WOMEN'S LEGAL SERVICE NSW

Submission to the Australian Law Reform Commission Issues Paper: Justice Responses to Sexual Violence
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Acknowledgments

We acknowledge the Traditional Custodians of the lands on which we work across NSW and on which we live. We pay respect to Elders past and present. Is, was and always will be Aboriginal land.

We acknowledge the many women and girls who have been subjected to sexual violence with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

About Women's Legal Service NSW

Women's Legal Service NSW is a specialist accredited women-led community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We have been operating for over forty years. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

Since 1995 Women's Legal Service NSW has provided a state-wide First Nations Women's Legal Program (**FNWLP**). This program delivers a culturally safe legal service to First Nations women, including regular engagement with communities across NSW. We provide a First Nations legal advice line, casework services including a specialised family law service to assist First Nations women access the family law courts, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for First Nations women, including about sexual violence.

An Aboriginal Women's Consultation Network supports and enhances the work of the FNWLP. It meets quarterly to ensure that Women's Legal Service NSW delivers a culturally safe service. The members include regional community representatives and the FNWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the Women's Legal Service NSW Board.

Our work in the area of sexual violence

Women's Legal Service NSW specialises in working with victim-survivors of gendered violence.

Our work in the area of sexual violence includes advising women subjected to sexual violence about reporting to police, evidence collection and legal processes; victims support, personal injury civil claims and National Redress Scheme entitlements; privacy and use of sensitive information; complaints about service providers such as police; representing complainants in removing suppression orders or non-publication orders and representing women as respondents to defamation proceedings arising out of their own sexual assault reports to police. Our experience is also drawn from our long work representing 13 victim-survivors of child sexual abuse against the State of NSW that was also the subject of the Royal Commission into Institutional Responses to Child Sexual Abuse Case Study 19 into Bethcar Children's Home.

We also assist services providing therapeutic support to women. This includes advising and at times representing these services to respond to subpoenas and requests for records in court proceedings. We also advise and assist services working with victim-survivors in applications for victims support.

Women's Legal Service also operates a Working Women's Legal Service. A significant part of this service is responding to sexual violence, including sexual harassment in the workplace. Further, for almost 15 years, we have provided civil and family law services to women in prison. We recognise the high rates of gender-based violence experienced by women prior to entering prison as well as sexual violence perpetrated within

prison. We note the Special Commission of Inquiry into the offending of Correctional Services Officer Wayne Astill at Dilwynnia Correctional Centre.

We also engage in community legal education[1] and law reform in relation to sexual violence.

Use of language

Victim-survivor

We acknowledge that there are different preferences for the language used to describe a person who has been subjected to sexual violence. Some prefer the terminology "*victim*", some "*survivor*" some "*victim-survivor*". In this submission we use the term "*victim-survivor*". This is intended to be inclusive of all.

Gendered language

While anyone can be subjected to sexual violence, the research and our experience over more than forty years highlights that sexual violence is predominantly perpetrated by men against women and children. Our language in this submission is gendered to reflect this.

Criminal legal system

Many First Nations people have questioned the accuracy of the description of the "*criminal justice system*" in Australia as a "*just*" system, noting its continuing colonising impacts.

Many victim-survivors of gender-based violence who engage in the criminal legal system also challenge the description, advocating the systems must become more gender-based violence and trauma-informed and the importance of cultural safety and disability informed and LGBTIQA+ informed practices.

In acknowledging that language matters and the importance of using language that resonates particularly with First Nations people and victim-survivors we use the language "*criminal legal system*".

[1] See for example: https://www.wlsnsw.org.au/category/publications/wls-publications/

Introduction

1. We warmly welcome this inquiry and see it as an important opportunity to explore doing things differently. This includes better acknowledging that justice in the criminal legal system requires meaningful consideration of the rights of the complainant as well as the accused and the importance of centring trauma-informed practice and interactions, cultural safety, disability informed practices and LGBTIQA+ informed practices to best ensure provision of best evidence. This must be evident in Human Rights Acts and frameworks, Victims Rights Charters and in the criminal legal system.

2. It is important this review considers sexual violence in all its contexts and across a person's lifespan, including child sexual abuse; sexual violence within a domestic and family violence context, including in aged care and other residential settings; grooming and sexual violence perpetrated by abuse of a relationship of authority, trust or dependence, including in prison and other institutional settings; sexual violence perpetrated in non-intimate relationship contexts; non-therapeutic involuntary sterilisation of people with disability; female genital mutilation/cutting; technology-facilitated sexual abuse; sexual violence in the workplace; and other forms.

3. This inquiry provides an important opportunity to make sexual violence in all its forms more visible and to normalise discussions about it. There must be greater recognition of the harm caused by sexual violence; an exploration of better ways to hold those who use sexual violence accountable for their actions; a focus on ensuring the criminal legal system does not cause more harm to victim-survivors as a result of its own processes; a focus on healing and recovery; and a greater focus on the prevention of sexual violence in all its forms.

4. Despite measures such as pre-recorded evidence, witness intermediaries and ground rules hearings which undoubtably contribute to victim-survivors providing their best possible evidence, and the ground-breaking NSW consent reforms that focus on affirmative consent, there remain fundamental structural and systemic issues that impede a comprehensive and truly trauma-informed approach, particularly within criminal legal proceedings.

5. There must be greater efforts to address prejudices, discrimination and biases in relation to gender, race, ableism, ageism and heteronormativity – both through education and training to help us all identify and address our prejudices and biases and also through accountability mechanisms.[2] Such prejudices, discrimination and biases limit access to justice for many victim-survivors of sexual violence, particularly First Nations women and children, refugee and migrant women and children, people with disability, LGBTIQA+ communities, older women and children and young women. The responsibility for this work rests with us all and relates to all systems, including the legal system.

6. This inquiry is an important opportunity for the ALRC to consider developments and practices within Australia and other jurisdictions and different ways of doing things.

> *Just because a change does not coincide with the way we have always done things does not mean that it should be rejected…. Do proposed changes cause unfair prejudice to the defendant? If so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective*.[3]

[2] For example, then Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar AO made recommendations to include accountability mechanisms to address systematic racism in Australian Human Rights Commission (2020) *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report*, p 103 (105).

[3] Lord Chief Justice, Lord Judge cited in the *UK Equal Treatment Bench Book* in reference to adapting procedures to facilitate effective participation of witnesses in criminal proceedings cited in Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial (Palgrave Macmillan),* p580-81.

7. We have read several chapters of Anne Cossins' *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* which outline a detailed proposal of how to transform the sexual assault trial into a trauma-informed system. We commend Cossins' focus on transforming the criminal legal system to provide trauma-informed interactions for victim-survivors by seeking to educate everyone in the criminal legal system about long-term impacts of trauma and ways to minimise trauma and remove triggers, eliminate the perpetration of rape myths and better regulate cross-examination. We recommend the Australian Law Reform Commission consider these proposals further.

8. We strongly support specialisation in legal systems response to sexual violence, including specialist police, specialist prosecutors, specialist defence, specialist independent legal representatives, specialist judicial officers, specialist witness intermediaries, specialist interpreters and specialist wrap around support.

9. We must acknowledge not only the significant harm complainants suffer as a result of sexual violation, but also that this harm is significantly compounded through engagement in criminal legal proceedings and increasingly, through defamation processes. All reforms must be grounded in a focus on "*do no harm*".

10. In summary we recommend:

    10.1 Addressing prejudices, discrimination and biases in relation to gender, race, ableism, ageism and heteronormativity – both through education and training to help us all identify and address our prejudices and biases and also through accountability mechanisms.

    10.2 A greater focus on "*trauma-informed interactions*" and processes in all justice responses to sexual violence, including the criminal legal response.

    10.3 Close consideration of the proposals outlined in Cossins' *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial.*

    10.4 A federal and NSW Human Rights Act that incorporates a duty of equal access to justice for victim-survivors as well as defendants.

    10.5 Implement the recommendations in: KPMG and RMIT University Centre for Innovative Justice (2023) *This is my story. It's your case, but it's my story." Interview study: Exploring justice system experiences of complainants in sexual offence matters.*

    10.6 Regular, independent auditing of police response to sexual violence which include the voices of victim-survivors and publishing of results, reflecting upon what is working well and examining ways to continuously improve practice.

    10.7 "*A clear, robust, transparent and easily accessible internal 'right to review' process of police and ODPP prosecutorial decisions for victim-survivors of sexual violence*" consistent with Recommendation 50 of the Queensland Women's Safety and Justice Taskforce Report 2 Vol 1 be implemented in all states and territories. This includes the outcome of an internal review process including written reasons for the decision which is communicated in plain language in a format the victim-survivor understands.

    10.8 Remove the language of "*vulnerable person*" and "*vulnerable witness*" and provide protections for all complainants and associated witnesses in sexual violence matters.

    10.9 Expand witness intermediaries in relation to sexual offence matters to all complainants as a right and to other witnesses by leave.

10.10 A Ground Rules Hearing is held in all sexual offence matters.

10.11 All complainants of sexual offence matters have the right to pre-record evidence and there be provision for associated prosecution witnesses to also pre-record their evidence.

10.12 In addition to the above, other outstanding recommendations in Judy Cashmore and Rita Shackel (2018) *Evaluation of the Child Sexual Offence Pilot Final Outcome Evaluation Report* be implemented.

10.13 Implement the recommendations in Quilter and McNamara (2023) Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis.

10.14 Specialisation including specialist judges, legal practitioners and counsel, support services, police, interpreters, and witness intermediaries.

10.15 Regular and ongoing training for police, legal practitioners and counsel, and judicial officers including of the long-term impact of trauma and impacts on the brain including "*trauma symptoms and their impact on a complainant's ability to give evidence, how to avoid re-traumatisation and how to manage the situation when a complainant is triggered*". There should also be training for everyone working in the criminal legal system about long term impacts of trauma and how to minimise trauma and prevent triggering.

10.16 Accreditation of all legal counsel undertaking sexual offence work.

10.17 Regular and independent evaluation of training to assess its effectiveness in changing culture and practice, particularly for promoting trauma-informed interactions.

10.18 A safe and accessible multi-agency response for those who have been subjected to sexual violence where services may be co-located, including medical and forensic services, counsellors, police, lawyers and support workers.

10.19 Implement recommendation 39 of *Respect@Work Report*.

10.20 Legislate a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any matters involving sexual violence with an emphasis on victim-survivor choice.

10.21 An equal access costs model in the terms of the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 currently before Parliament in relation to federal unlawful discrimination court proceedings for state/territory anti-discrimination and related civil proceedings.

10.22 Strengthen anti-discrimination laws and include being a victim-survivor of gender-based violence as a protected attribute in state/territory and federal anti-discrimination laws.

10.23 Defamation laws be reformed to provide for protection in making reports to medical/health professionals and a speedy determination of a vexatious or unmeritorious complaint in a form that minimises the cost and evidentiary burden on the respondent to such proceedings.

10.24 In relation to Victims Support:

10.24.1 Establish an independent Commissioner Victims Rights.

10.24.2 Legislate the removal of the requirement to prove injury in Victims Support applications.[4]

10.24.3 Remove all time limits for victim-survivors of sexual, domestic and family violence, including child sexual abuse and child abuse as well as victim-survivors of modern slavery in relation to different aspects of Victims Support applications.

10.24.4 Discretion to apply for review out of time and ensure all aspects of the Victims Support Scheme are subject to internal and external review.

10.24.5 Provide greater recognition of sexual violence, child sexual abuse, domestic violence, including child abuse, and modern slavery through higher recognition payments. These payments should increase in value with the current categories shifted to higher categories. Payments need to be indexed annually and should not ever decrease despite indexation.

10.24.6 Legislate a standard of proof of "*reasonable likelihood*" consistent with the National Redress Scheme for people who have experienced institutional child sexual abuse.

10.24.7 The form of evidence to support a Victims Support application is not prescribed.

10.24.8 Introduce Immediate Needs Support Package - Sexual violence – to respond to immediate needs.

10.24.9 Improve access to economic loss payments.

10.24.10 Legislate the paying of disbursements to third parties for reasonable access to information expenses and other evidentiary reports (so support services supporting victim-survivors with applications who pay these expenses up from for clients can be reimbursed).

10.24.11 Add a new Victims Support payment called a Disability and Domestic and Family Violence Crisis payment.

10.24.12 Require Victims Services or its managing agency or Minister to publish policies and guidelines they rely on to make decisions.

10.24.13 Introduce a discretionary process for victim-survivors under 18 years old to access their recognition payment rather than it being held on trust.

10.24.14 Services Australia amends the Social Security Guide to protect recipients of Special Benefit and allow them to get the full benefit of Victims Support (or equivalent) payments without their Special Benefit being affected. This is particularly important for victim-survivors of sexual violence, child sexual abuse, domestic violence, child abuse, and modern slavery.

10.24.15 Expand eligibility for Victims Support to all people who are victims of crime whilst incarcerated.

[4] This has also been recommended by the Victorian Law Reform Commission in relation to victim-survivors of a sexual offence, a criminal act that occurred in the context of family violence, or victims who witnesses, heard or were otherwise exposed to any of the above criminal acts and were under 18 years at the time of exposure. See VLRC (2018) *Review of the Victims of Crime Assistance Act 1996: Report*, paragraph 12.242 and Recommendation 31.

10.24.16 A legislative presumption not to pursue restitution in circumstances of sexual violence, child sexual abuse, domestic violence, child abuse and modern slavery unless the victim-survivor elects Victims Services pursue restitution.

10.24.17 Legislate the requirement for Victims Services to note all evidence considered and provide reasons for their decisions ensuring that decision-makers provide applicants with detailed information to justify their decision in plain language, and that the reasons outline the evidence relied upon to reach the decision.

10.24.18 As a matter of procedural fairness, if Victims Services intends to draw adverse inferences on the evidence before it, Victims Services should advise the applicant or their legal representative and ask if there is further evidence to submit or submissions to be made with respect to the issue in question.

10.24.19 The NSW Department of Communities and Justice implements improvements to access to Victims Services Approved Counselling as proposed in our submission to the review of the *Victims Rights and Support Act* included in Appendix A.

10.25 Strengthen the NSW Charter of Victims Rights to:

10.25.1 Give victim-survivors a right to seek a review of prosecutorial decisions consistent with Recommendation 50 of the Queensland Women's Safety and Justice Taskforce: *Hear Her Voice: Women and girls' experiences across the criminal justice system – Report 2 Volume 1*.

10.25.2 Make clear a victim-survivor's right to access an interpreter when reporting violence to police and throughout the justice journey.

10.25.3 Inform a complainant of "*any special protections or alternative arrangements for giving evidence*" and informing the court of the complainant's preferences for this as outlined in the *Victims Charter Act 2006 Victoria*.

10.25.4 Help victim-survivors realise the right to make a claim under the Victims Support Scheme.

Human Rights Acts – A Duty of Equal Access to Justice

The human rights framework for victim-survivors

11. We support a federal and NSW Human Rights Act. We further support the Australian Human Rights Commission's proposal to include a duty of equal access to justice in a Human Rights Act.[5]

12. We recognise a part of a duty of equal access to justice is derived from the right of an accused to a fair trial. We acknowledge and support this fundamental right and its explicit protection.

13. However, we believe a necessary element of a fair trial also includes explicit protections to ensure victim-survivors can safely participate in the policing and legal process and provide their best evidence. The rights of victim-survivors and the rights of accused people are not mutually exclusive. Both can be realised if access to justice is afforded to both. This is consistent with the recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse that "*the criminal justice*

[5] Australian Human Rights Commission (2022), *Free & Equal, Position Paper: A Human Rights Act for Australia*

system operates in the interests of seeking justice for society, including the complainant and the accused".[6]

14. Explicit inclusion of the rights of victim-survivors in a federal Human Rights Act is vital. There is no federal Victims Rights Charter highlighting the urgency to include victim-survivors rights in a federal Human Rights Act. In jurisdictions where there are Victims Rights Charters we support the integration of the rights of victim-survivors into Human Rights Acts.

15. The *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* provides that victim-survivors should be "*treated with compassion and respect for their dignity*"[7] and that policing and judicial systems take gender-sensitive approaches to their roles and to avoid re-victimisation.

16. The CEDAW Committee's General Recommendation 33 makes several recommendations for the realisation of women's access to justice. The Committee notes the influence of gender stereotypes in criminal proceedings involving gender-based violence, particularly regarding the questioning of victim-survivors and evidence.

> *Use a … gender-sensitive approach to avoid stigmatization, including secondary victimization in cases of violence, during all legal proceedings, including during questioning, evidence collection and other procedures relating to the investigation.*[8]

The Committee also recommends that States,

> *Review rules of evidence and their implementation, especially in cases of violence against women, and adopt measures with due regard to the fair trial rights of victims and defendants in criminal proceedings, to ensure that evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes.*[9]

17. The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* make several recommendations for how States can ensure victim-survivors obtain access to justice while at the same time balancing the rights of the accused. Among other recommendations, Guideline 7 provides that States should provide access to:

- advice and assistance throughout the criminal legal process, provided in a manner which prevents re-victimisation;
- legal advice about their involvement in the criminal legal process;
- prompt information from police and other front-line responders about the matter, their entitlement to legal aid, assistance and protection, and how to access these rights;
- mechanisms that allow for the presentation and consideration of victim-survivors views and concerns, where their personal interests are affected or where it is in the interests of justice, at appropriate stages in the criminal legal process.[10]

[6] Royal Commission into Institutional Responses to Child Sexual Abuse (2017) *Criminal Justice Report*, Recommendation 1.
[7] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, A/RES/40/34 (adopted 29 November 1985), Article 4.
[8] CEDAW Committee, General Recommendation No. 33 on women's access to justice, CEDAW/C/GC/33 (3 August 2015), p19 [51(g)].
[9] Ibid [51(h)]
[10] United Nations General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 67th Sess, A/RES/67/187 (28 March 2013), Guideline 7, p18 [48].

18. Former Commissioner for Victims Rights in South Australia, Michael O'Connell advocates for a broader understanding of a "fair trial" which incorporates the rights and voices of victim-survivors, stating:

> *It is important to have an inclusive understanding of the principle of a fair trial that has regard to the position of not only the defendant but also the positions of victims and witnesses. As Wolhuter and others aptly said, — victim empowerment and the reduction of secondary victimisation require procedural rights during both the pre-trial and trial stages. Victim studies and my experiences convince me that there is nothing less empowering for a victim (who wants to be involved in decision-making) than being unable to influence any decision that affects him or her.*[11]

19. Providing gender-based violence informed, trauma-informed, culturally safe and disability informed processes will also assist victim-survivors to provide their best evidence.

How a Human Rights Act may assist

20. The rights of victim-survivors by way of a duty of equal access to justice should be included in a federal and state/territory Human Rights Acts. Such a right must recognise and afford victim-survivors similar procedural rights to those of the accused, including guaranteeing

    20.1 access to interpreters at all stages of the police, judicial and other processes;

    20.2 access to legal representation to understand and enforce their rights; and

    20.3 access to gender-based violence and trauma informed, culturally safe support services.

21. A duty of equal access to justice for victim-survivors should also include allowing the participation of victim-survivors in the criminal legal process where decisions are being made that directly impact them. This could include in bail decisions, in shielding protected confidences, in challenging improper questions in cross-examination, in providing victim impact statements and in applications by complainants to lift non-publication orders.

22. The Charter of Victims Rights in NSW provides that victim-survivors should be consulted about the charges laid against the accused, or the reason for not laying charges, as well as decisions by the prosecution to modify charges or drop them, and more generally about the progress of criminal proceedings.[12] However, the experience of our clients is that they are often not consulted and often have very limited knowledge of the progress of criminal proceedings to which they are the primary witness. Additionally, there needs to be more effective mechanisms to review such decisions. This is discussed further below.

23. Further, if victim-survivors are not provided with appropriate gender-based violence informed, trauma-informed, culturally safe, disability informed services, or translation services or communication supports during the initial stages of an investigation, this can compromise their reporting of the violence. In our experience, this can lead to negative police, judicial and community perceptions of victim-survivor credibility if their stories contain inconsistencies by virtue of their experience of trauma or due to lack of specialist translation services or lack of support to help them effectively communicate.

24. A Human Rights Act which embeds both a duty to equal access to justice for victim-survivors as well as for defendants, sends a clear message that the voices and experiences of victim-survivors are important. It recognises that a victim-survivor's right to dignity, life and security is protected when the

[11] Michael O'Connell, 'Integrating victims rights in criminal proceedings' (2017/2018) *Australian Institute of Judicial Administration* 10.

[12] Section 6.5 *Victims Rights and Support Act 2013* (NSW)

system supports their understanding of and participation in legal processes which directly impact them and their safety.

Recommendation

A federal and NSW Human Rights Act that incorporates a duty of equal access to justice for victim-survivors as well as defendants.

Criminal legal system

Trauma-informed interactions in criminal legal system

25. Cossins advocates that the "*public health concept of trauma-informed care could be used to enact cultural change in organisations that do not deliver trauma-informed specific services but deal with traumatised individuals, such as victims of sexual assault*". This includes victim-survivors of sexual violence engaging in legal processes, including criminal legal processes.[13]

26. Cossins explains that the purpose of creating a trauma-informed care system is not to provide trauma-informed services but, for example, to *"create trauma-informed interactions between court personnel and complainant."*[14]

27. The culture change to which Cossins refers includes embedding protections to prevent the "*triggers of the sexual assault trial*".[15]

28. Cossins also refers to extensive research undertaken with victim-survivors of child sexual abuse and their family members as well as with adult complainants about the damaging and ongoing trauma impacts of the criminal trial well after it has ended, highlighting the urgency in doing better.[16]

29. In considering how to promote "*trauma-informed interactions*" that "*do no harm*", Cossins advocates the adoption of "*principles that characterise trauma-informed systems not delivering trauma-specific services*". These include:

    - *Recognition of the long-term impact of trauma*
    - *Safety*
    - *Minimisation of trauma*
    - *Empowerment, and*
    - *Cultural competence*[17]

Reporting to police

30. Some clients have reported to us they have enduring high regard and appreciation for police officers who have provided respectful, believing, supportive responses to their complaints of sexual violence

[13] Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial (Palgrave Macmillan),* p566.
[14] Ibid, p542
[15] Ibid, p562
[16] Ibid, p536-539
[17] Ibid, p566. For a detailed description see p 547-568

and who have kept in touch with them throughout the process and provided the support they need to continue through the prosecution process.

31. Other clients have felt police made incorrect assumptions about their reasons for reporting and/or doubted their credibility. Many report failure by police to keep them updated about the progress of investigations, whether or not charges have been laid and if so, what charges and the accused plea. We are concerned by data in the recent BoCSaR report that found only 15% of sexual assault reported to NSW Police resulted in charges laid and where matters proceeded to court, less than half (41%) of defendants had a sexual offence charge proven against them, either by way of a guilty plea or guilty verdict.[18] Further, "*just 8% of reported contemporary child sexual assault incidents, 7% of reported historic sexual assault incidents and 6% of reported adult sexual assault incidents result[*ed*] in a proven charge".*[19]

32. It would be helpful to better understand the reasons why so few sexual offence matters proceed to charges being laid and the barriers to this.

33. This report referred to another BoCSaR commissioned study undertaken by KPMG and RMIT University Centre for Innovative Justice involving interviews with sexual assault complainants and legal practitioners in NSW which "*found that the majority of victims wanted to see charges laid*".[20]

> *The decision not to proceed was determined by the police, with some informants expressing concerns around the quality of the initial investigation and evidence collection conducted by police. Issues highlighted included that statements from complainants were often delayed and not adequately recorded, failure to document evidence such as photographic evidence of physical injuries, or failure to gather additional evidence such as CCTV footage or interviewing witnesses. The researchers cite the quality of investigations as a reason for matters not progressing to court.*[21]

34. Police need to be properly resourced and supported to undertake effective investigations into sexual violence. Further we support initiatives to "*improve access to, and the quality of medical and forensic examinations*".[22]

35. We support the introduction of a "*NSW Police Code of Practice for Sexual Violence to standardise a trauma-informed approach to working with complainants and investigating sexual offence*".[23]

36. We support the "*roll out of training for NSW Police across all commands on trauma, sexual offence myths, and impacts of sexual violence*".[24] This training must include experts such as Aboriginal Community Liaison Officers, Multicultural Liaison Officers, Gay and Lesbian Liaison Officers, Youth Liaison Officers, Domestic Violence Officers and Aged Crime Prevention Officers. Such training needs to be undertaken by all working in the criminal legal system and not limited to police and needs to be regularly independently evaluated for its effectiveness. It is important such training is co-designed and co-delivered by subject matter and lived experience experts.

[18] Gilbert, B (2024) *Attrition of sexual assaults from the New South Wales criminal justice system*, *Bureau Brief No BB170*, BoCSaR, p 1.
[19] Ibid.
[20] Ibid, p5
[21] Ibid, p5
[22] KPMG, RMIT University Centre for Innovative Justice (2023) *This is my story. It's your case, but it's my story." Interview study: Exploring justice system experiences of complainants in sexual offence matters* (NSW Department of Communities and Justice NSW Bureau of Crime Statistics), Recommendation 7
[23] Ibid, Recommendation 4
[24] Ibid, Recommendation 6

37. To help ensure a victim-survivor is kept informed of their matter, we recommend a victim-survivor is given multiple means of contacting the person they provided their complaint to for an update on their matter.

38. We also support the KPMG and RMIT University Centre for Innovative Justice recommendation for the "*NSW Government to consider the establishment of a model which connects victim-survivors with a consistent source of support from the point of disclosure throughout the reporting and trial process*".[25]

39. We also recommend regular, independent auditing of police response to sexual violence which is important to ensure continuous improvement in police practice. It also helps to build further public confidence in police response to sexual violence when the public know that police are continually reflecting on what works well and examining ways to continuously improve practice. It is important to include the voices of victim-survivors of sexual violence in these independent reviews and to publish the outcome of the reviews.

40. We commend the Sexual Assault Reporting Option provided by NSW Police. This option can be used if a victim-survivor does not want to make a formal report to police, but they want police to know they have been sexually assaulted. The victim-survivor can elect to be contacted further by police or to be anonymous. Such a reporting option provides agency to victim-survivors. It can also help police to identify repeat offenders. We support alternative reporting options such as this.

Recommendations

Implement the recommendations in: KPMG and RMIT University Centre for Innovative Justice (2023) *This is my story. It's your case, but it's my story." Interview study: Exploring justice system experiences of complainants in sexual offence matters*.

Regular, independent auditing of police response to sexual violence which include the voices of victim-survivors and publishing of results, reflecting upon what is working well and examining ways to continuously improve practice.

Prosecution response

41. A study by Fitzgerald in 2006 of attrition of sexual offences in the NSW criminal legal system found "*36.7% of defendants in the Local Court had all their sexual offence charges dismissed without a hearing or 'otherwise' disposed' of*".[26] Reasons were not provided by Fitzgerald. However, Gilbert notes:

> *the interview study by KPMG and RMIT University's Centre for Innovative Justice (2023) suggests that most sexual assault matters fail to proceed at [prosecution] stage as justice agencies have decided that a successful prosecution is unlikely. For most of these cases, there was insufficient evidence, either due to the nature of the incident or a poor investigation, or, less commonly, there were discrepancies between a victim's statement and other forms of evidence. In the rare cases where a complainant no longer wanted to proceed with their matter, they stated reasons such as receiving insufficient support during the process, negative experiences with the system, and/or long wait times between reporting and the trial*.[27]

42. We hear that sexual violence complainants engaged in the criminal legal system do not always understand how decisions are made in their matter and by whom, including how charges may be laid

[25] Ibid, Recommendation 2
[26] Cited in Gilbert, Note 18, p 5
[27] Ibid, p5.

or negotiated in plea-bargaining, or a decision made to withdraw or not to lay charges in the first instance.

43. We note the range of recommendations made in previous inquiries relating to the prosecution of matters outlined on page 8 of the ALRC's Issues Paper and support the implementation of these recommendations.

44. We particularly note the recommendations:

- *requiring the ODPP to have written policies for decision-making and consultation, including: (i) a right for complainants to seek written reasons for key decisions; and (ii) a robust and effective formalised complaints mechanism to allow complainants to seek internal merits review of key decisions;*

- *providing for an independent review of sexual violence cases that are not progressed, or for cases to be considered by a victims' commissioner if requested; and*

- *regular auditing of prosecution decisions to identify patterns which affect the decision on whether or not to prosecute*

45. We note *NSW ODPP Prosecution Guidelines* and *NSW ODPP Victims' Right of Review Policy* which outlines

> *A victim of crime is entitled to seek a review of an ODPP decision not to commence, or to discontinue, a prosecution when that decision ends all charges affecting them.* [28]

46. It would be useful to publish data about the number of requests made to review an ODPP decision and the outcome, including reasons provided if the original decision is upheld.

47. We recommend both the NSW Police and NSW ODPP have "*a clear, robust, transparent and easily accessible internal 'right to review' process of police and ODPP prosecutorial decisions for victim-survivors of sexual violence*". Further, the outcome of an internal review process must include written reasons for the decision which is communicated in plain language in a format the victim-survivor understands. We note this was a recommendation of the Queensland Women's Safety and Justice Taskforce.[29] Such a model exists in England and Wales and is referred to in the Queensland Women's Safety and Justice Taskforce report.

48. Further, the Victorian Victims of Crime Commissioner recently recommended the establishment of an independent review mechanism to enable victim-survivors "*to seek a review of certain police and prosecution decisions*".[30] The Commissioner notes the "*anticipated benefit*" of this recommendation includes "*an independent review model may identify bias or misconceptions held by certain decision makers*".[31]

49. We further recommend the NSW Charter of Victims Rights include the requirement for NSW Police and the Office of the Director of Public Prosecutions to have transparent and easily accessible internal 'right to review' processes, particularly for prosecutorial decisions relating to sexual violence. This is particularly important given the very high attrition rates for sexual offences and differing views as to

[28] NSW ODPP (2021) *Victims' Right of Review Policy*, p4
[29] Women's Safety and Justice Taskforce (2022) *Hear Her Voice: Women and girls' experiences across the criminal justice system – Report 2 Volume1*, Queensland, Recommendation 50
[30] Victims of Crime Commissioner (2023) *Silenced and sidelined: Systemic inquiry into victim participation in the justice system*, Recommendation 4
[31] Ibid, p 467

the extent this is related to complainants not wanting to proceed or other factors, including police decisions and insufficient investigation.

Recommendation

"A clear, robust, transparent and easily accessible internal 'right to review' process of police and ODPP prosecutorial decisions for victim-survivors of sexual violence" consistent with Recommendation 50 of the Queensland Women's Safety and Justice Taskforce Report 2 Vol 1 be implemented in all states and territories. This includes the outcome of an internal review process including written reasons for the decision which is communicated in plain language in a format the victim-survivor understands.

The trial process

Procedural protections

50. We acknowledge the importance of procedural protections outlined in the ALRC Issues Paper and strongly support such protections being available as a right to all complainants of gender-based violence, including sexual offences and domestic and family violence offences more broadly. It is also important these protections be available to other witnesses too.

51. The terms "*vulnerable person*" and "*vulnerable witness*" is often used in legislation and policy with the intention to provide legal protections for particular cohorts of people giving evidence in criminal proceedings.

52. Language must be strengths-based, focus on accountability and be identifiable for and with victim-survivors. People are not vulnerable simply because, for example, of their age, or a cognitive impairment. Systems, structures, discrimination, and other barriers to equality, justice and safety must be challenged. We recommend removing the language of "*vulnerable*". We believe all complainants in sexual violence proceedings should as a right be able to access protections to ensure they can give their best possible evidence and are not subjected to further trauma and harmful or distressing experiences, and this is in the public interest.

53. In relation to a ban on direct cross-examination, we support the appointment of a legal practitioner to undertake cross-examination.[32] We note a court appointed legal representative has duties to their client and the court.

54. Queensland has provisions which prevent an accused from directly cross-examining a "*protective witness*" (which includes and extends beyond a complainant) and a legal representative can be appointed for the purposes of cross-examination and has duties to their client and the court.[33] We support this protection being available to witnesses beyond the complainant.

55. While procedural protections are very important and seek to reduce the trauma for complainants and witnesses in giving their evidence, many have commented that of themselves these protections and other progressive law reform is not enough to ensure the provision of best evidence.

56. Quilter and McNamara comment:

[32] NSWLRC, *Questioning of complainants by unrepresented accused in sexual offence trials*, Report 101, June 2003, Recommendations 1, 4 and 7.

[33] Section 21P and s 21O of the *Evidence Act 1977* (Qld)

> *we believe it is important to confront the disconnect between the prevailing narrative of progressive law reform and incremental improvement over 40 years in relation to sexual offences, and the practical reality that core features of sexual offence trials have remained unchanged*.[34]

57. Quilter and McNamara see this as "*not primarily a problem of recalcitrance (or ignorance) on the part of judges and lawyers*"

> *Rather, the problem is that the reforms of the last 40 years have attempted only modest incursions into the essence of what makes sexual offence trials so traumatic for many complainants, including the adversarial nature of proceedings, the breadth and sensitivity of topics complainants might be asked to address, the absence of substantive barriers to the evocation of rape myths and stereotypes, and the length of time for which complainants might be examined.*[35]

58. Similarly, Cossins refers to the UK *Equal Treatment Bench Book* which outlines a number of examples of a "*flexible approach*" to "*enable vulnerable witnesses to give their best evidence*".[36] Cossins comments the protections within the *Equal Treatment Bench Book* are *"premised on equality principles, rather than trauma-informed principles" which means "they are adaptations to the hostile and traumatising environment of the adversarial trial" but "do not directly address the triggers that may require a witness 'to come back the next day' because of distress".*[37]

59. Cossins notes that "*Without judges who are trained in trauma-informed care, judicial discretion is an inadequate method for overcoming the barriers faced by vulnerable witnesses*".[38]

60. Cossins advocates Bench Books, including the *Equality before the Law Bench Book* in NSW would benefit from *"explicitly adopting a trauma-informed approach*".[39]

Witness Intermediaries

61. The role of witness intermediaries is outlined at s294L(1) of the *Criminal Procedure Act 1986 NSW*:

> *(a) communicate to the Court whether the witness can understand questions put to the witness, and*
>
> *(b) explain to the Court and the person asking questions the best way a witness can be asked questions the witness can understand.*

62. Evaluations of witness intermediaries, ground rules hearings and pre-recorded evidence in sexual offence trials have found these mechanisms are effective in assisting complainants to give their best evidence and improve the quality of evidence.

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[34] Julia Quilter and Luke Mc Namara (2023) *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*, (Crime and Justice Bulletin, Number 259), p 37

[35] Ibid.

[36] Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial (Palgrave Macmillan), p580*

[37] Ibid, p 582

[38] Ibid, p 580

[39] Ibid, p582. We note the NSW *Equality before the Law Bench Book* has been updated to refer to trauma-informed practice but that there needs to be further work across the criminal legal system to embed trauma-informed interactions that go beyond procedural protections that provide "*adaptations to the hostile and traumatising environment of the adversarial trial"* to also have procedural and other protections to prevent and limit triggers and retraumatisation.

63. Witness Intermediaries were piloted in NSW, along with ground rules hearings and expansion of pre-recorded evidence as part of the Child Sexual Offence Evidence Pilot which started in Sydney and Newcastle in March 2016.

64. After a successful evaluation, the program has been expanded to all NSW District Courts from 29 January 2024. The *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023* (NSW) provides that for proceedings in relation to a prescribed sexual offence a witness intermediary must be appointed for a witness who is less than 16 years of age[40] from a panel established by the Secretary of the Department[41] subject to legislative provisions[42]. Of its own motion or on the application of a party to the proceedings, the Court may also appoint a witness intermediary for a witness who is "*16 or more years of age only if it is satisfied that the witness has difficulty communicating*".[43]

65. A witness intermediary in NSW is an officer of the court and "*has a duty to impartially facilitate the communication of, and with, the witness so the witness may give the witness's best evidence*".[44] They are accredited professionals, including in speech pathology, social work, psychology, teaching or occupational therapy who have also completed the witness intermediary training course provided by the Department of Communities and Justice.[45] The evaluation of the NSW pilot recommended "*more diverse witness intermediaries need to be appointed*" including First Nations and culturally and linguistically diverse witness intermediaries. The evaluation noted direct engagement with First Nations and culturally and linguistically diverse communities as well as expanding witness intermediary appointment criteria could assist in overcoming barriers to recruiting witness intermediaries.[46]

66. Cossins recommends witness intermediaries be appointed in all sexual offence trials to ensure cultural change in limiting questions to those that are age and/or developmentally appropriate.[47] She further notes they have the potential to play a key role in promoting the Courts' cultural competency with respect to First Nations people and refugee and migrant communities.[48]

67. Plotnikoff and Woolfson note a disadvantage associated with witness intermediaries is "*their inability to intervene to prevent improper questioning at trial, and the concomitant discovery that 'judges and prosecutors said they would be less likely to intervene in inappropriate questioning where an intermediary was present'*".[49]

68. Cossins suggests there could be further cultural change when witness intermediaries are viewed within a trauma-informed care context and their role extends to also include intervening to prevent improper questioning.[50]

[40] Section 294M(3)(a) *Criminal Procedure Act 1986* (NSW)
[41] Section 294M(1) *Criminal Procedure Act 1986* (NSW)
[42] Section 294M(4) *Criminal Procedure Act 1986* (NSW)
[43] Section 294M(3)(b) *Criminal Procedure Act 1986* (NSW)
[44] Section 294L(2) *Criminal Procedure Act 1986 (NSW)*
[45] Section 294M(2) *Criminal Procedure Act 1986 (NSW)* and s109 *Criminal Procedure Regulation 2017 (NSW)*
[46] Judy Cashmore and Rita Shackel (2018) *Evaluation of the Child Sexual Offence Pilot Final Outcome Evaluation Report* (Report prepared for Victims Services, NSW Department of Justice), p15
[47] Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial (Palgrave Macmillan), p393.*
[48] Ibid, *p 565.*
[49] Cited in Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial (Palgrave Macmillan), p565.*
[50] Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial (Palgrave Macmillan), p565*

Ground Rules Hearings

69. Ground Rules Hearings (**GRH**) provide an important pre-trial opportunity for the Judge and both counsel to address the needs of a witness and discuss the process and content of cross-examination to cater to those needs. In some jurisdictions the Judge may require the defence to provide their proposed questions in writing prior to the pre-recorded evidence hearing.[51] If a witness intermediary (**WI**) is appointed, they will also make recommendations to this effect. Ideally, the GRH Directions will improve the efficiency of the trial and produce more reliable evidence by minimising the distress experienced by the witness during cross-examination.

70. In NSW, a GRH is not mandatory for a sexual assault complainant aged 16 years and over unless the Court is satisfied that the witness has difficulty communicating. Evaluations in other jurisdictions have established the importance of GRH and we submit that GRH should be mandated in all sexual offence trials across all Australian states and territories.

71. In Victoria, access to a GRH is extended beyond the range of witnesses provided for by NSW law. A GRH must be held if an intermediary has been appointed or the witness is a complainant in a proceeding for a sexual offence.[52]

72. The *Dorrian Review* in Scotland also recommended Ground Rules Hearings for all sexual offence trials.[53]

73. In a UK pilot, Ground Rules Hearings have been described as "*key to the success of the pilot*" because questions posed to the witness were phrased appropriate to the needs of the witness, questions focused only on those issues which require to be addressed in the cross-examination, Counsel was compelled to prepare their questions thoroughly and carefully and as a result, pre-recorded evidence hearings tend to be much shorter than cross-examination in the usual trial setting. [54] Legal practitioners reported that a Ground Rules Hearing improved the cross-examination process and they thought "*that the quality of evidence was higher*" by the witness because the questions posed to the witness were "*more focused and relevant*", and because of the improved questioning styles being adopted by the defence. Legal practitioners were also of the opinion Ground Rules Hearings and pre-recorded evidence hearings were "*reducing the level of distress/trauma suffered by witnesses*".[55]

74. An evaluation of the NSW Pilot found "*strong widespread support for the special measures in the Pilot"* including witness intermediaries, Ground Rules Hearings, pre-recorded evidence and specialist judges.[56]

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[51] For example, in Leeds and Liverpool during the pilot "*it was the practice to require defence counsel to submit their proposed questions in advance for approval in a Ground Rules Hearing Form. This form also required counsel to certify that they have read the Judicial Protocol on the Implementation of section 28, and the relevant toolkit on the Advocate's Gateway (which provides guidance on the way to cross-examine children in an age and development appropriate way)*." Scottish Court Service, *Evidence and Procedure Review Report,* March 2015 [para 2.37] at p 19. The UK Judicial Commission (2023*) Equal Treatment Bench Book* states at paragraph 148: "*It is now quite common (and expected) for advocates to be directed to disclose their proposed questions in writing to the judge in advance of the ground rules hearing. Those are then discussed at the ground rules hearing and approved or amended as appropriate. In order to control questioning, judges should construct developmentally appropriate questions if advocates fail to do so*."

[52] Section 398B(3) *Criminal Procedure Act 2009* (Vic)

[53] Scottish Courts and Tribunal Service (2021) *Improving the Management of Sexual Offence Cases – Final Report from the Lord Justice Clerk's Review Group*, Recommendation 1(c)

[54] Scottish Court Service, *Evidence and Procedure Review Report*, March 2015 [2.37-2.38] at p 19

[55] John Baverstock, *Process evaluation of pre-recorded cross-examination pilot (Section 28)* (Ministry of Justice Analytical Series, 2016), pg 7

[56] Judy Cashmore and Rita Shackel (2018) *Evaluation of the Child Sexual Offence Pilot Final Outcome Evaluation Report* (Report prepared for Victims Services, NSW Department of Justice) p3.

75. The evaluation found "*judges, and prosecution and defence lawyers were positive about the GRH*"

> *What makes the most difference is the requirement on defence counsel to ask questions that are appropriate to the age, intellect and emotional maturity of the child. The ground rules conference causes counsel (Crown & defence) to turn their mind to those issues*. [Crown Prosecutor][57]

76. A senior prosecution lawyer commented:

> *The importance of the ground rules hearing cannot be underestimated and the recently introduced practice (in Sydney) of having the GRH a week before the PRH has improved the whole process. It has meant another court date but the trade-off in terms of greater understanding of the WI's recommendations, of how to implement them and greater co-operation in relation to this aspect of the Pilot – which all translates as a better outcome for the child and the justice system - is worth it*.[58]

77. Quilter and McNamara recommend that "*consideration be given to introducing a system of mandatory GRHs for all sexual offence trials in NSW*" as one measure "*to further reduce the influence of rape myths on sexual offence trials, and to better protect complainants from inappropriate lines of questioning*".[59] Recommendation 8 of the KMPG interview study includes that GRHs be adopted in NSW to provide for and "*support efficient and effective transparency between the parties during the conduct of the trial, as a provision of better quality evidence from the complainant when aggressive questioning tactics have been limited by the 'ground rules'*"[60]

78. Ground Rules Hearings are both an important mechanism in the legal process to manage cross-examination so as to ensure the best evidence given by a witness is before the Court, and a guardrail for the safety and wellbeing of the witness.

Pre-recorded evidence

79. The NSW Child Sexual Offence Evidence Program pilot enabled child witnesses in pilot sites to give their evidence by way of pre-recorded evidence hearing.

80. The NSW Pilot Evaluation notes the two key objectives of pre-recording evidence:

    1) to facilitate the collection of evidence from a child complainant closer to the time of the complaint "*hence facilitating memory recall and minimising potential memory decay*"; and

    2) "*enabling a child's involvement with the criminal justice process to be concluded at an earlier stage in proceedings thus allowing child witnesses to 'move on' with their life*"[61]

81. The benefits of pre-recording evidence were acknowledged by legal and non-legal professionals in the evaluation. In addition to ensuring better quality evidence and limiting stress for child witnesses and promoting their well-being, including by "*allowing children to exit the criminal trial early" and*

[57] Ibid, p 53
[58] Ibid, p 54
[59] Julia Quilter and Luke Mc Namara (2023) *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*, (Crime and Justice Bulletin, Number 259), p 37
[60] KMPG, "*This is my story. It's your case, but it's my story"; Interview Study: Exploring justice system experience of complainants in sexual offence matters*, (NSW Bureau of Crimes Statistics and Research, 31 July 2023), p 112
[61] Judy Cashmore and Rita Shackel (2018) *Evaluation of the Child Sexual Offence Pilot Final Outcome Evaluation Report* (Report prepared for Victims Services, NSW Department of Justice) p62-63

"providing more certainty about the timing of their testimony"[62], many also acknowledged pre-recorded evidence hearings contributed to the efficiency of proceedings.[63]

82. A Crown Prosecutor commented:

> *It is far better for the complainant – to have a set time/date to give evidence sooner - and then they can get on with their life. They are not being asked to relive the matter years afterwards, and in circumstances where they have been likely trying to forget it. In my opinion, I want them to be able to not have it at the forefront of their mind all the time, I want them to be able to recover from it. A constant request for them to remember the minutiae of it cannot be good for them psychologically. This system at least tries to mitigate that.*[64]

83. Other jurisdictions in Australia provide for pre-recording of evidence in all sexual offence matters. We recommend all complainants of sexual offence matters have the right to pre-record evidence and there be provision for associated prosecution witnesses to also pre-record their evidence.

84. The NSW Pilot Evaluation strongly supported the use of pre-recorded evidence hearings and recommended improvements to the process. One recommendation included:

> *In cases where a parent will also be a witness, consideration should be given to pre-recording their evidence as well at the pre-recorded evidence hearing. This is to avoid the child and parent being restricted from talking with each other and to assist the child being able to 'move on' with support from that parent. Necessary legislative amendments should be introduced to this effect.*[65]

Recommendations

Remove the language of "vulnerable person" and "*vulnerable witness" and provide protections for all complainants and associated witnesses in sexual violence matters.*

Expand witness intermediaries in relation to sexual offence matters to all complainants as a right and to other witnesses by leave.

A Ground Rules Hearing is held in all sexual offence matters.

All complainants of sexual offence matters have the right to pre-record evidence and there be provision for associated prosecution witnesses to also pre-record their evidence.

In addition to the above, other outstanding recommendations in Judy Cashmore and Rita Shackel (2018) *Evaluation of the Child Sexual Offence Pilot Final Outcome Evaluation Report* be implemented.

Other efforts to reduce perpetuation of rape myths in the trial process

85. In their review of the *Experience of Complainants of Adult Sexual Offences in the District Court of NSW,* Quilter and McNamara expressed concern at the way prosecutors perpetuate rape myths in the presentation of their cases.

[62] Ibid, p4
[63] Ibid, p 63-64
[64] Ibid.
[65] Ibid, p14.

86. They referred to the NSW *Heroines of Fortitude report* which studied 150 sexual assault trials and sentencing hearings heard in the District Court from May 1994 April 1995, noting 82% of complainants were cross-examined about lying.[66] A significant proportion of complainants were cross-examined on other rape myths.[67]

87. Quilter and McNamara compared this to the transcripts of sexual offence trials finalised between 2014 to 2020, noting that little had changed. In 95% of trials there was an implied or expressed suggestion the complainant was lying.[68] Quilter and McNamara were "*struck by the range of suggested motives and, in some instances, their speculative nature*".[69]

88. Quilter and McNamara recommend changes to the way the prosecution presents their case, including:

    88.1 Wherever possibly applying to have the complainant give their evidence in narrative form or use open questions;

    88.2 "*Limiting the scope of evidence that is led so as to exclude unnecessary "routine" evidence*";

    88.3 The "*essential components of the prosecution's case be reimagined*" to focus on free and voluntary agreement, abandoning questions focused on resistance, avoid leading evidence based on stereotypes and assumptions of how a victim-survivor should behave.

89. They further recommend "*closer scrutiny of the relevance of evidence and the admissibility of credibility evidence*" and review of jury directions.[70]

90. Quilter and McNamara also:

> *recognise that attempts to reduce the influence of problematic rape myths and stereotypes in trials must be allied to efforts to reduce their prevalence in the wider community* [71]

91. Cultural change requires an extensive evidence-based community education campaign developed by experts about the drivers of gender-based violence, respectful relationships and ethical sexual practice that challenges rape myths, male entitlement and victim-blaming attitudes. A comprehensive primary prevention strategy is required that includes preschools, schools, tertiary institutions, workplaces, sporting clubs, media and entertainment.[72] One off training is insufficient; it must be ongoing.

92. Cossins proposes a range of ways to limit the perpetuation of rape myths, including:

    92.1 Prohibitions on what can be included in opening and closing addresses[73]

[66] Citing NSW Department for Women (1996) *Heroines of Fortitude report in* Julia Quilter and Luke McNamara (2023) *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*, (Crime and Justice Bulletin, Number 259), p4-5.
[67] Ibid.
[68] Julia Quilter and Luke Mc Namara (2023) *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*, (Crime and Justice Bulletin, Number 259), p23
[69] Ibid, p24.
[70] Ibid, p39-40
[71] Ibid, p 38
[72] For further information see: Quadara, A "The Everydayness of Rape How Understanding Sexual Assault Perpetration Can Inform Prevention Efforts" in Henry, N & Powell. A (eds*) Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture,* London: Palgrave McMillan, 2014.
[73] Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial, p 595-597*

92.2 New provision for prohibited questions which "*prevent topics that endorse rape myths from being the subject of cross-examination*"[74]

92.3 "*Time-limited cross-examination and vetting of questions*"[75]

92.4 Changing the cross-examination process to include "*the use of a specialist examiner trained in the principles of trauma-informed care"* who conducts the cross-examination of the complainant or witness to whom these provisions apply.[76] Cossins proposes a detailed legislative provision which includes "*the list of permissible questions for the purposes of cross-examination is the list that has been drawn up by the presiding judge and the specialist examiner at a pre-trial hearing*"[77]

93. Further, we hear that improper questions are regularly asked of complainants and not always challenged by lawyers and judges despite s41 of the *Evidence Act 1995* NSW which requires judicial officers to intervene when improper questions are asked. This is also supported by research.[78] Further, it is our view the damage is already done to complainants in the asking of the question, even if a judicial officer intervenes to stop the question from being answered. We support the examination of ways to prevent the asking of improper questions.

94. The UK Law Reform Commission in its current review of *Evidence in Sexual Offences Prosecutions* acknowledges that rape myths are "*so intractable and ingrained*" and is "*considering options for more radical reforms to sexual offences trials*" including:

94.1 Introducing specialist examiners to question complainants

94.2 Specialist courts for sexual offences

94.3 The use of "*rape myth acceptance scales to screen or train jurors*"

94.4 Introducing a requirement of reasoned verdicts

94.5 "*Remov[ing] juries from sexual offences cases altogether*"[79]

Recommendations

Implement the recommendations in Quilter and McNamara (2023) *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*

Close consideration of the proposals outlined in Cossins' Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial.

[74] Ibid, p 592-593.
[75] Ibid, p606-610.
[76] Ibid, p 611-615. Cossins notes that in 2010, the National Child Sexual Assault Reform Committee recommended the enactment of a provision for an intermediary examiner. Cossins has adapted that to provide a draft provision for cross examination by a specialist examiner at p613-614.
[77] Ibid, p613-614
[78] NSWLRC (2003) *Questioning of complainants by unrepresented accused in sexual offence trials*, Report 101, p40; Cashmore and Trimboli (2006) cited in Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial,* p 351
[79] UK Law Reform Commission (2023) *Evidence in Sexual Offences Prosecutions Consultation Paper, paragraph 13.4* The final report is to be published in 2024.

Specialisation

95. Specialisation is also key to cultural change. The NSW Criminal Justice Sexual Offence Taskforce *Responding to sexual assault the way forward* (2006) report made several commendable recommendations relating to specialisation.

96. Recommendation 66 called for a number of changes including: specialised case management hearings; specialist judges; specialist prosecutors who remain on a case throughout the process; proactive case management to ensure matters are dealt with promptly; separate entrances to the court room for victims-survivors; access to CCTV; creation of a case management system within the Office of Director of Pubic Prosecution to ensure high standards and that complainants are kept informed of the progress of their matter through conferences and any issues impacting upon timely finalisation of their matter is resolved; data collection; *"the creation of a cross-agency monitoring body to assess and evaluate a dedicated and specialised court with alternate listing arrangements and the performance of all contributors to the project".*

97. Consistent with these recommendations we call again for an urgent increased focus on specialisation, including specialist judges, legal practitioners, support services, police, interpreters and witness intermediaries.

98. The ALRC and NSWLRC have previously acknowledged the importance of ongoing training for police officers, lawyers and judicial officers.[80] It is vital that all workers in the criminal justice system from police who take the initial report, interpreters and support workers to all workers in the court system including legal practitioners, judicial officers and court staff are gender-based violence informed, trauma informed, culturally competent, LGBTIQA+ informed and disability informed.

99. Cossins advocates for much greater training and education of everyone working in the criminal legal system of the long-term impact of trauma and impacts on the brain including "*trauma symptoms and their impact on a complainant's ability to give evidence, how to avoid re-traumatisation and how to manage the situation when a complainant is triggered*".[81] This requires regular and in depth training, including "*training of all organisational staff about the institutional behaviours and processes that mimic the dynamics likely to trigger retraumatisation*".[82] Cossins emphasises the importance of this training extending to all who engage with complainants including "*police, prosecutorial staff and all court personnel, including security guards, clerks, tipstaff, defence lawyers, judges and sheriffs*".[83]

100. It is imperative that fact finders, including judicial officers and jury members as well as legal practitioners are aware of the impact of trauma on memory and that providing best evidence to fact finders "*can be impeded when the emotional memories of the original trauma are retriggered*".[84]

101. Cossins refers to the extensive 3-day residential training Judges who sit on sexual assault trials in England and Wales are required to undertake every three years which has been found to be effective in influencing their practice.[85]

[80] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response,* Sydney, 2010, paragraph 24.99
[81] Cossins, A (2020) *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial,* p 559-560
[82] Ibid, p547
[83] Ibid p562-563
[84] Ibid, p540
[85] Ibid, p426

102. The New Zealand Law Reform Commission recommended accreditation for all prosecutions appearing in sexual offence matters.[86] They further recommended specific experience and competency requirements be included in Regulations for defence counsel who appear in trials on a legal-ais basis.[87]

103. In the UK, there is an Advocate Panel specialist Rape and Serious Sexual Offences List. These advocates "*have received [Crown Prosecution Service] accredited training within the last 3 years in respect of rape and serious sexual abuse casework and can demonstrate the experience and ability to undertake cases which exhibit the characteristics of this type of offending*".[88]

104. The UK Commission has released a Consultation Paper which seeks feedback on whether there should be mandatory training for all legal practitioners on myths and misconceptions in order to work on sexual offence cases.[89]

105. We support accreditation of all legal counsel undertaking sexual offence work and for those who are accredited to be suitably remunerated in recognition of the difficulty of the work and importance of maintaining accreditation to continue undertaking this work.

106. To ensure regular and ongoing training is effective, it is vital training is regularly and independently evaluated to assess its effectiveness in changing culture and practice, particularly for promoting trauma-informed interactions. Training of itself is insufficient.

107. We also recommend a safe and accessible multi-agency response for those who have been subjected to sexual violence where services may be co-located, including medical and forensic services, counsellors, police, lawyers and support workers.

108. It is vital that those who have experienced sexual violence are able to access the support they need when they need it – for example, wrap around services including intensive case management.

109. Additionally, early access to specialist women's legal services and specialist Aboriginal and Torres Strait Islander women's legal services is also important to help those who have experienced sexual violence to understand their legal options.

Independent legal representation

110. There is also a role for independent legal representation for victim-survivors as they traverse the criminal legal system. Specialist gender-based violence informed, trauma-informed, culturally safe legal services could provide legal assistance and representation in the following ways:

- Legal advice prior to reporting to police with an explanation about criminal legal processes and options
- Provide legal representation (with standing) during proceedings including:
    - to ensure protection of sexual assault communications privilege and other protections
    - objections to improper questioning (or prohibited questions as proposed by Cossins)

[86] New Zealand Law Reform Commission (2015)*The Justice Response to victims of sexual violence: Criminal Trials and Alternative Processes* (Report 136) Recommendations 25,
[87] Ibid, Recommendation 26
[88] Crown Prosecution Service, The Rape and Serious Sexual Offences List
[89] UK Law Commission (2023) *Evidence in Sexual Offence Prosecutions: A consultation paper* Consultation Q75, paragraph 9.26

- in assisting with the drafting of victim impact statements
- to make applications for non-publication or suppression orders to be removed

- to assist a complainant with Victims Support applications and other intersecting legal issues, for example, bail hearings, protection orders, family law, child protection, employment law, tenancy law and defamation proceedings.

Case study

Laura and Jennifer* contacted our service for legal assistance with removing a non-publication order regarding the prohibition on the publication of their identities in relation to child sexual abuse proceedings. Their uncle had been found guilty of a number of child sexual abuse offences against them as children. As adults, they wanted to be able to publicly share what had happened.*

Laura and Jennifer required assistance with advocating to the Court their desire to remove the non-publication order. Both women wanted to exercise their agency to be able to share what happened to them on social media when they wished.

We assisted the women to prepare and file documents with the Court outlining why they wanted the non-publication order lifted. The Court considered the women's evidence and confirmed the removal of the non-publication order. Without the assistance of an independent legal advocate, the women would have been in a challenging position to advocate themselves for the removal of the non-publication order.

** This case study has been de-identified, including by not using their real names.*

111. We note the pilot Sexual Assault Legal Services in the Australian Capital Territory, Victoria and Western Australia. The role of independent legal representation should be further considered as part of a trauma-informed response.

112. We further note the recommendation of the Victorian Victims of Crime Commissioner for the "*Victorian Government to fund a sexual offence legal representation scheme and introduced legislative amendments to facilitate legal representation at specific stages of sexual offence proceedings*".[90]

Recommendations

Specialisation including specialist judges, legal practitioners and counsel, support services, police, interpreters and witness intermediaries.

Regular and ongoing training for police, legal practitioners and counsel, and judicial including of the long-term impact of trauma and impacts on the brain including "*trauma symptoms and their impact on a complainant's ability to give evidence, how to avoid re-traumatisation and how to manage the situation when a complainant is triggered*". There should also be training for everyone working in the criminal legal system about long term impacts of trauma and how to minimise trauma and prevent triggering.

Accreditation of all legal counsel undertaking sexual offence work.

Regular and independent evaluation of training to assess its effectiveness in changing culture and

[90] Victims of Crime Commissioner (2023) *Silenced and sidelined: Systemic inquiry into victim participation in the justice system*, Recommendation 22

practice, particularly for promoting trauma-informed interactions.

A safe and accessible multi-agency response for those who have been subjected to sexual violence where services may be co-located, including medical and forensic services, counsellors, police, lawyers and support workers.

Civil proceedings and other justice responses

Restorative justice

113. Some victim-survivors of sexual violence may wish to engage in a restorative justice process.

114. We support exploring restorative justice options that complement a criminal legal response and that have strong safeguards for victim-survivors, including only participating with the informed consent of all parties, and with the process being facilitated by trained experts in gender-based violence, including sexual violence and trauma-informed practice and processes that are culturally safe. It is vital the process is victim-survivor centric and victim-survivor led.

115. Restorative justice alternatives must not replace a criminal legal response. It is vital that people who perpetrate sexual violence are held accountable for their actions.

Civil litigation

116. As outlined in the ALRC Issues Paper, "*civil litigation can be expensive, lengthy and retraumatising*".

117. We support efforts that would make the process more accessible and effective as well as gender-based violence and trauma-informed, culturally safe, disability informed and LGBTIQA+ informed.

118. The *Respect@Work Report* examined measures to support victim-survivors of workplace sexual violence who are witnesses in civil proceedings. We endorse the proposals set out in Recommendation 39 of the *Respect@Work Report*, including:

- *having the proceedings conducted in a closed courtroom*
- *giving evidence from a remote room*
- *having their evidence in chief be audio-visually recorded prior to the hearing*
- *having an audio-visual recording of their evidence during the hearing be re-used in any subsequent proceedings*
- *being protected from direct cross-examination by a self-represented party*
- *having a support person present while giving evidence*.

119. We acknowledge victim-survivors of sexual violence may have differing views on suppression orders and non-publication orders. For some victim-survivors the risk of being identified by name or image acts as a disincentive to participate in legal proceedings and they may want anonymity and confidentiality to safely participate in proceedings. Other victim-survivors may want to be identified and able to publicly share their stories. These options may play an important role for the individual victim-survivor's healing.

120. For the reasons outlined in the *Respect@Work Report*, we support an amendment to state/territory legislation to introduce a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any matters involving sexual violence with an emphasis on victim-survivor choice.

121. In NSW, the "*prohibition of publication identifying victims of certain sexual offences*"[91] applies to complainants in prescribed sexual offence proceedings except where authorised by the court[92] or with the consent of the complainant.[93] Consideration should be given to extending the prohibition of publication identifying victims of sexual offences to all proceedings involving sexual violence.

122. The prohibition should include publication of the name or image of the victim-survivor, their family members and witnesses.

123. Access to specialist gendered violence informed, culturally safe legal services can assist a victim-survivor to make an informed decision. It is also important there are mechanisms in place to allow victim-survivors to exercise agency.

Recommendations

Implement recommendation 39 of *Respect@Work Report*.

Legislate a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any matters involving sexual violence with an emphasis on victim-survivor choice.

Workplace laws

Establishing safe disclosure mechanisms

124. We support the establishment of safe disclosure mechanisms in the workplace. The research has shown that very few workers feel safe to report sexual harassment when they experience it.[94] The Australian Human Rights Commission (**AHRC)** has provided Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 to assist employers in meeting their positive duty to eliminate sexual harassment in the workplace. These guidelines include setting up reporting and response processes that are trauma-informed and victim-survivor centred. We support this important work of the AHRC.

125. We welcome the introduction of sexual harassment into the definition of serious misconduct in the Fair Work Regulations 2009. We see the specific inclusion of sexual harassment in the definition of serious misconduct as promoting a cultural shift in employers' attitudes to the seriousness of sexual harassment. In turn, this will encourage reporting, not only by victim-survivors but also on the part of by-standers. We support similar recognition of the serious nature of sexual harassment into all workplace laws.

Work Health Safety laws

126. We welcome the recognition that most jobs involve some risk of sexual and gender-based harassment and violence and that this can cause both psychological and physical harm.

[91] Section 578A *Crimes Act 1900* (NSW)
[92] Section s578A(4)(a) *Crimes Act 1900* (NSW)
[93] *Section* s578A(4)(b) *Crimes Act 1900* (NSW)
[94] Australian Human Rights Commission, *Time for respect: Fifth national survey on sexual harassment in Australian workplaces* (2022) p130.

127. We further welcome protections which recognise that an employer must proactively prevent sexual and gender-based harassment at work as well as positive reporting duties which apply to Directors, workers and others, such as consumers and customers of a service.

Costs orders

128. The risk of incurring significant legal costs is a major impediment to applicants bringing otherwise meritorious actions. Consideration must be given to a costs model which removes as many barriers to justice as possible.

129. People who have been subjected to discrimination and sexual harassment should not face the risk of having to pay the legal costs of the perpetrator or the perpetrator's employer should they lose. Equally, they must be able to recover their own legal costs if they win to ensure that they are not left out of pocket, and that legal representation is financially viable and accessible.

130. We support an equal access costs model in the terms of the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 currently before Parliament in relation to federal unlawful discrimination court proceedings. An equal access costs model allows people who experience workplace sexual violence to recover their legal costs if successful. If unsuccessful, they would not be required to pay the other side's costs, with some limited exceptions, such as for vexatious litigation.

131. A costs model of this kind is important for several reasons, including enabling applicants to fund litigation, to encourage respondents to settle matters, and to deter respondents from breaching their obligations under anti-discrimination laws.

Recommendation

An equal access costs model in the terms of the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 currently before Parliament in relation to federal unlawful discrimination court proceedings for state/territory anti-discrimination and related civil proceedings.

Best practice for non-disclosure agreements

132. Best practice for non-disclosure agreements is complex. Some victim-survivors do not want their identity disclosed while others want the opportunity to speak out. Some victim-survivors prefer limited non-disclosure agreements. Best practice needs to prioritise the wishes of the victim-survivor and not those of the offender and /or the employer.

133. A report into current practices of lawyers involved in workplace sexual harassment matters showed the overwhelming position taken is to include blanket confidentiality and non-disparagement clauses as a matter of course in any negotiated settlement.[95] The systematic overuse of blanket non-disclosure agreements can perpetuate a cultural tolerance of workplace sexual harassment through protecting offenders and covering up patterns of behaviour. This also requires further consideration in the context of the new positive duty on employers to prevent sexual harassment.

134. The AHRC has published Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints. These guidelines establish best practice for using confidentiality and non-disclosure clauses in matters involving complaints of workplace sexual violence. The guidelines recognise that confidentiality obligations can be counter-productive to eliminating workplace sexual violence by silencing victims, but they can enhance victim-survivor's

[95] Featherstone, R., and Bargon, S (2024) *Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work Report* (University of Sydney Law School) p1 (8)

agency when chosen by the victim-survivor. We support the Australian Human Rights Commission's guidelines. We also note the Model Confidentiality clauses as an Appendix to 'Let's Talk About Confidentiality Report. We support these being considered and read in conjunction with the Australian Human Rights Commission Guidelines.

135. We note legislation being considered in Ireland which only allows non-disclosure that is the "*expressed wish and preference*" of the victim-survivor [96] and similar legislation in Prince Edward Island, Canada.[97] We recommend consideration and implementation of such legislation.

Anti-discrimination laws

136. An intersectional feminist framework is useful in critically analysing how anti-discrimination law can be improved. This framework provides recognition of intersectional discrimination, promotes positive obligations to prevent discrimination occurring in the first place, ensures accessible and effective remedies in response to individual experiences of discrimination and provides an effective remedy to structural and systemic discrimination, with the aim of eliminating all forms of discrimination.

137. We strongly believe to adequately protect human rights in Australia, we need anti-discrimination laws that strengthen protections and positive obligations as well as a federal and state/territory Human Rights Acts.

138. In our submission to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework, we advocated for the right to be free from gender-based violence as well as a duty of equal access to justice.[98] We also recommend the addition of being a victim-survivor of gender-based violence as a protected attribute in state/territory and federal discrimination laws. Our arguments for this are outlined in our submission in response to the *Review of the Anti-Discrimination Act 1977 (NSW).*[99]

139. We support the Australian Human Rights Commission's submission to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework and the discussions about the need for both federal and state/territory Human Rights Acts as well as the strengthening of anti-discrimination laws.

Recommendation

Strengthen anti-discrimination laws and include being a victim-survivor of gender-based violence as a protected attribute in state/territory and federal anti-discrimination laws.

Defamation

140. All victim-survivors of sexual violence should be able to report their experiences to appropriate authorities without fear of reprisals. This includes reporting to police, to medical/health professionals, to employers and other relevant agencies or services.

[96] Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 Ireland
[97] *Non-disclosure Agreements Act Prince Edward Island*
[98] Women's Legal Service NSW (2023) *Submission in response to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework*
[99] Women's Legal Service NSW (2023) *Preliminary Submission in response to the NSWLRC Review of the Anti-Discrimination Act 1977 (NSW)* paragraphs 14-22

141. An increasing number of our clients are being named as respondents to defamation proceedings or being threatened with defamation by perpetrators. We also see employers making reference to potential defamation actions. Although the likelihood of a defamation action is small, the threat is a serious deterrent to victim-survivors speaking up about their experience and in particular, in reporting to police and employers.

142. We commend and support the work undertaken to enact amendments to the *Defamation Act* NSW including for absolute privilege when reporting to police or other complaint-handling bodies consistent with Model Defamation Reform and the Guiding Principles for Jurisdictions to determine whether to extend absolute privilege to matter published to a complaints-handling body.

143. As well as extending absolute privilege, defamation laws should be reformed to provide for protection in making reports to medical/health professionals and a speedy determination of a vexatious or unmeritorious complaint in a form that minimises the cost and evidentiary burden on the respondent to such proceedings.

Recommendation

Defamation laws be reformed to provide for protection in making reports to medical/health professionals and a speedy determination of a vexatious or unmeritorious complaint in a form that minimises the cost and evidentiary burden on the respondent to such proceedings.

Compensation Schemes

144. Under international human rights, States are required to act with due diligence to protect, promote and fulfil their human rights obligations.[100] These obligations include individual reparations for violation of human rights, a right "*firmly enshrined in the corpus of international human rights and humanitarian instruments*."[101]

> *Given the disparate and differentiated impact that violence has on women and on different groups of women, there is a need for specific measures of redress in order to meet their specific needs and priorities. Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation. Additionally, women who experience violence have traditionally encountered obstacles to accessing the institutions that award reparations*.[102]

145. The NSW Victims Compensation Scheme was abolished in 2013 and replaced with a Victims Support Scheme.

[100] Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5,* CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33.

[101] *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, Human Rights Council, A/HRC/14/22, 23 April 2010; See also: the *Universal Declaration of Human Rights* (Art. 8), the *International Covenant on Civil and Political Rights* (Art. 2, para. 3), the *International Convention on the Elimination of All Forms of Racial Discrimination* (Art. 6), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 14), the *Convention on the Rights of the Child* (Art. 39), CEDAW General Comment 19 at paragraphs 9, 24(i), 24(t)(i).

[102] Ms Rashida Manjoo Note 100 at paragraph 24.

146. The Victims Support Scheme is an important way to acknowledge the harm perpetrated against victim-survivors of gender-based violence, including sexual violence and provide financial support and assistance and counselling to assist with recovery.

147. The NSW Government commenced a review of the *Victims Rights and Support Act 2013* (NSW), with submissions due July 2022. There is still no report or response to this review. At Appendix A we provide our submission to the review which provides detailed comments and recommendations to strengthen the Victims Support Scheme including for victim-survivors of sexual violence to ensure it is accessible, trauma informed, victim-survivor centric and responsive to the needs of victim-survivors. Our key recommendations are set out below.

Recommendations

Establish an independent Commissioner Victims Rights.

Legislate the removal of the requirement to prove injury in Victims Support applications.[103]

Remove all time limits for victim-survivors of sexual, domestic and family violence, including child sexual abuse and child abuse as well as victim-survivors of modern slavery in relation to different aspects of Victims Support applications.

Discretion to apply for review out of time and ensure all aspects of the Victims Support Scheme are subject to internal and external review.

Provide greater recognition of sexual violence, child sexual abuse, domestic violence, including child abuse, and modern slavery through higher recognition payments. These payments should increase in value with the current categories shifted to higher categories. Payments need to be indexed annually and should not ever decrease despite indexation.

Legislate a standard of proof of "*reasonable likelihood*" consistent with the National Redress Scheme for people who have experienced institutional child sexual abuse.

The form of evidence to support a Victims Support application is not prescribed.

Introduce Immediate Needs Support Package - Sexual violence – to respond to immediate needs.

Improve access to economic loss payments.

Legislate the paying of disbursements to third parties for reasonable access to information expenses and other evidentiary reports (so support services supporting victim-survivors with applications who pay these expenses up from for clients can be reimbursed).

Add a new Victims Support payment called a Disability and Domestic and Family Violence Crisis payment.

Require Victims Services or its managing agency or Minister to publish policies and guidelines they rely on to make decisions.

Introduce a discretionary process for victim-survivors under 18 years old to access their recognition

[103] This has also been recommended by the Victorian Law Reform Commission in relation to victim-survivors of a sexual offence, a criminal act that occurred in the context of family violence, or victims who witnesses, heard or were otherwise exposed to any of the above criminal acts and were under 18 years at the time of exposure. See VLRC (2018) *Review of the Victims of Crime Assistance Act 1996: Report*, paragraph 12.242 and Recommendation 31.

payment rather than it being held on trust.

Services Australia amends the *Social Security Guide* to protect recipients of Special Benefit and allow them to get the full benefit of Victims Support (or equivalent) payments without their Special Benefit being affected. This is particularly important for victim-survivors of sexual violence, child sexual abuse, domestic violence, child abuse, and modern slavery.

Expand eligibility for Victims Support to all people who are victims of crime whilst incarcerated.

A legislative presumption not to pursue restitution in circumstances of sexual violence, child sexual abuse, domestic violence, child abuse and modern slavery unless the victim-survivor elects Victims Services pursue restitution.

Legislate the requirement for Victims Services to note all evidence considered and provide reasons for their decisions ensuring that decision-makers provide applicants with detailed information to justify their decision in plain language, and that the reasons outline the evidence relied upon to reach the decision.

As a matter of procedural fairness, if Victims Services intends to draw adverse inferences on the evidence before it, Victims Services should advise the applicant or their legal representative and ask if there is further evidence to submit or submissions to be made with respect to the issue in question.

The NSW Department of Communities and Justice implements improvements to access to Victims Services Approved Counselling as proposed our submission to the review of the Victims Rights and Support Act included in Appendix A.

Victims' charters

148. In order for Victims' Charters to achieve their purpose, the rights contained in the Charter must be in plain language, easily accessible and enforceable. There must also be a clear and accessible complaints mechanism and transparency in reporting on breach of charter complaints and how they are resolved.

Recommendation

Strengthen the NSW Charter of Victims Rights to:

Give victim-survivors a right to seek a review of prosecutorial decisions consistent with recommendation 50 of the Queensland Women's Safety and Justice Taskforce: *Hear Her Voice: Women and girls' experiences across the criminal justice system – Report 2 Volume 1*.

Make clear a victim-survivor's right to access an interpreter when reporting violence to police and throughout the justice journey.

Inform a complainant of "*any special protections or alternative arrangements for giving evidence*" and informing the court of the complainant's preferences for this as outlined in the *Victims Charter Act 2006 Victoria*.

Help victim-survivors realise the right to make a claim under the Victims Support Scheme.

Potential Model for Civil Alternative in Adult Rape/Sexual Assault Matters

149. We refer to the proposal outlined in Appendix C of the submission by Queensland Sexual Assault Network: Potential Model for Civil Alternative in Adult Rape/Sexual Assault Matters. While Women's Legal Service NSW has not formed a view on this proposal, we support the ALRC exploring this proposal further as well as other possible civil alternatives.

Appendix A: Women's Legal Service NSW Response to the Statutory Review of the Victims Rights and Support Act 2013 NSW

WOMEN'S LEGAL SERVICE NSW

Submission to the Department of Communities and Justice

The importance of victim-survivors being able to access what they are entitled to and need

Statutory review of the *Victims Rights and Support Act (NSW) (VRSA)*

11 July 2022

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About Women's Legal Service NSW

Women's Legal Service NSW (**WLS NSW**) is a community legal centre established 40 years ago that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

Since 1995 WLS NSW has provided a statewide First Nations Women's Legal Program (**FNWLP**). This program delivers a culturally safe legal service to First Nations women, including regular engagement with communities across NSW. We provide a First Nations legal advice line, casework services including a specialised family law service to assist First Nations women access the family law courts, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for First Nations women.

An Aboriginal Women's Consultation Network guides the FNWLP. It meets quarterly to ensure that we deliver a culturally safe service. The members include regional community representatives and the FNWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.

Women's Legal Service NSW is represented on:

- the Domestic and Family Violence and Sexual Assault Council chaired by the Minister for the Prevention of Domestic Violence
- the NSW Victims of Crime Interagency
- co-convenes the Community Legal Centres NSW Domestic Violence Victims Compensation Subcommittee
- Corrective Services NSW Women's Advisory Council
- Community Legal Centres New South Wales Prisoner's Rights Working Group

Acknowledgments

We acknowledge the Traditional Owners of the lands on which we work across NSW and on which we live. We pay respect to Elders past, present and emerging. Is, was and always will be Aboriginal land.

We acknowledge the many women who have experienced sexual, domestic and family violence and abuse with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

Use of language

Gendered language

While acknowledging that anyone can experience sexual, domestic and family violence and abuse, the research and our experience over forty years clearly highlights that sexual, domestic and family violence and abuse is predominantly perpetrated by men against women and children. Our language in this submission is gendered to reflect this.

Current review

1. At the outset we would like to acknowledge the importance of a victim support scheme. Consistent with human rights obligations it is vital that victim-survivors have access to counselling and financial support and that the harm they have suffered as a result of one or more acts of violence is recognised. When the NSW Victims Support Scheme works well and operates as a beneficial legislative scheme, victim-survivors feel that their experience is heard, acknowledged and validated. This is a very important part of a victim-survivor's healing and recovery. We note recovery is included as one of the key pillars in the Draft National Plan to End Violence Against Women and Children 2022-2032.

2. We commonly hear from victim-survivors that in trying to navigate the Victims Support Scheme on their own, they find it all too difficult and give up on trying to access the support they are entitled to and need.

3. Unnecessary barriers to accessing victims support can compound a victim-survivor's trauma leaving them feeling invalidated, unheard and the act of violence not acknowledged.

Summary of recommendations

4. Women's Legal Service NSW, along with other community legal centres, NGO members of the Victims of Crime Interagency, NSW Women's Alliance members and other organisations working with victim-survivors of crime, have contributed to the development of recommendations to this review, many of which are discussed in this submission. Collectively, we work with tens of thousands of victim-survivors. This submission refers to the recommendations made in the joint submission as well as to some more detailed recommendations in this submission.

5. The purpose of these recommendations is to highlight areas which need addressing to best ensure the Victims Support Scheme in NSW is achieving its potential and is as trauma informed and survivor centric as it can be. This will not only assist victim-survivors in crisis, but also with their recovery.

6. Collectively, we recommend a phased approach with some areas requiring more immediate implementation.

7. Recommendations that do not require legislative amendment but are issues organisations supporting victim-survivors have been raising for some time should be implemented by the end of 2022.

8. Many organisations have raised the urgent need to remove the requirement to separately prove injury in Victims Support applications. This requirement compounds trauma experienced by victim-survivors as they are forced to keep retelling their story. While noting this will require legislative change, this is an urgent change that is required outside the statutory review process. We recommend this change is implemented by the end of 2022.

9. The remaining recommendations are to be implemented by 2023. We believe all of the recommendations are important and should be implemented.

10. In summary, recommendations include:

Recommendations to be implemented by end of 2022

1.1. The NSW Government legislates the removal of the requirement to prove injury in Victims Support applications by the end of 2022.

1.2. The NSW Department of Communities and Justice implements by the end of 2022 improvements to access to Victims Services Approved Counselling including:

1.2.1. Increase the number of suitably qualified Victims Services Approved Counsellors available, including in regional, rural and remote areas. This includes counsellors who are culturally safe, disability aware, LGBTIQA+ aware, trauma informed, with expertise in working with particular priority populations and expertise on particular issues.

1.2.2. Provide more information to victim-survivors about expertise of counsellors and Victims Services assists victim-survivors to access a counsellor when they request this help.

1.2.3. Provide access to culturally safe healing.

1.2.4. Open approval applications to suitably qualified "organisations" that have the required values, skills and accreditations which would automatically qualify their employed counsellors. The primary relationship would remain with the organisation not the individual staff members but would increase the availability of counselling to Victims Services.

1.2.5. Develop policy and procedures that recognise the need to apply extended hours of counselling allocation up to 44 hours where appropriate with further extensions as required and there be a presumption in favour of approving the application.

1.2.6. Victims Services reviews approved models of counselling philosophy to ensure holistic approaches are employed along with the other values and requirements for appointment. This is to ensure appointed counsellors do not insist clients only talk about the part of their reaction that the counsellor has perceived as being in relation to the "Crime Event". Trauma informed practice and models of counselling philosophy understand reactions to trauma are complex.

1.2.7. Adequately remunerate Victims Services Approved Counsellors.

1.2.8. Reinstate funding for group work in NSW. Individual counselling is not a substitute for victim-survivors wishing to benefit from facilitated peer support group work.

1.2.9. Increase access to counselling for victim-survivors of crime while they are in custody.

1.2.10. Victims Services to provide professional support (including vicarious trauma support) to counsellors and opportunities for professional development and training.

1.2.11. Remove the two session "no show rule" so that victim-survivors who are unable to attend appointments for reasons beyond their control are able to continue to receive counselling.

1.3. Victims Services:

1.3.1. returns to collecting evidence or funds services to undertake this work and reimburses services for associated costs by the end of 2022.

1.3.2. publishes submissions in response to their review conducted in March 2021 and publishes the final report.

1.4. By the end of 2022, consistent with recommendation 3.6 of the Final Report: Second year review of the National Redress Scheme, the requirement to provide bank details up front should be removed. Bank details should be provided after a successful determination.

1.5. By the end of 2022, simplify identity checks:

1.5.1. Victims Services adopts a more flexible approach to identity documents, accepting a wider range of identity documents and enabling applicants to provide identification documentation at a later time rather than at the time of application. This includes accepting a MIN.

1.5.2. Victims Services allows the identification documentation requirement to be waived in appropriate circumstances.

1.6. By the end of 2022 the Department of Communities and Justice ensures procedural fairness by:

1.6.1. An application for a recognition payment or financial assistance for economic loss is not determined until at least 12 months after lodging the application or until such time as an applicant advises Victims Services that they have lodged everything they intend to lodge, and the claim is ready to be determined or in the alternative Victims Services informs the applicant/legal representative/advocate in writing of the earliest date by which each aspect of a Victims Support application will be determined.

1.6.2. The Applicant/legal representative/advocate having access to all evidence upon which Victims Services relies on to make a decision.

1.6.3. Victims Services adopting a more trauma informed approach to auditing of Immediate Needs Support Package – Domestic Violence (INSP- DV).

1.7. By the end of 2022:

1.7.1. require Victims Services or its managing agency or Minister to publish policies and guidelines the rely on to make decisions.

1.7.2. require Victims Services or its managing agency or Minister to regularly publish comprehensive data annually about the operation of the Victims Support Scheme as occurred under the Victims Compensation Scheme and also publish quarterly reports.

1.8. Improve consultation in the following ways:

1.8.1. Commissioner Victims Rights improves consultation mechanisms by requiring that proper consultation is undertaken before Victims Services makes change. These consultation processes must include ensuring the Victims Advisory Board (**VAB**) works collaboratively with the Victims of Crime Interagency (**VoCI)** and other appropriate mechanisms with avenues for community organisations to raise issues at VAB meetings and the publishing of VAB and VoCI minutes.

1.8.2. Ensure proper consultation in this review to hear about the experiences of priority populations, including First Nations people, refugee and migrant communities including people on temporary visas experiencing violence, people with disability, LGBTIQA+ communities, people who are homeless, people with lived experience of prison, people in regional, rural and remote areas, older people and younger people and for priority populations and the services supporting them to have input into proposed solutions and be consulted on proposed solutions.

Recommendations that the NSW Government implements in 2023

1.9. Remove all time limits for victim-survivors of sexual, domestic and family violence, including child sexual abuse and child abuse as well as victim-survivors of modern slavery in relation to Victims Support applications, including:

1.9.1. Remove upper time limits on recognition payments for victim-survivors of domestic violence, sexual assault and child abuse as well as victim-survivors of modern slavery.

1.9.2. Extending the time limit for financial assistance for victim-survivors of domestic violence, sexual assault, child sexual abuse and child abuse as well as victim-survivors of modern slavery to 10 years from the last act of violence for all elements of financial assistance.

1.10. Provide greater recognition of domestic violence, including child abuse, sexual violence, child sexual abuse and modern slavery through higher recognition payments. These payments should increase in value with the current categories shifted to higher categories.

1.10.1. Choking, suffocation, strangulation or attempts to choke, suffocate or strangle should be specifically included at a minimum as a Category C recognition payment.

1.10.2. Category B recognition payments should be expanded to include domestic violence involving violence that is one of a series of related acts and modern slavery.

1.10.3. The list of relationships outlined in the definition of "*sexual assault and domestic violence*" in s 19(8)(f) of the *VRSA* be expanded to be consistent with the list included in the definition of "*domestic relationship*" in the *Crimes Domestic and Personal Violence Act.*

1.10.4. Category B recognition payment should be elevated to Category A ($15,000).

1.10.5. Payments need to be indexed annually and should not ever decrease despite indexation.

1.11. Amend the definition of "*victim of crime*" and "*act of modern slavery*" in the *Victims Rights and Support Act* to include all forms of modern slavery. This requires:

1.11.1. The definition of "*victim of crime*" in s5(1) of the *Victims Rights and Support Act* specifically referring to sections 5(1)(a) and 5(1)(b) of the *Modern Slavery Act 2018 NSW.*

1.11.2. The definition of "*modern slavery*" in s19A of the *Victims Rights and Support Act* be amended so an "*or*" exists between s19A(1)(a) and s19A(1)(b) rather than an "*and*" or it reads "*and/or*".

1.12. Legislate a standard of proof of "reasonable likelihood" in the *Victims Rights and Support Act* consistent with the National Redress Scheme for people who have experienced institutional child sexual abuse.

1.13. The form of evidence to support a Victims Support application is not prescribed.

1.14. Improve access to economic loss payments:

1.14.1. The type of evidence to support an economic loss claim should not be prescribed.

1.14.2. Victim Services actively supports victim-survivors to evidence claims of economic loss.

1.14.3. Improve access to economic loss payments for victim-survivors engaged in casual work.

1.14.4. Clarification and simplification of the calculation of loss of actual earnings and that the method of calculation is embedded in the *Victims Rights and Support Act*. Further consultation specific to this issue is required.

1.15. Improve access to the Victims Support Scheme for family victims:

1.15.1. Remove time limits on funeral payments to accommodate matters where the victim's body has not been found or where the victim's body has not been released for any reason.

1.15.2. Remove time limits for justice related expenses to accommodate matters that do not get resolved within the current period.

1.15.3. Allow additional justice related payments over and above the current limit to accommodate matters that go to retrial and multiple appeals.

1.15.4. Remove time limits on applications for justice related expenses for family victims. In the alternative, though less preferred, the time limit should start from the day charges are laid in relation to the homicide. These expenses should be made available for all homicide related court matters – including mentions, trials, appeals and Coronial Inquests, Mental Health Review Tribunal hearings and State Parole proceedings.

1.15.5. Improve access to Victims Support Approved Counsellors in rural areas, especially where family victims choose to have face to face counselling or may not have access to adequate online services. This will require active recruitment of counsellors by Victims Services.

1.15.6. Reinstate option for payment of support person expenses for court or other related needs.

1.15.7. Remove time limits or hours restrictions on counselling for family victims who will need to return to counselling at other stages in their life eg appeals, retrials, parole hearings.

1.16. Legislate amendments to the *Victims Rights and Support Act* to enable Victims Services to pay third parties for *Government Information (Public Access) Act 2009* (access to information) expenses and other evidentiary requirements such as medical reports separate to financial assistance.

1.17. Add a new Victims Support payment called a Disability and Domestic and Family Violence Crisis payment.

1.18. Introduce Immediate Needs Support Package - Sexual violence.

1.19. Introduce a discretionary process for victim-survivors under 18 years old to access their recognition payment rather than it being held on trust.

1.20. Victims Services advocate to Services Australia for amendments to the *Social Security Guide* that will protect recipients of Special Benefit and allow them to get the full benefit of Victims Support (or equivalent) payments without their Special Benefit being affected. This is particularly important for victim-survivors of domestic violence, sexual violence, child abuse, child sexual abuse and modern slavery.

1.21. Expand eligibility for Victims Support to all people who are victims of crime whilst incarcerated.

1.22. Strengthen the Charter of Victims Rights to:

1.22.1. Give victim-survivors a right to seek a review of prosecutorial decisions consistent with recommendation 50 of the Queensland Women's Safety and Justice Taskforce: *Hear Her Voice: Women and girls' experiences across the criminal justice system – Report 2 Volume 1*.

1.22.2. Make clear a victim-survivor's right to access an interpreter when reporting violence to police and throughout the justice journey.

1.22.3. Inform a complainant of "*any special protections or alternative arrangements for giving evidence*" and informing the court of the complainant's preferences for this as outlined in the *Victims Charter Act 2006 Victoria*.

1.22.4. Help victim-survivors realise the right to make a claim under the Victims Support Scheme.

1.23. Amend the *VRSA* to provide discretion to apply out of time for internal review for all aspects of Victims Support.

1.24. To clarify and to ensure procedural fairness and natural justice to applicants, the *VRSA* should include provisions which note:

1.24.1. That the time limit for lodging an internal review applies only to the notification to Victims Services of the internal review request;

1.24.2. Victims Services must set a date on which the internal review decision will be made and that date must be at least a further 3 months from the date of filing of the internal review request and can be extended on application of the applicant and must not be unreasonably refused by Victims Services. Victims Services can set an earlier date to make an internal review decision upon the request of an applicant;

1.24.3. That the grounds and further evidence and submissions can be filed after 90 days and up until the internal review decision date; and

1.24.4. That the grounds and submissions can be amended up until the internal review decision date.

1.25. Amend the *VRSA* to ensure external review is available for all claims for financial assistance, including immediate needs and economic loss.

1.26. Section 41A of the *VRSA* (lapsing provision) be reviewed and if it continues it not be interpreted narrowly and that there is a presumption to extend the time to provide evidence, particularly in relation to requests by applicants who are victim-survivors of sexual violence, child sexual abuse, domestic violence, child abuse, modern slavery as well as for family victims.

1.27. Legislate the requirement for Victims Services to note all evidence considered and provide reasons for their decisions ensuring that decision-makers provide applicants with detailed information to justify their decision in plain language, and that the reasons outline the evidence relied upon to reach the decision.

1.28. Section 43(7) of the *VRSA* be extended to enable the Commissioner on request to amend a notice to correct an error in the notice. There should also be steps taken to make people aware of this provision.

1.29. As a matter of procedural fairness, if Victims Services intends to draw adverse inferences on the evidence before it, Victims Services should advise the applicant or their legal representative and

ask if there is further evidence to submit or submissions to be made with respect to the issue in question.

1.30. A legislative presumption not to pursue restitution in circumstances of sexual violence, child sexual abuse, domestic violence, child abuse and modern slavery unless the victim-survivor elects Victims Services pursue restitution.

1.31. Prohibit use of:

1.31.1. Victims Support financial assistance payments to service debts, including an order of restitution.

1.31.2. Recognition payments to offset or pay off any kind of debt, including an order of restitution except where a victim-survivor requests it.

1.32. If a person makes an application to Victims Services for a recognition payment and they have an existing order for restitution (debt), Victims Services must notify them about this at the time of them lodging the application. Victims Services should also advise as to whether that debt has been transferred to Revenue NSW and provide information about Work Development Order programs available, so the applicant has the opportunity to reduce any debts by that scheme.

1.33. Uniformity of processes within Victims Services and Revenue NSW about debt collection.

1.34. Victims Services and Revenue NSW provide a list of Work Development Order programs available in the area where the person lives when advising about enforcement/debt.

1.35. Establish an independent Commissioner Victims Rights.

1.36. The independent Commissioner Victims Rights and Victims Services regularly consult organisations to ensure cultural safety and to remove barriers to accessing Victims Support with the independent Commissioner Victims Rights publishing an annual report which includes a list of stakeholder meetings the Commissioner has attended, consultations and inquiries undertaken by the Commissioner, a summary of reports published, and media work undertaken by the Commissioner.

Previous review

11. We note the first statutory review of the *Victims Rights and Support Act* (***VRSA***) commenced 3 years after assent of the *Victims Rights and Support Act* in mid 2016.

12. There were some important amendments made to the *VRSA* following the last statutory review. However, the Attorney General in his Second Reading Speech also noted that as victim support applications could stay open for 5 years and a large number of claims remained open at the time of the 2016 review,

> *I consider it too early to recommend any major policy changes to the Victims Support Scheme*.[1]

13. As this submission highlights there is an urgent need to further increase access to the NSW Victims Support Scheme to ensure all victim-survivors can access the support to which they are entitled and

[1] Victims Rights and Support Amendment (Statutory Review) Bill 2018, Second Reading, *Legislative Assembly Hansard*, 6 June 2018 (Attorney General the Hon Mark Speakman SC)

need. Now is the time to make important changes working with victim-survivors and the services supporting them in the implementation of the solutions we propose.

Human rights framework

14. Under international human rights, States are required to act with due diligence to protect, promote and fulfil their human rights obligations.[2] Part of these obligations includes individual reparations for violation of human rights, a right "*firmly enshrined in the corpus of international human rights and humanitarian instruments*."[3]

> *Given the disparate and differentiated impact that violence has on women and on different groups of women, there is a need for specific measures of redress in order to meet their specific needs and priorities. Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation. Additionally, women who experience violence have traditionally encountered obstacles to accessing the institutions that award reparations*.[4]

15. Additionally, in 1985 Australia endorsed the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles)*.[5] While not legally binding, by endorsing this Declaration, States, including Australia, have committed to:

    1.1. Endeavour to provide financial compensation to victim-survivors who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (Article 12(a))

    1.2. The establishment, strengthening and expansion of national funds for compensation to victim-survivors; (Article 13)

    1.3. Strengthening judicial and administrative mechanisms to enable victim-survivors to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible; (Article 5)

    1.4. Taking measures to protect [a victim-survivor's] privacy and ensure their safety from intimidation and retaliation; (Article 6(d))

    1.5. Training for police, justice, health, social service and other personnel concerned to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid (Article 16).

[2] Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5,* CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33.

[3] *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, Human Rights Council, A/HRC/14/22, 23 April 2010; See also: the *Universal Declaration of Human Rights* (Art. 8), the *International Covenant on Civil and Political Rights* (Art. 2, para. 3), the *International Convention on the Elimination of All Forms of Racial Discrimination* (Art. 6), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 14), the *Convention on the Rights of the Child* (Art. 39), CEDAW General Comment 19 at paragraphs 9, 24(i), 24(t)(i).

[4] Ms Rashida Manjoo Note 3 at paragraph 24.

[5] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, General Assembly Resolution 40/34 of 29 November 1985

Part 1: Recommendations to be implemented by end of 2022

The requirement to separately prove injury

16. An issue that many victim-survivors and organisations working with victim-survivors have been raising for some time is the need to remove the requirement to prove injury in Victims Support applications.

17. We refer to the joint statement on this issue endorsed by over 70 organisations.[6] The joint statement outlines the issue and proposed solution in detail.

18. In summary, the joint statement outlines that in order to access a recognition payment or financial assistance for economic loss through the Victims Support Scheme, a victim-survivor must currently establish:

    i. that they were the victim of an "*act of violence*"[7], and

    ii. that they were injured as a result. Injury can be physical or threats of physical injury and / or psychological injury or harm.

19. The applicant must prove their claim on the balance of probabilities. As a part of their application, applicants are required to produce two different sources of documentary evidence:

    i. a report of the act of violence to police, government agency or a non-government organisation funded to provide support to victims of crime;[8] and

    ii. a medical, dental or counselling report to verify actual injury has been sustained.[9]

20. Many women with whom we work have expressed concern at having to unnecessarily repeat their story in order to successfully access Victims Support. For example, women may have reported sexual and/or domestic violence, or violence they experienced as children such as child abuse and/or child sexual abuse to a service that works with victim-survivors, but they have not accessed medical, dental of counselling support.

21. We acknowledge the importance of access to specialist, trauma-informed, culturally safe counselling. Consistent with the principles of trauma-informed care, it is also important that survivors have agency about how and when they access such counselling, if at all.

22. The requirement to prove injury is an inheritance from the NSW Compensation Scheme. The Victims Compensation Scheme was abolished in 2013 and replaced with the NSW Victims Support Scheme. Under the former Victims Compensation Scheme, there was a compensation range for certain types of acts of violence with the ultimate award based on an assessment of the severity of injury. For example, a victim-survivor of a series of related sexual assaults (Category 3) could be awarded between $25,000 to $50,000.

23. Under the Victims Support Scheme, there are now set amounts awarded for each recognition payment which is based on the type of crime committed. This means there is generally no need for an

[6] *Joint Statement: The case for removing the requirement to separately prove injury in NSW Victims Support applications*, July 2022

[7] *Victims Rights and Support Act 2013 NSW*, s 19

[8] *Victims Rights and Support Act 2013* s 39(2)(b)(i)

[9] *Victims Rights and Support Act 2013* s 39(2)(b)(ii) Additional evidence is required to support a claim for economic loss, see *Victims Rights and Support Act 2013 s 39(3) and s39(4)*

assessment of the severity of the injury. Financial assistance for economic loss is based on actual losses, not severity of injury.

24. The fact of the act of violence should be sufficient.

25. This should apply in relation to all acts of violence.

26. At an absolute minimum the removal of the requirement to prove injury must occur in relation to sexual violence, domestic violence, child sexual abuse, child abuse and modern slavery. The long-term impacts arising from such violence and abuse are well known[10] and should therefore be considered a given.

27. By their very nature, these crimes result in an injury. Injury can include harm to mental health, physical harm and impact on social, sexual and interpersonal functioning.

28. In the few instances where severity of injury is relevant, such as to establish grievous bodily harm or serious bodily injury, the victim-survivor may still need to provide evidence of injury to establish aggravation.

29. This should not apply to "*sexual assault resulting in serious bodily injury*" in relation to child sexual abuse. For the purposes of the Victims Support Scheme all child sexual abuse should be deemed to result in serious bodily injury. Evidence of such harm is well known[11] and should be acknowledged by only requiring (1) proof of the act of violence and (2) the age of the child at the time of the alleged offence.

30. Removing the requirement to separately prove injury can be via amendment of section 19 of the *Victims Rights and Support Act* to delete "*injury*" as an element of the "*act of violence*" and making consequential amendments.

31. In the alternative and at an absolute minimum, the change could be implemented by amending the definition of "*act of violence*" in section 19 of the *Victims Rights and Support Act 2013,* by which "*sexual assault and domestic violence*" and "*modern slavery*" are deemed to be "*violent conduct*" for the purposes of the definition of act of violence.

32. There would also need to be amendments to section 39 of the *Victims Rights and Support Act* relating to documentary evidence requirements.

33. We refer the reader to the Joint Statement for more detail about proposed legislative amendments to remove the requirement to separately prove injury in Victims Support applications.

34. The removal of the requirement to prove injury in Victims Support applications would reflect trauma informed and client centred approaches as well as provide efficiency in the operation of the Victims Support Scheme. It would increase access to Victims Support for the most marginalised in society who may struggle to obtain evidence of injury.

[10] See the *Joint Statement: The case for removing the requirement to separately prove injury in NSW Victims Support applications*, July 2022.
[11] Judith Cashmore and Rita Shackel (2013) The long-term effects of child sexual abuse, *CFCA Paper No. 11*.

Recommendation 1:

The NSW Government legislates the removal of the requirement to prove injury in Victims Support applications by the end of 2022.

Improving access to counselling

35. Counselling can play a very important role in a victim-survivor's recovery. It is essential that counselling is available when a victim-survivor needs it, and it is easy to access. It is also important that counselling is culturally safe and that a person can access counselling from someone with expertise in victim-survivor's presenting issues.

36. We have previously raised concerns about access to counselling in our submission to the Review of Victims Services changes implemented from 1 July 2020, dated 5 March 2021, in meetings with the Commissioner Victims Rights and in the Open letter to the Attorney General and Minister for Prevention of Domestic and Sexual Violence, dated 29 November 2021.

37. The importance of access to counselling is reflected in the Charter of Rights which states:

> *A victim will have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim's needs.*

38. Shifting the responsibility to access counsellors from Victims Services onto victim-survivors as part of the changes implemented from 1 July 2020 has proved very challenging.

Women's experiences of accessing counselling

Women have sought our assistance to help them locate a counsellor. Many women have expressed feeling overwhelmed by having to choose a counsellor from a long list. Others have limited digital literacy and do not know how to navigate the system.

We have tried to call counsellors to make appointments and often our calls are not returned. We fear if victim-survivors are trying to find a counsellor on their own that they will give up if a counsellor doesn't return the call.

For those who might be able to access the Victims Services website, they have told us it was very difficult to search the list via a mobile phone.

39. The comments above are not a criticism of the counsellors, but of the system.

40. As part of this review there should be consideration of data about the following:

    i. How many applications for Victims Support counselling have been granted each year as a number and percentage over the operation of NSW Victims Support Scheme?

    ii. What is the breakdown in relation to (a) domestic violence (b) sexual violence (c) child abuse (d) child sexual abuse and more recently (e) modern slavery over each financial year?

    iii. How many victim-survivors who have been approved for counselling have accessed counselling as a number and percentage over the operation of NSW Victims Support Scheme and with a

breakdown in relation to (a) domestic violence (b) sexual violence (c) child abuse (d) child sexual abuse and more recently (e) modern slavery over each financial year?

41. In our submission in response to the review of Victims Services changes implemented since 1 July 2020 we recommended exploring the establishment of a specialist team within Victims Services dedicated to co-ordinating the allocation of counselling, particularly in relation to sexual assault, child sexual abuse, domestic abuse and child abuse. These staff could build relationships with the Approved Counsellors, identify Approved Counsellors with relevant expertise and allocate a client to an appropriate counsellor. This system would also provide for consideration of referral to an Approved Counsellor with experience in working with First Nations women, refugee and migrant women, people with disability, LGBTIQA+ communities, women in custody, older people, children and young people, victim-survivors who have experienced complex trauma. It would allow a consideration of the current availability and/or workload of an Approved Counsellor.

42. Consultation with Approved Counsellors about such a system may also identify ways in which referrals could be streamlined in a manner that does not put the burden on the person accessing the counselling and is trauma informed. Victims Services could help facilitate initial contact between the victim-survivor and the Approved Counsellor. Victims Services Approved Counsellors need to feel supported in their work and Victims Services has an important role to play in this.

43. We further recommended the following:

    1.1. At least every three months, Victims Services contact Approved Counsellors to ask if they are still accepting Victims Support counselling work and ask about waiting times.

    1.2. At least every six months, Victims Services conduct client satisfaction surveys which should include questions such as:

    1.2.1. Was it easy to find a counsellor?

    1.2.2. What would make it easier for you to attend counselling?

44. Victims Services needs to engage more bilingual Approved Counsellors because there are currently limited options. Several of our clients have been unable to access a counsellor who can speak their language. Access to culturally safe, trauma informed counselling is vital.

45. Victims Services must also engage more First Nations Approved Counsellors.

Access to culturally safe healing

46. We also support greater access to culturally safe healing, including in group settings, particularly for First Nations people.

47. For First Nations women, trauma is complex and unique. In addition to high levels of sexual violence and domestic and family violence, First Nations trauma includes trans-generational and community trauma arising from the ongoing trauma experienced as a result of colonisation, dispossession and the Stolen Generations. First Nations trauma is the loss of identity, belonging, love, legacy, community and country and the ongoing forced removal of children from their families and communities.

48. In addition to general limited access to counselling, we are concerned by the very limited access to Victims Services counselling for women in custody and submit that trauma informed, culturally safe counselling should be readily and regularly available to women who are incarcerated.

49. The review of the pilot of counselling for women in Dillwynia and Wellington Correctional Centres was very positive.[12]

50. The majority of women in custody have complex histories of sexual and physical abuse starting in childhood.[13] The rates of previous victimisation are highest for First Nations women, with some studies suggesting that up to 90% of First Nations women in custody are survivors of family abuse and other violence.[14] First Nations women are also 35 times more likely to be hospitalised due to family abuse related assaults, than non-First Nations women.[15] Access to culturally safe counselling and healing is therefore important. Helping women to recover from trauma may also reduce recidivism.

51. Further, the only evidence of act of violence or injury might be evidence from a counsellor's report. Failure to provide access to counselling in prison may preclude some victim-survivors of complex trauma from obtaining Victims Support. We note during COVID that many women in prison found in difficult to access counselling.

52. It is important all First Nations people who want to access culturally safe healing are able to do so.

53. For criminalised First Nations women, specialised, culturally safe spaces to heal and address their criminogenic risk factors could divert women from incarceration and provide opportunities for women to safely care for children and to be on country, based on an Aboriginal Healing Framework.[16]

Other improvements to accessing counselling

54. We support improvements to the process of appointing counsellors as Victims Services Approved Counsellors, including "*open[ing]approval applications to suitably qualified "organisations" that have the required values, skills and accreditations which would automatically qualify their employed counsellors. The primary relationship would remain with the organisation not the individual staff members but would increase the availability of counselling to Victims Services*". This would include, for example, organisations such as Women Health NSW members.

55. In order to increase suitably qualified Victims Services Approved Counsellors it is also imperative they are suitably renumerated.

[12] Thomas Dornan and Elyse Aird, (2015) *An evaluation of the counselling in prison trial* (NSW Government, Parramatta)

[13] Australia's National Research Organisation for Women's Safety (2020) *Women's imprisonment and domestic, family, and sexual violence: Research synthesis* (ANROWS Insights, 03/2020), M Stathopoulos and A Quadara (2014) *Women as offenders, Women as victims: The role of corrections in supporting women with histories of sexual abuse*, A report for the Women's Advisory Council of Corrective Services NSW

[14] Australian Law Reform Commission (2018) *Pathways to justice: Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples*

[15] Productivity Commission Steering Committee for the Review of Government Services (2009) *Overcoming Indigenous Disadvantage: Key Indicators 2009*, p 26.

[16] The core characteristics of an Aboriginal Healing Framework include: Indigenous ownership of the program design and evaluation, a holistic and multidisciplinary approach, the centrality of culture and spirituality, the program is informed by history, a strengths-based approach, the use of preventative and therapeutic strategies and the commitment to healing, see C Caruana (2010)"Healing services for Indigenous people" 17 *Family Relationships Quarterly*. See also We Al-li - Culturally Informed Trauma Integrated Healing Approach (CITIHA) to training for individuals, families, communities and organisations

56. We also acknowledge concerns raised by NGO Victims of Crime Interagency members about it being more difficult to access counselling beyond 22 hours as outlined in the Open letter to the NSW Attorney General and Minister for Prevention of Domestic and Sexual Violence, dated 29 November 2021.

Recommendation 2:

The NSW Department of Communities and Justice implements by the end of 2022 improvements to access to Victims Services Approved Counselling including:

a. Increase the number of suitably qualified Victims Services Approved Counsellors available, including in regional, rural and remote areas. This includes counsellors who are culturally safe, disability aware, LGBTIQA+ aware, trauma informed, with expertise in working with particular priority populations and expertise on particular issues.

b. Provide more information to victim-survivors about expertise of counsellors and Victims Services assists victim-survivors to access a counsellor when they request this help.

c. Provide access to culturally safe healing.

d. Open approval applications to suitably qualified "organisations" that have the required values, skills and accreditations which would automatically qualify their employed counsellors. The primaryrelationship would remain with the organisation not the individual staff members but would increase the availability of counselling to Victims Services.

e. Develop policy and procedures that recognise the need to apply extended hours of counselling allocation up to 44 hours where appropriate with further extensions as required and there be a presumption in favour of approving the application.

f. Victims Services reviews approved models of counselling philosophy to ensure holistic approaches are employed along with the other values and requirements for appointment. This is to ensure appointed counsellors do not insist clients only talk about the part of their reaction that the counsellor has perceived as being in relation to the "Crime Event". Trauma informed practice and models of counselling philosophy understand reactions to trauma are complex.

g. Adequately remunerate Victims Services Approved Counsellors.

h. Reinstate funding for group work in NSW. Individual counselling is not a substitute for victim-survivors wishing to benefit from facilitated peer support group work.

i. Increase access to counselling for victim-survivors of crime while they are in custody.

j. Victims Services to provide professional support (including vicarious trauma support) to counsellors and opportunities for professional development and training.

k. Remove the two session "no show rule" so that victim-survivors who are unable to attend appointments for reasons beyond their control are able to continue to receive counselling.

Victims Services collect evidence for Victims Support applications – Burden of evidence gathering is a barrier

57. On I July 2020, Victims Services shifted the burden of evidence gathering onto victim-survivors and the services assisting them. We strongly oppose this and have consistently raised our concerns about this shift.

58. To our knowledge there has been no additional funding provided to services supporting victim-survivors to undertake this work. These services are already over-stretched, under-funded and under-resourced and this shift has had significant impacts on legal and non-legal service providers assisting victim-survivors to access victims support.

59. The vast majority of victim-survivors are negotiating Victims Support on their own, without a legal representatives or advocate.

60. When the Victims Support Scheme was introduced in 2013, its key feature was to be its accessibility. There was no longer a need to pay lawyers' fees to complete applications or to cover the cost of gathering evidence because Case Co-ordinator roles were established within Victims Services to assist victims-survivors. The Government commissioned report (**the report**) recommended:

> *Victims Services provides claimants with a case coordinator to assist the claimant with immediate needs, navigating the various government and community support services relevant to the victims needs and to help claimants through the claims process*.[17]

61. The report further recommended:

> *dedicated case co-ordinators for victims from backgrounds that require greater help in seeking assistance such as Aboriginal and Torres Strait Islanders, culturally and linguistically diverse communities, rural and remote communities, the homeless and people with disabilities.*[18]

62. The report also acknowledged "*a problem that has been identified with providing financial assistance is the reliance on victims keeping receipts and records*." "*To avoid this problem*" the report recommended "*one of the roles of case coordinators … would be to assist by directly settling invoices for items such as medical and dental treatment as an alternative to reimbursement of receipt*".[19]

63. The report clearly states:

> *Any changes to the scheme should ensure that all claimants have an equal opportunity to receive support with completing and submitting their applications. The scheme should also ensure that claimants are provided with the assistance they need in order to navigate the criminal justice system, the legal system, Centrelink, Medicare and other government agencies and non government organisations that victims rely on for support.*[20]

64. The recommendations made in the report are just as relevant today to ensure an accessible and responsive victim support scheme.

[17] PricewaterhouseCoopers (2012) *NSW Department of Attorney General and Justice Review of the Victims Compensation Fund*, 2012, Recommendation 36
[18] Ibid, Recommendation 38.
[19] Ibid, p 60.
[20] Ibid, p 69.

65. However, the changes implemented on 1 July 2020 fail to ensure "*all claimants have an equal opportunity to receive support with completing and submitting their applications*".

66. Our staff who have been supporting women to make Victims Support applications since 1 July 2020 have regularly commented it is very time consuming and taking them away from other important work they would otherwise be doing.

67. They describe having to make several appointments with a victim-survivor to obtain the necessary information to complete the application form and to identify the relevant agencies/bodies/organisations they need to contact to request supporting evidence.

68. They further describe that there are differing requirements and processes across different agencies with respect to requests for records and that it is not only confusing, but also time consuming to navigate and engage with agencies regarding their respective processes. We fear that if these processes are proving challenging for legal representatives, it is likely to prove even more challenging, if not impossible for unrepresented applicants.

69. In seeking evidence to support a claim, requests for access to documents often need to be refined to limit the costs to agencies. This too takes time.

70. Victim-survivors have contacted our service because they struggle with how to obtain the evidence to support their application. Some of them have had their claims dismissed because they were not able to provide evidence in support of their claim. This is an experience echoed by other services.

71. On rural trips, several services have raised with our First Nations Women's Legal Program staff that there has been no training to help them complete Victims Support applications and expressed worry that it is not clear what information is being sought or what evidence is required to obtain victims support for their client. They too commented on the time-consuming nature of the work and their concern that the process is traumatising for their clients and for themselves.

72. Every barrier put in a victim-survivor's way will deter them from accessing the support they are entitled to and need.

73. Further, the additional burden of time and money imposed on services who are representing or assisting clients to make a Victims Support application to obtain evidence to support their application leads to that service having to reduce the numbers of clients it can assist. This is certainly true for WLS NSW.

74. We recommend that Victims Services support victim-survivors as they did prior to 1 July 2020 and as recommended by the Government commissioned report in 2012 by collecting the evidence to support a Victims Support application.

75. We recommend that victim-survivors be able to choose a pathway to make their application for Victims Support: they can opt to collect their own evidence, or they can opt for Victims Services to collect evidence on their behalf. This is outlined in more detail in the 2020 Community Legal Centre NSW submission to the Commissioner outlining an alternative proposal to the one the Commissioner put forward.[21]

[21] Community Legal Centres NSW, (2020) Further consultation on Victims Support Scheme and alternative proposal,

76. It is particularly important that victim-survivors of sexual assault, child sexual abuse, domestic abuse, child abuse, modern slavery or other victim-survivors with complex trauma or needs have the option to obtain assistance in evidence gathering from Victims Services should they seek it.

77. In light of strong opposition to the changes, the NSW Government committed to a review within 6 months of the changes. Then Secretary of the Department of Communities and Justice, Mr Coutts-Trotter stated at the time:

> *We will work with various voices in the sector to undertake a review of this change six months down the line and if it is creating the kind of problems people fear, we will be open about it.*[22]

78. A review was undertaken by Victims Services, the agency that itself implemented the changes, with submissions due in March 2021. Submissions to this review have not been published and neither has the final report on the review. There have been repeated calls for the publishing of submissions and the report. See Open letter to NSW Attorney General dated 29 November 2021.

Recommendation 3:

a. Victims Services returns to collecting evidence or funds services to undertake this work and reimburses services for associated costs by the end of 2022.

b. Victims Services publishes submissions in response to their review conducted in March 2021 and publishes the final report.

The obligation to provide upfront banking details is a barrier

79. We are concerned that the requirement to provide banking details at the time an application for victims support is lodged is a barrier to access. For example, many of our incarcerated clients do not know their bank details, are unable to access their bank details because they cannot call their bank from prison and some do not even have a bank account. Other clients who have recently fled a violent relationship do not have a bank account in their own name.

80. We do not believe that the provision of bank account details upfront should be contingent on a person applying for Victims Support. Their provision should be an option but not a requirement which precludes the lodging of a Victims Support application.

81. When it is not possible to provide banking details, our clients have had mixed results in providing a third party's bank details or making alternative arrangements for payments to be made.

82. We are also concerned about the significant possibility that the requirement to provide bank details up front may result in financial abuse where, for example, the bank account provided at the time of making an application was a joint account with the perpetrator.

83. Further, the requirement to provide bank details upfront sets up a false expectation that applicants will be successful in their application.

[22] Gina Rushton, 'NSW victims of crime now have a new obstacle to collecting compensation', *Crikey*, 29 June 2020

84. It also fails to acknowledge the impact of trauma on memory and the at times chaos of everyday life for victim-survivors so that even though the Victims Support application form requires them to update their bank details, they may not remember to do so.

85. The Final Report: Second Review of the National Redress Scheme (2021) outlines concerns about barriers arising from the requirement to provide bank details up front and recommended removal of the requirement to provide bank details up front.

Recommendation 4:

By the end of 2022, consistent with recommendation 3.6 of the Final Report: Second year review of the National Redress Scheme, the requirement to provide bank details up front should be removed. Bank details should be provided after a successful determination.

Government issued identification requirement is a barrier

86. The requirement to provide Government issued identification is a particular barrier for women in custody wishing to access Victims Support. In our practice this requirement is leading to delays in lodging Victims Support applications as it can take some time to obtain a copy of this identification document. This concern has also been raised by several other community legal centres.

87. The usual practice to obtain a copy of Government issued identification when a person is in custody is through the Services and Program Officers (**SAPO**) in Correctional Centres. The client either requests the SAPO to provide a copy of their MIN card (identify card when in prison) or instructs WLS NSW to request this from the SAPO. However, it is important to note that this impinges a person's right to privacy as the person in custody is generally required to explain why they need a copy of their MIN card. Similarly, legal representatives making a request direct to the SAPO are generally required to provide a reason for the request of a copy of a person's MIN card. Further, it also relies on being able to contact a SAPO to make the request and may also depend on relationships built with Corrective Services staff. There have been some instances where Corrective Services staff have refused to make a copy of a MIN card available, leaving an inmate who has no other form of identification, effectively unable to apply for Victims Support.

88. In correspondence to Ms Fallon, Senior Manager Client and Legal Services, Victims Services on 28 July 2020 we raised these concerns and proposed an alternative solution. We recommended, at least in the short term, that an advocate upload a signed statement on letterhead, confirming the applicant is currently in custody and providing their name, MIN and location and that this be accepted as Government issued identification. We understand our concerns were forwarded to the Commissioner for consideration but to date, our suggestion has not been adopted. Providing Victims Services with a MIN should be sufficient for the purpose of fulfilling identification documentation requirements.

89. Challenges to providing Government issued identification is not limited only to our clients who are incarcerated. It also affects women who have fled their homes due to violence and who want to apply for an immediate needs support package but who do not have Government issued identification documents as well as victim-survivors who are homeless and First Nations victim-survivors who do not have identification.

90. We remain concerned that this new requirement is a barrier for the most marginalised, denying them access to the support they are entitled to and need.

91. There should be exceptions to providing Government issued identification and the exceptions should be clearly communicated – for example for people who are homeless, people who have had to flee violence and left without or have lost their Government issued identification, people in institutional settings and for trans people (binary and non-binary) who were born in NSW and who have not undergone gender affirmation surgery and cannot update their gender markers on identity documents. This can cause challenges in having identification documents that match gender experience. The exceptions should include a non-exhaustive list.

92. Providing discretion to waive the requirement for Government issued identification and exercising this discretion in a manner that is beneficial for victim-survivors who are traumatised and marginalised is important to ensure people are able to access the support they are entitled to and need to recover from trauma. We are concerned that current practices are unnecessarily compounding trauma, in addition to creating a barrier to access.

93. In the event identification remains a requirement, the identification documentation list should be further expanded, and its provision should not be a pre-requisite to application and could be provided at a later date but before any payments are made.

94. The issue of identification documentation was raised in the Final Report: Second year review of the National Redress Scheme. Recommendation 3.6 of the Final Report recommended simplifying identify checks.

Recommendation 5:

By the end of 2022, simplify identity checks:

a. Victims Services adopts a more flexible approach to identity documents, accepting a wider range of identity documents and enabling applicants to provide identification documentation at a later time rather than at the time of application. This includes accepting a MIN.

b. Victims Services allows the identification documentation requirement to be waived in appropriate circumstances.

Ensure procedural fairness

95. We are concerned that Victims Services has a practice of determining matters without asking the applicant if all evidence has been provided and where it is well within the 12-month period for providing evidence. This has led to matters being determined prior to all supporting evidence being lodged and regularly this has led to adverse decisions.

96. We are concerned that in an effort to improve the timeframes within which Victims Services makes decisions, the time taken to properly consider an application and all of the evidence and the quality of decisions is being affected. This means that Victims Services is effectively limiting victim-survivors appeal avenues in circumstances where an internal review has to be used unnecessarily because of what appears to be a focus on speed and efficiency rather than on the quality of the decision.

97. Further, it also has the effect of allowing victim-survivors less time than they are otherwise entitled to in order to collect their evidence. For example, if Victims Services makes a determination 1 month after the lodging of the application, the applicant then has 90 days after the day on which the applicant is given notice of the decision to file an internal review and lodge the additional evidence rather than the full 12 months.

98. Decisions which dismiss an application for failure to prove act of violence or injury or which find a lesser recognition payment than the one which the applicant submits they are eligible for, compound trauma for victim-survivors and causes real harm; it sends a message that victim-survivors are not believed. This is particularly problematic where a decision is made before giving an applicant the chance to provide all relevant evidence. We have raised our concerns above as to the barriers and challenges caused to applicants and their representatives in obtaining evidence to support a claim.

99. We are particularly concerned for people who are not legally represented and may just give up at this stage.

100. We recommend an application for a recognition payment is not determined until at least 12 months after lodging the application or until such time as an applicant advises Victims Services that they have lodged everything they intend to lodge, and the claim is ready to be determined.

101. There might be many reasons beyond just preserving a limitation period to lodge upfront. This includes, for example, the availability of assistance at the time to lodge the claim. It is vital that victim-survivors are able to lodge a Victims Support application without all evidence attached at the time of lodging the application, but that this be done with procedural fairness safeguards.

Lack of procedural fairness

Jenny submitted her Victims Support application for financial assistance and a recognition payment. Evidence was not submitted at the time of lodging the application as we were in the process of obtaining it. Within a month of lodging the application a decision was made to dismiss the application on the basis of a failure to establish act of violence, despite having 12 months to provide the evidence. The decision was made without notice of the earliest date by which Victims Services intended to make a decision. The decision was based on police evidence which Victims Services could not provide to us. Jenny sought an internal review. Her matter was remitted to an Assessor with a decision to be made upon Jenny providing further evidence or after the passing of 12 months since lodging her application, whichever comes first.*

**Not her real name*

Lack of procedural fairness

Elizabeth was subjected to domestic violence, including physical assaults, perpetrated by her partner.*

We assisted Elizabeth to lodge an application for a recognition payment for domestic violence related physical assaults. At that time Elizabeth was incarcerated and had reported the violence but did not yet have medical evidence of injury because she could not access counselling in prison.

When we lodged Elizabeth's application with evidence of reporting the violence only, Victims Services gave her a further 12 months to obtain and provide evidence of injury.

Despite this, a Victims Services Assessor proceeded to determine her application before the 12 months had lapsed and dismissed her application due to lack of evidence. We assisted Elizabeth

to apply for internal review.

On review, a Senior Assessor determined that the claim should be remitted to the original Assessor for determination; and that the claim should not be determined until 12 months had passed from the lodgement of the application, or until Elizabeth had provided her evidence and requested the Assessor to determine her claim (whichever occurred sooner).

**Not her real name*

Failure to provide access to vetted COPS reports is a barrier

102. Victims Services no longer provides applicants and/or their legal representatives access to vetted Computerised Operational Policing System (**COPS**) reports. This causes a number of problems for applicants and is not only a barrier but also amounts to a denial of procedural fairness.

103. We understand this is due to a change in NSW Police Force practice which means only a very small group of people at Victims Services (assessors) can view COPS reports and only at the time of making a determination. We understand Victims Services is not permitted to download the COPS reports nor provide vetted COPS reports to an applicant and/or their advocate. Further, we understand Victims Services is not permitted to provide police reports to the Tribunal when producing its bundle of documents pursuant to, and ultimately in breach of section 58 of the *Administrative Decisions Review Act 1997 NSW* (***ADRA***).

104. A failure to provide a copy of the COPS and other police records considered by an assessor leaves an applicant at a disadvantage because they are not privy to the same material being considered by an assessor. Sometimes this material will lead an assessor to draw an adverse inference which the applicant can not respond to, or the applicant is not able to identify that the assessor has failed to consider evidence in the police records which should have led the decision maker to determine the claim at a higher payment. This is not resolved by an applicant simply obtaining records under *Government Information (Public Access) Act 2009* (access to information). Leaving aside the unnecessary expense and time of making an application for police records, heavy redactions of those records or a failure to provide exactly the same records viewed by assessors at Victims Services mean that it is imperative that the principles of procedural fairness are upheld and that applicants are able to see and know exactly what evidence is being considered by a decision maker in their case.

Failure to provide access to Court and other documents is a barrier

105. We have requested documents in Victims Services' possession in a matter for internal review. Victims Services indicated that they had obtained Local Court records but that the Court prevented them from sharing these documents with the applicant or their legal representative.

106. In another matter, Victims Services advised that documents obtained from Corrective Services were unable to be provided to the applicant or legal representatives. Where this is the only record of either act of violence, a report to government agency or injury, this is particularly problematic.

107. We are concerned by this lack of procedural fairness. There must be an urgent resolution to ensure Victims Services can release such documents to the applicant or their legal representative.

Adopting a more trauma informed approach to auditing of Immediate Needs Support Package – Domestic Violence (INSP- DV)

108. We are also concerned about the burdensome requirements imposed by Victims Services in relation to the auditing of Immediate Needs Support Package – Domestic Violence (**INSP- DV**). This has included requiring an applicant to produce receipts before further Immediate Needs Support can be accessed.

109. We understand the need for Victims Services to ensure that funds are appropriately spent. However, it is important that where an applicant requires further support, including a further immediate needs support package that the applicant is not precluded until such time as they produce a receipt or provide other evidence of expenditure, such as a statutory declaration.

110. Noting that many victim-survivors are negotiating Victims Support on their own, without a legal representatives or advocate, it is also important that flexibility about evidence to show expenditure for INSP - DV is clearly communicated to everyone.

Recommendation 6:

By the end of 2022 the Department of Communities and Justice ensures procedural fairness by:

a. An application for a recognition payment or financial assistance for economic loss is not determined until at least 12 months after lodging the application or until such time as an applicant advises Victims Services that they have lodged everything they intend to lodge, and the claim is ready to be determined or in the alternative Victims Services informs the applicant/legal representative/advocate in writing of the earliest date by which each aspect of a Victims Support application will be determined.

b. The Applicant/legal representative/advocate having access to all evidence upon which Victims Services relies on to make a decision.

c. Victims Services adopting a more trauma informed approach to auditing of Immediate Needs Support Package – Domestic Violence (INSP- DV).

Increase transparency and accountability

111. In the interests of transparency, accountability and natural justice, applicants, advocates and legal representatives should have access to policies and guidelines upon which Victims Services base their decisions.

112. It would also be helpful to publish some de-identified case study examples of decisions.

113. We are also deeply concerned by the lack of published data about the Victims Support Scheme on the Victims Services website.

114. Following the introduction of the Victims Support Scheme, Victims Services published some data in its data profiles from 2013-14 to 2017-18. This was published on Victims Services website. This information has been removed since Victims Services has updated its website in September 2021.

115. We note limited information was published in the Department of Communities and Justice Annual Report 2020-21.

116. Women's Legal Service NSW and Community Legal Centres NSW wrote to the Commissioner Victims Rights on 17 July 2020 outlining the importance of data, including baseline data to assess the impact

of changes implemented from 1 July 2020. The data requested was similar to the data previously published in the Chairperson Victims Compensation Tribunal Annual Reports.

117. In addition to the data requested in the letter, it is important information about the outcome of internal and external reviews are published. For example, in the data profiles for 2016-17, information was provided on:

    i. The number of internal reviews lodged, the number of determinations made in relation to internal review and the outcomes, including the number:

        - confirmed,
        - overturned,
        - increased,
        - withdrawn and
        - remitted

    ii. the number of reviews to the NSW Civil and Administrative Tribunal and the number of decisions:

        - awarded
        - dismissed
        - remitted
        - pending

118. We continue to call for the regular publishing of comprehensive data on the Victims Support Scheme and would welcome involvement in discussions with the Department of Communities and Justice on this issue.

Recommendation 7:

a. By the end of 2022, require Victims Services or its managing agency or Minister to publish policies and guidelines the rely on to make decisions.

b. By the end of 2022, require Victims Services or its managing agency or Minister to regularly publish comprehensive data annually about the operation of the Victims Support Scheme as occurred under the Victims Compensation Scheme and also publish quarterly reports.

Improve consultation with victim-survivors and their advocates

119. There have been significant concerns about a lack of and/or limited consultative processes regarding decisions that impact significantly on victim-survivors in NSW.

120. In recent years, several changes have been implemented by Victims Services without consultation.

121. Victims Services changes to the operation of Victims Support that took effect from 1 July 2020 – including changes to access to Victims Services Approved Counselling and the burden of evidence gathering shifting from Victims Services to victim-survivors - were initially announced by email to stakeholders as changes that would commence within a week. In response to this communication, many organisations raised significant concerns and there was a short period of consultation.

122. There have since been changes to auditing of INSP-DV and funding for group counselling has stopped. Again, there has been little consultation on these changes.

123. In September 2021 the Commissioner Victims Rights unilaterally amended the Victims of Crime Interagency Terms of Reference to remove any reference to the Victims of Crime Interagency as a consultative mechanism. This was in the face of strong opposition by NGO members of the Victims of Crime Interagency. We continue to join other organisations in advocating consultation is included in the Victims of Crime Interagency Terms of Reference. See the Open Letter to NSW Attorney General.

124. Minutes of the Victims of Crime interagency meetings are no longer published. The last meeting in which Victims of Crime Interagency minutes were published was in March 2020.

125. Reports from the Victims Advisory Board are no longer published and previous Victims Advisory Board reports have been removed from the Victims Services website.

126. There have been long periods of time when the Victims Advisory Board has not met.

127. While acknowledging the very important role of the 6 community members on the Victims Advisory Board we ask is this a sufficient number of community representatives?

128. We understand that when the Victims Advisory Board was first established it had a strong working relationship with the Victims of Crime Interagency, with issues identified at the Victims of Crime Interagency also being discussed at the Victims Advisory Board with two-way feedback mechanisms. This is consistent with the function of the Victims Advisory Board

> *to consult victims of crime, community victims support groups and Government agencies on issues and policies concerning victims of crime*.[23]

129. Such a process helps to identify issues and possible solutions and should be promoted.

130. It is important that there are strong consultative mechanisms between the Commissioner Victims Rights, Victims Services and victim-survivors and their advocates to work collaboratively to ensure a trauma informed, culturally safe response to victim-survivors and so victim-survivors can access the support they need.

131. It is also important to ensure proper consultation processes in the conduct of this review to hear about the experiences of priority populations and the services supporting them as well as for survivors and the services supporting them having input into any proposed solutions.

Recommendation 8:

Improve consultation in the following ways:

a. Commissioner Victims Rights improves consultation mechanisms by requiring that proper consultation is undertaken before Victims Services makes change. These consultation processes must include ensuring the Victims Advisory Board (**VAB**) works collaboratively with the Victims of Crime Interagency (**VoCI)** and other appropriate mechanisms with avenues for community organisations to raise issues at VAB meetings and the publishing of VAB and VoCI minutes.

b. Ensure proper consultation in this review to hear about the experiences of priority populations, including First Nations people, refugee and migrant communities including people on temporary visas experiencing violence, people with disability, LGBTIQA+ communities, people who are homeless, people with lived experience of prison, people in regional, rural and remote areas, older people and younger

[23] *Victims Rights and Support Act 2013 NSW*, s111(1)(b)

people and for priority populations and the services supporting them to have input into proposed solutions and be consulted on proposed solutions.

Part 2: Recommendations that the NSW Government implements in 2023

Removing time limits for victim-survivors of sexual, domestic and family violence and modern slavery

Remove upper time limits for recognition payments

132. The *Victims Support and Rehabilitation Act 1996* (now repealed) included section 26(3)(b) which provided for leave to be granted to file an application for victims compensation outside of the usual time limit for cases of sexual assault, domestic violence or child abuse. This was an important provision and recognised the very common delay in reporting acts of violence and/or seeking compensation for such acts of violence and removed a barrier which would otherwise exist for applicants seeking to apply for compensation out of time.

133. The introduction of the *Victims Rights and Support Act* in 2013 failed to include any such out of time provisions. The absence of an out of time provision ignores the lived experience of many victim-survivors in delayed reporting, leaving many victim-survivors unable to apply for any victims support other than counselling and does not reflect a trauma-informed victim-survivor centric support framework.

134. Time limits of 10 years to apply for a recognition payment for adult victim-survivors of domestic violence and sexual assault or 10 years after the day of turning 18 years of age if the act of violence was child abuse are too restrictive.

135. Published data about Victims Support applications indicates a significant proportion of people are precluded from making an application because of the time limits. For example, in 2013-14, 11.4% (636) of recognition payment applications were lodged more than 10 years from the act of violence. In 2014-15, 13.7% (1019) were lodged more than 10 years after the act of violence. Victims Services did not include a breakdown, for example in relation to victim-survivors of domestic violence, sexual violence and child abuse.

136. While Victims Services published data profile sets up to 2017-18 these data profile sets have been removed from the Victims Services website. However, we anticipate that if such data is examined, including more recent data it will continue to show the timeframes are a barrier.

137. There are many barriers to victim-survivors of sexual violence, domestic violence, child abuse and modern slavery disclosing violence. This includes shame, stigma, loss of trust, social pressures, isolation from social support, economic dependence on the perpetrator, cultural and community barriers. It can also take some time for a victim-survivor to identify that what has happened to them is a crime and it requires awareness of the supports available.

138. Women victim-survivors who are also primary care-givers often leave self-care until last and this may mean they are only in a position to deal with acts of violence they experienced when they were children when their own families have grown up.

139. We note that other jurisdictions in Australia allow discretion to apply out of time.

140. We recommend no time limit, or in the alternative, the addition of a provision for leave to be granted for out of time applications to victim-survivors of domestic violence, sexual assault, child abuse and

modern slavery and that there is a presumption leave will be granted unless "*satisfied that there is no good reason to do so*".

141. We recommend there be a provision for granting leave for out of time applications to victim-survivors of domestic violence, sexual assault, child abuse and modern slavery and that there is a presumption leave will be granted unless "*the Commissioner is satisfied that there is no good reason to do so*".

Remove 2-year timeframe for financial assistance

142. Similarly, the 2-year time limit (or 2 years after the day of turning 18 years) for financial support for medical and dental expenses is too restrictive.

143. While there are exceptions to the time limits for victim-survivors of child sexual abuse with respect to some limited forms of financial assistance - such as out-of-pocket expenses and expenses associated with criminal or coronial proceedings - significantly, these do not include medical and dental expenses.

144. In the second reading speech Minister Hazzard on behalf of the then Attorney General states

> *Victims need to be supported while they recover and come to terms with what has happened.*

145. Minister Hazzard also states the new scheme is an "*infinitely better response to victims*" because it

> *provides a package of practical and financial support that is tailored to victims' individual needs and provided to victims at the time they need it.*

146. We agree that victim-survivors need to be supported while they recover but the reality of what it takes for recovery does not always happen within the first two years of the relevant act of violence. To be truly "*tailored*" and responsive to the "*victims' individual needs*" for financial assistance, particularly for victim-survivors of domestic violence, sexual assault, child sexual abuse, child abuse and modern slavery, the time limit needs to be expanded beyond 2 years. We recommend extending the time limit to 10 years from the last act of violence for all elements of financial assistance. If Recommendation 15 in relation to removal of these timeframes for family victims is not implemented, there should be consideration of this time frame extending to family victims too.

Recommendation 9:

Remove all time limits for victim-survivors of sexual, domestic and family violence, including child sexual abuse and child abuse as well as victim-survivors of modern slavery in relation to Victims Support applications, including:

a. Remove upper time limits on recognition payments for victim-survivors of domestic violence, sexual assault and child abuse as well as victim-survivors of modern slavery.

b. Extending the time limit for financial assistance for victim-survivors of domestic violence, sexual assault, child sexual abuse and child abuse as well as victim-survivors of modern slavery to 10 years from the last act of violence for all elements of financial assistance.

Greater recognition of domestic violence, including child abuse and sexual violence and modern slavery through higher recognition payments

Choking, suffocation and strangulating and attempts

147. The *Crimes Amendment (Strangulation) Act 2014* recognised choking, suffocation and strangulation as separate and specific offences and strengthened provisions relating to attempts to choke, suffocate and strangle. In the second reading speech, the then Attorney General, and Minister for Justice acknowledged the prevalence of strangulation in domestic violence incidents. The Attorney General also recognised the potential lethality of strangulation "*which causes significant physical and psychological trauma to victims*". In acknowledging the difficulty in establishing grievous bodily harm as it "*rel[ies] on proof of particular bodily harm*", the Attorney General noted

> *many people who survive strangulation have minimal visible external injuries, despite the seriousness of the offence. An insidious aspect of strangulation incidents is the significant fear and psychological damage that can be inflicted on a victim without any physical injuries being apparent.*[24]

148. We share concerns about the difficulty victim-survivors of domestic violence have in establishing grievous bodily harm and therefore recommend choking, suffocation, strangulation or attempts to choke, suffocate or strangle should be specifically included at a minimum as a Category C recognition payment.

Ongoing domestic violence

149. It is not clear to us why the *Victims Rights and Support Act* rightfully recognises the impact of ongoing sexual abuse and provides for a Category B payment, while failing to recognise the impact of ongoing and prolonged domestic violence. Even though an applicant could technically make a number of different applications for different periods or clusters of domestic violence by the same offender, Victims Services does not usually find such applications as "*unrelated*" pursuant to section 19(4) and (5) of the *VRSA*. What this means is that many applicants of ongoing domestic and family violence and abuse are only eligible for a recognition payment of $1500, unless they can meet the grievous bodily harm element, to receive a payment of $5000. These recognition payments do not reflect community expectations as to appropriate payments in recognition of ongoing domestic and family violence and abuse.

150. We submit that the Category B recognition payment should be expanded to include ongoing acts of domestic violence.

151. We also submit that modern slavery should fall within a Category B recognition payment.

Better recognition of family violence within familial and kinship context

152. We recommend the list of relationships outlined in the definition of "*sexual assault and domestic violence*" in s 19(8)(f) of the *VRSA* be expanded to include all domestic relationships outlined in the *Crimes Domestic and Personal Violence Act.*

[24] Crimes Amendment (Strangulation) Bill 2014, Second Reading, *Legislative Assembly Hansard*, 7 May 2014 (then Attorney General, and Minister for Justice, the Hon Brad Hazzard)

153. Consistency in the definition of relationships across the two Acts is important. It is not clear why there are gaps or carve outs of particular relationships and it means that there are some victim-survivors of violence who are not entitled to claim victims support.

154. One such gap relates to the absence of recognition of First Nations kin relationships as reflected in the *Crimes Domestic and Personal Violence Act* as follows

> *In the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person's culture*,[25]
>
> or
>
> *is or has been a relative of the other person.*[26]

155. This gap has significant impacts for First Nations people and their potential eligibility for victims support.

156. We recommend the list of relationships outlined in the definition of "*sexual assault and domestic violence*" in s 19(8)(f) of the *VRSA* is expanded to be consistent with the list included in the definition of "*domestic relationship"* in the *Crimes Domestic and Personal Violence Act.*

Elevating acts of violence to higher recognition payments and annual indexation

157. We also advocate that Category B recognition payments be elevated to a Category A recognition payment ($15,000). This is to reflect the seriousness of the offences as well as the fact there has been no indexation on payments since the Victims Support Scheme was introduced in May 2013.

158. It is important that payments are indexed annually but note further that payments should never decrease, despite indexation.

Recommendation 10:

Provide greater recognition of domestic violence, including child abuse, sexual violence, child sexual abuse and modern slavery through higher recognition payments. These payments should increase in value with the current categories shifted to higher categories.

a. Choking, suffocation, strangulation or attempts to choke, suffocate or strangle should be specifically included at a minimum as a Category C recognition payment.

b. Category B recognition payments should be expanded to include domestic violence involving violence that is one of a series of related acts and modern slavery.

c. The list of relationships outlined in the definition of "*sexual assault and domestic violence*" in s 19(8)(f) of the *VRSA* be expanded to be consistent with the list included in the definition of "*domestic relationship*" in the *Crimes Domestic and Personal Violence Act.*

d. Category B recognition payment should be elevated to Category A ($15,000).

[25] *Crimes (Domestic and Personal Violence) Act 2007 NSW*, s 5(h)
[26] *Crimes (Domestic and Personal Violence) Act 2007 NSW*, s 5(g)

e. Payments need to be indexed annually and should not ever decrease despite indexation.

Modern slavery

Amend definition of "victim of crime" and "modern slavery"

159. Amendments to the *Victims Rights and Support Act* have recently taken effect to recognise a "*victim of crime*" includes victim-survivors of modern slavery. This is a welcomed development.

160. However, the definition of "*victim of crime*" under the *VRSA* means that:

a. only some forms of modern slavery are captured;

b. only those subject to slavery, servitude and forced labour occurring *in a supply chain* may access the victims of crime provisions under the *VRSA*.

161. Specifically,

> *A **victim of crime** is a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence or in the course of conduct of a kind referred to in paragraph (b) of the definition of **modern slavery** in section 5 (1) of the Modern Slavery Act 2018.*

162. *The conduct referred to in section 5(1)(b)* of the *Modern Slavery Act (**MSA**)* is *"any conduct involving the use of any form of slavery, servitude or forced labour to exploit children or other persons taking place in the supply chains of government agencies or non-government agencies"*.

163. This new definition of "*victim of crime*" explicitly includes:

i. slavery[27];

ii. servitude[28] ;or

iii. forced labour[29] .

164. Excluded from this list are other forms of modern slavery captured by section 5(1)(a) of the *MSA*'s definition of modern slavery, namely the offences contained in Schedule 2 of the *MSA*.

165. These include other forms of slavery and slavery-like offences such as deceptive recruiting, debt bondage, forced marriage and trafficking.

166. Each of these types of conduct are defined distinctly and separately under the *Commonwealth Criminal Code*, so it does not necessarily follow that they fall within a broader notion of "*slavery*", "*servitude*" or "*forced labour*" (or, if they do, this is not clear from the drafting).

167. This "*victim of crime*" definition also requires the modern slavery conduct take place in the supply chain of a government or non-government agency which potentially excludes modern slavery conduct that cannot be identified as having occurred in a supply chain. This again may limit the people who may be considered a "*victim of crime*". The fact that there is no definition of "*supply chain*" under the *MSA* or

[27] which has the same meaning as in section 270.1 of the Commonwealth Criminal Code.
[28] which has the same meaning as in section 270.4 of the Commonwealth Criminal Code.
[29] which has the same meaning as in section 270.6 of the Commonwealth Criminal Code

the *VRSA* is problematic as it creates further uncertainty as to who is entitled to seek assistance under the victims support scheme.

168. On 9 October 2019, we made a submission to the Inquiry into the Modern Slavery Act 2018 and associated matters in which we raised these issues.

169. We recommend amending the definition of "*victims of crime*" and "*act of modern slavery*" in the *VRSA* to include all forms of modern slavery.

Recommendation 11:

Amend the definition of "*victim of crime*" and "*act of modern slavery*" in the *Victims Rights and Support Act* to include all forms of modern slavery. This requires:

a. The definition of "*victim of crime*" in s5(1) of the *Victims Rights and Support Act* specifically referring to sections 5(1)(a) and 5(1)(b) of the *Modern Slavery Act 2018 (NSW).*

b. The definition of "*modern slavery*" in s19A of the *Victims Rights and Support Act* be amended so an "*or*" exists between s19A(1)(a) and s19A(1)(b) rather than an "*and*" or it reads "*and/or*".

Standard of proof of "reasonable likelihood"

170. The standard of proof for determining eligibility for redress under the National Redress Scheme for Institutional Child Sexual Abuse is "*reasonable likelihood*". Section 6 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018,* defines *"reasonable likelihood*" as

> *the chance of the person being eligible is real, is not fanciful or remote and is more than merely plausible.*

171. This standard of proof was recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse in its *Redress and civil litigation report* (2015). The Royal Commission concluded that:

> *the standard of proof for a redress scheme should be lower than the common law standard of proof.*[30]

172. The Royal Commission was of the view that a lower standard of proof was appropriate, given that redress payments are not intended to provide compensation equivalent to common law damages.[31]

173. We note the highest payment available under the National Redress Scheme is $150,000.

174. A recognition payment under the *VRSA* is not compensation assessed according to common law principles. Rather, as the name indicates it is intended to be a recognition of the harm caused by the act of violence.

175. On this basis it is appropriate that the standard of proof of "*reasonable likelihood*" should also apply to the NSW Victims Support Scheme.

[30] Royal Commission into Institutional Responses to Child Sexual Abuse (2015) *Redress and civil litigation report*, p 372 (380)
[31] Ibid, p375-76 (383-384)

176. An independent review of the National Redress Scheme was conducted following the second anniversary of the Scheme. The review found:

> *…the standard of reasonable likelihood to be appropriate. However, the Scheme should review its policy guidelines and training material to ensure appropriate guidance is provided to [Independent decision makers] to avoid inconsistencies*.[32]

177. The review also raised concerns that the Scheme's Assessment Framework did not impose one consistent standard of proof and recommended:

> *The Australian Government amend the Act, the Assessment Framework, policy and guidelines to establish a 'reasonable likelihood' standard of proof for all decisions relating to an application*.[33]

178. The findings of the *Second Year Review of the National Redress Scheme* reiterate the importance not only of legislating a lower standard of proof for determining eligibility for redress, but also ensuring that decision-makers are appropriately skilled and supported to apply the threshold consistently and to assess applications in a survivor-centric and trauma-informed way.

179. These findings are also relevant in the context of a Victims Support Scheme.

Recommendation 12:

a. Legislate a standard of proof of "reasonable likelihood" in the *Victims Rights and Support Act* consistent with the National Redress Scheme for people who have experienced institutional child sexual abuse.

The form of evidence should not be prescribed

180. The requirement to provide specific forms of evidence that meet the standard of proof of balance of probabilities to support a Victims Support application is too restrictive. For example, documentary evidence requirements for a recognition payment include:

i. a police report, or a report by a Government agency or a report by a person or non-government organisation funded to provide support to victims of crime to establish act of violence, and

ii. a medical, dental or counselling report verifying injury.

181. Expanding the forms of evidence to establish act of violence to include a non-government organisation funded to provide support to victims of crime was an important improvement implemented following the 2016 statutory review. This change recognises not all victim-survivors report to police or government agencies.

182. It is not clear why documentary evidence needs to be prescribed.

183. We continue to advocate it should be sufficient that an applicant provides evidence to meet the standard of proof of "reasonable likelihood" and that the form of evidence to meet that test is not prescribed.

[32] R. Kruk (2021) *Final Report: Second Year Review of the National Redress Scheme* p 63 (64)
[33] R. Kruk (2021) *Final Report: Second Year Review of the National Redress Scheme*, recommendation 3.4

Recommendation 13:

The form of evidence to support a Victims Support application is not prescribed.

Improve access to loss of earnings payments

184. Establishing loss of earnings is difficult, particularly for unrepresented applicants.

185. Evidence is prescribed and includes documentation from the employer that outlines the time taken off work without pay and the reason for the leave.[34]

186. Some victim-survivors of violence, particularly victim-survivors of sexual and domestic violence may be reluctant to claim for economic loss for many reasons, including fear, shame and embarrassment about telling their employer the reason for their absence from work.

187. In some circumstances, the alleged perpetrator of the violence may be the employer, for example, modern slavery or a sexual assault by an employer. Prescribing the form of evidence denies some people access to the support to which they are entitled and need.

188. We recommend the *VRSA* be amended so the type of evidence required is not prescribed.

189. It is also important that casual workers are not excluded from loss of earning payments. For example, currently casual workers are ineligible for support in circumstances where they are seen to "refuse work" because they are in hospital or attending court. This should be reconsidered.

190. We also recommend Victim Services assists victim-survivors to obtain alternative forms of evidence.

Calculation of "actual loss of earnings"

191. The need for further work to be undertaken on the calculation of "actual loss of earnings" was raised in the Community Legal Centres NSW submission to the 2016 review of the *VRSA*.

192. We extract the relevant paragraphs below.

> *[69] A further issue relates to the way actual loss of earnings is calculated. The process of calculating loss of earnings is complex and convoluted and is not likely something which could be navigated by the ordinary person.*
>
> *[71] We recommend clarification and simplification of the calculation of loss of actual earnings and that the method of calculation is embedded in the victims support legislation and indexed.*
>
> *[72] We recommend further consultation on this issue.*

193. We note the *Victims Rights and Support Amendment (Statutory Amendment) Act 2018* amended Cl 7 of the *Victims Rights and Support Regulation* focussed on calculation of actual loss of earnings to allow for indexation, removing reference to:

> *the Workers Compensation Act 1987 after the first 26 weeks of incapacity within the meaning of clause 1 of Part 19H of Schedule 6 to that Act.*

[34] *Victims Rights and Support Act 2013 NSW* s 39(3)

Inserting instead

> *section 37 of the Workers Compensation Act 1987 (as in force immediately before its substitution by the Workers Compensation Legislation Amendment Act 2012) and indexed in accordance with law.*

194. However, it continues to be challenging for people to calculate actual loss of earnings, particularly victim-survivors doing this on their own. This must be addressed.

Recommendation 14:

Improve access to economic loss payments:

a. The type of evidence to support an economic loss claim should not be prescribed.

b. Victim Services actively supports victim-survivors to evidence claims of economic loss.

c. Improve access to economic loss payments for victim-survivors engaged in casual work.

d. Clarification and simplification of the calculation of loss of actual earnings and that the method of calculation is embedded in the *Victims Rights and Support Act*. Further consultation specific to this issue is required.

Improve access to the Victims Support Scheme for family victims where there has been a homicide

195. We share concerns raised by the Homicide Victims Support Group and support recommendations to improve access to the Victims Support Scheme for family victims.

Recommendation 15:

Improve access to the Victims Support Scheme for family victims:

a. Remove time limits on funeral payments to accommodate matters where the victim's body has not been found or where the victim's body has not been released for any reason.

b. Remove time limits for justice related expenses to accommodate matters that do not get resolved within the current period.

c. Allow additional justice related payments over and above the current limit to accommodate matters that go to retrial and multiple appeals.

d. Remove time limits on applications for justice related expenses for family victims. In the alternative, though less preferred, the time limit should start from the day charges are laid in relation to the homicide. These expenses should be made available for all homicide related court matters – including mentions, trials, appeals and Coronial Inquests, Mental Health Review Tribunal hearings and State Parole proceedings.

e. Improve access to Victims Support Approved Counsellors in rural areas, especially where family victims choose to have face to face counselling or may not have access to adequate online services. This will require active recruitment of counsellors by Victims Services.

f. Reinstate option for payment of support person expenses for court or other related needs.

g. Remove time limits or hours restrictions on counselling for family victims who will need to return to counselling at other stages in their life eg appeals, retrials, parole hearings.

Legislative provision for disbursements

196. When we represent women in Victims Support matters, we generally pay the costs associated with *Government Information (Public Access) Act 2009* (access to information) expenses and other evidentiary requirements such as medical reports.

197. When we seek these expenses, overwhelmingly Victims Services informs us they are only able to pay these expenses directly to the applicant and that we should recover this money from the applicant. This is an impractical and unworkable system.

198. On very rare occasions, Victims Services repays us directly for these disbursements.

199. There is no consistency in approach by Victims Services.

200. The clients with whom we work are not in a position to pay these expenses upfront. As a non-profit community legal centre, our resources are very limited and are further stretched by having to cover the costs of disbursements, particularly where we are not reimbursed.

201. This is yet another reason why Victims Services should return to collecting evidence on behalf of Victims Support applicants.

202. In the event that Victims Services does not return to obtaining evidence, and in circumstances where an applicant or their representative seeks evidence at cost from an agency, there must be an efficient, transparent and consistent system for reimbursement. Amongst solutions previously put forward by us is a consideration of whether Victims Services can be directly invoiced by agencies for access to information and related expenses.

203. Alternatively, there is a need for legislative amendment to the *VRSA* to enable Victims Services to pay third parties for *Government Information (Public Access) Act 2009* (access to information) expenses and other evidentiary requirements such as medical reports separate to financial assistance.

204. It is important these expenses are separate and in addition to financial assistance as financial assistance is for a specific purpose – immediate needs and economic loss.

205. If Victims Services does not return to obtaining evidence, the NSW Government will need to fund services to undertake this work, in addition to also funding disbursements. This is particularly important for victim-survivors of sexual violence, child sexual abuse, domestic violence, child abuse and modern slavery.

Recommendation 16:

Legislate amendments to the *Victims Rights and Support Act* to enable Victims Services to pay third parties for *Government Information (Public Access) Act 2009* (access to information) expenses and other evidentiary requirements such as medical reports separate to financial assistance.

Disability and Domestic and Family Violence Crisis payment

206. In the Community Legal Centres NSW submission to the 2016 statutory review of the *VRSA* we supported the proposal by People with Disability Australia for a new Victims Support payment called

a Disability and Domestic and Family Violence Crisis payment. We continue to support this recommendation.

207. People with Disability Australia raised the important issue of the need for the NSW Victims Support Scheme to be more responsive to the needs of victim-survivors of violence with a disability.

208. Disability support, for example, for attendant care in a refuge or for an Auslan or sign interpreter, is very expensive. The cost of such support may be a barrier to leaving situations of domestic violence.

209. While victim-survivors of violence with a disability can claim such expenses as immediate needs, this means having to choose between these expenses and for example, clothing and furniture. This results in people with a disability being treated differently to those without a disability and is an unacceptable solution.

210. People with Disability Australia (**PWDA**) have previously proposed the addition of a new victims support payment called a Disability and Domestic and Family Violence Crisis payment.

211. They propose this payment should be modelled on the Victorian Family and Domestic Violence Crisis Response Initiative, which is:

    i. A maximum of $9000 over 12 weeks;

    ii. Available for women with disability and/or women whose child/ren have disability (however, this should be guided by self-identification of disability in collaboration with a domestic and family violence service provider, in line with World Health Organisation definition);

    iii. Covers the standard array of disability supports, including personal care, Auslan or sign language interpretation, assistance providing care for children, assistance with meal preparation, shopping, and so on.

212. Given the National Disability Insurance Scheme (**NDIS**) does not provide a crisis response service the need for a Disability and Domestic and Family Violence Crisis payment is all the more important.

213. If the NDIS is unable to provide the required assistance before the end of the 3- month period, the Disability and Domestic and Family Violence Crisis payment should be available for up to an additional 3 months.

214. This payment should be a separate payment and not included in the $5,000 maximum amount for immediate needs, $30,000 maximum amount for economic loss or in the recognition payment. Victim-survivors of crime with a disability should not be required to choose between needs. Rather their varying needs should be adequately met.

215. We continue to endorse this recommendation.

216. Implementation of this recommendation would be consistent with the objects of the *Victims Rights and Support Act* and the *NSW Domestic and Family Violence Justice Strategy* to ensure the justice response is "*an accessible system*" including for people with disability.[35]

Recommendation 17:

Add a new Victims Support payment called a Disability and Domestic and Family Violence Crisis

[35] NSW Domestic Violence Justice Strategy 2013-2017, p 12 and 20.

payment.

Introduce Immediate Needs Support Package – Sexual violence

217. We congratulate Victims Services and their staff on the introduction of the Immediate Needs Support Package for victim-survivors of domestic violence.

218. In May 2020 in a letter from Community Legal Centres NSW to the Commissioner Victims Rights about proposed changes to Victims Support, community legal centres outlined why the Immediate Needs Support Package for Domestic Violence is so important to victim-survivors and in large part meets their needs, including because:

- *the act of violence is recent;*
- *there are lower evidentiary requirements than a recognition payment;*
- *the evidence is readily available, for example through a Police COPS report;*
- *if a female victim-survivor is attending Local Court for first mention relating to an apprehended domestic violence order, she will likely receive assistance from a Women's Domestic Violence Court Advocacy Service worker who can provide a pro forma support letter and submit the application; and*
- *there is a maximum payment of up to $5000.*

219. We strongly support the rolling out of the Immediate Needs Support Package for other categories of victim-survivors, including victim-survivors of sexual violence.

Recommendation 18:

Introduce Immediate Needs Support Package - Sexual violence.

Young people

220. We understand that the intention of holding recognition payments for victim-survivors under 18 years old on trust is to protect their recognition payment. However, there needs to be a discretionary process for victim-survivors under 18 years old to access their recognition payment prior to turning 18 years. This may help some young people attain economic independence. We refer to the submission of Youth Law Australia which discusses this issue in more detail.

Recommendation 19:

Introduce a discretionary process for victim-survivors under 18 years old to access their recognition payment rather than it being held on trust.

Special Benefit

221. Recipients of Victim Support payments should be able to get the full benefit of the payment without their Centrelink benefit being affected.

222. Victims Services publications about Victims Support indicate a Centrelink payment should not be affected by a Victim Support payment.

223. However, there is an exception with Special Benefit. This payment is treated differently because it is discretionary. The other income support payments are legislated entitlements if a person satisfies the criteria for eligibility.

224. The *Social Security Act* says that Special Benefit **may** be granted if the person is not eligible for any other income support payment and the person is "*unable to earn a sufficient livelihood*".[36]

225. The *Social Security Guide* states that a person has to be in financial hardship as well as unable to earn a sufficient livelihood, and that Special Benefit is not payable if the person has more than $5000 in available funds.

226. It can be difficult for people on Special Benefit to advocate they get the full benefit of the Victims Support payment without impacting Special Benefit. This process can be distressing and further compound trauma.

Recommendation 20:

Victims Services advocate to Services Australia for amendments to the *Social Security Guide* that will protect recipients of Special Benefit and allow them to get the full benefit of Victims Support (or equivalent) payments without their Special Benefit being affected. This is particularly important for victim-survivors of domestic violence, sexual violence, child abuse, child sexual abuse and modern slavery.

Expand eligibility for Victims Support to people who are victim-survivors of crime whilst incarcerated

227. Currently a person in custody (excluding those on remand) is not eligible for Victims Support if they are a victim-survivor of a crime while in custody unless there are special circumstances, or they are in prison for failure to pay a fine.

228. This can convey the message that violence against a person in custody does not matter and violence in prison is condoned.

229. All victim-survivors of crime should be able to access the support they need to help them to recover.

Recommendation 21:

Expand eligibility for Victims Support to all people who are victims of crime whilst incarcerated.

Strengthen the Charter of Victims Rights

Reporting on Charter complaints

230. Consistent with the Commissioner's role in "*promoting and overseeing the implementation of the Charter of Victims Rights*", Victims Services previously provided quarterly reports at the Victims of Crime Interagency meetings about the number of Charter of Victims Rights complaints it received, the nature of the alleged breaches, the agency involved, and the number of complaints sustained, not sustained, withdrawn or outside the Charter. The last report was provided in March 2020.

[36] *Social Security Act 1991 Cth* s 729

231. We note there is reference in the Department of Communities and Justice Annual Report 2020-21 to 41 Charter of Victims Rights complaints made with 39 resolved by 30 June 2021.[37] However, there is no detail about the nature of the complaints, agencies involved and how the matters were resolved.

232. We recommend that Victims Services resume publishing quarterly reports which note the number of Charter of Victims Rights complaints it received, the nature of the alleged breaches, the agency involved, and the number of complaints sustained, not sustained, withdrawn or outside the Charter.

Victim-survivors right to seek a review of prosecutorial decisions

233. The Queensland Women's Safety and Justice Taskforce recently considered the Queensland Charter of Victims Rights and recommended it be reviewed once an independent commissioner for victims of crime is established.

234. The Taskforce referred to the model in England and Wales where victim-survivors of crime can "*ask for a review where a decision is made not to charge a suspect, not to refer a matter to the Crown Prosecution Service, not to start a prosecution, or to stop a prosecution*".

235. The Taskforce recommended

> *The Queensland Police Service and the Office of the Director of Public Prosecutions establish a clear, robust, transparent and easily accessible internal 'right to review' process of police and prosecutorial decisions for victim-survivors of sexual violence. The internal right of review will include an ability for a victim-survivor to request that a police decision to discontinue charges, and a prosecution decision made on behalf of the Director of Public Prosecution, be reviewed by another more senior officer. The outcome of the review could be for the decision to be changed, affirmed or an alternative decision made. The outcome of an internal review process including the reasons for the decision will be clearly communicated, using plain English to the victim-survivor*.[38]

236. We support a similar recommendation being implemented in NSW.

Communication with victim-survivors

237. The *Victims Charter Act 2006 Victoria* specifically refers to "*tak[ing] into account and be[ing] responsive*" to a number of factors in communicating with victim-survivors, including:

> *(i) the victim's understanding of English; and*
>
> *(ii) whether the victim has a disability; and*
>
> (iii) *whether the victim is a child*.[39]

238. We regularly hear from women that they have not had access to an interpreter when they needed one at the time of reporting sexual, domestic and/or family violence and abuse, for example, to police or at other stages throughout the justice journey.

[37] Department of Communities and Justice, (2021) Annual Report 2020-21 Volume 1 Performance and activities report, p 92

[38] Women's Safety and Justice Taskforce (2022) *Hear Her Voice: Women and girls' experiences across the criminal justice system* – Report 2 Volume1, Queensland, recommendation 50

[39] *Victims Charter Act 2006 Victoria*, s 7B(c)

239. It would be beneficial to include similar provisions in the NSW Charter of Victims Rights to ensure, greater awareness of a victim-survivor's right to access an interpreter.

Information about trial process and role as witness

240. Section 6.6 of the Charter Victims Rights in NSW provides:

> *A victim who is a witness in the trial for the crime will be informed about the trial process and the role of the victim as a witness in the prosecution of the accused*.

241. We recommend the Charter of Victims Rights also inform a complainant of "*any special protections or alternative arrangements for giving evidence*" and informing the court of the complainant's preferences for this as outlined in the *Victims Charter Act 2006 Victoria*.[40]

Access to support and financial assistance for victim-survivors of personal violence

242. The Charter of Victims Rights includes:

> *A victim will be informed at the earliest practical opportunity, by relevant agencies and officials, of the services and remedies available to the victim*.[41]
>
> *A victim will have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim's needs.*[42]
>
> *A victim of a crime involving sexual or other serious personal violence is entitled to make a claim under the Victims Support Scheme*.[43]

243. The *Victims Rights Act 1996* which was repealed and replaced by the Charter of Victims Rights in the *VRSA* when the NSW Victims Support Scheme was introduced included similar wording in reference to compensation:

> *A victim of a crime involving sexual or other serious personal violence is entitled to make a claim under a statutory scheme for victims compensation*.

244. However, this was based on a victims compensation scheme that provided a framework for costs and disbursements to help a victim-survivor make a claim for victims compensation.

245. When the NSW Victims Support Scheme was introduced, Victims Services collected the evidence to support a victims support application for victim-survivors who requested this.

246. If Victims Services does not return to collecting the evidence, section 6.17 of the Charter of Victims Rights needs to be strengthened to ensure this right is realised.

Recommendation 22:

Strengthen the Charter of Victims Rights to:

a. Give victim-survivors a right to seek a review of prosecutorial decisions consistent with

[40] *Victims Charter Act 2006 Victoria,* s 11(2)(a)(iv) and s 11(2)(b)
[41] *Victims Rights and Support Act 2013 NSW*, s 6.2
[42] *Victims Rights and Support Act 2013 NSW*, s 6.3
[43] *Victims Rights and Support Act 2013 NSW* s 6.17

recommendation 50 of the Queensland Women's Safety and Justice Taskforce: *Hear Her Voice: Women and girls' experiences across the criminal justice system* – Report 2 Volume 1.

b. Make clear a victim-survivor's right to access an interpreter when reporting violence to police and throughout the justice journey.

c. Inform a complainant of "*any special protections or alternative arrangements for giving evidence*" and informing the court of the complainant's preferences for this as outlined in the *Victims Charter Act 2006 Victoria.*

d. Help victim-survivors realise the right to make a claim under the Victims Support Scheme.

Ensure procedural fairness

Discretion to apply for an internal review out of time

247. The strict 90-day time limit for internal review is a barrier.

248. Even though a Victims Services decision includes basic information about the right to seek a review, an applicant may not understand what this means and what they need to do. Some may not be able to obtain legal advice or only seek legal advice towards the end of the time limit. We note the Victims Support Scheme is intended to operate without the assistance of lawyers.

249. The current lack of discretion is at odds with the intended beneficial nature of the legislation for victim-survivors and is an unusual practice. There is discretion to apply out of time for external reviews.

250. We submit there should be out of time provisions applied to internal reviews.

Victims Support internal review – change to practice is a barrier to justice

251. Victims Services introduced a change in practice with respect to internal reviews in about October 2020 without consultation.

252. Prior to October 2020, applicants had 90 days from receiving the decision within which to lodge a request for internal review. Applicants could provide (or amend) grounds and lodge any further relevant evidence at a later date, including after 90 days. This practice was in place from the time of the introduction of the Victims Support Scheme in 2013.

253. We noticed a change in practice when we tried to lodge an internal review without providing grounds, electing to provide grounds at a later time, and were unable to do so.

254. We wrote to the Commissioner Victims Rights to seek clarification on the change in practice on 13 October 2020 and to advocate the practice since the introduction of the Victims Support Scheme in 2013 continue.

255. The Commissioner corresponded with Women's Legal Service NSW on this issue and indicated she believed the internal review application form and Victim Services practices were inconsistent with the legislation and would be changed accordingly. The Commissioner interpreted s49 of the *VRSA* as requiring an application for review to include the full ground/errors of the review at the time of filing which cannot be amended, and any supporting evidence must be submitted within 90 days. We note that this does not preclude Victims Services deferring a decision while it seeks further information.

256. On 11 November 2020, we wrote to the Attorney General, and then Minister for Prevention of Domestic and Sexual Violence, the Hon Mark Speakman, raising concerns about this change in practice and advised further that we did not agree with the Commissioner's legislative interpretation.

257. We note further that the NSW Civil and Administrative Tribunal does not require all evidence and/or submissions to be submitted within the timeframe for lodging an appeal of a Victims Services decision and grounds for an appeal can be amended.

258. Beyond what we believe to be an incorrect legislative interpretation, the practical application of this interpretation is that this limits the time available to an applicant to collect any additional evidence required to support an internal review application. This is particularly an issue where a decision has been made without providing procedural fairness as outlined in Jenny's and Elizabeth's case studies above.

259. We are particularly concerned for applicants who are not legally represented and traversing an application for internal review.

260. To clarify and to ensure procedural fairness and natural justice to applicants, the *VRSA* should include provisions which note:

    i. that the time limit for lodging an internal review applies only to the notification to Victims Services of the internal review request;

    ii. Victims Services must set a date on which the internal review decision will be made and that date must be at least a further 3 months from the date of filing of the internal review request and can be extended on application of the applicant and must not be unreasonably refused by Victims Services. Victims Services can set an earlier date to make an internal review decision upon the request of an applicant;

    iii. that the grounds and further evidence and submissions can be filed after 90 days and up until the internal review decision date; and

    iv. that the grounds and submissions can be amended up until the internal review decision date.

Recommendation 23:

Amend the *VRSA* to provide discretion to apply out of time for internal review for all aspects of Victims Support.

Recommendation 24:

To clarify and to ensure procedural fairness and natural justice to applicants, the *VRSA* should include provisions which note:

a. That the time limit for lodging an internal review applies only to the notification to Victims Services of the internal review request;

b. Victims Services must set a date on which the internal review decision will be made and that date must be at least a further 3 months from the date of filing of the internal review request and can be extended on application of the applicant and must not be unreasonably refused by Victims Services. Victims Services can set an earlier date to make an internal review decision upon the request of an applicant;

c. That the grounds and further evidence and submissions can be filed after 90 days and up until the internal review decision date; and

d. That the grounds and submissions can be amended up until the internal review decision date.

External review for all aspects of Victims Support

261. Currently only decisions about recognition payments can go to an external review.

262. All decisions should be externally reviewable, including decisions on claims for financial assistance.

Recommendation 25:

Amend the *VRSA* to ensure external review is available for all claims for financial assistance, including immediate needs and economic loss.

Lapsing provision

263. Following the 2016 statutory review of the *Victims Rights and Support Act,* a recommendation was made to:

> *Include a new section of the Act to empower the Commissioner to lapse an application for which the supporting evidence was not lodged within twelve months of the last correspondence, unless there is a good reason for the delay, provided that the Commissioner has first attempted to contact the applicant on at least three occasions.*[44]

264. This provision allowed at least 12 months for the collection of evidence.

265. At the time of its introduction, Victims Services was responsible for collecting evidence and if unable to locate evidence, Victims Services typically asked the applicant to provide it.

266. Since the changes implemented on 1 July 2020, the burden now falls to applicants to collect their own evidence. Further, Victims Services states in their publications about Victims Support that if supporting evidence is not provided within 12 months of lodging an application "*Your application will be closed*".

267. It is essential that section 41A is not interpreted narrowly and that there is a presumption to extend the time to provide evidence, particularly in relation to requests by applicants who are victim-survivors of domestic violence, sexual violence, child abuse, child sexual abuse, modern slavery as well as for family victims.

Recommendation 26:

Section 41A of the *VRSA* (lapsing provision) be reviewed and if it continues it not be interpreted narrowly and that there is a presumption to extend the time to provide evidence, particularly in relation to requests by applicants who are victim-survivors of sexual violence, child sexual abuse, domestic violence, child abuse, modern slavery as well as for family victims.

[44] NSW Department of Justice (2018) Statutory Review: Victims Rights and Support Act 2013, Recommendation 14, p 20(24)

Legislative requirement to note all evidence and provide reasons

268. Victims Services decisions are usually brief and appear to be of a template nature.

269. It is often not clear what evidence is considered and whether all evidence has been considered.

270. There have been several occasions where we have represented women claiming grievous bodily harm arising from a significant psychological injury who were awarded a Category D recognition payment at first instance and a Category C recognition payment either on internal review or review to the NSW Civil and Administrative Tribunal. Sometimes this has been because Victim Services did not have all relevant evidence before it prior to making a decision. On other occasions it appears they had all relevant information before it but did not properly consider the evidence.

271. Detailed reasons for the decision are often not provided.

272. A lack of clarity about what evidence has been considered and the reasons for the decision makes it difficult for victim-survivors to understand why a decision has been made. It also makes it difficult to appeal a decision (through internal or external review).

273. We note s 43(5) of the *VRSA* requires reasons for the making of a successful determination and s 43(6) of the *VRSA* requires reasons when an application is dismissed.

274. We recommend the strengthening of these provisions, legislating the requirement for Victims Services to note all evidence considered and provide reasons for their decisions outlining the evidence relied upon for a decision so victim-survivors can understand the decision and to ensure procedural fairness

275. It is also important that decisions are in plain language so they can be easily understood by victim-survivors.

Recommendation 27:

Legislate the requirement for Victims Services to note all evidence considered and provide reasons for their decisions ensuring that decision-makers provide applicants with detailed information to justify their decision in plain language, and that the reasons outline the evidence relied upon to reach the decision.

Commissioner correcting an error in a determination notice

276. Following the last statutory review, s43(7) of the *VRSA* was introduced:

> *The Commissioner may, only on the Commissioner's own initiative, amend a notice given under this section to correct an error in the notice*.[45]

277. It would be helpful if data could be published on how often this provision has been used in each financial year since its introduction.

278. We recommend that this provision should also be extended to enable the Commissioner on request to amend a notice to correct an error in the notice. There should also be steps taken to make people aware of this provision.

[45] *Victims Rights and Support Amendment (Statutory Review) Act 2018 NSW*

Victim-blaming assumptions and procedural fairness in relation to adverse inferences

279. We are also concerned that some assessors are making victim-blaming assumptions about evidence and applicants. For example, there may be many reasons why a survivor of sexual assault might say they will make a further statement to police and then not make a statement. Adverse inferences should not be drawn from this. Adverse inferences should also not be drawn because an applicant may have been under the influence of drugs or alcohol at the time of the act of violence, or because she may have had criminal convictions for past offences.

280. As a matter of procedural fairness, if Victims Services intends to draw adverse inferences on the evidence before it, Victims Services should advise the applicant or their legal representative and ask if there is further evidence to submit or submissions to be made with respect to the issue in question. In our experience, Victims Services is failing to provide procedural fairness in this regard.

Recommendation 28:

Section 43(7) of the *VRSA* be extended to enable the Commissioner on request to amend a notice to correct an error in the notice. There should also be steps taken to make people aware of this provision.

Recommendation 29:

As a matter of procedural fairness, if Victims Services intends to draw adverse inferences on the evidence before it, Victims Services should advise the applicant or their legal representative and ask if there is further evidence to submit or submissions to be made with respect to the issue in question.

Restitution

Presumption not to pursue restitution in circumstances of domestic violence, child abuse, sexual violence, child sexual abuse and modern slavery

281. One of the objectives of the *VRSA* is

> *to enable financial support paid and recognition payments made under the Scheme to be recovered from persons found guilty of the crimes giving rise to the payments.*[46]

282. However, this objective must also be understood in the context of other objectives including the need to "*recognise and promote the rights of victims of crime*"[47] and "*provision of support for victims of acts of violence and acts of modern slavery.*"[48] Where there are competing objectives, the safety of the victim-survivor must be prioritised.

283. Many victim-survivors of domestic violence, child abuse, sexual violence, child sexual abuse and modern slavery identify restitution as a major barrier to accessing the Victims Support Scheme. Victim-survivors express fear that the perpetrator will be alerted to their application for support and that this, in combination with a restitution order, leads to risks to the safety of the victim-survivor. It is not uncommon that these safety concerns mean a victim-survivor does not ultimately apply for the support they need and are entitled to.

[46] *Victims Rights and Support Act 2013 NSW* s 57
[47] *Victims Rights and Support Act 2013 NSW* s 4
[48] *Victims Rights and Support Act 2013 NSW* s 17

284. Safety concerns should not be a barrier to accessing Victims Support.

285. Further, requiring the victim-survivor to prove circumstances to substantiate the waiver of restitution can compound the trauma of the victim-survivor.

286. Since the introduction of changes that require bank details to be provided at the time of making a Victims Support application, Victims Support payments are generally paid immediately upon the decision to make an award. This means that some victim-survivors are not given an opportunity to raise their concerns about restitution before accepting a payment.

287. A safer and more trauma informed approach is a legislative presumption not to pursue restitution in circumstances of sexual violence, child sexual abuse, domestic violence, child abuse and modern slavery unless the victim-survivor elects Victims Services pursues restitution.

288. This prioritises safety and a victim-survivor's agency, important features of a trauma informed, survivor centric approach.

Recommendation 30:

A legislative presumption not to pursue restitution in circumstances of sexual violence, child sexual abuse, domestic violence, child abuse and modern slavery unless the victim-survivor elects Victims Services pursues restitution.

Prohibit use of financial assistance payments to service debt

289. Immediate Needs financial assistance payments are intended to help victim-survivors with urgent immediate needs for their safety and recovery.

290. Financial assistance for economic loss also assists with recovery.

291. Financial assistance must not be used to offset or pay off any kind of debt, including an order of restitution.

292. A recognition payment is made to acknowledge a traumatic and violent experience. Recognition payments must not be used to offset or pay off any kind of debt, including an order of restitution except where a victim-survivor requests it.

Recommendation 31:

a. Prohibit use of Victims Support financial assistance payments to service debts, including an order of restitution.

b. Prohibit use of recognition payments to offset or pay off any kind of debt, including an order of restitution except where a victim-survivor requests it.

Notice of an Order for restitution

293. For more than a decade WLS NSW has provided culturally safe, specialised, family and civil law advice, casework and education services to criminalised women across NSW.

294. We work in partnership with Wirringa Baiya Aboriginal Women's Legal Centre and the Western Sydney Community Legal Centre to provide the Legal Education and Advice in Prison (**LEAP**) for women, which is a family and civil law program in the four Sydney women's correctional centres. WLS NSW is also available as a free phone call for advice in other correctional centres around the state. LEAP prioritises access for First Nations women.

295. As previously mentioned, the majority of women in custody have complex histories of sexual and physical violence starting in childhood.

296. We are concerned that the current requirement for Victims Services to inform a person of an order for restitution does not provide sufficient safeguards to ensure the person actually receives notice of the provisional order.

297. Section 61(1) of the *Victims Rights and Support Act* provides:

> *The Commissioner must serve notice of an order for restitution personally or by post on the person against whom it was made*.

298. As a matter of procedural fairness, Victims Services must ensure the respondent to the order for restitution in fact receives it.

299. Criminalised women with whom we work are often unaware they have an order for restitution until they receive notice of the successful outcome of their own Victims Support application. It is at that time they are informed all or at least part of their Victims Support recognition payment will be used to pay the order for restitution.

300. Whilst not limited to clients in prison, it most notably impacts our incarcerated clients.

301. Several women we have assisted who are in custody have had their order for restitution posted to them at an incorrect Correctional Centre. This means they do not receive the provisional order for restitution and do not have the opportunity to challenge it, including seeking a full or partial waiver. The time to challenge is 28 days with discretion up to 90 days. Once the order for restitution is confirmed, the current practice is to transfer the debt to Revenue NSW. Often women in custody are not aware of the order for restitution until months and sometimes years after the order is made.

302. It is also important that if a person makes an application to Victims Services for a recognition payment and they have an existing order for restitution, Victims Services must notify them about the debt at the time of them lodging the application. This is important to provide the opportunity to challenge the order for restitution and/or seek to access Work Development Order programs to pay off the debt.

303. Victims Services should also advise as to whether that debt has been transferred to Revenue NSW and provide information about Work Development Order programs available, so the applicant has the opportunity to reduce any debts by that scheme.

304. It is also important that the person is able to quickly access Work Development Order programs, including if they are in custody. Women in custody often experience delays in accessing Work Development Order programs for the purposes of paying an order of restitution.

Recommendation 32:

If a person makes an application to Victims Services for a recognition payment and they have an existing order for restitution (debt), Victims Services must notify them about this at the time of them lodging the application. Victims Services should also advise as to whether that debt has been transferred to Revenue NSW and provide information about Work Development Order programs available, so the applicant has the opportunity to reduce any debts by that scheme.

Uniformity of processes within Victims Services and Revenue NSW about debt collection

305. It is important that there is transparency about the different processes undertaken by Victims Services and Revenue NSW in relation to debt collection.

306. It is also important that there is a consistent approach to the waiving or reducing of debt.

307. Both Victims Services and Revenue NSW should provide a list of Work Development Order programs available in the area where the person lives when advising about enforcement/debt.

Recommendation 33:

Uniformity of processes within Victims Services and Revenue NSW about debt collection.

Recommendation 34:

Victims Services and Revenue NSW provide a list of Work Development Order programs available in the area where the person lives when advising about enforcement / debt.

Independent Commissioner Victims Rights

308. Since the role of Commissioner Victims Rights was established in 2013 WLS NSW and other NGOs have consistently advocated the position be independent. As stated in the Open Letter to the Attorney General dated 29 November 2021:

> *To be otherwise, places the person in the role in a very difficult position due to competing interests. The role of Executive Director Victims Services involves budgetary oversight in the delivery of services. As outlined above, in recent times, there have been significant cuts or limits on access to support for victim-survivors provided by Victims Services. In our collective experience, this has impacted negatively upon the victim-survivors with whom we work. Often these decisions are being made without any consultation with the members of the [Victims of Crime Interagency]. Victim-survivors need an effective advocate. The current functions of the Commissioner do not make it clear that this is the primary role of the Commissioner. This requires a position that is independent of the Department of Communities and Justice. We need a fully funded and independent Commissioner.*

309. There is little transparency in the current role of NSW Commissioner Victims Rights. In other jurisdictions in Australia annual reports are published outlining in detail the work the Victims of Crime Commissioner has engaged in, consultations and inquiries undertaken by the Victims of Crime Commissioner, including inquiries into systemic issues impacting on victim-survivors and other

systemic advocacy undertaken.[49] In other jurisdictions Victims of Crime Commissioners are active in the media [50] with one Commissioner's report noting their role in the media to "*promote the voices of victims and represent their interests and concerns in public discourse*".[51]

310. As outlined above, we are concerned by the lack of transparency and accountability in the work of Victims Services and the Commissioner. We and many others have expressed strong concern about the failure to publish submissions to the review of Victims Services changes implemented since 1 July 2020 and the failure to publish a final report despite a commitment to openness about any findings. We are also concerned by the removal of previous reports from the Victims Services website, including Victims Advisory Board reports, Victims Services data profiles and reports such as the 2015 *Evaluation of the counselling in prison trial.* We are also concerned by the failure to publish communiques following meetings of the Victims Advisory Board and minutes to the Victims of Crime Interagency meetings and the Commissioner's absence from Victims of Crime Interagency meetings over the past two years.

311. We continue to call for the NSW Commissioner Victims Rights to be an independent role similar to what was recently recommended in Queensland.

312. The Queensland Women's and Safety Justice Taskforce recently recommended the appointment of an independent Commissioner Victims Rights.

313. It recommended the Commissioner's functions include:

- *identifying systemic trends and issues including in relation to policy, legislation, practice or procedure and potential responses to address these issues*
- *assisting victims in their dealings with government agencies across the criminal justice system, including through oversight of how agencies respond to complaints*
- *monitoring and reviewing the effect of the law, policy and practice that impact victims of crime*
- *other functions recommended throughout this report.*

The commissioner will be authorised to exercise the rights of victims, upon their request and with consent, including in relation to their interactions with police, other government agencies and the courts (similar to the South Australian model).[52]

314. The Taskforce specifically noted

> *A victims' commissioner is needed to take an impartial role in relation to complaints about services provided to victims. It would therefore be appropriate that the functions of [Victims Assist Queensland] related to deciding applications for victims' assistance should remain separate to the victims' commissioner.*[53]

[49] For example, *Victims of Crime Commissioner Annual Report 2019-20*, Victoria, p 7(4); *Victims of Crime Commissioner Annual Report 2020-21*, Victoria, p 6(4), 14(8), 38-39(20)
[50] For example, ACT Human Rights Commission (2020) *Annual Report 2019-20*, p 94(95); *Victims of Crime Commissioner Annual Report 2019-20*,Victoria, p18(10);); *Victims of Crime Commissioner Annual Report 2020-21*, Victoria, p 16(9)
[51] *Victims of Crime Commissioner Annual Report 2020-21*, Victoria, p 15(8)
[52] Women's Safety and Justice Taskforce (2022) *Hear Her Voice: Women and girls' experiences across the criminal justice system* – Report 2 Volume1, Queensland, recommendation 18
[53] Ibid, p 141(151)

315. In considering if the work could be done by an existing body the Taskforce concluded:

> *that a victims' commissioner would need to establish an independent public profile to build confidence in its impartiality and that the establishment of a new body would be preferable*.[54]

Recommendation 35:

Establish an independent NSW Commissioner Victims Rights.

Recommendation 36:

The independent Commissioner Victims Rights and Victims Services regularly consult organisations to ensure cultural safety and to remove barriers to accessing Victims Support with the independent Commissioner Victims Rights publishing an annual report which includes a list of stakeholder meetings the Commissioner has attended, consultations and inquiries undertaken by the Commissioner, a summary of reports published, and media work undertaken by the Commissioner.

316. In conclusion, we reiterate again the importance of a victims support scheme that is transparent, accountable, consistent, beneficial, accessible, meaningful, including by way of its payments, victim-survivor centric, trauma informed, culturally safe, disability aware and LGBTIQA+ aware in order to best meet the needs of victim-survivors in NSW.

317. We look forward to further engagement with the review team to explore and discuss ways to further improve the Victims Support Scheme in NSW.

[54] Ibid, p 139(149)