defence in rape and sexual assault cases. Indeed, some of the recent commentary on social media

has fallen well below the standards of intelligent professional discourse and debate – and that is disappointing.

It is understandable that lawyers who take on the important role of ensuring procedural justice for those accused of crimes, are passionate about defending the options open to them to argue for the innocence of their clients and secure their freedom. Their professional identity in this role is squarely informed by the rule of law, and society benefits from their commitment to it.

However, as custodians of the rule of law, lawyers' primary ethical duty is to the court and the administration of justice - not to the client. Fulfilling this duty in relation to the mistake of fact defence's operation in the context of rape and sexual assault context requires engagement with the evidence-base that brings the efficacy of the fairness of that defence into question.

The rule of law provides an assurance to the citizens of Australia - and of Queensland - that they will be governed responsibly, and that the operation of the law and the legal system will be just and fair. Lawyers can look to the rule of law for purpose and meaning in our professional lives. When an aspect of our system is not working, we need to work together to fix it. Reform of the mistake of fact defence in the context of rape and sexual assault offers an opportunity for an aspect of unfairness and injustice in our legal system to be addressed.

Additional submissions:

- All professionals involved in the criminal justice system should receive training in trauma-informed practices.
- Improper questioning of the witness should be disallowed.
- The number of times victim-survivors are required to re-tell their stories must be minimised.
- The WLSQ submission that calls for the adoption of independent victim advocate models is supported – this initiative would provide support for victim-survivors to navigate legal processes, access practical support, information and advice, and make key decisions.
- The WLSQ recommendation for a pilot scheme for separate legal representation for victims of sexual assault is supported. Victim-survivors should have their own separate legal representation.
- The WLSQ recommendation for the adoption of the Model Bill which implements the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, in particular Recommendation 44, is supported.
- The WLSQ recommendation of the introduction of 'expert evidence' in sexual offence trials, such as the evidence of medical practitioners, clinical psychologists, academics and scientists, is supported.
- The WLSQ recommendation that counselling communications should be protected is supported.
- The WLSQ submission in relation to alternatives to court is supported along with the reference to the following resource as a useful starting point for considering this issue: https://aifs.gov.au/publications/conventional-and-innovative-justice-responses-sexual-violence/introduction.

Thank you for the opportunity to make a submission to this important Taskforce.

Please do not hesitate to be in touch if you require any further information or have any queries.

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