Women and girls' experiences across the criminal justice system as victim-survivors of sexual violence.

Full Stop Australia submission to the Women's Safety and Justice Taskforce Discussion Paper 3
April 2022

Full Stop Australia acknowledges the traditional owners of country throughout Australia, and their continuing connection to land, sea and community. We pay our respects to them and their cultures, and to elders both past and present.

Introduction

Full Stop Australia is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic and family violence since 1971. We offer expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic or family violence, and specialist help for their supporters and those experiencing vicarious trauma. We also provide best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector. Finally, FSA advocates with governments, the media and the community to prevent and put a full stop to sexual, domestic and family violence.

In preparing this submission, FSA consulted with its clinical staff, who are highly qualified counsellors and social workers who specialise in trauma-informed practice. FSA also consulted with survivors of sexual violence. In order to do this, FSA has launched the National Survivor Advocate Program to ensure that law, policy and practice is survivor-led across the country. The central element of the program will be the establishment of a National Advisory Group of diverse people with lived experiences of violence and abuse in a range of settings who are passionate about advocating for systemic reform. As the National Advisory Group is still in the process of being formed, we have been consulting with survivor advocates who have been registered with our program by way of survey and also informally in one-to-one conversations. However, we intend going forward to consult with the Group in preparing future submissions and also with victim-survivors who engage with us outside the Group structure.

FSA, as a national service, aims through its advocacy work to support our colleagues in each State and Territory who are working tirelessly on the ground to improve the lives of victim-survivors of sexual, domestic and family violence. We aim to use our experience of law reform in different jurisdictions to advocate for consistent approaches to sexual violence nationally. In regards to this consultation, FSA has particular experience of some of the law reform approaches suggested in this paper as we operate the Sexual Violence Helplne in NSW (previously known as the Rape Crisis Line). In preparing this submission, we were very grateful to have had the benefit of reviewing the submissions of our colleagues the Queensland Sexual Assault Network (QSAN) and the Women's Legal Service Queensland (WLSQ). We strongly encourage the taskforce to heed their calls. We also consulted informally with sexual assault services and other important stakeholders on the Gold Coast while attending the stakeholder roundtable.

What we know from these conversations and our research, is that the Queensland criminal justice system is failing victim-survivors of sexual violence. The system is in urgent need of comprehensive, systematic and whole-of-government reform to ensure that:

- sexual assault services are universally available and properly funded to provide the supports that victim-survivors need not only during a moment of crisis, but also to recover from the complex trauma they experience as a result of sexual violence;

- comprehensive law reform is required to improve complainants' experiences of the criminal justice system including (but not limited to) the laws of consent, admissibility of evidence and procedural laws;
- substantial funding to develop and implement (in consultation with experts in the field and victim-survivors) training in responding to sexual violence, trauma-informed and cultural awareness training for every institution in society that responds to sexual violence whether it is the criminal justice system, health system or education system.
- substantial funding to develop and implement whole-of-community education and awareness raising of sexual violence, consent and coercive control in the context of sexual, domestic and family violence.

Unfortunately, Queensland is lagging behind other jurisdictions. As the horrific murder of Hannah Clarke and her children Aaliyah, Liana and Trey has shown us, we cannot afford to wait a moment longer. Every day that steps are not taken to change the system, is another day that more innocent lives are lost or forever ruined by the scourge of sexual, domestic and family violence.

Enough is enough.

We thank you for the opportunity to make a submission. This submission was prepared by Laura Henschke, Taran Buckby, Joanna Griffiths, and Leili Friedlander. We would be very happy to provide any further feedback to the Taskforce on any aspect of this submission. You can contact us at any time if you have any further questions at info@fullstop.org.au.

Cross-cutting issues

Whilst crisis services exist for people impacted by sexual violence in Queensland, there is an alarming lack of services available to support people to recover from the violence and abuse they have experienced. We understand sexual violence services are not only critically underfunded, but not universally available, especially in rural and remote areas. QSAN for example, have said in their submission

> Although the terms of reference of the Taskforce are to consider policy and legislative responses and not funding issues, the reality is that community discussion about sexual violence, prompted by the work of the Taskforce and similar work, heightens awareness of sexual violence and in turn will promote women and girls and other survivors to come forward to services to seek assistance. This is of course a positive by product of this work and the publicity surrounding it.
>
> However, for QSAN services who have not had any substantive increase in core funding since their inception in 1996 (26 years ago), this is a concerning prospect. There are huge swathes of regional Queensland without a specialist sexual violence response, including Mt Isa and "blackspots" associated with service delivery, in other areas. In certain regions, there are waiting periods of up to 12 months to obtain sexual violence counselling and time limitations on those who are helped

because of funding pressures, despite sexual violence responses often requiring long term therapeutic work.

QSAN is more than ready to assist the Taskforce and government in developing best practice responses to sexual violence in Queensland including our ideas on improving systemic issues, but it is within this 'funding context' and facing these 'funding pressures' that we provide this advice.

We strongly endorse their recommendations that:

- *Specialised sexual violence services are provided an immediate and urgent increase in long term core funding to ensure no women, men and children are turned away because of funding constraints.*
- *That in the longer term, a full analysis is undertaken of sexual violence specialist services to determine current and future need, current gaps, to properly fund prevention work and respond accordingly to the recommendations. That this analysis appropriately considers:*
    - *The longer term needs of therapeutic intervention for sexual violence victim-survivors,*
    - *The profound impact on their mental health and welfare over a life-course,*
    - *The different matters and responses required to different clients including adult survivors of child sexual abuse, child sexual abuse (victims and children displaying problematic sexualised behaviours), intimate partner sexual violence, victims of inter-generational abuse within their families, institutional sexual abuse (including in religious contexts), sexual abuse of people with disabilities in group homes or by other people, aged care issues and sexual harassment in the workplace.*
- *That the State Governments continue funding and contribute to the expansion of the funding for a Queensland state peak body for sexual violence services to ensure that frontline experience is appropriately informing policy, service delivery and legislative development at a state and federal level and to provide support to services.*

Notwithstanding that sexual violence services are drastically underfunded, another fundamental issue that is alluded to by our colleagues at QSAN, is that sexual violence service systems are geared towards providing an emergency crisis response and there are significant gaps in trauma specialist counselling and care navigation services for people impacted by violence and abuse, especially children and young people *throughout their life course*.

While mainstream mental health services exist for people impacted by complex trauma, treatment is fragmented, siloed, and in most cases focuses on one incident rather than a "whole of life"

response to complex and intergenerational trauma.[1] Furthermore, we know that due to a lack of funding, there is also a lack of coordination of trauma management and recovery services, and no state or national body to support workforce development and specialisation.

As a result of this critical gap in the service system, people impacted by sexual violence are left to navigate complex health systems on their own, often falling between the gaps, and suffering from the physical, psychological, and relational impacts of unaddressed trauma. Common flow on effects of this include vulnerability to further victimisation from sexual violence, disengagement from social, educational, and vocational activities, and intergenerational trauma transfer.

These service gaps are not unique to Queensland. FSA has identified that there are service gaps across the country. The taskforce's review presents a unique opportunity for the Queensland Government to exercise leadership and commit to a significant investment in trauma recovery for victim-survivors of sexual violence in Queensland as per QSAN's reccomendations.

The impacts of trauma on victim-survivors of sexual violence

The impacts of sexual violence are far-reaching for the individual and the community. Impacts for individuals include relationship breakdown, financial and housing insecurity, mental and physical injuries and ill health, substance abuse issues, complex trauma, and disrupted social and economic engagement. This includes injuries and homicide and poor mental health.

For children, the impacts of being exposed to sexual violence are magnified. Some common trauma impacts include the development of mental health issues, sleep disturbances, learning difficulties and behavioural problems. There is also evidence that living with family, domestic and sexual violence makes children more vulnerable to other forms of child abuse and neglect, including being sexually assaulted and/or using problematic and sexually harmful behaviours against other children.

More broadly, sexual, domestic and family violence impacts upon the community, placing greater strain on families, workplaces, and social, health and justice service systems. Intimate partner violence is estimated to cost the Australian economy over $22 billion each year.[2]

Complex trauma results from multiple, repeated forms of interpersonal violence (including sexual violence) causing traumatic health problems and psychosocial challenges. Complex trauma is commonly associated with a wide range of psychiatric diagnoses and misdiagnoses, functional impairments, and an array of educational, vocational, relational and other health problems.[3] Depressive (36%) and anxiety (33%) disorders and suicide and self-harm (20%) are among the top

[1] ANROWS, *Constructions of Complex Trauma and Implications for Women's Wellbeing and Safety from Violence: Key FIndings and Future Directions (Research to Policy and Practice, May 2020) 8.*
[2] KPMG, *The Cost of Violence Against Women and their Children in Australia* (Report, 2016) 4.
[3] ANROWS *(n 1) 7.*

ten leading causes of the overall burden in women aged 18-44.[4] A large part of this is attributed to the complex trauma impacts of intimate partner violence. Moreover, women who have experienced sexual violence in childhood are three times more likely to experience violence by a partner compared to those not abused as children.[5] The compounding effect of intergenerational trauma in this regard often remains unaddressed and overlooked.[6]

Short and long term mental health consequences associated with complex trauma can persist into the person's life course after the incident and after the violence has stopped.[7] People impacted by complex trauma are often in frequent contact with police and other crisis services and are regularly hospitalised as a result of additional experiences of family, domestic and sexual violence and the associated trauma impacts.[8] The damaging, pervasive and life-long impacts of sexual violence for victim-survivors encompass a broad spectrum of responses and symptoms and whilst healing is possible for everyone, the dynamics of post-assault support play a significant factor influencing the wellbeing, healing and recovery of sexual assault survivors.[9]

As responses to sexual violence have evolved and the nature and complexities of this type of violence has become better understood, research and practitioners have identified the prevalence of trauma and the critical need for services that come in contact with sexual assault survivors to adopt a trauma-informed model of care. The Queensland Centre for Domestic and Family Violence Research reinforces the importance of incorporating trauma-informed care organisation-wide and asking victims how they can be supported towards their healing and recovery goals.[10]

Intersectionality

An important fundamental consideration when recognising and responding to trauma is an understanding that each victim-survivor is unique, has different needs and wants, and that many are subject to compounding forms of disadvantage and structural inequality. FSA strongly supports an intersectional framework which acknowledges the complex, intersecting needs and experiences of victims of sexual violence in the criminal justice system.

This includes not only recognizing (but also prioritizing in any policy responses) the needs of victim-survivors who are:

- Under 18 years of age;
- Elderly or living in aged care;

[4] Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story* (Report, 2019).
[5] Ibid.
[6] ANROWS, *Violence Against Women and Mental Health* (Research Synthesis, April 2020).
[7] Ibid.
[8] Ibid.
[9] Queensland Centre for Domestic and Family Violence Research, Trauma-informed Rresponses to Sexual Assault (Report, May 2020) 1.
[10] Ibid) 4.

- Identify as living with a disability;
- Identify as Aboriginal and/or Torres Strait Islander;
- Identify as a member of the Culturally and Linguistically Diverse (CALD) community;
- Identify within the LGBTIQA+ community;
- Living on a student, migrant or refugee visa; and/or
- Currently experiencing homelessness.

All these factors significantly influence the experience and needs of victim-survivors navigating the criminal justice system.

Whilst being a victim of sexual assault is not unique to women and girls, they do however, make up most victim-survivors.[11] Further reports reveal that:

- Aboriginal and Torres Strait Islander women and girls are estimated to be at least three times more likely to experience sexual assault than non-Indigenous women in Australia.[12]
- A higher proportion of women aged 18 and with a disability or a long-term health condition experience sexual assault than those without a disability or a long-term health condition.[13]
- Migrant and refugee women are more likely to be subjected to sexual violence when compared to Australian-born women.[14]
- Transgender women of colour from CALD communities, as well as women and girls who identify as lesbian, bisexual or queer, experience additional prejudice and discrimination due to the intersection of gender, sexuality, social class, race and religion. Creating higher rates of experiences of violence and impacting how these women and girls navigate and access the criminal justice system.[15]

Therefore, as is evident above, given the higher proportion and intersecting barriers of women and girls from diverse and marginalised communities, the specific needs and unique experiences of such communities need to be carefully considered and catered for when seeking to support victim-survivors of sexual assault.

The importance of training in responding to trauma.

When considering ways in which trauma can be better recognised and responded to at each point across the criminal justice system, FSA strongly urges for a commitment to orientation and training, ongoing reflective practice, alongside accountability and a comprehensive review of behaviours and institutional practices. Literature and research engaging with institutional and

[11] Australian Bureau of Statistics (2016) *Personal Safety Survey.*
[12] Ibid.
[13] Australian Institute of Health and Welfare, *Family Domestic and Sexual Violence in Australia* (2018).
[14] Marie Segrave, Rebecca Wickes and Chloe Keel (2021) *Migrant and refugee women in Australia: the safety and security study* Monash University (Report).
[15] Australia's National Research Organisation for Women's Safety, *Crossing the line: Lived experience of sexual violence among trans women of colour from culturally and linguistically diverse (CALD) backgrounds in Australia* (2020).

behavioural change shows that much is needed to successfully achieve system-wide reform to better practices and change engrained culture.[16]

In this regard, we note and endorse the recommendations of our colleagues at QSAN and WLSQ with regards to specific training needs in the Queensland context.

FSA recommends *significant training and awareness measures for all relevant law enforcement, healthcare, and justice system officials to ensure that sexual violence is recognised and responded to in an intersectional and trauma-informed way*.

Such training and reform could involve:

- All relevant whole-of-system bodies undergoing trauma-informed and culturally specific training regarding sexual violence, informed and affirmative consent, sexual assault misconceptions or rape-myths.
- Committing to a trauma-informed model when supporting victims through the process of reporting and the criminal justice system. We note that the Queensland Police Service (**QPS**) has already committed to such a model which is a great first step, but more will need to be done to ensure that the the QPS operates in a trauma-informed way (as per our discussion on reporting, investing and charging sexual offences below). Such a commitment could involve actions such as providing consistency of case management, allowing for home visits to do police reports and interviews or providing victims with a social or support worker who can be present during the process.
- Better communication and signposting of forensic medial examinations and procedures so victim-survivors know what to expect of the process and development of protocols around the legal use of photographic and video evidence of sexual assault to better protect victim-survivors.
- Better communication of process and law in individualised language to ensure victim-survivors are making informed decisions and separation for magistrates hearing so victim-survivors do not encounter the accused.

When survivor-advocates from FSA's National Survivor Advocate Program were asked on how reporting their experience of sexual violence to Queensland police could be improved, two advocates offered the following insight:

"... more training in Trauma Informed Care for QPS and DPP staff. Hold space to express self. QPS staff and DPP control the conversation which for a lot of survivors of trauma, where power was taken from them, reporting this crime is regaining control. QPS need to be aware of this and allow space"

[16] Anthony Murphy and Benjamin Hine, 'Investigating the demographic and attitudinal predictors of rape myth acceptance in U.K. Police officers: developing an evidence base for training and professional development', (2019) 25(2) *Psychology, Crime & Law* 69-89.

"The ability to do a police report somewhere other than the police statement, i.e., in comfort of own home or in a comfortable space/room at the hospital."

When asked how prosecuting authorities, including Officer of the Director of Public Prosecutions could be improved for victims, whilst the major themes in the feedback involved giving back power to the complainant throughout the process and increased support, one survivor-advocate also reported that, ***"... I had to see my attacker again for the first time waiting to go into the magistrates hearing, there wasn't a separate area delegated. I also had to request a screen up so he wasn't looking at me - this should be a given, not a request... the Court process was traumatic. Being bounced from lawyer to lawyer at DPP although helpful, it would have been better to have support throughout from one lawyer."***

This speaks to the importance of judicial officers and courts staff allowing for greater flexibility to allow for trauma-informed practice, and improved communication and support for complainants throughout the criminal justice process.

When asked how the court and judicial processes could be improved for victim-survivors, survivor-advocates offered the following

"A delegated area for the victim and support people to sit/wait in, away from the public area and the attacker who can openly linger around."

"Support animals should be allowed to support in court if friends are unable to due to being witnesses in the case"

"I know it was necessary but having graphic photos and videos shown to all involved in the case, including lawyers, jury etc. of my private parts was extremely traumatising."

Specific measures which could be introduced to make the court system more trauma informed are discussed in more detail below.

Protecting and Promoting Human Rights

We are particularly concerned about QSAN's observation in their submission that

> An increasingly problematic issue is that the Human Rights Act (HRA) only specifically recognises the rights of a "person charged in a criminal process" in Queensland and does not specifically recognise the human rights of the victim of the offence, including the human rights of children who are victims. The lack of specific reference to victims means for all intent and purposes in Queensland, the rights of the defendant, in practice are elevated above other rights in the criminal process.

FSA supports and endorses the recommendations of its colleagues QSAN and WLSQ in relation to urgent steps that must be taken to immediately strengthen human rights protections for survivors of sexual violence in Queensland.

Community understanding of sexual offending

In recent years, there has been a rise in community-led movements opposing norms of gender inequality and violence which drive sexual harassment, sexual assault and child sexual abuse.[17] This renewed focus in Australia on law reform in relation to sexual offences resulted in the Queensland Law Reform Commission (QLRC) reviewing and publishing their recent report on the state's sexual consent laws.[18] Despite significant lobbying by many calling for comprehensive changes,[19] the five recommendations from the QLRC report failed to substantially change or strengthen the existing law, and do not properly address the problems of rape myths and community attitudes which prompted the review in the first place. In our respectful submission, the outcomes of this report were disappointing and will be discussed in further detail below.

In our experience (and contrary to what the QLRC report found), rape myths persist strongly not only in the criminal justice process but in every institution and sector of the wider community. Rape myths are understood as the prejudicial, stereotyped or false beliefs about rape, rape victims and rapists.[20] These myths extend to prescriptive beliefs about the scope, causes, context and consequences of sexual aggression which serve to deny, downplay or justify sexually aggressive behaviour of (usually) men against (usually) women and girls.[21] These societal and community attitudes impact heavily on a survivor's experience of the criminal justice system in every fundamental respect whether it is through having to ensure a significant and particularly traumatising aspects of the trial (such as cross examination) or at the very beginning of a matter when attending a police station to report a sexual assault. In our view,, until the prevalence of rape myths are acknowledged not only by key actors in the criminal justice system but in the machinery of government, the criminal justice system will continue to fail survivors as it is currently doing.

The most prominent and pervasive examples of rape myths (which we see commonly occurring in criminal trials) reflect community beliefs that if women do certain things (such as wear certain clothing or answer a certain question) they are asking to be raped, ultimately resulting in societal

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[17] Rachael Burgin and Jonathan Crowe, 'New South Wales Law Reform Commission draft proposals on consent in sexual offences: a missed opportunity?' (2020) 32(3) *Current Issues in Criminal Justice*, 346.
[18] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report, June 2020).
[19] Jonathan Crowe, *Queensland rape law 'loophole' could remain after review ignores concerns about rape myths and consent* (August 2020) <https://theconversation.com/queensland-rape-law-loophole-could-remain-after-review-ignores-concerns-about-rape-myths-and-consent-141772>.
[20] Joseph Briggs and Russ Scott, 'Rape myths and a reasonable belief of consent *R V Lazarus [2017] NSWCCA 279*' (2020) 27(5) *Psychiatry, Psychology and Law* 750, 759.
[21] Ibid.

and cognitive notions that 'rape fantasies are common in women' and that 'she asked for/wanted it'.[22] Such bigoted beliefs about rape and rape myths have been found as a substantial factor for jurors on the issue of consent, with research revealing that jurors have strong expectations about how a 'real' rape victim behaves which ultimately contributed to rates of acquittal.[23]

Some other examples of negative perceptions of rape complainants included:

- The complainant had flirted and danced with the accused before the rape;
- The complainant did not scream or call for help during the rape;
- The complainant did not immediately leave the scene of the rape;
- The complainant did not incur any physical injury and there was no medical evidence of physical injury;
- The complainant delayed making a report to police; and
- The complainant did not appear distressed giving evidence of rape.[24]

Further, throughout rape and sexual assault trials, defence counsel may draw upon such themes of rape myths to discredit the complainant and suggest the complainant was unclear or ambivalent in indicating their lack of consent.[25]

A survivor-advocate from FSA's National Survivor-advocate Program spoke to such impacts of rape myths throughout their process in the Queensland criminal justice system, reporting that they felt community attitudes and rape myths impacted their experience through ***"...opinions about being drunk, [what] clothes I wore etc. It was good that I was able to have name suppression throughout the process."***

Consent

Crimes of rape and sexual assault throughout Australia are defined by reference to the absence of consent.[26] Whilst all jurisdictions across Australia require consent to be either freely or voluntarily given, consent to sex does not necessarily require that consent be positively expressed.[27] As such, consent may be inferred from certain circumstances, including a failure to act by the complainant, level of intoxication.

Recent advocacy and discussion of consent law in Australia have suggested that the law should move in the direction of an affirmative consent model.[28] In our view, a true affirmative consent standard requires that a person demonstrates an ongoing willingness to engage in a sexual act

[22] Ibid.
[23] Ibid.
[24] Australian Institute of Criminology *the Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study* (2006).
[25] Jennifer Temkin, Jacqueline Gray and Jastine Barrett, 'Different functions of rape myth use in court: findings from a trial observation study' (2018) 13(2) *Feminist Criminology* 205, 219.
[26] Burgin and Crowe (n 15) 347.
[27] Ibid.
[28] Ibid 348.

either verbally or through their actions. It requires that for consent to be legally effective, it must be positively expressed in some way. Further, an affirmative model of consent ensures that a defendant cannot escape responsibility for committing rape or sexual violence against someone by claiming to have made a mistake, as the defendant must take positive steps to communicate with the other person and thus ascertain their willingness to take part in the sexual act.[29]

Given this standard, consent therefore would not be inferred from the complainant's actual or perceived behaviour, nor could it be implied from lack of resistance or based on a pre-existing relationship between parties. Moreover, there would be no responsibility of revoking or expressing non-consent by the complainant to sexual acts or changed conditions due to consent itself being defined by the positive communication and expressed willingness by both parties.

As such, FSA urges the Women's Safety and Justice Taskforce to consider the implementation of an affirmative model of consent across the Queensland jurisdiction (which will be discussed in future detail below).

In September 2020, the NSW Law Reform Commission published a report providing recommendations to change the state's consent laws.[30] In November 2021, affirmative consent laws were passed in the NSW parliament, showcasing the opportunity for Queensland to move towards an affirmative model of consent and in turn create positive reform for victim-survivors of sexual violence.

Improving community understanding

Social narratives of both consent and rape myths reflect the broader social and cultural issues of gender equality in Australian communities.[31] And whilst the law can play a role in addressing these issues by providing clear guidance and offering definitions of consent which reflect respectful relationships, more needs to be done to ensure the community understands consent and misconceptions about rape myths.

FSA notes the work and advocacy from activists such as Chanel Contos, who is changing the conversation Australians are having around consent. In March 2022, Teach Us Consent, Contos' organisation received $8.51 million in funding over 5 years to develop resources in collaboration with Our Watch.[32] These resources will intend to deliver holistic sexual consent education which seeks to inform young Australians on matters of consent and respectful relationships.

Whilst FSA welcomes this funding announcement, further resourcing is needed to ensure consent education programs are effective to reshape the sex education system across Australian

[29] Ibid.
[30] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (2020).
[31] Burgin and Crowe (n 15) 349.
[32] Teach us Consent (April 2022) < Homepage - Teach us consent >.

schools. In addition, the States and Territories have a role to play in working with the Federal Government to implement consent education in schools and the wider community. Also of note is the importance of incorporating LGBTIQA+ and queer sex education within these resources to capture the diversity within Australian relationships and ensure that consent sex education is not strictly heterosexual and considers a diversity of relationships within its scope.

In terms of an example of a consent campaign that could be developed by the Queensland Government, the NSW Government has recently released its consent campaign MakeNoDoubt[33] to complement existing affirmative consent laws.

Barriers to reporting

Extensive research highlights the barriers victims face in deciding to report a case of sexual violence.[34] Barriers range from confusion or guilt about the offence, fear of the perpetrator or that they will not be believed, a perception of the criminal justice system being difficult, stressful, expensive and a time-consuming process which requires the victim to expose themselves to not only police and public scrutiny, but also potential cross-examination.[35] These barriers can have serious legal and psychological consequences for both the complainant and others involved .[36]

These barriers make it difficult for victim-survivors to report leading to either delayed or non-reporting, with research highlighting that 83.1% of Australian women did not report their most recent incident of sexual violence to the police.[37]

We are also aware that sex workers in Queensland face significant barriers in reporting sexual violence to QPS, not only due to the many negative myths and stereotypes that persist about sex work but also because sex work has not been fully decriminalised in Queensland. In our experience, this presents a significant disincentive for sex workers to report sexual violence for fear of prosecution. We understand that the QLRC will also be considering decriminalising sex work in an upcoming review, and we look forward to hearing the outcome of that review at the end of this year.

We consulted with Queensland survivor-advocates regarding their experiences with reporting to QPS. An FSA survivor-advocate explained that before reporting the sexual offence to Queensland police they considered ***"... If I would have to face the perpetrator in Court. If I reported, would my information become public information? What the process involved [and] would my counselling records be subpoenaed."***

[33] Make no doubt (nsw.gov.au)
[34] Australian Institute of Family Studies, *Challenging misconceptions about sexual offending: Creating an evidence-vased resources for police and legal practitioners* (Report 2017)
[35] Ibid 3.
[36] Ibid.
[37] Ibid 4.

When asked what could be done to reduce the barriers in reporting sexual violence, the survivor-advocate recommended that ***"social workers or support workers that can be with you as a support person during the police report process, [and the] ability to do a police report somewhere other than the police station, i.e., in comfort of own home or in a comfortable space/room at the hospital"*** would better support victim-survivors going through the reporting process.

Public reporting on sexual offending and domestic and family violence

FSA submits that the rights of victim-survivors should be paramount in any consideration of open justice. We support the presumption that all proceedings for sexual, domestic and family violence be as confidential as possible, subject to the view of the victim-survivors themselves.

We strongly support the principle that victim-survivors have a right to be heard, but they need to be supported to make their voices heard (for example, through counselling and legal representation). This is consistent with the Charter of Victims' Rights.[38]

We believe this is so because proceedings relating to sexual violence involve specialised considerations which are discussed at different points in this submissions including:

- Delays in reporting due to fears of disclosure and the stigma and shame attached to proceedings. Victim-survivors might delay reporting for many years[39];
- The overrepresentation of vulnerable societal groups including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse and LBTIQ+ communities and older women;
- The likelihood that disclosure of the accused's identity might also reveal the victim's identity (particularly in rural or remote communities);
- Court processes including the giving of evidence and victim impact statements which are re-traumatising for victim-survivors, particularly children (who are society's most vulnerable); and
- Very low levels of reporting, prosecution and conviction of sexual assault

We strongly support any reforms of Queensland law which are aimed at giving victim-survivors the *option* to speak about their experiences, should they choose. We submit that the option should be provided, so long as they are supported to speak out and are fully informed as to their options.

We recognise and acknowledge the empowerment that comes from victim-survivors telling their stories. We know from our experience that speaking out about sexual violence can be important

[38] *Victims of Crime Assistance Act 2009* (QLD), s. 8(1)(b).
[39] See, eg, 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* <https://doi.org/10.52922/ti04824>.

to individual recovery. We also know that the ability to speak out can address barriers to justice and foster community understanding about the nature and extent of sexual violence.

However, it should also be mentioned here that speaking out can come at great personal cost. In high-profile matters, victim-survivors might be under great public and media pressure, and this can be re-traumatising. Therefore, if consent is to be granted, it must be informed consent. We know that in other jurisdictions, inserting a requirement that any consent to publication be informed, can assist in ensuring that victim-survivors are only speaking out when they have made a free and informed choice.

However, we note that in addition to any legislative reforms, victim-survivors also need to be provided with wrap-around services to help them to safely disclose and that these services should include (but not be limited to) counselling and legal advice. Funding legal representation for complainants in sexual assault matters would go some way to achieving this where proceedings are ongoing.

Reporting, investigating and charging of sexual offences

We warmly welcome the Queensland Police taking steps to develop its sexual violence response strategy 2021-2023[40] and its vision to create:

> A victim-centric, trauma-informed sexual violence response that protects the community, strengthens public confidence, and contributes to Queensland and National integrated action plans.

We look forward to seeing the Queensland Police Service meet the goals and actions set out in the strategy. While we warmly welcome the strategy and believe it is a long-needed step in the right direction. We submit that more needs to be done now to improve complainants' experiences of the reporting, investigating and charging process.

We endorse the recommendations of QSAN and WLSQ in relation to urgent reforms required to improve the reporting, investigating and charging of sexual offences.

We also recommend that the Queensland Police Service take steps to:

- *Develop a specific action plan (in collaboration with Indigenous communities) to address sexual violence in Indigenous communities.*
- *Develop a specific action plan to address sexual violence in other priority populations (such a young women, women with a disability, CALD women and women in regional, rural and remote areas).*

[40] Queensland Police Service, Sexual Violence Response Strategy 2021-2023, (Report, October 2021) <QPS-Sexual-Violence-Response-Strategy-2021-23.pdf (police.qld.gov.au)>.

- *Develop a specific action plan to address sexual violence of older women and women with a disability in institutional and non-institutional contexts.*
- *Reorientate police recruitment processes to increase the uptake of officers with the appropriate skills, experience and attributes to effectively respond to survivors in a trauma-informed way.*
- *Sexual Violence Liaison Officers should not only be universally available, but should also be tailored to meet the needs of individual communities (for example, an Aboriginal Sexual Violence Liaison Officer should be available to assist Aboriginal communities).*
- *Female interpreters should be universally available for all survivors of sexual violence when dealing with police at all times.*
- *QPS need to more regularly partner with non-government organisations and local communities to develop community-driven solutions to sexual violence.*
- *QPS to consider a collaborative model of service response whereby police officers are accompanied by sexual violence workers on callouts and at each major police station for over the counter complaints.*
- *Establish a state-wide automatic referral process for sexual assault and sexual harassment matters, including those which occur in non-domestic settings. These could be triaged through the state-wide sexual assault service to local sexual assault services.*
- *Develop comprehensive and regular training for all officers (devised in consultation with specially trained experts) on responding to sexual, domestic and family violence and in particular on the following topics:*
    - *Understanding and recognising coercive controlling behaviours in the context of sexual violence;*
    - *Understanding and recognising technology-facilitated sexual violence and abuse;*
    - *Working with culturally diverse communities in responding to sexual violence; and*
    - *Working with Aboriginal and Torres Strait Islander Communities in responding to sexual violence.*
- *Develop a comprehensive and regular wellbeing and secondary or vicarious trauma support program for all officers which is delivered by experts. For example, FSA provides training covering:*
    - *Understanding the construct of vicarious trauma;*
    - *Differentiating vicarious trauma from burnout;*
    - *Understanding what contributes to vicarious trauma;*
    - *Recognising the symptoms of vicarious trauma experienced by self and others;*
    - *Identifying key individual and organisational vicarious trauma management strategies; and*
    - *Understanding the role of psychologically safe workplaces in the management of vicarious trauma.*

We also warmly welcome QPS taking action to improve data collection and therefore accountability mechanisms for responding to sexual violence. We recommend that this could be

further enhanced, by taking steps to strengthen complaint and feedback mechanisms for survivors in sexual violence.

In this regard, FSA recommends that QPS do the following:

- *Review their complaints mechanisms to ensure that people who have had a negative experience when contacting the police for help in the context of sexual violence are able to rely upon an independent, timely and trauma informed process for investigation and resolution of their complaint. This complaints mechanism at first instance should not be managed by police and should be overseen by a victims advocate with the skills and qualifications to oversee such complaint processes and prosecute cases on behalf of victims where necessary.*
- *Data captured by QPS to support its activities should be made public so that QPS can publicly report on its performance, including feedback from sexual violence victims. This data should be published annually to track improvements in performance over time and identify areas for improvement.*
- *Ensure lived experience is embedded in all Steering Groups and Working Groups dedicated to sexual violence.*

Legal and court processes for sexual offences

Adequacy of sexual consent legislation in Queensland (including mistake of fact)

As the discussion paper points out, the Queensland Law Reform Commission (**QLRC**) recently conducted a broad ranging review of Queensland's consent laws (including the excuse of mistake of fact)[41] (**QLRC Report**) and came to the conclusion that (among other things):

- Detailed examination of the existing law of consent does not generally reveal significant issues for reform to the definition of consent or the excuse of the mistake of fact, as it applies to rape and sexual assault. The QLRC found that there is a risk the unnecessary amendments to the legislation might have unforeseen consequences for defendants, complainants or both.[42]
- The introduction of a requirement to take steps could operate unfairly because 'not all situations where a defendant may honestly and reasonably believe that a complainant is giving consent will alert a defendant to the need to take steps to ascertain the fact of consent'.[43]

[41]QLRC (n 14).
[42] Ibid [4.123]
[43] Ibid [63].

- Recent research does not strongly support the concern that jurors commonly harbour false misconceptions or rape myths and therefore no changes should be made to deal with these preconceptions.[44]

It is also important to note that the QLRC stated a starting point for the review that the criminal law of consent should 'support the objective of protecting sexual autonomy'.[45]

Firstly, we disagree that there is no significant scope for reform of the law of consent in Queensland. Many of our colleagues in the sector, victim-survivors and the broader community (not just in Queensland but across the nation) have been calling for urgent and fundamental changes to the law of consent for many years. These state based calls have taken on a national significance following the #metoo movement and through the work of advocates such as Saxon Mullins and Brittany Higgens. In particular, we acknoweldge the tireless work of our colleagues in the sexual violence sector in Queensland in calling for these reforms for over 20 years. We do not believe that the QLRC Report adequately acknowledged or took into account these voices in coming to its conclusions (let alone the voices of victim survivors).

Furthermore, we note the research of Jonathan Crowe and Bri Lee (herself a survivor of sexual violence) who identified a number of undesirable and socially regressive consequences with the mistake of fact defence.[46] Their main concern was that the excuse effectively undermines the way that Queensland law construes the notion of free and voluntary consent.

> Consent cannot be established…by the complainant's social behaviour, relationship to the defendant or lack of overt resistance. However, all these factors have been found by the Court of Appeal to be potentially important in cases where the mistake of fact excuse is enlivened. The efforts of the Queensland courts to appropriately define the notion of consent by excluding prejudicial or irrelevant social or contextual factors, in other words, are undetermined by the defendant's ability to cite those factors as inducing or rationalising his mistaken belief as to consent.[47]

Secondly, we disagree that the introduction of a requirement to take steps could operate unfairly. We note that in NSW, a safeguard has been put in place to ensure that persons with substantial cognitive impairments are excused from the requirement to take steps to ascertain consent. Respectfully, we do not understand how the QLRC came to the conclusion that there exists a circumstance where a person should not take steps to ensure that another person is consenting before engaging in sexual activity. In particular, in circumstances where a starting principle of the law of consent is that the law intends to protect sexual autonomy.

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[44] Ibid [75].
[45] Ibid [18].
[46] Jonathan Crowe and Bri Lee, 'The mistake of fact excuse in Queendland Rape Law: Some problems and proposals for reform' (2020) 39 (1) *University of Queensland Law Journal*, 1.
[47] Ibid.

Sexual autonomy should not be confused with sexual entitlement. We don't consider that there is any moral or legal justification for a person not to take steps to ascertain consent before engaging in sexual activity. As the NSW Attorney General said in the second reading speech for the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021*:[48]

> People are entitled to expect that if someone wants to have sex with them, then that other person will ask—and that if the first person has not said something or done something to communicate consent, then the other person will take further steps to ascertain consent. This is just a basic matter of respect. It is time for the law to catch up with common human decency and common sense.

Thirdly, we disagree that there is no need to take steps to address harmful preconceived notions that may exist about sexual activity or any other rape myths that might be held by the jury. Firstly, as the discussion paper points out, the research referred to by the QLRC has since received criticism from a number of academics. However, we respectfully consider that the issue of the prevalence of rape myths was considered too narrowly. Whether or not rape myths impact on the decision-making capacity of a jury is but one of *many* considerations which must be made when considering reforming the law relating to consent.

We suggest that what must be considered is the nature and prevalence of rape myths throughout the criminal justice system and beyond. As we have already outlined in this submission, there is a large body of evidence to suggest that harmful myths and stereotypes exist not only in the justice system but in the wider community.[49] In our respectful submission, this provides a strong basis for reforming the law of consent.

This case[50] was highlighted by the QLRC in its report and in our view, is just one example of rape myths persisting:

> The complainant gave evidence that the defendant, an Uber driver, had grabbed her upper thigh and her breast while she was intoxicated and in the Uber, but that she had not reacted until he attempted to kiss her when she turned her head away. The defendant denied that any of this contact occurred. The defendant also relied on mistake of fact as to consent, on the following evidence: during the eight minute drive, she answered his personal questions (for example, whether she had a boyfriend); when she had a coughing fit and he patted her on the back, she did not say 'Please do not touch me again'; she did not say anything that would suggest that he was to desist from touching her sexually; and, she did not push him away. This reflects that the excuse of mistake of fact may arise on any part of the evidence, even if the defence case is, or is primarily, denial of sexual contact.

[48] New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, [50] (Mark Speakman, Attorney General).

[49] See, for example Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners | Australian Institute of Family Studies (aifs.gov.au)

[50] QLRC (n 14) [3.14].

In this case, the uber driver was permitted to argue that he honestly and reasonably believed that the complainant was consenting merely because she *answered a personal question* and did not actively resist his advances. We consider it quite remarkable that this evidence lends itself to any kind of rational or persuasive argument that a person held a reasonable view of consent. Further, we consider that the ability to make this argument is exactly the kind of mischief that was highlighted by Crowe and Lee in their research.

Finally, we note that the QLRC appears to have been significantly persuaded by the fact that their analysis of trials showed that the conviction rate was higher when mistake of fact was left to the jury, than when mistake of fact was not left to the jury. This fact was also highlighted in the discussion paper. We consider that this statistic misses the point. Firstly, we note our point above in which we argue that the QLRC considered the prevalence of rape myths too narrowly. Secondly, the statistic which we found overly persuasive, and was not highlighted by the QLRC in its report, was that the conviction rate was **12% higher** for those trials where denial of sexual contact or penetration occured as the line of defence (41%) versus when there was an admission of sexual contact but denial of absence of consent (29%). This statistic shows to us that something is not working with the law of consent in Queensland. A 29% conviction rate is not one that we should be aiming for in a society that takes sexual violence seriously and we certainly don't accept that such a large discrepancy should be ignored.

Given all of the above, we therefore recommend that the Queensland government take urgent and immediate action to strengthen Queensland's consent laws to:

- *Clarify the definition of consent to say that consent not only means that a person freely and voluntarily agrees but also that each party communicates this agreement through words or actions (ie. adopting a definition of enthusiastic consent).*
- *Include a more fulsome definition of consent modeled on the new s.61HI of the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021.*
- *Include an objectives provision in the consent regime modeled on the following proposal*[51]

> *It is the intention of Parliament that in interpreting and applying this chapter, courts are to have regard to the following matters—*
>
> *(a) there is a high incidence of sexual violence within society;*
>
> *(b) sexual offences are significantly under-reported;*
>
> *(c) a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment or mental illness;*
>
> *(d) sexual offenders are commonly known to their victims;*
>
> *(e) sexual offences occur most frequently in residential locations;*

[51] This wording was drafted by Professor Jonathan Crowe, Dr Asher Flynn & Bri Lee, an unpublished manuscript as part of the Australian Feminist Legislation Project. The wording was provided to us by our colleagues at Domestic Violence NSW during FSA's consultation with the NSW Government on the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021.

(f) there are legitimate reasons why victims of sexual violence may not physically resist an assault, including, but not limited to, physiological responses to aggression and fear of escalating or prolonging the attack;
(g) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred; and
(h) there are legitimate reasons why victims of sexual violence may not immediately report an assault to police or another person and a failure to make an immediate report, without more, does not discredit an allegation.

- *Include in the legislative regime on consent, a specific, non-exhaustive list of circumstances where there is no consent (based upon the NSW model but with some enhancements) including the following circumstances:*
    - *Where a person does not say or do anything to communicate consent;*
    - *Where a person does not have the capacity to consent;*
    - *Where a person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity;*
    - *Where a person is unconscious or asleep;*
    - *Where a person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—*
        - *when the force or the conduct giving rise to the fear occurs, or*
        - *whether it occurs as a single instance or as part of an ongoing pattern of behaviour that in any way controls or dominates the person and causes that person to feel fear for the safety or wellbeing of that person, another person, an animal or property, or*
    - *Where a person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—*
        - *when the coercion, blackmail or intimidation occurs, or*
        - *whether it occurs as a single instance or as part of an ongoing pattern of behaviour that in any way controls or dominates the person and causes that person to feel fear for the safety or wellbeing of that person, another person, an animal or property*
    - *Where a person participates in the sexual activity because the person or another person is unlawfully detained, or*
    - *Where a person participates in the sexual activity as a result of the abuse of a relationship of authority, trust or dependence regardless of –*
        - *when the abuse occurs, or*
        - *whether it occurs as a single instance or as part of an ongoing pattern, or*
        - *whether or not the person who commits the abuse is the same person as the accused person, provided that the abuse is connected to the sexual activity, or*

        - *whether the abuse involves interactions which are in-person or virtual, wholly or partly*[52],
    - *the person participates in the sexual activity because the person is mistaken about—*
        - *the nature of the sexual activity, or*
        - *the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic, cosmetic, religious, spiritual or cultural purposes,*
    - *the person participates in the sexual activity because the person is under the mistaken belief that the other person is actually someone else (ie. a case of mistaken identity as opposed to a mistake about the gender of a person).*
    - *the person participates in the sexual activity because of a fraudulent inducement (with the definition of fraudulent inducement clarifying that the definition does not include representations about a person's gender identity, sex characteristics, sexual health status, income, wealth, or feelings).*
    - *the person participates in the sexual activity subject to the other person using a device to prevent sexually transmitted infections or a contraceptive device and the other person intentionally:*
        - *does not use the device;*
        - *tampers with the device; or*
        - *removes the device.*

      Ie. this provision explicitly criminalises the act of stealing. Note, the definition of contraceptive device would need to made clear that it does not include oral contraceptives but would include all other kinds of devices used for contraceptive reasons but also to prevent STI's.
    - *the sexual activity occurs while the person is an adult but is inextricably linked to circumstances by which a person has been procured for unlawful sexual activity or groomed for sexual purposes as per the offences set out in Chapter 22 of the Criminal Code (ie. to criminalise grooming that persists from childhood into adulthood in certain circumstances).*

- *Remove the mistake of fact excuse in the Criminal Code as it is currently drafted and instead replace it with a knowledge component to the definition of consent modelled on the new s.61HK of the Crimes Act 1900 (NSW) with improvements. We submit the new knowledge component could say something like*

  (1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if

[52] Any proposed amendments we have suggested to the recently proclaimed s.61H(j)(h) were provided courtesy of Marque lawyers during FSA's consultation with the NSW Government on the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021.

(a) the accused person actually knows the other person does not consent to the sexual activity, or
(b) the accused person is reckless as to whether the other person consents to the sexual activity, or
(c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

(2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, immediately before or at the time of the sexual activity, say or do anything clear to find out whether the other person consents to the sexual activity.

The proposed new knowledge component of the definition of consent would still allow the accused to argue that they had a reasonable belief that the other person was consenting but it would remove the ability of the accused to argue self-induced intoxication and would require an accused to take steps to find out whether the other person was consenting before he or she could rely on their reasonable belief.

Adequacy of sexual offence laws in Queensland involving children

Our review of the criminal law in Queensland concerning sexual offences has identified some serious concerns with the Queensland criminal law concerning sexual offences against children that warrant urgent attention.

We consider that this review presents an opportunity for the taskforce to recommend that the Queensland government significantly review its criminal laws concerning sexual activity between adults (ie. those over the age of 18) and children and young persons under the age of 18. We find it particularly alarming that:

- No regime exists in Queensland law to criminalise inappropriate relationships occurring between adults in positions of authority (such as teachers, doctors, religious authorities etc) and boys and girls between the ages of 16 and 18.
- Because of the hierarchy of offending which currently exists for prosecuting offences involving sexual activity with children (ie. with rape and unlawful carnal knowledge being alternative counts), a jury may be required to consider whether or not a a child between the ages of 13 and 16 consented to sexual activity, so as to be acquitted of the crime of rape, despite the fact that legally, a child under the age of 16 can never consent to sexual activity. The byproduct of this (and also of the mistake of fact excuse as currently worded) means that complainants under the age of 16 will need to withstand questioning and arguments which go directly to the issue of whether or not they consented. As our submission has noted, this situation is difficult and traumatic for adult complainants, let alone a girl or boy under the age of 16.

We consider that both of these situations are absolutely unacceptable and do not accord with current community standards. It is widely accepted that society should have no tolerance for and actively condemn the sexual abuse of children and the use of power and authority to facilitate the sexual abuse of young people. We consider that this needs to be remedied as a matter of critical urgency.

To illustrate our point about the consent issue, we note the case of Phillips v The Queen as summarised by Crowe and Lee:[53]

> The 13-year old complainant in that case was asleep in bed when the defendant, a 21-year-old man staying overnight in her house, entered her room, climbed on top of her, and penetrated her while she tried to push him off. Similar events occurred on three other occasions, resulting in four charges in total. The first and third counts involved evidence of physical resistance by the complainant, while the second and fourth incidents involved passive compliance, although she was not consenting. The defendant was charged with rape and unlawful carnal knowledge as alternatives (since the complainant was under the legal age of consent)...It is, of course, legally impossible for a 13-year-old girl to consent to sexual intercourse, but the use of rape and unlawful carnal knowledge as alternative charges obliges the jury to distinguish between sex that is non-consensual due to the complainant's age and sex that is non-consensual for other reasons...her level of resistance ended up being central to the Court of Appeal's reasoning...The availability of s 24 therefore, seems to turn substantially on the question of whether the complainant struggled. When a 21-year-old man climbs on top of a 13-year-old girl in her bed and penetrates her without invitation or encouragement, it does not matter legally whether she struggles or not. However, even if a lack of vigorous physical resistance does not establish consent, the reasoning in Phillips shows that it may be relevant to the mistake of fact excuse.

Given all of the above, we therefore strongly recommend that Queensland:

- *Remove the ability of an accused person over the age of 18 to argue that a child between the ages of 13 and 16 has consented to rape by amending s.349(3) of the Criminal Code.*
- *Implement an offence regime which criminalizes sexual conduct between a person over the age of 18 and a person between the ages of 16 and 18 who have a special relationship of authority modelled on Division 10, Subdivision 11 of the Crimes Act 1900 (NSW).*
- *Amend the Criminal Code to remove references to "relationships" in Chapter 22 as has been done in NSW, Victoria, Western Australia and shortly in Tasmania.*
- *Take steps to implement all remaining recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse that are not already implemented or otherwise discussed in other parts of this submission.*

Victims' experiences of the Court process

[53] Crowe and Lee, above n 46, 8-9.

As previously discussed, victim-survivors of sexual assaut often respond to the trauma of the offence in various ways. Such complex responses implicate the ways in which a victim-survivor navigates and participates in the criminal justice system.[54] However, legal processes critically lack a robust understanding of the potential and complex impacts the victim's trauma may have on criminal proceedings.[55] To ensure justice can be obtained for victims of sexual assault, legal processes must be trauma informed. This includes ensuring those in the criminal justice system are able to identify, recognise and support a victim when they display complex-trauma.[56]

As the discussion paper points out, section 21A of the *Evidence Act 1977* (Qld) provides certain "special measures" that a Queensland court can put in place when a special witness gives evidence. These special measures include:

- the person charged or other party to the proceeding be excluded from the room in which the court is sitting or be obscured from the view of the special witness while the special witness is giving evidence or is required to appear in court for any other purpose;
- while the special witness is giving evidence, all persons other than those specified by the court be excluded from the room in which it is sitting;
- that the special witness give evidence in a room
    - other than that in which the court is sitting; and
    - from which all persons other than those specified by the court are excluded;
- that a person approved by the court be present while the special witness is giving evidence or is required to appear in court for any other purpose in order to provide emotional support to the special witness;
- that a videorecording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the video recorded evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness;
- another order or direction the court considers appropriate about the giving of evidence by the special witness, including, for example, any of the following—
    - a direction about rest breaks for the special witness;
    - a direction that questions for the special witness be kept simple;
    - a direction that questions for the special witness be limited by time;
    - a direction that the number of questions for a special witness on a particular issue be limited.

While we appreciate that the current special measures regime goes some way to accommodating the needs of witnesses and ensuring that the system remains trauma-informed, we consider that the special measures regime needs to be overhauled to strengthen the protection of complainants and witnesses of all ages in sexual offence matters and bring

[54] Judy Cashmore and Rita Shackel 'Research on sexual assault to inform the courts and legal professionals' *Judicial Officers Bulletin*, 3 (2), 15.
[55] Ibid 18.
[56] Ibid.

Queensland in line with other jurisdictions. In our respectful submission, Queensland seriously lags behind other states in providing a trauma-informed criminal justice system for complainants. This is also evidenced by the submissions of our colleagues QSAN and WLSQ who both go into extensive detail about how the criminal justice system is failing victim-survivors on a daily basis.

We note QSAN's on-the-ground observations that survivors have no trust in the criminal justice system. A large part of this stems from a realisation of the actual reality of what it would be like to follow a matter through the criminal justice system. As QSAN observed in their submission

> Clients often ask QSAN counsellors about the experience of other women reporting and whether they should report. QSAN counsellors obviously cannot direct or not someone to report however, they do also have to provide an honest account of other women's experiences of the criminal justice system and reality check on its limitations and the real possibility of re-traumatisation.

We understand that arguments have and will continue to be made, that providing certain protections to complainants' does so at the cost of a fair trial for the accused. But for the protections that are already in place in other jurisdictions, we do not believe these arguments are borne out by the experience of those jurisdictions (especially in NSW and Victoria). That being said, we note that there does remain a significant lack of empirical evidence surrounding complainants' experiences of the criminal justice system in sexual assault matters both in Queensland but also across the nation. There is also a significant lack of data regarding the criminal justice process. We note in this regard, that QSAN has recommended that *Queensland develop and regularly publish comprehensive data on prosecution and conviction rates in sexual violence matters to establish whether there has been any change, to understand the patterns and to assist determination about whether they are falling over time*.

In regards to procedural improvements, FSA recommends that *urgent legislation be passed so that in the short term, the current "special measures" regime in the Evidence Act 1977 (Qld) is amended to insert a presumption that a complainant in a sexual assault matter (of whatever age) is entitled to all special measures as required in each particular case but can decline any measures as they wish*.

FSA then recommends that the Queensland Government *work towards a comprehensive, whole of system reform of the procedures by which criminal trials are conducted in sexual assault matters so that the system is more trauma-informed for victim-survivors of sexual violence*. This will not only dramatically improve the experiences of victims who already come forward (by ensuring they can give the best quality evidence), but it will also encourage more victims to come forward. This reform should be in close consultation with services operating on the ground and also victim-survivors.

We consider that any reform would, as a minimum, include a commitment to the following:

- *Funding an empirical study into complainants' experiences of the criminal justice system modelled on the NSW Bureau of Crime Statistics and Research study to determine what*

further measures could be taken to improve complainants' experiences of the justice system.

- *The development of a Sexual Assault Trials Handbook modelled on the handbook currently in operation in NSW.*
- *A regime should be introduced for all evidence in criminal trials for sexual offences (of whatever age) be recorded and such evidence be able to be used in any subsequent trial or re-trial.*
- *Sexual assault complaints should be automatically entitled to give evidence remotely (whether via AVL, or in a special remote witness facility, or via use of screening).*
- *Sexual assault complaints should be automatically entitled to a support person to be able to sit with them while giving evidence, for emotional support.*
- *Queensland to consider the introduction of "special hearings" for cross-examination in certain circumstances as occurs in Victoria.*
- *Queensland to consider piloting/conducting a review to determine the feasibility of introducing evidence of police recorded interviews and body worn camera evidence as evidence-in-chief at criminal trials where possible (including, what appropriate supports and training should be put in place for police officers to properly take such evidence).*
- *A range of jury directions be introduced to counter rape myths surrounding sexual assault trials (such as those introduced in NSW) including directions as to:*
    i. *Circumstances in which non-consensual sexual activity occurs;*
    ii. *Responses to non-consensual sexual activity;*
    iii. *Lack of physical injury, violence or threats;*
    iv. *Behaviour and appearance of complainant; and*
    v. *Sexual assault in the context of coercive control and domestic and family violence.*
- *Queensland to consider the introduction of "ground rules hearings" as occurs in Victoria (and has been proposed in the Commonwealth jurisdiction) as a means by which parties can quickly, cheaply and effectively discuss the complex and diverse needs of each complainant at the outset of a criminal trial and the Court can make directions with regards to all aspects of the trial including the modes of giving evidence, video-recording, questioning, evidence etc.*

We fully appreciate that a number of these measures are only successful if there are the resources and facilities to implement them. We know first-hand that many actors in the judicial system (such as lawyers, judges and court staff) are most often trying their best in difficult circumstances. The onset of the COVID-19 pandemic has laid bare the insufficiencies of the court system in relation to its ability to operate remotely and via the use of technology. However, courts have been forced to adapt and courtrooms across the Country are now better equipped to use technology and this has arguably improved access to justice. That being said, significant and urgent investment is required to facilitate the courts' access to the technology and facilities required to implement the above reforms.

We suggest priority be given to reforms that can be implemented now, with a view to implementing more difficult reforms after further investments have been made. We consider that this needs to be made a priority as the fairness of the trial is impacted if complaints are not able to give the best possible evidence.

The admissibility of evidence for sexual offences

Tendency and Coincidence Evidence

As the discussion paper notes, the test for tendency and coincidence evidence is set out in the common law in Queensland in the cases of *Pfennig v The Queen* (1995) 182 CLR 461 at 482–3 and *R v McNeish* [2019] QCA 191 [30]. Section 132A of the Evidence Act 1977 (Qld) is also applicable which provides

> In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

We note that the Queensland Government themselves have acknowledged that the common law that applies broadly in Queensland is the most restrictive approach applied to this kind of evidence.[57]

We recommend that as a first step, the Queensland Government take steps to incorporate the remainder of the Uniform Evidence Law (Tendency and Coincidence) Model Provisions 2019 (Model Provisions) that are not already implemented into Queensland law by:

- *Codifying the operation of similar fact and propensity evidence at common law so that the common law cannot operate to override the new legislative provisions on tendency and coincidence evidence.*
- *Create a new, legislative test of tendency and coincidence evidence for all sexual assault matters which is modelled on ss 97, 97A and 101 of the Evidence Act 1995 (NSW).*
- *Amend the procedural law to create a presumption of joint trials in circumstances where a defendant has been accused of multiple offences, in respect of which the prosecution is seeking to lead tendency or coincidence evidence.*
- *Ensuring that tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt.*

However, we do understand that the reforms introduced by the *Evidence Amendment (Tendency and Coincidence) Bill 2020* in NSW will be reviewed (and subject to a consultation process) by the NSW Government this year. As such, we would suggest that the Queensland Government

[57] Queensland, Hansard, Queensland Legislative Assembly, 27 November 2019, 3876, (Yvette D'Ath, Attorney-General and Minister for Justice).

liaise closely with the NSW Government in consideration of any reforms it might take or to take into account any insights that may emerge from that process.

While we appreciate that there are those in Queensland who strongly oppose these kinds of reforms, we consider that any arguments that oppose the reforms must be outweighed by the strong and compelling arguments for their introduction. The Royal Commission into Institutional Responses to Child Sexual Abuse considered the operation of these rules in detail over a 5-year enquiry. What the Commission found, and what led to the development of the Model Law, was a recognition that the law of tendency and coincidence was failing children who had been sexually abused and was resulting in uneccessary acquittals. We submit that it is incumbent on the Queensland government to make the requisite changes to ensure that it does not continue to fail survivors of child sexual abuse.

Evidence of sexual reputation and history

We strongly recommend that *any evidentiary rules regarding evidence of sexual reputation and history be modelled on s. 293 of the Criminal Procedure Act 1986 (NSW).* We note the observations of our colleagues WLSQ regarding the operation of the current provisions on sexual history in a case where one 13 year-old complaintant was cross-examined abou being sexual abused by her grandfather, and another example where another client was cross-examined about being raped by her step-father. In our view, both of these examples are unacceptable and there should be procedural safeguards in place to ensure that this kind of harmful and traumatising questioning is not raised.

We also strongly recommend, as suggested by the Victorian Law Reform Commission (**VLRC**) in its ground-breaking report *Improving the Justice System Response to Sexual Offences*[58] (**VLRC Report**) that victim-survivors should:

- *be given notice that evidence of sexual reputation/experience is being introduced. We note that if ground rules hearings are being considered, the notice requirement might form part of the ground rules hearing process; and*
- *Victim-survivors be given legislative standing to participate in any decisions made about this evidence and also be provided with access to legal representation.*

Improper Questions

Cross examination is considered to be one of the most traumatic aspects in a sexual assault criminal proceeding.[59]

We submit that the Queensland provision (s.21 *Evidence Act* (QLD)) is *severely limited in scope and detail and requires significant strengthening*. The current provision:

[58] Victorian Law Reform Commission, *Improving the justice system response to sexual offences* (Report, September 2021), 479, 88.
[59] Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts: Report to the Victorian Law Reform Commission* (Final Report, August 2021), 7.

- Does not mandate disallowance of improper questions; and
- Fails to recognize questions that intimidate, stereotype, belittle, harass or humiliate as common categories of improper questions that must be disallowed.

We recommend that *Queensland adopt a provision which is modeled on section 41 of the Evidence Act 2008 (NSW)*.

We also recommend that Queensland *implement recommendation 84 of the VLRC Review to further enhance the protections for complaints and ensure they are respected during the trial process*. Recommendation 84 would require the Queensland *Criminal Procedure Act* to be amended so that, in the absence of the jury and before the complainant is called to give evidence, the judicial officer, prosecution and defence counsel discuss and agree to:

- The style and parameters of questioning so that questioning is not improper or irrelevant;
- The scope of questioning includes questioning on sensitive topics and evidence to reduce re-traumatisation; and
- The preferences and needs of complainants. These could include a whole range of considerations including creating a familiar, sensitive and courteous environment in the courtroom, preferred modes of addressing parties, introductions, supports that are required (such an interpreters), the importance of breaks and time limits to questioning.

The treatment of complainants and their questioning should be in line with what the judicial officer determines following the discussion and the process can then be repeated until the conclusion of the complainant's evidence.

While anticipating that this recommendation could be received with hesitancy, we think that any implementation issues would be far outweighed by the benefits to complaints and to the fairness of the court process for all parties.

These kinds of conversations are already happening on an informal basis in all criminal trials across the country. The purpose of the reform is to embed them as common practice in criminal trials. The conversations themselves need not be lengthy, and would (on the one view) streamline the trial process as issues such as these could be dealt with quickly and simply upfront, rather than through a series of ad hoc objections and conversations right throughout the Court process.

The VLRC set out what they understood to be the aims and benefits of this process which includes:[60]

- ensure a fair and efficient trial, by enabling complainants to give their best evidence;
- ensure that complainants are treated respectfully and with dignity;

[60] VLRC Report (n 57) [21.53].

- recognise the role of complainants as participants in the trial, by considering their rights, interests and preferences;
- set clear expectations for everyone about what will not be tolerated by the court, which should reduce the need for judges or prosecutors to intervene or object during the trial and make it easier for them to intervene or object clarify for the complainant at an early stage what to expect from the trial, reducing their anxiety about the process and how they might be questioned; and
- prevent improper and inappropriate questioning.

Access to independent legal representation

Survivors already have access to legal representation in Queensland in some circumstances. WLSQ provide sexual assault counselling privilege legal assistance service (referred to as Counselling Notes Protect) statewide.

Their service delivery model as outlined on the WLSQ website consists of the following:

- Advice and task assistance to sexual assault victims seeking to prevent disclosure of or make an informed choice regarding counselling communications in criminal court proceedings;
- Court representation at application for leave proceedings for victims seeking to prevent disclosure of counselling communications; and
- Education and training to the legal profession, sexual assault services and other support services regarding the privilege.

FSA strongly *supports all jurisdictions across Australia piloting this process and in particular Queensland*. As noted above, a service delivery model already exists in Queensland to provide survivors with independent legal representation in certain circumstances. We therefore consider that a pilot could operate by building upon a service delivery model that already exists.

In this regard, we note that our colleagues WLSQ have also supported a pilot and we support their submissions in this regard.

Protected Counselling Communications

As the primary service working on the ground with survivors in relation to this aspect of the criminal justice system, we support and endorse all recommendations made by WLSQ in relation to the operation of this privilege in Queensland.

Conclusion

We take this opportunity to highlight the observations of our colleagues at QSAN in their submission to this discussion paper

> In far too many sexual violence cases, the result is that the system is indifferent to issues of sexual violence or paralysed in being able to effectively respond. QSAN is of the view that we need a circuit breaker to challenge the intransigence. We need a system's overhaul including law changes, such as affirmative consent and reasonable steps to send a strong message of prevention and accountability to the community (including victims and perpetrators), service providers, including the police, lawyers and ODPP. We need to be better able to introduce contextual evidence and evidence of a domestic violence history in intimate partner sexual violence matters, to increase safety and accountability in high-risk domestic violence matters. We need a legal system in tune with community sentiment on consent and the role of women in a modern society and that is consistent with academic knowledge on the dynamics of sexual violence offending, including sexual predation.
>
> Change will not be quick and will take time. To achieve safety and justice from sexual violence Queensland women need systemic change and this should be planned and mapped out over a decade. It will require persistence, political will, funding, appropriate implementation, and oversight.

We strongly urge the taskforce and the Queensland government to listen to the voices of victims-survivors and those supporting them who for too long, have been ignored and silenced.