

29 July 2021

Director, Criminal Law Specialist
Policy, Reform and Legislative Branch
NSW Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

By email only: Alexandra.Kerr@justice.nsw.gov.au

Dear Mr Karpin,

Review of sentencing practices for historical offences

1. Rape & Domestic Violence Services Australia ("RDVSA") welcomes the invitation to provide a response to the discussion paper, *Review of sentencing practices for historical offences*. We appreciate the extension of time in which to submit a response.
2. RDVSA is a non-government organisation that provides a range of trauma specialised counselling services for people who have experienced sexual, domestic or family violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; a counselling service and support for people experiencing domestic and family violence across Australia and the LGBTIQ+ violence counselling service.
3. In the 2019/20 financial year, RDVSA provided 27,793 occasions of service to 10,218 clients nationally. 88% of callers identified as female, and 90% identified as someone who had experienced sexual, domestic and/or family violence.
4. The discussion paper seeks comment on whether, and if so how, s.25AA of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("CSP Act") should be extended to encompass all offences. Because of our experience and expertise, the focus of our submission will be on the impact of any law reform on people who have experienced

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Counselling Services

24/7 NSW Rape Crisis:	1800 424 017
Domestic Violence Impact Line:	1800 943 539
Sexual Assault Counselling Australia:	1800 211 028
LGBTIQ+ Violence Service:	1800 497 212
rape-dvservices.org.au	

sexual assault and/or domestic and family violence. Therefore, we will only be considering the extension of s.25AA in the context of offences relating to sexual assault and/or domestic and family violence.

5. In summary, RDVSA broadly supports the proposal to extend s.25AA so long as rigorous monitoring and evaluation is undertaken to ensure that vulnerable groups are protected from harsher sentencing.
6. Section 25AA was introduced in response to Recommendation 76 of the Royal Commission into Institutional Responses to Child Sexual Abuse (“the Royal Commission”). In coming to their recommendation, the Royal Commission noted that:
 - a. Victim-survivors told them of the confusion and anger they felt when an offender received a sentence that is very light compared with current standards
 - b. It is now understood that delay in reporting offences is likely to be a feature of the offending itself. It can be difficult for victim-survivors to accept that an offender should receive a lighter sentence due only to the passage of time between the offending and sentence
 - c. It was clear from the sentencing decisions in cases involving historical offending in New South Wales that sentencing judges are determining sentences that are not as severe as would be appropriate under contemporary community standards.¹
7. The Royal Commission also identified several concerns with applying historical sentencing patterns and practices which are summarised in the discussion paper.² One of these was that historical sentencing may not align with community standards.
8. It seems clear that, among other things, the impact of outdated and incorrect sentencing practices upon victim-survivors and the issue of delayed reporting of offences were fundamental considerations for the Royal Commission in coming to its recommendation. In our experience, both of these issues are also relevant to other offences involving sexual assault and/or domestic and family violence. We will now deal with each of those issues in turn.
9. Sentencing patterns and practices are continually adapting to take into account prevailing community standards and enhanced understandings of the nature and impact of offending. RDVSA considers that improvements can still be made to sentencing standards and practices in relation to sexual assault and/or domestic and family violence. In our submission to the Sentencing Council’s review on homicide for

¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report – Parts VII to X and Appendices* (2017), 318-319 <[Criminal Justice Report - Parts VII to X and appendices \(childabuseroyalcommission.gov.au\)](https://www.childabuseroyalcommission.gov.au)>.

² Department of Communities and Justice, *Review of Sentencing Practices for Historical Offences: Discussion Paper* (2021) 4 [4.1].

example, we expressed our concern that many Judicial Officers in NSW were prescribing to views not based on current evidence regarding domestic and/or family violence.³ We recommended that Judicial Officers should receive comprehensive and ongoing training in relation to the dynamics, complexities and impacts of domestic and family violence, including as to the many different forms of abuse and violence.⁴

10. RDVSA considers that an extension of s. 25AA would help ensure that sentencing patterns and practices utilise (as much as possible) current evidence and more accurately reflect community standards. We consider this to be vital in ensuring our justice system adequately protects and recognises victim-survivors.
11. Delays in reporting are common to offences involving sexual assault and/or domestic violence. Tidmarsh and Hamilton (2020) write in relation to sexual assault that

“There continues to be a misconception that ‘real victims’ would report rape or sexual assault immediately, and those who delay disclosure are likely to be lying or falsely recalling rapes or sexual assaults. Empirical evidence, however, shows most victims who experience rape or sexual assault delay disclosing and reporting, or never disclose their experiences. Indeed, 83 percent of Australian women did not report their most recent incident of sexual assault to the police (Australian Bureau of Statistics (ABS) 2013; Cox 2016), and only six in 10 women who experienced sexual assault sought advice or help from others (ABS 2013)”⁵

12. Tidmarsh and Hamilton explain that common reasons for failing to report include:
 - a. confusion, guilt, or shock about the assault
 - b. fear of the perpetrator
 - c. fear of the consequences of reporting
 - d. fear that they will not be believed, and
 - e. rape myth acceptance, where victims do not recognise they have experienced sexual assault or blame themselves for what has occurred.⁶
13. RDVSA considers that an extension of s.25AA would lessen the negative impact of delayed reporting on justice outcomes for victim-survivors.
14. Despite being broadly supportive, we do hold concerns that if s.25AA is extended, harsher penalties could have an unintended impact on vulnerable groups such as women who are charged with criminal offences, in circumstances where they were the primary victim-survivor of domestic and/or family violence. We recognise that harsher

³ Rape & Domestic Violence Services Australia, *Final Submission on the NSW Sentencing Council’s Review of Sentencing for murder and manslaughter* (January 2020) <[MU15.pdf \(nsw.gov.au\)](#)>, 2 [6].

⁴ *Ibid* 3 [9].

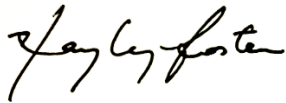
⁵ Patrick Tidmarsh and Gemma Hamilton, ‘Misconceptions of sexual crimes against adult victims: Barriers to justice’ (2020) 611 *Trends and Issues in Crime and Criminal Justice*, 3.

⁶ *Ibid*.

sentencing can disproportionately impact vulnerable groups such as Aboriginal and Torres Strait Islander people. Therefore, we consider that if any changes are made, there should be a mechanism for rigorous and ongoing monitoring and evaluation of those changes.

15. Thank you again for the opportunity to make a submission. If you have any questions or would like to discuss further, please do not hesitate to contact Laura Henschke on 02 8585 0333 or legal@rape-dvservices.org.au.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Hayley Foster', written in a cursive style.

Hayley Foster
Chief Executive Officer
Rape & Domestic Violence Services Australia