Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

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Hon Margaret McMurdo AC
Taskforce Chair
Women's Safety and Justice Taskforce
GPO Box 149
Brisbane QLD 4001

By email: [redacted]
Copy to: [redacted]

Dear Taskforce Chair

Women's Safety and Justice Taskforce: Discussion Paper 3

Thank you for the opportunity to provide a response to the questions asked in Discussion Paper 3 (**Discussion Paper**).

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS has consistently supported measures aimed at addressing domestic and family violence and its consequences. We acknowledge and commend the Women's Safety and Justice Taskforce (**Taskforce**) on its valuable work to date. The issues raised by the Taskforce are challenging, complex and important. Given the breadth of issues raised and the volume of questions included in the Discussion Paper, we have responded to the questions in so far as they are within the expertise of our legal policy committees.

This response has been compiled predominantly by the QLS Criminal Law Committee, whose members have extensive expertise in dealing with criminal matters. The submission also has the benefit of input from members of the QLS Domestic and Family Violence Law Committee, Health and Disability Law Committee, Children's Law Committee, Family Law Committee and Human Rights and Public Law Committee.

Introductory remarks

The Discussion Paper asks a series of questions concerning potential reform of the rules of evidence to which we respond later in this correspondence. At the outset, the Criminal Law Committee raises three thematic issues for the Taskforce's further consideration.

First, the Criminal Law Committee considers there may be significant misconceptions within the lay-community about the content and application of current statutory and common law principles governing sexual offence and domestic violence proceedings. These misconceptions relate to the element of consent and the excuse of honest and reasonable mistake as to consent in sexual offence proceedings, as well as the current legal principles governing the reception of preliminary complaint evidence, evidence of uncharged acts/prior discreditable conduct and relationship evidence in sexual offence and domestic violence proceedings. They also relate to the rules governing applications for separate trials and the content of jury directions concerning failure to complain or delay in complaint. Owing to the highly legalistic nature of these principles, these misconceptions may be held by some non-legally trained stakeholder groups.

Misconceptions of this type can result in a perception that the current state of the law takes an inadequate approach to the reception of evidence in these proceedings and, thereby, does not properly vindicate the rights of victims when, in fact, the situation in practice is not so. The rules of evidence under consideration in the Discussion Paper have developed and refined over decades, through the long experience of the courts and the legislature to achieve a balance that affords a just and fair process to the prosecution and the defence, and avoids the consequences of wrongful convictions. Amendment of these base evidentiary principles may have far-reaching ramifications and unintended consequences.

Second, the evidentiary reforms under consideration have the capacity to compound the legal technicality of sexual offence and domestic violence proceedings in a way that, paradoxically, risks occasioning delay, legal error, burgeoning appellate case-load and increased trauma for complainants. Reform of the fundamental laws of evidence need to be approached with great care.

Third, an essential starting point in the consideration of evidentiary reform is the imperative that the law afford the defendant a fair trial.

We elaborate on these issues in response to questions about potential evidentiary reform at pages 30-44.

1. What are the drivers of First Nations women and girls' overrepresentation as victims of sexual violence? What works to reduce this overrepresentation? What needs to be improved?

First Nations women and girls are exposed to higher rates of sexual violence due to complex social and historical factors that contribute to their instability and vulnerability, including: high rates of domestic and family violence; entrenched poverty and intergenerational trauma that reinforce patterns of disadvantage; high levels of homelessness; and, overcrowding due to a lack of available and affordable housing which means women and girls must move in with other people.[1] These underlying social and economic circumstances result in First Nations women and girls being at high risk for exposure to sexual violence.

Intergenerational impoverishment, overcrowding and family violence can also lead to intervention by the Department of Child Safety, Youth Justice and Multicultural Affairs and the removal of children from their families, resulting in placement in foster care or residential care,

[1] See generally, Australian Human Rights Commission, *Wiyi Yani U Thangani – Women's Voices: Securing Our Rights, Securing Our Future* (Report, 9 October 2020).

which can also further expose girls to sexual violence.[2] The sexual abuse of children in out-of-home care was documented in the Royal Commission into Institutional Responses to Child Sexual Abuse, which brought to light thousands of cases of historical sexual abuse in care, and heard or read over 9,000 reports of child abuse.[3] The report identified that a disproportionate number of survivors were Aboriginal or Torres Strait Islanders.[4]

2. What are the drivers of First Nations women and girls' overrepresentation as accused persons and offenders in the criminal justice system? What works to reduce this overrepresentation? What needs to be improved?

The Australian Human Rights Commission highlights:

> Disadvantage and intergenerational trauma are the drivers in Aboriginal and Torres Strait Islander women and girls having contact with the criminal justice system. ... [W]omen and girls emphasise the impact of family and sexual violence, poverty and homelessness, and mental health and cognitive impairment as having a significant impact on the likelihood of incarceration. Aboriginal and Torres Strait Islander women and girls are statistically more likely to be the victims of crime and violence than non-Indigenous women, and their offending behaviours are often intimately connected to these experiences and the trauma that has resulted.[5]

First Nations women often emerge from the criminal justice system more disadvantaged than they were upon entry: 'Once they have made contact, the justice system at every stage, from experience with police, the courts, incarceration in prison and parole, causes additional trauma and further entrenches inequalities, meaning they are frequently even more disadvantaged after contact with the justice system than they were before.'[6]

Some of our members report this experience is common among their clients who are First Nations women. These women become overwhelmed, feel disempowered and this in turn results in more trauma and perpetuates a cycle that is difficult to break. For example, our members report First Nations women involved in family violence matters may reach a point where they feel so overwhelmed or disadvantaged that they choose to act against legal advice and against their own interests. This may include wanting to concede a domestic violence application against them which is unjustified. For First Nations women going through child protection proceedings, they may become overwhelmed and revert to behaviours that were the cause of their children's removal because they feel they can no longer "fight the system", or are suffering from grief due to the loss of their children.

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[2] The case of Tiahleigh Palmer, who was raped at 12 years old by her 20 year old foster brother and subsequently murdered by her foster father, illustrates the risks that children can face in out-of-home care.

[3] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report and Recommendations* (Final Report, 2017).

[4] Ibid.

[5] Australian Human Rights Commission (n 1) 122.

[6] Ibid 167.

4. What are the experiences of women and girls with multiple and complex intersecting needs as victim survivors of sexual violence in the criminal justice system? What works? What needs to be improved?

Women and girls with cognitive or intellectual disabilities

Women and girls with cognitive or intellectual disabilities who are victim-survivors of sexual violence have complex needs. There is a lack of data about the nature and extent of violence against women with cognitive or intellectual disabilities in Queensland, which corresponds with a lack of information and knowledge about the best ways to respond to and prevent it.[7] A key area of concern is the over-representation of women and girls with cognitive or intellectual disabilities as victim-survivors.

There is also a need to improve ways we obtain evidence from women and girls with cognitive or intellectual disabilities in relation to sexual violence crimes, whether as victim-survivors, witnesses or defendants (for example, by examining the potential expansion of the Queensland Intermediary Scheme).[8]

Engagement with victim survivors

QLS supports initiatives that ensure appropriate engagement with victim survivors by the criminal justice system to mitigate the risk of further traumatisation. For example:

- specially trained police units such as the Child Protection and Investigation Unit and the Vulnerable Persons Unit;
- multi-agency teams who come together to develop and implement multi-agency responses to the needs of victim survivors, such as the Suspected Child Abuse and Neglect Team and the High Risk Team;
- support services staffed by appropriately trained personnel to assist victim survivors; and,
- initiatives like the Queensland Intermediary Scheme (discussed further below).

Some members consider the following issues should be the subject of further review and improvement:

- police failing to refer victim survivors to appropriate support services at the time of complaint (e.g. rape crisis counselling, 1800RESPECT for safety planning), which some members report is a particular problem in regional, rural and remote communities;
- police failing to obtain an adequate and comprehensive statement from the victim survivor, with some victim survivors reporting that police have discouraged them from making a statement;
- a lack of access to a female interpreter or appropriately trained interpreter where English is not the victim survivor's native language;

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[7] Similar observations have been made in the Victorian context, which resulted in the Voices Against Violence Research Project and has been used as a basis for evidence-based recommendations for legal, policy and service sector reform. See, for example L Healey, *Voices Against Violence: Current Issues in Understanding and Responding to Violence Against Women with Disabilities* (Women with Disabilities Victoria, Office of the Public Advocate and Domestic Violence Resource Victoria, Paper 2, 2013).

[8] Queensland Courts, QIS Pilot Program (Web page, 21 June 2021) <https://www.courts.qld.gov.au/services/queensland-intermediary-scheme/qis-pilot-program>.

- training and education programs for those who come into contact with victim survivors throughout the criminal justice system;
- engagement with the victim throughout the complaint process where currently, investigating officers and/or Victim Liaisons at the Department of Public Prosecutions (**DPP**) are relied on to keep victim survivors informed of the progress of their complaint and may send correspondence to young, First Nations or culturally and linguistically diverse complainants in language they cannot access and/or describing the court process in legalistic terms; and,
- expanding access to the Queensland Intermediary Scheme to include some victims of sexual violence and other vulnerable groups (discussed further below).

5. What are the experiences of women and girls with multiple and complex intersecting needs as accused persons and offenders in the criminal justice system? What works? What needs to be improved?

Women and girls with cognitive or intellectual disabilities

Women and girls with cognitive or intellectual disabilities in detention have often experienced multiple system failures in identifying and appropriately responding to their needs before they engage with the criminal justice system. It is often the case that their disability-related behaviours of concern are attributed with criminal intent and the child or young person is prosecuted by the criminal justice system, rather than supported by other appropriate service systems.

The criminal justice system is poorly suited to respond to complex needs arising from mental illness, disability, acquired brain injury, and substance abuse, where the role of prison 'has become, in many cases, simply to "warehouse" or "manage" people who fall into these categories, without providing appropriate or adequate support in addressing the underlying issues.'[9] There is a need to ensure adequate support for women and girls with cognitive or intellectual disabilities who are involved in the criminal justice system as offenders, which includes adequate representation and the provision of disability supports, including those funded by the NDIS, in custodial settings. Prison staff must also be appropriately trained on how to deal with specific types of disability, and the types of adjustments that can be made to enable prisoners with disabilities to have full and effective access to prison life.

First Nations women

It is widely accepted that even before entering prison, many First Nations women are 'trapped in a cycle of disadvantage that may include poverty, domestic violence, homelessness, unemployment, poor health, and lack of educational opportunity.'[10] In 2016, statistics show Aboriginal and Torres Islander women accounted for: 35% of women in prison; 33% of women on remand; 40% of women held in high security prisons; and, were more likely than non-Indigenous women to return to prison for parole breaches.[11] More recent data confirms the continued over-representation of Aboriginal and Torres Strait Islander women in the criminal justice system, who are now imprisoned at over 14 times the rate of non-Aboriginal and Torres

[9] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No. 133, 2017) [11.32].
[10] Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (Report, 2019) 63.
[11] Ibid.

Strait Islander women.[12] It is widely acknowledged this is partly the result of First Nations people being subject to increased police surveillance and over-policing.[13]

Corrective and related criminal justice services must be delivered in a way that accounts for the historic and continuing disadvantages experienced by Aboriginal and Torres Strait Islander Women to address their specific needs. For example, there is a need for: increased support to prevent risk of self-harm; more transitional supports near their communities of origin;[14] more educational supports; and, more family support.

The Queensland Human Rights Commission (**QHRC**, formerly the Anti-Discrimination Commission Queensland) has previously recommended a review of services and programs currently available to Aboriginal and Torres Strait Islander women prisoners, to include consultation with Aboriginal and Torres Strait Islander women prisoners themselves about how to enhance and improve the programs and services available in prison, and on release.[15]

Women prisoners as mothers and primary carers

It must be acknowledged that when fathers are incarcerated, 'the vast majority of children remain in their family home, cared for by their mother, whereas, when mothers are sent to prison, more commonly children require alternative arrangements'.[16] Where a female prisoner is also a single mother, being incarcerated can leave her children without adequate care and support. Time spent in prison by women who are mothers and primary carers can have significant and long-lasting consequences for their children and families.[17] Problems can include: isolation; behavioural difficulties at school; anxiety; insecurity; withdrawal; anger; and, mental health concerns. The QHRC has previously recommended that the *Penalties and Sentences Act 1992* (Qld) include the principle that the best interests of the child be a factor to be considered when sentencing a person with a dependent child. Similar provisions are found in Commonwealth legislation,[18] as well as legislation in South Australia[19] and the Australian Capital Territory.[20]

The recent case of *Borchardt v Queensland Police Service*[21] illustrates the difficulties of short imprisonment for women prisoners who are mothers and primary carers of young children,

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[12] Australian Bureau of Statistics, 'Prisoners in Australia' (2021) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2021#key-statistics>.

[13] Grace O'Brien, 'Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia' (2021) 10 *Social Sciences* 68:1-10, 5; Amy Simmons, 'Over-policing to blame for Indigenous prison rates', *ABC News* (online, 25 June 2009) <https://www.abc.net.au/news/2009-06-25/over-policing-to-blame-for-indigenous-prison-rates/1332486>.

[14] See, for example Amelia Radke, 'Women's Yarning Circles: A gender-specific bail program in one Southeast Queensland Indigenous sentencing court, Australia' (2018) 29(1) *The Australian Journal of Anthropology* 53.

[15] Anti-Discrimination Commission Queensland (n 10) 74.

[16] Flynn et al, 'Responding to Children When Their Parents are Incarcerated: Exploring the Responses in Victoria and New South Wales, Australia' (2015) 32 *Law in Context* 4, 5.

[17] Catherine Flynn, 'Responding to the children of women in prison: Making the invisible visible' (2011) 19 *Family Relationships Quarterly* 10.

[18] Section 16A(2)(p) of the *Crimes Act 1914* (Cth) requires a sentencing court to take into account 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.

[19] *Sentencing Act 2017* (SA) ss 86, 105, 114, 115 and 120.

[20] *Crimes (Sentencing Act) 2005* (ACT) s 33.

[21] [2021] QDC 101.

where the sentencing judge was found to have failed to properly consider the defendant's family responsibilities. In that case, the defendant's baby was nine months old when she was sentenced to imprisonment, and she had seven dependent children aged between nine months and 10 years. The defendant served 27 days in custody before being released on bail.

The District Court noted: 'the mere fact that the appellant had seven children aged between nine months and 10 years should have been enough to alert the sentencing Magistrate to the possibility that this may be one of those rare matters where consideration fell within the categories of exceptional or extreme.'[22] While the District Court found there was a miscarriage of justice in the first instance, a "best interests of the child" statutory rule may have reduced the likelihood of the defendant serving any time in prison and her children being separated from their mother until she was granted bail.

However, the Criminal Law Committee cautions that such a rule could also act to the detriment of some women, for example in domestically violent relationships where a male defendant seeks to obtain a sentence discount, or where it is used to justify the imprisonment of a woman with the consequence that her child is removed and placed in the child protection system. There is already scope for the court to consider the impact of a sentence upon dependent children of an offender in the broad discretion permitted under s 9(2)(r) (and s 9(2)(p) in relation to Aboriginal and Torres Strait Islander offenders) of the *Penalties and Sentences Act 1992* (Qld).[23]

Some prisons accommodate young children who reside with their mothers, however strict prison rules can negatively impact childhood development and behaviours. It has previously been recommended that prison officers working in units where young children are accommodated must be 'reminded that a child's needs are the priority'.[24]

Older children of women prisoners will be physically separated from their mother while she is incarcerated and may reside with family or non-family foster carers, or enter State residential care. Marshall describes the children of prisoners as 'the invisible victims of crime and the penal system. They have done no wrong, yet they suffer the stigma of criminality. Their rights to nurture are affected both by the criminal action of their parent and by the state's response to it in the name of justice.'[25] To mitigate the severe consequences of incarceration on a woman's children, contact between the prisoner and her children must be facilitated, and decisions regarding early release (parole) must take into account women prisoners' care-taking responsibilities.

Additionally, the impact of birth, birth trauma, stillbirth, miscarriage and post-natal depression are little recognised but potentially relevant risk factors for criminality and sentencing mitigation in certain populations that require further study.[26] Members of our Criminal Law Committee consider these are contextual matters police, courts and defence lawyers sometimes fail to

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[22] Ibid [33].
[23] See *R v Chong; ex parte Attorney-General (Qld)* [2008] QCA 22.
[24] Anti-Discrimination Commission (n 10) 99.
[25] Kathleen Marshall, *Not Seen. Not Heard. Not Guilty: The Rights and Status of the Children of Prisoners in Scotland* (Scotland's Commissioner for Children and Young People, 2008) 8.
[26] Some studies recognise the impact that post-natal depression may have on female criminality: Sarah Passmore, Samantha Woodhouse and Susan Cooper, 'Assessing risk in female offenders: A review of the HCR-20 and the FAM' [2014] *Forensic Update Annual Compendium* 21. See also Isla Masson and Linnea Osterman, 'Working with female offenders in restorative justice frameworks: Effective and ethical practice' (2017) 64(4) *Probation* 354.

properly elucidate from female defendants which can be highly relevant to the disposition of a matter.

6. How are the impacts of trauma for women and girls understood and exercised at each point across the criminal justice system?

Our members consider there is scope to improve the criminal justice system's understanding of trauma and response to trauma. There remains no single accepted definition of "trauma" in the medical literature, which has led to a lack of clarity as to how a "trauma-informed" framework can or should apply to the criminal justice system in practice. McLachlan highlights:

> To be 'trauma-informed' is to have 'an understanding of trauma and an awareness of the impact it can have across settings, services, and populations'. To operationalise such an approach, it is necessary to understand what 'trauma' is, yet there is no universally accepted definition or conceptualisation of trauma. In fact, '[i]t remains contentious among mental health professionals as to whether "trauma" relates to a single event or series of events, an environment, to the process of experiencing the event or environment, or to the psychological, emotional, and somatic effects of that experience'.[27]

On the one hand, psychiatrists, forensic and clinical psychologists often rely on a clinical definition of "trauma" based on the American Psychiatric Association's *Diagnosis and Statistical Manual of Mental Disorders* (**DSM**), of which the most recent version (DSM-5) requires 'exposure to actual or threatened death, serious injury, or sexual violence'.[28] In fact, the DSM-5 clarified and narrowed the types of events that qualify as "traumatic", where medically based trauma 'is now limited to sudden catastrophe such as waking during surgery or anaphylactic shock. Non-immediate, non-catastrophic life-threatening illness, such as terminal cancer, no longer qualifies as trauma, regardless of how stressful or severe it is.'[29]

On the other hand, the DSM-5 has been criticised for 'not comprehensively recognising the range and impact of trauma' where some psychiatrists, psychologists, social workers and counsellors with frontline experience 'have identified the importance of responding to the subjective impact of ongoing, interpersonal trauma – particularly domestic/family abuse and chronic child abuse and neglect.'[30] This trauma-informed work has led to a broader understanding of trauma than the clinical model where:

> trauma is viewed not as a single discrete event but rather as a defining and organizing experience that forms the core of an individual's identity ... The impact of trauma is thus felt throughout an individual's life in areas of functioning that may seem quite far removed from the abuse, as well as in areas that are more obviously connected to the trauma.[31]

It is not clear on which definition of "trauma" the Discussion Paper relies. Further, the Discussion Paper does not appear to reference a definition of "trauma-informed practice" that is accepted in the medical literature. Rather, the Discussion Paper references a report from Australia's National Research Organisation for Women's Safety which takes a 'psychosocial approach to

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[27] Katherine J McLachlan, 'Same, same or different? Is trauma-informed sentencing a form of therapeutic jurisprudence?' (2021) 25(1) *European Journal of Current Legal Issues* 738:1-15, 2.
[28] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013) 271.
[29] Anushka Pai, Alina M Suris and Carol S North, 'Posstraumatic Stress Disorder in the *DSM-5*: Controversy, Change, and Conceptual Considerations' (2017) 7(1) *Behavioural Sciences* 7: 1-7, 2.
[30] McLachlan (n 27) 3.
[31] Ibid.

complex trauma', relying on a definition of "complex trauma" that refers to 'multiple, repeated forms of interpersonal victimisation and the resulting traumatic health problems and psychosocial challenges'.[32]

Notwithstanding the importance of recognising the impact of traumatic experiences on victims and offenders alike, we consider there is a need to clarify what is meant by "trauma" and "trauma-informed practices", guided by the most recent medical literature. Where this submission uses the term "trauma-informed practices", we refer to the QHRC's definition below.

The over-criminalisation of behaviours in out-of-home care for women and girls with disability

In relation to women and girls living in out-of-home care, our members report that some residential service providers default to a police response, contacting law enforcement as a means to manage a person's challenging behaviour in out-of-home care, rather than utilising trauma-informed practices or acknowledging the need for targeted support systems to be put in place for women and girls requiring disability supports.

There is a need for alternative approaches to address the anti-social behaviours of women and girls in out-of-home care, such as a consistent evidence-based de-escalation and co-regulating responses to diffuse problematic behaviour and/or an in-house restorative justice approach.

For girls living with disability, the terminology used in the disability service system is 'positive behaviour support'. Positive behaviour support is a way of looking at the fit between the person and the environment in which they find themselves. It could include changing factors such as staff attitudes, physical factors such as reducing noise levels (sensory), or ensuring increased choices to the person with disability.

Trauma-informed practice in prisons

Traumatic childhood experiences and contact with the child protection system make some women and girls more vulnerable to early interaction with the criminal justice system. The QHRC highlights that:

> past traumatic experiences can play a significant role in women's criminal justice involvement, adjustment within institutional settings, and success in the community. Trauma-informed practice is a framework for human service delivery that is based on knowledge and understanding of how trauma affects people's lives and their service needs. It means that service providers have an awareness and sensitivity to the way in which clients' presentation and service needs can be understood in the context of their trauma history. The broad principles of trauma-informed practice require prisons to provide women with opportunities to experience safety, trust, choice, collaboration, and empowerment.[33]

The detention environment is not equipped to respond to this trauma and can exacerbate the trauma for the child or young person, leading to escalating behaviours of concern and re-traumatisation. Prisons, in particular, 'are built on an ethos of power, surveillance and control, yet trauma sufferers require safety in order to begin healing. A trauma-informed approach may

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[32] Australia's National Research Organisation for Women's Safety, *'A deep wound under my heart': Constructions of complex trauma and implications for women's wellbeing and safety from violence* (Research Report, Issue 12, May 2020) 15. The report also highlights that 'women and professionals used the language of trauma in a variety of ways': 52.

[33] Anti-Discrimination Commission Queensland (n 10) 61-2.

offer an alternative to delivering a less traumatic prison environment and experience for female criminal offenders with a history of sexual abuse or assault.'[34]

The QHRC emphasises the need for trauma-informed practice in women's prisons for a number of reasons:

- An extremely high prevalence of trauma exists among women prisoners.
- Some of the basic features of women's prisons can function as significant trauma triggers for women prisoners.
- Evidence suggests that the lack of trauma-informed practices in facilities has a negative effect, and compromises prisoners' mental health and success inside and outside of facilities.
- Creating a trauma-informed culture can contribute to greater institutional safety and security.[35]

The implementation of trauma-informed practices can lead to a notable decrease in negative behaviours, for example: prisoner-on-staff and prisoner-on-prisoner assaults; the use of segregation; suicide attempts; and, the need for mental health watches.[36]

First Nations women

First Nations women carry the additional burden of intergenerational trauma, being 'the legacy of historical dispossession and dislocation from land, culture and family.'[37] In this respect, the Australian Law Reform Commission (**ALRC**) highlights how individual memories of trauma become embedded in the culture as they are passed from adults to children 'in cyclic processes as cumulative emotional and psychological wounding.'[38] For First Nations people, 'intergenerational trauma is a collective consequence of colonisation rather than simply an individual experience. It is compounded by negative contact with the justice and related systems, such as children's protection'.[39]

7. How can the impacts of trauma be better recognised and responded to at each point across the criminal justice system? Consider: police; forensic medical examinations and processes; prosecuting authorities including the police and the DPP; lawyers; and, support services.

As discussed previously, there is a need to improve the criminal justice system's understanding of trauma and its impact on those who come into contact with the criminal justice system, both as offenders and victim survivors. For example, victim survivors with complex Post Traumatic Stress Disorder or Borderline Personality Disorder may have difficult behaviours which require appropriate engagement. Some victim survivors may not appear upset or distressed at the time of complaint, and they may not be believed on this basis.

Some of our members report that prosecutors are often siloed and inaccessible to the victim survivor. Victim survivors often rely on the arresting officer to update them on the process which

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[34] Mary Stathopoulos, 'Addressing women's victimisation histories in custodial settings' (2012) 13 *ACSSA Issues* 1.
[35] Ibid 62.
[36] Ibid.
[37] Australian Law Reform Commission (n 1) 79.
[38] Ibid.
[39] Ibid.

can cause tension because the arresting officer themselves may not know the progress of a matter.

Some members also report that some victim survivors feel disconnected from the process, where assistance by a dedicated social worker or other trained professional may assist them throughout the criminal justice process.

We raise a lack of appropriate trauma counselling available for offenders within the criminal justice system, particularly offenders in custody, where corrective services and parole officers may have limited resources and training in this area. Trauma counselling, which is sufficiently specialised and resourced to help offenders address the underlying causes of their offending is not offered in custody or through probation and parole.

9. What are your experiences or observations about how the rights of women and girls who are involved in the criminal justice system as accused persons or offenders are protected and promoted? What works? What could be improved?

Section 32 of the *Human Rights Act 2019* (Qld) (**HR Act**) sets out the rights that apply to all persons in criminal proceedings, which include the right to:

- be presumed innocent until proved guilty according to law;
- be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands;
- have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;
- be tried without unreasonable delay;
- be tried in person, and to defend themselves personally or through legal assistance chosen by the person or, if eligible, through legal aid;
- be told, if the person does not have legal assistance, about the right, if eligible, to legal aid;
- have legal aid provided if the interests of justice require it, without any costs payable by the person if the person is eligible for free legal aid;
- examine, or have examined, witnesses against the person;
- obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;
- have the free assistance of an interpreter if the person cannot understand or speak English;
- have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance;
- not to be compelled to testify against themselves or to confess guilt; and,
- have a conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with law.

In relation to persons who are detained, section 30 of the HR Act provides:

(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, unless reasonably necessary.
(3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

The HR Act also enshrines the right to health services;[40] the right to life;[41] the right to education;[42] the right to recognition and equality before the law;[43] the right to privacy and reputation;[44] the right to protection of families and children;[45] and, provides for cultural rights generally[46] and in relation to Aboriginal and Torres Strait Islander people.[47]

The Society considers that these rights, as well as any other substantive rights, should remain non-gendered. However, contact with the criminal justice system can have a disproportionate effect on the rights of women and girls. For example, the Australian Human Rights Commission has identified:

> Women in prison face considerable human rights problems. Strip searches can be degrading, humiliating and traumatic, especially for women who have suffered from sexual abuse. Mothers that are prisoners experience difficulties in maintaining their relationship with their children and suffer disruptions to family life, which can lead to their children suffering from emotional and behavioural problems. Indigenous women prisoners, in particular, can suffer from disruption to their cultural responsibilities and dislocation from their communities.[48]

Strip searches

Strip searching, in particular, has been highlighted as one practice that may constitute inhuman or degrading treatment and violate the right to bodily integrity unless absolutely necessary and required for good reason. They are often conducted on 'women who have experienced disproportionately high rights of sexual abuse and family violence and who, in the vast majority of cases, are awaiting trial or sentence, or are serving short sentences for non-violent crimes.'[49] The Human Rights Law Centre in Victoria commented in 2017 that:

> [t]he rationale given for the current routine use of strip searches is that they are necessary to maintain safety and security in prisons. However, evidence shows that routine strip searches are not a reasonable nor proportionate response to achieving this aim, particularly in light of the serious harm they cause women. ... Routine strip searching is an archaic practice that causes harm, particularly to survivors of sexual and family violence. At a time of state-wide emphasis on reducing violence against women, it is inconceivable that the Victorian Government would continue to condone the routine use of a practice that so closely replicates the power and control

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[40] *Human Rights Act 2019* (Qld) s 37.
[41] Ibid s 16.
[42] Ibid s 36.
[43] Ibid s 15.
[44] Ibid s 25.
[45] Ibid s 26.
[46] Ibid s 27.
[47] Ibid s 28.
[48] Australian Human Rights Commission, *Human Rights and Prisoners* (Information Sheet) <https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_prisioners.pdf>.
[49] Human Rights Law Centre, *Total Control: Ending the routine strip searching of women in Victoria's prisons* (Report, 5 December 2017) 2.

> dynamics of family violence, particularly when it is known that so many imprisoned women have experienced family violence.[50]

Inappropriate strip search practices have been recorded at Queensland prisons.[51] In Queensland, it appears that even where sophisticated technology can detect drugs and metal objects without the need for prisoners to remove clothing, strip searching remains a routine practice:

> Prisoners are strip searched upon entering and leaving a prison, irrespective of the purpose. For example, a person will be strip searched upon returning from court, from hospital treatment or upon being transferred from another prison. People who are considered to be at risk of self-harm or suicide are also strip searched, a procedure that many prisoners in crisis perceive as punishment and find extremely stressful in circumstances where they are already having difficulty coping with the prison environment. Incarcerated people are also strip searched before and after contact visits with friends and family, and before a drug test.[52]

Queensland Corrective Services' Custodial Operations Practice Directive relating to searches provides in relation to strip searches that corrective services facilities where female prisoners are accommodated 'must develop a Local Instruction for responding to the individual needs of female prisoners when conducting removal of clothing searches including considerations such as the prisoner's menstrual cycle or pregnancy.'[53] The Criminal Law Committee recommends that this and other related operations directives and protocols should be reviewed and amended to ensure strip search protocols are compatible with human rights and take into account the fact that women in prison have higher rates of child sexual abuse victimisation histories than women in the general community,[54] and high numbers of women in custody (that is, around 70-90%) have experienced abuse.[55] Consideration should also be given to ending the practice of routine strip searches for women and implementing less intrusive alternatives.

11. What are the impacts and implications for women and girls who are accused persons or offenders if matters are delayed across the criminal justice system? What works? What needs to be improved?

Many of the impacts experienced by accused persons or offenders when matters are delayed across the criminal justice system affect both males and females. For example, delays in a person's matter across the criminal justice system (for example, as a result of forensic backlogs, delays with co-offenders, or other court delays like those experienced during the COVID-19 pandemic) can increase a person's consideration of a guilty plea to resolve the criminal matter

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[50] Ibid 2-3.
[51] Queensland Ombudsman, *The Strip Searching of Female Prisoners: An Investigation into the Strip Search Practices at Townsville Women's Correctional Centre* (Report, September 2014).
[52] Caxton Legal Centre Inc, *Searching of Prisoners* (Web page, 2 September 2019) <https://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/prisons-and-prisoners/searching-of-prisoners/>.
[53] Queensland Corrective Services, *Search – Prisoner Search* (Custodial Operations Practice Directive, 18 March 2022) v 3.1.
[54] Mary Stathopolous, 'Addressing the needs of women in prison with histories of sexual abuse', *Penal Reform International* (4 December 2013) <https://www.penalreform.org/blog/addressing-histories-sexual-abuse-women-prison/>.
[55] Australia's National Research Organisation for Women's Safety (ANROWS), *Women's imprisonment and domestic, family and sexual violence* (Research Synthesis, 16 July 2020)

without further delay. However, there are additional factors unique to women and girls that affect the way they navigate the system.

Accused women and girls often have overlapping legal issues which may incorporate child safety and domestic violence matters. They may be tied to their co-offenders through their relationships such that where a matter is delayed, their connection to a problematic relationship is also prolonged. Delays in these proceedings can result in an accused being unable to take up or continue educational and/or work opportunities due to the uncertainty surrounding the resolution of their case. As women are more often in lower socio-economic positions than their male co-accused, this can compound their disadvantage. The Criminal Law Committee considers there should be a focus by both the prosecution and defence as to whether a matter should be further delayed awaiting a co-offender's committal or application, or whether there is scope to progress it.

Bail and remand practices

Women on bail may be subject to numerous bail conditions which can become particularly onerous when matters are delayed. They may impact a woman's work and lifestyle, or create further practical or psychological barriers to removing themselves from domestically violent relationships. As women are often primary caregivers for children, ageing parents and extended family, bail conditions can impact their ability to transport children, attend medical appointments, find alternative care arrangements, and other parental and familial responsibilities. Attendance at court, particularly in the arrest courts or large call-over courts, can mean an accused needs to be at court for almost a full day. Where matters are delayed beyond the time anticipated, this can affect a woman's care arrangements.

New Victorian research also outlines how strict bail and remand practices create 'pipelines to prison' and systematically disadvantage women experiencing housing insecurity and domestic and family violence and increase their risk of becoming trapped in longer-term cycles of incarceration.[56] The study found, in particular, that 'homelessness is the most significant barrier for women to overcome in an application for bail and that women's lack of safe and secure housing is often the result of DFV. This indicates that the crisis of women's remand levels is a product of *systemic inequalities* in the operation of bail laws rather than individual issues or "crime" trends.'[57]

Our members report that many courts and prosecutors support the amendment of bail conditions with the prosecuting body's written consent. However, a number of courts will not, or are hesitant to, have this as the default position. We consider there should be further encouragement of permitting variation requests to be made in writing, which would allow for these matters to be dealt with more expeditiously and may assist women in domestically violent situations to be able to take advantage of assistance without significant barriers in place.

Technology

The increased reliance on technology during the COVID-19 pandemic has improved access to justice and created significant efficiencies by reducing the time and costs incurred by parties and their representatives in attending court. However, our members in regional or non-

[56] Emma K Russel, Bree Carlton and Danielle Tyson, 'It's a Gendered Issue, 100 Per Cent: How Tough Bail Laws Entrench Gender and Racial Inequality and Social Disadvantage' (2021) *International*
[57] Ibid 2.

centralised courts report that technology in these places has been unable or ill-equipped to allow the remote appearance of more than one party, which has contributed to delays in finalising matters.

In particular, the inability for both a practitioner and prisoner to appear by video-link (particularly as a result of COVID-19 delays, or court commitments elsewhere), means that often matters are adjourned to another day to either facilitate the transport of the accused in person, or to accommodate an in-person hearing. The Society is supportive of upgrades to technology to facilitate the continued and increased use of remote appearances to assist in increasing efficiencies in proceedings.

Our members consider technology may also be used to facilitate grants of bail. In particular, the NSW Bureau of Crime Statistics and Research recently found there is 'no meaningful difference in the likelihood of bail refusal for defendants appearing via AVL [audio-visual link] at their first court bail hearing compared with those appearing in person'.[58]

Pregnancy and family contact

A study by the Australian Institute of Health and Welfare in 2020, based on data from the National Prisoner Health Data Collection, found that around 85% of incarcerated women report having been pregnant in their lives.[59] This includes women who may not have had a live birth (for example, those who miscarried or terminated a pregnancy), and those whose children were no longer dependent. More than half (54%) of the prison entrants surveyed reported having at least one dependent child.[60] Pregnant imprisoned women are a high-risk obstetric group, with both the mother and baby more likely to have problems and poorer outcomes, likely as a result of these women coming from disadvantaged backgrounds with a history of drug abuse.[61]

Delays in the criminal justice system, along with strict bail and remand laws, mean that a woman who is remanded may give birth in custody or her children will reach an age where they are no longer able to remain in jail with her. These circumstances can cause significant trauma for both mother and child. Delays may also impact a woman's ability to access prenatal care when they first enter a correctional facilitation.[62] Anecdotally, our members report that depending on location, a woman's vulnerability and her level of engagement with medical services, imprisonment may actually increase access to pre-natal and other medical support.[63]

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[58] Min-Taec Kim, 'Estimating the impact of audio-visual link on being granted bail' (2021) 235 *Crime and Justice Bulletin* 1-40: 1.

[59] Australian Institute of Health and Welfare, *The health and welfare of women in Australia's prisons* (Infocus, November 2020) <https://www.aihw.gov.au/getmedia/32d3a8dc-eb84-4a3b-90dc-79a1aba0efc6/aihw-phe-281.pdf.aspx?inline=true> 10.

[60] Ibid.

[61] Ibid.

[62] While more recent studies are lacking, one study published in 2014 reported 'no association between imprisonment during pregnancy and improved perinatal outcomes for imprisoned women or their neonates. A history of imprisonment remained the strongest predictor of poor perinatal outcomes, reflecting the relative health disadvantage experienced by this population of women': Walker et al, 'Pregnancy, prison and perinatal outcomes in New South Wales, Australia: a retrospective cohort study using linked health data' (2014) 14 *BMC Pregnancy and Childbirth* 214:1-11, 1.

[63] Given the *Termination of Pregnancy Act 2018* (Qld) has been in effect for less than five years, there is limited data as to whether imprisonment can decrease, increase, or has limited effect on women's access to termination services.

The Discussion Paper identifies six programs aimed specifically at maintaining family contact while women are in prison.[64] However, given the location of some of Queensland's five women's correctional facilities,[65] some women cannot have visits with their children or family, and delays in proceedings often extend these difficulties, and amplify the effects of incarceration.

Allocation of trial prosecutors

Our members highlight that a trial prosecutor is often allocated only days before a final hearing, after the matter has been before the court for a number of months or years. The late allocation of the trial prosecutor impacts the complainant's ability to be properly conferenced and consulted in a timely manner, and as a consequence, takes away any practical ability for the matter to be resolved through negotiation or a restorative justice referral.

Misidentification of the perpetrator

Members of the Domestic and Family Violence Law Committee highlight that delays experienced in proceedings for Domestic Violence Orders can have significant impacts on the parties involved. Victims of domestic violence are commonly the subject of an Application for a Domestic Violence Order as the respondent. This can arise when police mischaracterise victim trauma behaviour (which we discuss further at page 19), or a perpetrator brings a private application against a victim as a further act of domestic violence. In such cases, Temporary Protection Orders can be made *ex parte* with restrictive conditions, impacting on a victim's parenting and property rights which a court may be reluctant to amend prior to a final hearing.

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

Resources are often concentrated around major metropolitan areas, meaning that victim survivors in regional, rural and remote areas may need to travel long distances to access support services. Most of these services suffer from under-funding, have long wait times for access, and limit eligibility criteria to only the most vulnerable victim survivors.

14. How can service delivery be better integrated and coordinated to meet the needs of the women and girls who are victim survivors of sexual violence during their involvement with the criminal justice system? What works? What needs to be improved?

Our members report that victim survivors often feel they were not provided with adequate referrals by police or referrals are made as an off-hand comment, and consider further training for police is required, along with sufficient resourcing, to ensure victim survivors can be properly assisted to access support services.

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[64] Women's Safety and Justice Taskforce, *Women and girls' experiences across the criminal justice system as victim-survivors of sexual violence and also as accused persons and offenders* (Discussion Paper 3, 22 February 2022) Appendix 11, 106.

[65] These are: Brisbane Women's Correctional Centre; Helana Jones Centre; Numinbah Correctional Centre; Southern Queensland Correctional Centre; and, Townsville Women's Correctional Centre.

15. How are the rights and interests of victims of sexual violence in Queensland met and protected? What works? What could be improved? Relevant matters may include: your experiences with Victims Assist Queensland; your experiences with the Queensland Human Rights Commission; the establishment of an independent commission with responsibility for victims' rights; other models to protect and safeguard the rights of victims

Some of our members consider the assistance available to people applying to Victims Assist Queensland to be inadequate resulting in the scheme being accessible only to those with sophisticated systems understanding or who have social work support with experience in making applications. Survivors of sexual or domestic violence may not have the capacity or sufficient understanding to make such applications without assistance. Some members suggest consideration be given to an independent commission with responsibility for victims' rights, which may provide some benefits to victims in accessing services like Victims Assist Queensland.

17. What are the risks and benefits of introducing a mechanism to review and oversee prosecutorial agencies in Queensland?

The Discussion Paper refers to the review process that victims of crime can access in relation to prosecutorial decisions made in England and Wales.[66] However, it should be acknowledged that most Australian jurisdictions already incorporate automatic review into the initial decision-making process, by way of supervision:

> Before a decision not to prosecute is taken, the lawyer with carriage of the matter will usually consult at least with their supervisor and often more senior colleagues will review the file and decision-making process. This contrasts with the procedure in England and Wales, whereby review of the first decision-maker is only undertaken as a part of the review process. There is a capacity to review decisions not to prosecute in the first instance across the jurisdictions. Victims' access to information about this avenue varied, however, undermining the value of the system.[67]

The primary benefit of an oversight mechanism is likely to be increased transparency around the prosecution's decision-making processes and increased accountability, where victim engagement is key to a successful prosecutions system.[68] However, these benefits can be achieved in other ways; namely by ensuring prosecution bodies having clear, transparent and easy to access written policies for decision-making, as well as undertaking meaningful victim consultation and communication.

Gaudron and Gummow JJ of the High Court have highlighted why decisions not to prosecute may not be amenable to judicial review: 'The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.'[69] Further risks arise through the potential loss of prosecutorial discretion and prosecutors placing enhanced weight on the position of the victim as opposed to an objective view of the evidence. In the England and Wales context in relation to an application

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[66] Women's safety and Justice Taskforce (n 64) 32.
[67] Anna Talbot, 'Criminal justice: DPP complaints and oversight mechanisms' (2016) 136 *Precedent* 40.
[68] Ibid.
[69] *Maxwell v The Queen* (1996) 184 CLR 501, 534.

for judicial review of a decision to prosecute, the courts have emphasised the importance of prosecutorial discretion:

> In my judgment that submission really demonstrates that this is an area, once one considers matters such as weight to be given to evidence, where it is entirely within the discretion of the particular prosecutor what conclusion is reached, provided that the correct test are applied. That is precisely the sort of situation in which one reasonable prosecutor might reach one conclusion, whereas another might reach another conclusion, but that is not a basis for this court intervening or in any way impugning the decision.[70]

The Criminal Law Committee recommends in the first instance that clarification be sought on the protocols and policies in place at the DPP in relation to complaints handling, monitoring and reporting, for decisions not to prosecute, and further, that guidelines are developed to facilitate increased engagement with victims. The Criminal Law Committee also recommends that the Police Prosecution Corps develop an easy to access, clear and transparent complaints process in relation to decisions not to prosecute.

On the basis of the risks outlined above, the Criminal Law Committee does not recommend an additional oversight mechanism like the one in England and Wales be implemented in Queensland. While prosecutorial agencies should be appropriately resourced to ensure timely and adequate engagement with victims, the decision to charge, not to charge, or to discontinue a matter should remain one for prosecutorial discretion. Prosecutors should not be swayed to pursue prosecutions in circumstances where the relevant prosecutor has made a decision that the law, the evidence, or public interest does not support a conviction.

18. What are your experiences and observations of prosecutors and criminal defence lawyers in cases concerning women and girls who are victims of sexual violence or an accused person or offender?

Experiences and observations of **prosecutors** in cases concerning women who are **victims** of sexual violence

The Discussion Paper highlights that while the DPP has significant discretionary powers, including the ability to decide whether a criminal case should proceed and how it will be prosecuted, the reality is that victims have no control or ability to challenge prosecutors' decision-making.[71] This discretion, along with sufficient independence and impartiality from victims, is a fundamental tenet of our criminal justice system. In some respects, there is a 'tension between the victim's interests and the prosecutor's role as an independent officer who represents the community' where 'the prosecutor's paramount role is to ensure that the criminal law fulfils its objectives. From this perspective, victims should have little say concerning prosecutorial decisions.'[72]

Decisions by prosecutors affect not only how a matter proceeds, but may also affect how long a matter takes to proceed. Our members report that prosecutors are often reluctant to discontinue sex offences, even when the evidence is insufficient. This accords with research conducted by the Institute of Criminology on prosecutorial decisions in adult sexual assault cases: 'Prosecutors said they tend to be conservative about discontinuing cases, but that they

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[70] *R (Ram) v CPS* [2016] EWHC 1426 [31].
[71] Women's Safety and Justice Taskforce (n 64) 31.
[72] Denise Lievore, 'Prosecutorial decisions in adult sexual assault cases' (2005) *Trends & issues in crime and criminal justice* 291: 1-82, 2.

routinely look for opportunities to negotiate charges rather than risk an acquittal. They are experiencing increasing pressure to prosecute, even when it is their assessment that the prospects of conviction are poor.'[73]

Circuit courts

In regional circuit towns, it appears to be common practice that the complainant is only contacted by the prosecutor in the week prior to a trial listing. This is because prosecutors are extremely busy on circuits, leaving insufficient time to properly liaise with complainants or to build rapport and gain trust.

There is a level of community distrust of police in remote Indigenous communities. There also appears to be a lack of cultural competency training for police and a lack of cultural liaison officers for First Nations people, especially in remote communities.

Experiences and observations of **prosecutors** in cases concerning women who are **accused** persons or offenders

Our members report a tendency on the part of police officers, especially in the domestic violence context, to apply principles of strict equality rather than engaging with the broader and systemic issues that promote domestic violence and gender inequality. For example, women may be charged as the perpetrator or be the subject of a Police Protection Notice on the basis of assumptions formed at the scene of the incident, as opposed to considering the gendered dynamics of domestic violence or the application of coercive control. This police misidentification of the "primary aggressor" in domestic and family violence incidents is well documented in media reports.[74] Recent research highlights that body worn cameras can improve police accountability, however further effective regulation of body worn cameras is required so as not to deprive courts of the best evidence available to them.[75]

Some of our members have also observed a reluctance by prosecutors to deal with children by way of protected admissions under the *Youth Justice Act 1992* (Qld) (**YJA**), especially for serious charges.

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[73] Ibid 2.

[74] Ben Smee, 'Queensland police misidentified women murdered by husbands as perpetrators of domestic violence', *The Guardian* (online, 3 May 2021) <https://www.theguardian.com/australia-news/2021/may/03/women-murdered-by-husbands-labelled-perpetrators-of-domestic-violence-by-queensland-police>; Lexy Hamilton-Smith and Angel Parsons, '"Bogus" domestic violence orders on the rise as violent partners seek to silence survivors "out of spite"', *ABC News* (online, 20 June 2021) <https://www.abc.net.au/news/2021-06-20/qld-domestic-violence-survivors-issued-bogus-orders-crime/100219142>; Hayley Gleeson, 'Police are still misjudging domestic violence and victims are suffering the consequences', *ABC News* (online, 31 March 2022) <https://www.abc.net.au/news/2022-03-31/police-misidentifying-domestic-violence-victims-perpetrators/100913268>.

[75] Blewer and Behlau highlight police may claim they though they did not have to record an interaction or incident, or keep the footage, or that they did not have the resources to do so: Robyn Blewer and Ron Behlau, 'Every Move You Make...Every Word You Say: Regulating Police Body Worn Cameras' (2021) 44(3) *UNSW Law Journal* 1180, 1201. See also, Andi Yuu, 'Police body warn cameras may provide the best evidence – but need much better regulation', *The Conversation* (online, 19 May 2021) <https://theconversation.com/police-body-cameras-may-provide-the-best-evidence-but-need-much-better-regulation-159631>.

Experiences and observations of **defence lawyers** in cases concerning women clients who are **victims** of sexual violence

Our members report that cultural reasons may make First Nations women hesitant to talk to their defence lawyer, or anyone, about past sexual abuse.

In relation to the conduct of criminal defence lawyers in cross-examination, advocacy training has for many years now impressed upon the advocate the importance of: the use of simple, unambiguous language; adopting a measured, respectful and non-aggressive tone; questioning directed towards the issues in contention; and, eschewing a disrespectful, sarcastic or intimidating tone.

This mode of cross examination is the accepted model for training purposes, especially for cases involving sexual offences or offences of violence. Deviation is discouraged. For a modern day trained advocate, a deviation may occur in a rare case but likely never in a sex trial or a trial involving allegations of violence.

There may still exist advocates who tactically adopt a disrespectful, sarcastic, or intimidating tone, contrary to current training. However, in such instances the trial judge has the power to disallow improper questioning[76] under s 21 of the *Evidence Act 1977* (Qld) (**Evidence Act**). In our members' experiences, Judges do not hesitate to exercise this power.

Section 9E of the Evidence Act outlines principles for dealing with a child witness, defined as a child under 16 years. The following general principles apply: the child is to be treated with dignity, respect and compassion; measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence; the child should not be intimidated in cross examination; and, the proceeding should be resolved as quickly as possible.

Section 21A of the Evidence Act allows for protective measures to be adopted for special witnesses, who are complainants for sexual offences or offences of violence. Section 21N prohibits cross-examination by the alleged perpetrator.

Taken together, the existing legislative framework and modern training of advocates in cross-examination practices is highly protective of witnesses who are complainants in trials for sexual offences or offences of violence.

27. What factors do victims of sexual offences consider when deciding whether to report to police in Queensland?

There are multiple barriers to First Nations women reporting any offences, but in particular, offences of sexual violence.

Mistrust and fear of the police

Our members working with First Nations women across issues including family violence and sexual assault report a mistrust of the police due to lack of cultural competence, even in areas like Palm Island where the entire population comprises First Nations people. First Nations women may experience racism from police which manifests as: indifference to their reporting of crimes; misidentification of perpetrators in family violence matters (see our comments at pages

[76] Where an improper question is defined as a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive.

16 and 19); harsher responses by police towards First Nations women and girls suspected of committing offences.

Fear of retaliation by the perpetrator, the family or the perpetrator's family

Our members also report a genuine fear among First Nations women of retaliation, for example:

- the perpetrator insisting on contact with the woman while he is in prison and threatening her life when he gets out;
- prison calls from the perpetrator urging the woman to withdraw her complaint; and,
- threats of violence and taunting from the perpetrator's family.

Other barriers to reporting include: past negative experiences with police and the courts; lack of support to report crimes; and, failures to collect relevant evidence at critical stages. First Nations women may also be reluctant to report sexual offences, or any crimes for that matter, due to fear that the police will look into the victim's criminal history. As regards a failure to collect relevant evidence, our members report one case of a First Nations woman who was the victim of a date rape drug and subsequent sexual assault, who when she presented at hospital was assumed to be alcohol intoxicated due to slurred speech and disorientation. The hospital subsequently failed to collect critical blood samples to show the presence of the drug in her system. While the offence was reported, it was unable to be prosecuted.

33. If Queensland were to relax restrictions on reporting of sexual violence and/or domestic violence cases, for example by adopting legislation similar to New South Wales and Victoria, what would be the risks and benefits?

The current position in Queensland, in relation to offences of rape, attempted rape (including assault with the intent to commit rape) and sexual assault, is that the complainant may not be identified at any time in the proceedings without an order of the court and the accused cannot be identified until after committal without an order of the court. The Discussion Paper highlights that although the wording of the provisions in the *Criminal Law (Sexual Offences) Act 1978* (Qld) is somewhat unclear, it is likely that victims can be publicly identified if they consent in writing, are over 18, and have mental capacity.

The Discussion Paper references the #LetHerSpeak campaign, which did not identify Queensland's current legislative framework as problematic, and refers to a coalition of media organisations ('Australia's Right to Know Coalition') who argue that Queensland's current restrictions on reporting are unduly restricting the public reporting of sexual offences and domestic and family violence. However, the same coalition of media organisations, in its submission on a statutory tort of privacy, argued that the current privacy framework provides strong protection for individuals, including 'various legislative restrictions on the reporting of matters, including matters involving children, family law matters, adoptions, coronial inquiries, sexual offences, jurors, communication with prisoners and other detained persons'.[77]

The Criminal Law Committee considers that the current position in Queensland provides for the protection of the complainant's identity in certain circumstances whilst seeking to strike a balance between the right of the accused to a fair trial and the general rule of openness of the court and that court proceedings may be openly reported.

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[77] Australia's Right to Know Coalition, *Submission to the Review of the Privacy Act 1998 (Cth)*, <https://www.ag.gov.au/sites/default/files/2021-01/australias-right-to-know-coalition.PDF>.

In jurisdictions such as NSW and Victoria the complainant must not be identified without authorisation by the court unless consent has been obtained from a complainant (over the age of 14). Whilst it is recognised that complainants being able to self-publish details (and others publishing details with the consent of the complainant) provide a complainant with control over the circumstances in which their 'story' is told, there are obvious risks to the accused's ability to receive a fair trial in circumstances where jurors may have access to details of the complaint of which the prosecution, court and defence have not been made aware. It has been long recognized by the courts that:

> If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial. These principles are too basic to require elaboration. Occasionally however, we need to remind ourselves of them.[78]

The Criminal Law Committee considers that the appropriate balance between the ability of a complainant to tell their story and for the accused to receive a fair trial is struck where the complainant is able to self-identify and be identified (if they consent in writing, are over 18, and have mental capacity) in a report only after the defendant is convicted.

35. Should there be a discretion for courts to allow the publication of the identity of a child convicted of rape or sexual assault with the victim's consent?

QLS considers that allowing the publication of the identity of a child convicted of rape or sexual assault (or indeed, any other offence) should be strongly discouraged. In Queensland, publication of identifying information about a child is presently an offence and is prohibited under s 301 of the YJA. This prohibition reflects Australia's obligations as a signatory to the United Nations *Convention on the Rights of the Child* (**CRC**), of which art 40 states:

> States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[79]

Section 2(b)(vii) of art 40 further provides that signatories to the CRC must ensure that each child alleged as, or accused of, having infringed the penal law has 'his or her privacy fully respected at all stages of the proceedings.' Art 16 of the CRC prohibits arbitrary or unlawful interference with a child's privacy.

Additional guidelines are included in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (**Beijing Rules**) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (**Riyadh Guidelines**). The Beijing Rules provide that a

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[78] *R v Karakaya* [2005] 2 Cr App R 5 [24].
[79] UN General Assembly, *Convention on the Rights of the Child*, United Nations, Treaty Series, vol 1577, opened for signature on 20 November 1989.

juvenile offender's privacy must be respected at all stages of the proceedings to avoid harm caused by undue publicity,[80] and further that in principle, 'no information that may lead to the identification of a juvenile offender shall be published.'[81] The Riyadh Guidelines specifically note that 'in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons'.[82]

Schedule 1 of the YJA sets out a charter of youth justice principles, which include that a child who is detained 'should be given privacy that is appropriate in the circumstances including, for example, privacy in relation to the child's personal information'.[83] Section 16 of Schedule 1 further provides that children should be dealt with in a way that 'allows the child to be reintegrated into the community'.[84]

The ALRC has commented that while privacy is not an absolute right and must be balanced against other rights and important values in our community (for example, the desirability of an open justice system and the free flow of information to the public through the media and other outlets), there are significant policy reasons for protecting the identity of children involved in criminal proceedings, including convicted offenders. In this respect, the ALRC has supported the 'purpose-built provisions preventing the naming of children and young people in relation to criminal proceedings in the specific legislation in each jurisdiction.'[85]

Accordingly, the Society considers that publishing the identity of a child convicted of any offence would infringe on the child's fundamental right to have their privacy respected at all stages of the proceedings and would have adverse impacts on a child's ability to reintegrated into the community following their conviction for such an offence. This accords with statements from the ALRC which has, in the New South Wales context, stated that the current prohibition on the publication of a juvenile's name is supported by the human rights principles set out in the CRC, International Covenant on Civil and Political Rights, Beijing Rules and Riyadh Guidelines, where any changes to the current prohibition may breach Australia's human rights obligations.[86]

This aside, naming children who have committed serious offences such as rape and sexual assault can exacerbate criminal behaviour due to the stigma attached to such a label; reduce prospects of rehabilitation and social integration; and, diminish a person's future employment opportunities.

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[80] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly resolution 40/33 of 29 November 1985, r 8.1.
[81] Ibid r 8.2.
[82] United Nations Guidelines for the Prevention of Juvenile Delinquency, adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990, p 5.
[83] *Youth Justice Act 1992* (Qld) sch 2, s 20(e).
[84] Ibid sch 2, s 16.
[85] Submission of the Australian Law Reform Commission to the NSW Legislative Council's Standing Committee on Law and Justice on the Inquiry into the Prohibition on the Publication of Names of Children involved in Criminal Proceedings (12 December 2007) <https://www.alrc.gov.au/publication/submission-to-nsw-legislative-council-on-the-publication-of-names-of-children-involved-in-criminal-proceedings/>.
[86] Submission of the Human Rights and Equal Opportunity Commission to the NSW Legislative Council's Standing Committee on Law and Justice on the Inquiry into the Prohibition on the Publication of Names of Children involved in Criminal Proceedings (7 December 2007) <https://humanrights.gov.au/our-work/legal/submission-inquiry-prohibition-publication-names-children-involved-criminal>.

40. What are your experiences or observations of alternative reporting options offered to victims of sexual assault? What works well? What could be improved?

Our Criminal Law Committee members' involvement in many matters commences post-charge, so it is difficult to assess the availability of alternative reporting options from a criminal defence perspective. Post-charge however, it appears that victims of sexual offending are frequently not consulted where submissions in relation to alternative justice solutions are proposed by defence. The Crown often unilaterally determines that a matter is "too serious" or "unsuitable" for such a resolution, without any reference to the complaint or their wishes. Further, when alternative justice resolutions are proposed, our members report it is frequently the case that the benefits/disadvantages of such processes when compared the conduct of a criminal trial are not explained to the complainant in a manner that allows them to make a fully informed choice.

Anecdotally, our members report an increase in complainants in criminal matters seeking their own independent legal advice both prior and subsequent to making a complaint so they may be fully informed of their options. A lack of consultation by prosecutors with complainants can further disempower victims in the criminal justice process and should be discouraged. For example, Naylor highlights that 'victims want some control over the process. Just as the offence has taken away their control, the criminal justice process also risks their continued disempowerment and indeed irrelevance. A process is needed that does not reinforce their "victim" status, and that gives them a genuine voice.'[87] Alternative justice resolutions can also 'address a range of other victim expectations of "justice" which are notoriously unsatisfied in the adversarial trial'.[88]

The Criminal Law Committee considers that consultation with a complainant should be mandatory where alternative dispute resolution processes are proposed in relation to a sexual offence.

50. Should Queensland's laws on consent be amended again before the impact of amendments recommended by the QLRC can be properly evaluated?

The five key recommendations relating to consent in rape and sexual assault cases made by the QLRC were enacted in Queensland on 7 April 2021. The recommendations effected change to the *Criminal Code Act 1899* (Cth) (**Criminal Code**) by inserting the following provisions:

- Section 348(3): expressly providing that a person is not taken to give consent to an act if they did not say or do anything to communicate consent.
- Section 348(4): when consent is withdrawn by words or conduct, then the act is done or continues without consent.
- Section 348A(1)-(2): an arbiter of fact can consider anything the defendant did or said to ascertain consent when considering a honest and reasonable but mistaken belief.
- Section 348A(1), (3): the voluntary intoxication of the defendant may not be regarded when determining whether it was reasonable that the defendant believed they had consent.
- The definition of consent being applied to all sexual offences in Chapter 32.

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[87] Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33(3) *UNSW Law Journal* 662, 668.
[88] Ibid.

These recommendations were made after extensive research by the QLRC, drawing data and evidence-based opinions from the judiciary, the legal profession, academics and organisations representing the interests of victims and survivors of rape and sexual assault offences.

Given the infancy of the changes, their impact is currently unknown. To amend the laws on consent before the changes can be properly evaluated would, in the Criminal Law Committee's view, be premature. The Criminal Law Committee recommends that the laws relating to consent remain unchanged until there is sufficient quantitative and qualitative data available to properly determine whether further amendments are necessary.

51. Are there risks in Queensland not adopting an affirmative consent model as exists in New South Wales and will shortly be adopted in Victoria? Can these risks be mitigated while maintaining an accused person's right to a fair trial? If so, how?

It is critical to recognise the fundamental differences in the Victorian and New South Wales legislative frameworks relating to the prosecution's burden of proof as regards affirmative consent. In these jurisdictions, "knowledge" is an element of the offences of rape and sexual assault that must be proved by the prosecution. The relevant offences require proof that:

- the sexual act took place;
- the sexual act took place without consent; and,
- the defendant had the requisite degree of knowledge as to the absence of the consent.[89]

In Queensland, the offences of rape and sexual assault require proof of just two elements:

- the sexual act took place; and,
- the sexual act took place without consent.[90]

The QLRC has highlighted the absence of an element of knowledge 'makes the task of proving rape and sexual assault in Queensland less onerous.'[91] In Queensland, an evidentiary onus must be overcome, usually by defence, before the issue regarding the defendant's belief can be raised. This often requires the defendant to either give evidence and therefore have his/her evidence challenged in cross-examination or by reliance on evidence in the prosecution case, to overcome the evidentiary onus which would not be required when it is an element of the offence.

The current Queensland provisions allow a jury to determine the facts and context of the actions having regard to all the circumstances in each case. The use of a general phrase 'freely and voluntarily given' in conjunction with a non-exhaustive, broad list of circumstances ensures the trier of fact can apply the definition in s 348 of the Criminal Code in a flexible and meaningful way.

This fundamental difference in the prosecution's burden of proof in Victoria and New South Wales gives rise to a different set of circumstances than in Queensland.

As stated above in respect of question 50, the Criminal Law Committee considers it is important that the recent amendments made to consent laws in Queensland are properly evaluated, and

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[89] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Consultation Paper No 78, December 2019) 43 [172].
[90] Ibid [173]. The same approach is adopted in Tasmania and Western Australia (together with Queensland, known as the "Griffith Codes").
[91] Ibid [174].

review of these laws should precede any further amendment to introduce an "affirmative consent model" as exists in New South Wales. The QLRC has recently recommended against the introduction of an affirmative consent model in Queensland and any amendment to the definition of consent that incorporates the term 'agreement' or some variant of it.[92] Importantly, the QLRC has stated:

> [T]he current definition of consent already reflects a communicative model in that the definition requires consent (as a state of mind) to be 'given' (that is, communicated) to the other person. The current position in this regard is clear and settled. The introduction of a new term like 'agreement' would not substantially change the operation of the law and may create uncertainty in interpretation.
>
> In cases of rape and sexual assault, if the defendant does not deny penetration or the action constituting the assault, the primary issue will be whether the complainant gave consent. Absence of consent is proved by asking the complainant whether the complainant consented to the sexual act on the occasion in question. This focus on the complainant's state of mind is the means by which control over sexual autonomy is respected. Any approach that shifts the focus away from the complainant's state of mind is undesirable.
>
> On balance, the Commission is of the view that an amendment introducing the word 'agreement' or 'agrees' into the definition of consent in section 348 should not be made. Reform of this nature may introduce uncertainty as to the meaning of the definition. It remains the case that it is the complainant's consent that is relevant.[93]

The Criminal Law Committee considers that the recent amendments to Queensland's consent laws strike an appropriate balance in upholding the rights of both complainants and defendants. We reiterate our comments made to the QLRC's review, in particular that the many and varied expressions of human sexuality, and the many and varied contexts in which sexual interactions take place, mean that assessments of whether consent was given are best made on a case by case basis on the evidence in each case. Prescriptive rules of general application are apt to lead to injustice. The more appropriate way to bring about social change is through increased community education.

53. What are the risks or benefits of further reform?

Redrafting the definition of consent so that consent must be 'agreed' rather than 'given'

We repeat our submission made in respect of question 51, and respectfully adopt the QLRC's view that the definition of consent should not be redrafted so that consent must be 'agreed' rather than 'given'.

Including a provision that provides a non-exhaustive list of circumstances where consent does not and cannot exist

Section 348(2) of the Criminal Code currently provides a non-exhaustive list of circumstances where consent does not and cannot exist. We consider that the definition of consent in s 348(1) is sufficient to capture any circumstance in which consent does not and cannot exist.

We also agree with the QLRC's view that one of the core strengths of Queensland's criminal law is the combination of certainty and flexibility that comes from the relationship between the

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[92] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 91 [5.72].
[93] Ibid 91 [5.75]-[5.77].

Criminal Code and the significant body of case law that applies and interprets its provisions.[94] We respectfully adopt the QLRC's view in relation to a non-exhaustive list of circumstances where consent does not and cannot exist:

> Section 348(2) of the Criminal Code acts, as it states, not to limit section 348(1), which provides that consent means 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent'. Section 348(2) lists certain circumstances in which consent, while apparently given, was ineffective. In each case, the primary question is whether (or not) consent was freely and voluntarily given.
>
> Section 348(2) has the advantage of flexibility. The list of circumstances is non-exhaustive and is expressed in broad terms. In this way, it is capable of covering many circumstances, including those which may not have been contemplated at the time of drafting. It can also adapt to relevant changes in community standards or expectations. It avoids the inflexibility (and potential unfairness) of narrowly drafted circumstances addressed to specific issues that may arise through case law from time to time. A more extensive and specific list might produce unsatisfactory outcomes. A court's attention might be diverted from the essential issue—whether the complainant did not freely and voluntarily give consent—to:
>
> - an argument about, for example, whether a particular situation amounted (in law and fact) to deprivation of liberty, bodily harm or grievous bodily harm;
> - the erroneous view that the prosecution is required to prove that the facts of the case fell within a particular listed vitiating circumstance.
>
> The Commission's view is that changes to section 348(2) are unnecessary. The remaining part of the chapter discusses some specific issues for consideration.[95]

<u>Removing the ability of the defendant to rely on self-induced intoxication as a reason for having an honest belief as to consent</u>

This issue was comprehensively canvassed by the QLRC. Prior to the recent legislative amendment, Queensland courts had held that voluntary intoxication negated the availability of the excuse of mistake of fact under section 24 because a mistaken belief induced by voluntary intoxication was not reasonable.[96] We note, in particular, the QLRC's conclusion that the law relating to an intoxicated defendant's mistaken belief as to consent is well-established.[97] Voluntary intoxication is not relevant in determining whether a defendant's mistaken belief that the complainant gave consent was reasonable.

Upon the recommendation by the QLRC, and by 2021 amendment, s 348A(3) of the Criminal Code now states that in deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person.

The issue of any further amendment was considered by the QLRC and rejected. The Criminal Law Committee agrees with submissions to the QLRC that further amendment is unnecessary and would make no substantive change to the law in Queensland.[98] Again, we respectfully agree

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[94] Ibid 116 [6.28].
[95] Ibid 116-7 [6.29]-[6.31].
[96] Ibid 190-1 [7.117]-[7.119].
[97] Ibid 191 [7.119].
[98] Ibid 193-4 [7.131].

with the QLRC's view, which implicitly rejects any notion that the law should be amended beyond a statutory recognition of the pre-existing case law.[99]

Amending s 348A(2) to provide that regard **must** be had (rather than **may**) to anything the defendant said or did (or did not say or do) to ascertain consent when considering whether they had an honest and reasonable belief about consent

The Criminal Law Committee considers there to be no discernible benefits to such a reform. The QLRC recommended that the Criminal Code be amended to include a provision to the general effect that, for offences in Chapter 32, in deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, regard may be had to what, if anything, the defendant said or did to ascertain whether the complainant gave consent. The Commission did not consider that such an amendment changed the current law, but that it would give clear expression to the law as it stood.

The Criminal Law Committee adopts the submissions made to the QLRC that:

> there is no need for such changes in that 'a jury may already take into account any steps taken by the defendant as part of the circumstances surrounding whether the belief of the defendant was reasonable' ... [and] 'given the very wide variety of factual circumstances under which the law is meant to operate and be applied to sexual relations, there is strength and logic and flexibility in this approach'.[100]

An amendment from 'may' to 'must' risks importing a pre-requisite that unless 'steps' were taken by the defendant to ascertain consent, mistake is excluded. We reiterate submissions made by Legal Aid Queensland to the QLRC on this issue:

> that inclusion of a 'steps' requirement may have the effect of 'imposing a structure' onto human relationships, in particular onto 'all lawful sexual conduct'. It could 'also apply unfairly to people who are immature, impaired or unsophisticated who may not be in a position to understand this level of regulation'. ... [I]it would [also] be prescriptive and would risk criminalising consensual sexual activity. ... [S]uch an approach would do more than simply shift the focus of inquiry to the defendant's actions, it would shift 'the evidentiary onus to the defendant to show that they made reasonable efforts to ascertain consent'. This would ... be a significant change, which would not necessarily improve the experiences of victims.

54. Should stealthing be explicitly referenced in Queensland law? If so, should stealthing be a stand-alone offence or incorporated into the existing law in the definition of consent or in a provision such as section 218 of the Criminal Code, Procuring sexual acts by coercion?

The act of stealthing may already be covered under the current offence of rape, pursuant to s 349 of the Criminal Code. Consent is defined in s 348 of the Criminal Code to mean 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent', and subsection (2)(e) clarifies that consent is not freely and voluntarily given if it is obtained by false and fraudulent representations about the nature or purpose of the act.

In circumstances where a complainant's consent to sexual intercourse is conditional on the defendant's use of a condom, the act of stealthing may deprive the complainant of a free and voluntary choice about whether to continue with sexual intercourse or not. In circumstances

[99] Ibid 194 [7.135].
[100] Ibid 187 [7.99].

where a complainant does not consent to sexual intercourse without a condom, complainant's consent is withdrawn with the removal of the condom. Rape can be prosecuted on the basis that the defendant nullifies a complainant's consent in modifying the act that a complainant consents to (sex with a condom), without obtaining fresh consent to sexual intercourse without a condom.

There is no explicit reference in the Criminal Code to the act of non-consensual condom removal during sexual intercourse, and limited published decisions considering the issue in Queensland. There have been, however, at least two instances in Queensland where condom related consent issues have been considered by the courts. First, the defendant in the case of *R v RAD*[101] was convicted of one count of rape, which was upheld on appeal. In that case, the complainant told the defendant to put a condom on prior to sexual intercourse, but he refused to do so and went ahead and had sexual intercourse with the complainant. The prosecution argued at trial that sexual intercourse had occurred without the complainant's free and voluntary consent. In affirming this view, the trial judged stated 'the complainant was willing to have sexual activity with the accused, there was [no] consent to... sexual activity without a condom.[102]

The second case took place in 2019 before the District Court in Gladstone, where the defendant was tried for rape. It was alleged that without the complainant's consent, the defendant removed a condom during sexual intercourse. In that case, the complainant had agreed to intercourse on the basis the defendant would wear a condom; she watched him put one on but then during sexual intercourse she realised he was no longer wearing one. The defendant was found not guilty.[103] However, the QLRC said in relation to the case: 'It is not possible, however, to discern the basis of the jury's verdict. A jury is not required to give reasons for its decision, and, from the limited information available about the trial, it is unknown whether other issues were also raised.'[104]

The QLRC has recognised there is still a significant gap in the law and confusion around non-consensual condom removal,[105] stating '[o]n one view, the non-consensual removal of a condom... [is] already covered by existing provisions, like the one in Queensland, to the effect that a person's consent to an act is not freely and voluntarily given if it is obtained 'by false and fraudulent representations about the nature or purpose of the act.[106]

While there are conceivably situations where conduct constituting stealthing should appropriately be charged as a rape offence, there are other situations where the conduct is of a lesser nature and an "all or nothing" approach of a rape charge may result in a miscarriage of justice. Multiple offence options may properly reflect the complex circumstances in which stealthing may arise to varying degrees of criminality.

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[101] [2018] QCA 103.
[102] Ibid [31].
[103] S Barnham, 'Gladstone man fights rape allegation after removing condom', *The Observer* (online, 25 July 2019); S Barnham, 'NOT GUILTY: Man accused of 'stealthing' rape is acquitted', *The Observer* (online, 25 July 2019).
[104] QLRC (n 92) 135-6 [6.110].
[105] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Working Paper No 78, 20 December 2019) [134]. See also B Chesser and A Zahra, 'Stealthing: a criminal offence?' (2019) 32(2) *Current Issues in Criminal Justice* 217, 219.
[106] Ibid [136].

On this basis, the Criminal Law Committee agrees with the QLRC's findings:

> The Commission acknowledges ... that the sabotage or removal of a condom without the other party's consent is a concerning practice. It is aware of at least one instance where such an act has been prosecuted as rape in Queensland.
>
> There may well be merit in considering whether this practice should be specifically dealt with as an offence in its own right. The Commission does not recommend an amendment to section 348(2) of the Criminal Code to include specific circumstances where the defendant sabotages or removes a condom without consent.[107]

58. What are the risks and benefits of video-recorded interviews between police and victims of sexual offences for use as evidence-in-chief in trials?

Video-recorded interviews between police and victims of sexual offences can already be used as evidence-in-chief in Queensland. However, such use is restricted to children and persons with an impairment of the mind. QLS supports measures aimed at minimising trauma for victims, noting that engaging with the criminal justice system alone can be traumatic for victims. Video recorded statements and evidence from body-worn cameras are already admissible in certain circumstances and we support in principle video recorded statements in sexual offence proceedings, subject to the interests of justice and a fair trial.

There are complexities inherent in allowing video-recorded interviews to be used as evidence-in-chief that need further consideration. We acknowledge that there may be benefits to a victim as a result of the use of video recorded evidence-in-chief. For example, victims will not have to recount the facts multiple times, and will not have to go through the process again if a mistrial occurs or there is a re-trial after a successful appeal. Giving evidence-in-chief via a video-recorded interview with police may reduce the trauma for some victims that is associated with giving evidence in court.

The Criminal Law Committee highlights the following risks:

- Some victims feel empowered by giving evidence in person.[108] Relying on video-recorded evidence-in-chief may take away the victim's desired way of relaying their experiences.
- The way a victim's evidence is presented to the court may be impacted depending on the context and timing of when the recorded statement was taken. Pre-recorded evidence can sometimes be less impactful than evidence given personally.
- Quality, volume of detail, particularity and the admissibility of the content provided during the recorded interview is contingent on the way a victim is questioned by the interviewing police officer.[109]
- Where matters of credit and reliability are in issue, it may not always be in the interests of justice to present the complainant's evidence-in-chief as a recorded statement.

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[107] QLRC (n 92) 144 [6.142]-[6.143].
[108] Boyer and Creagh, *Improving the justice response to victims of sexual violence: victim's experiences* (Research Report, August 2018) <https://www.justice.govt.nz/assets/Documents/Publications/Improving-the-justice-response-to-victims-of-sexual-violence-victims-experiences.pdf>.
[109] Mark Kebbell and Nina Westera, 'Promoting pre-recorded complainant evidence in rape trials: psychological and practice perspectives' (2011) 35 *Criminal Law Journal* 376.

- There will be additional cost and resource implications for parties involved in any proceedings. The time required for transcribing and/or viewing statements may add to legal costs. Where these costs become prohibitive, this may result in access to justice issues.

Further, where evidence-in-chief is recorded, parts of the recorded statement may be ruled as inadmissible and edited accordingly. Depending on the circumstances, this may have a positive or negative impact on the way in which the evidence is received.

The usual rules of admissibility in relation to the contents of the video evidence should continue to apply, and the Court must retain an overriding discretion to exclude evidence or require evidence-in-chief to be given in person if it is in the interests of justice to do so. Consideration would also need to be given to appropriate trial directions to ensure that a jury does not place too little or too much weight on the evidence because it was given in pre-recorded form.

The Evidence and Other Legislation Bill 2021 (**EOA Bill**) introduces a time-limited pilot enabling video recorded statements taken by trained police officers to be used as an adult victim's evidence-in-chief in domestic and family violence related criminal proceedings (the **VRE Pilot**). Explanatory Notes provide that the EOA Bill supports the Government's intention to develop a time-limited pilot (of 12 months' duration) that is subject to an independent evaluation, which assesses the practical and financial impacts of the VRE Pilot for courts, police and prosecutors.[110]

Review of the VRE Pilot is likely to be instructive as to whether a similar process for victims of sexual offences is both beneficial and practical. Accordingly, QLS considers that the use of video-recorded interviews between police and victims of sexual offences for use as evidence-in-chief in trials should be assessed in light of any recommendations made in respect of the VRE Pilot.

Depriving women and girls of their agency

It is important to highlight that while video-recorded evidence-in-chief (and other reforms) may bring benefits to some victims, there is a need to ensure the system does not deprive women of their agency and autonomy. Other areas of the law (for example, mental health and guardianship) are moving away from protective models that purport to act in a person's "best interests" to rights-based models focusing on the person's "views and wishes".[111] While reforms that are sensitive to the needs of women victims are important, they should not come at the expense of depriving women of their personal autonomy and agency, or the accused of the right to a fair trial.

61. How is similar fact and propensity evidence being considered in Queensland? Could the law in Queensland be improved to ensure that a fair trial for the accused takes into account the 'triangulation of interests' of the accused, the victim and the public? If so, how?

The Discussion Paper states the Taskforce is interested to hear views as to whether the present law in Queensland in relation to similar fact and propensity evidence is working well and should

[110] Explanatory Notes, Evidence and Other Legislation Amendment Bill 2021 (Qld) 2, 10.
[111] For example, substitute decision-makers must act to the greatest extent possible, in accordance with the adult's views and wishes: *Powers of Attorney Act 1998* (Qld) sch 1, s 7(4).

remain the same or whether Queensland should introduce legislation to reflect the Model Bill that is being adopted in other jurisdictions. Alternatively, the wording of the propensity evidence provision in Western Australia could be adopted in Queensland or perhaps there should be other changes not set out in this discussion paper.[112]

The House of Lords in the United Kingdom has stated that a fair trial requires the court to consider the interests of the victim alongside those of the accused and the public. This perspective has been characterised by Lord Steyn as a 'triangulation of interests':

> The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case, this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.[113]

Any reform affecting the criminal law thus involves a careful balancing of the victim's rights with the accused's right to a fair trial, along with ensuring the law works in the public's interest.

The principle that evidence which reveals the accused is a person of bad character is not admissible in criminal proceedings, if it merely proves he or she has a general disposition or propensity to commit crime or a particular kind of offence, is properly enshrined deeply in the common law of Australia.[114]

The exclusory rule concerning propensity evidence stems from the potent measure of prejudice attending the improper reception of such evidence, and its resultant capacity to occasion miscarriages of justice. Geoffrey Flatman QC and Dr Mirko Bagaric[115] identify a three-fold prejudice involved in the reception of propensity evidence:

1. The over strong tendency to believe that the defendant is guilty of the charge merely because he is a likely person to do such acts. In *R v Bailey*[116] the Court said: '[i]t is easy to derive from a series of unsatisfactory allegations...an accusation which at least appears satisfactory...to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to contain what is missing'.[117]

   Put differently, there is a real risk the jury will over-estimate the cogency of the propensity evidence, and act illogically by giving too much weight to the evidence.

   In *BRS v R*[118] Kirby J stated that 'research confirms the common tendency to infer from particular conduct character traits which are then used to justify predictions and

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[112] Women's Safety and Justice Taskforce (n 64) 60.
[113] Attorney-General's Reference (No. 3 of 1999) [2001] 2 AC 91 [118], cited with approval by the House of Lords in *R v H* [2004] 2 AC 134, 145-46.
[114] *Markby v R* [1978] HCA 29; (1978) 140 CLR 108, 116 (Gibbs AJC, Stephen, Jacobs & Aickin JJ agreeing); *Perry v R* [1982] HCA 75 ; (1982) 150 CLR 580, 585 (Gibbs CJ), 603 (Wilson J), 609 (Brennan J).
[115] Geoffrey Flatman QC and Dr Mirko Bagaric, 'Non-similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions' (2001) *Australian Law Journal* 190, 199.
[116] [1924] 2 KB 300.
[117] Ibid 305.
[118] (1997) 191 CLR 275.

estimates about other conduct. However, objectively, such predictions are frequently shown to be unwarranted.[119]

2. The tendency to condemn, not because the accused is believed guilty of the present charge, but because he has escaped punishment from other offences. Thus, 'there might be a tendency for the jury to punish the accused for past misconduct by finding the accused guilty of the offence charged'.[120]

   This second danger refers not to a possible defect in logic that may be triggered by propensity evidence, but the real risk that the jury will convict solely due to a bias against the accused: 'sentiments of revulsion and condemnation ... might well deflect [the jury] from the rational dispassionate analysis upon which the criminal process should rest'.[121]

   In short, the reception of propensity evidence results in a bias being formed against the accused which will taint the jury's decision.

3. The confusion and/or distraction caused to the jury by propensity evidence, as it erroneously concentrates on resolving whether the accused actually committed the similar acts.[122] McHugh J reiterated these concerns in *Pfennig v R* (**Pfennig**):

   > One reason is that it creates undue suspicion against the accused and undermines the presumption of innocence.[123] Another is that tribunals of fact, particularly juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct.[124] Similarly, '[c]ommon assumptions about improbability of sequences are often wrong',[125] and when the accused is associated with a sequence of deaths, injuries or losses, a jury may too readily infer that the association 'is unlikely to be innocent'.[126] Another reason for excluding the evidence is that in many cases the facts of the other misconduct may cause a jury to be biased against the accused.[127]

Nevertheless, a common law exception to the exclusionary rule exists for propensity evidence (that is, similar fact evidence, relationship evidence or identity evidence) if it is sufficiently highly probative of a fact in issue as to outweigh the prejudice it might cause to the accused. It is admissible if there is no reasonable view of the evidence which, when the propensity evidence is considered with other relevant evidence, inconsistent with the accused's guilt.[128]

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[119] Ibid 322.
[120] *R v Rarru* (1996) 107 CCC (3d), 82.
[121] Ibid.
[122] Ibid. See also *Pfenning v R* (1995) 182 CLR 461, 512.
[123] *Perry* (1982) 150 CLR, 593–594 (Murphy J); *R v Boardman* [1975] AC 421, 451 (Lord Hailsham).
[124] Cowen and Carter, *Essays on the Law of Evidence* (Clarendon Press, 1956) 144-5; EJ Imwinkelried, 'The Use Of Evidence Of An Accused's Uncharged Misconduct To Prove *Mens Rea*: The Doctrines which Threaten to Engulf the Character Evidence Prohibition' (1990) 51 *Ohio State Law Journal* 575, 581-82; Andrew LC Ligertwood, *Australian Evidence* (2nd ed, Butterworths, 1993) 81-2; A Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide Law Review* 161, 169.
[125] *Perry* (1982) 150 CLR, 594 (Murphy J)
[126] Ibid.
[127] *R v Bond* [1906] 2 KB 389, 398 (Kennedy J); JA Gobbo, David Byrne, JD Heydon, *Cross on Evidence* (2nd ed, Butterworths, 1991) [21145]; Ligertwood (n 124) 81.
[128] *Pfenning v R* (1995) 182 CLR 461, 481–483 (Mason CJ, Deane & Dawson JJ); *Hoch v R* [1988] HCA 50; (1988) 165 CLR 292, 296 (Mason CJ, Wilson & Gaudron JJ); *Phillips v R* [2006] HCA 4; (2006) 225 CLR 303 [9], [54] (Gleeson CJ, Gummow, Kirby, Hayne & Heydon JJ).

Further, evidence is admissible at common law, even though it reveals other criminal conduct or non-criminal but discreditable behaviour by the accused, if it is part of the *res gestae*. Evidence of collateral facts which tends to prove the facts in issue (that is, circumstantial evidence) is often admitted in evidence even though it reveals other criminal conduct or non-criminal but discreditable behaviour by the accused.[129]

Against this backdrop of carefully crafted common law rules of admissibility, there is a serious question about the need for amendments to the law on propensity and similar fact evidence.

The WA experience

The Discussion Paper makes specific reference to the position in WA, where s 31A of the *Evidence Act 1906* (WA) provides:

> (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers -
>
> > that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
> >
> > that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
>
> (3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

Our members report that the WA experience with s 31A is that the proper interpretation and application of the provision has been fraught with difficulty. Self-evidently, Parliament's purpose in enacting s 31A was to confer on the courts greater power to admit propensity and relationship evidence. The proposed provision reflects the dissenting judgment of McHugh J in Pfennig:

> The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted. Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.[130]

Thus, s 31A signifies a radical modification of the common law. It abolishes the test that propensity evidence is inadmissible if there is a rational view of it, when considered with other relevant evidence that is inconsistent with the accused's guilt.[131] By s 31A, propensity evidence is admissible if the court considers that two, lesser requirements are satisfied.

First, the concept of 'significant probative value'. Second, the priority to be given to the 'public interest in adducing all relevant evidence of guilt' over 'the risk of an unfair trial' in the opinion of a 'fair minded person', consequent upon a comparison between the probative value of the evidence and the degree of risk of an unfair trial.

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[129] *Harriman v R* [1989] HCA 50 ; (1989) 167 CLR 590, 630 (McHugh J).
[130] *Pfenning v R* (1995) 182 CLR 461, 529 (McHugh J).
[131] *Donaldson v Western Australia* [2005] WASCA 196; (2005) 31 WAR 122 [102]–[130]; *Di Lena v Western Australia* [2006] WASCA 162; (2006) 165 A Crim R 482 [44]–[73]; *Noto v Western Australia* [2006] WASCA 278; (2006) 168 A Crim R 457 [26].

In *Dair v Western Australia* (**Dair**),[132] Steytler P held that 'significant probative value' means something more than mere relevance but less than a 'substantial' degree of relevance; that is, a probative value which is 'important' or 'of consequence'. The Criminal Law Committee considers the low-bar imposed by this test a serious concern.

At [66]-[67] in Dair, his Honour referred the serious difficulties in applying the second limb, fair-minded person test:

> Having identified the probative value of the evidence and the degree of risk of an unfair trial, the court must turn its attention to the conclusion that fair-minded people would draw from a comparison of the two. These fair-minded people are presumably reasonable members of the general public who are not lawyers.[133] However, the legislature must be taken to have assumed that such people would have informed themselves of 'at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances'.[134] The comparison that these fair-minded people are to be assumed to have undertaken is problematic. As McHugh J pointed out in *Pfennig* (528):
>
> > 'prejudicial effect [or, I would suggest, the degree of risk of an unfair trial] and probative value are incommensurables' that have 'no standard of comparison'.
>
> It is not easy to compare the probative value of the evidence with the degree of risk to the fairness of the trial that is brought about by its introduction. That risk arises because the jury might use the evidence in an impermissible way. In a case in which the evidence is led for its propensity value (for example, as identification evidence), the risk of unfairness might increase proportionately with the probative value of the propensity evidence. In effect, the test provided by s 2(b) requires an assessment to be made whether fair-minded people would think that the interests of justice require the admission of the evidence despite the risk... (emphasis added)[135]

In *PIM v The State of Western Australia*,[136] Pullin JA made the point that a court may decide, in a particular case, that both tests are satisfied in relation to the proposed evidence generally; that is, the evidence should be admitted generally at the trial, and not merely for a particular or limited purpose. Alternatively, the court may decide, in a particular case, that only the first test of significant probative value is satisfied unless the evidence in question is admitted: (a) solely for a particular or limited purpose; or (b) subject to the trial judge giving the jury a specific direction or directions in relation to the evidence.

The tests in s 31A are ambiguous, unduly complex and apt to produce errors of law and incorrect rulings on the admissibility of propensity evidence. Further, the practical effect of the provision will be to add a significant additional layer of complication to jury directions once such evidence is admitted and to significantly increase the workload of the criminal courts, in particular the Court of Appeal.

A cursory search of the judgments of the WA Court of Appeal since 2005, concerning the cognate provision s 31A, shows the enormous appellate litigation that introduction of the provision has occasioned for the WA Court of Appeal. The number of conviction appeals

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[132] *Dair v Western Australia* [2008] WASCA 72; (2008) 36 WAR 413.
[133] *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd (No 9)* (Unreported, NSWCA, 27 November 1990) (20), cited in *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411, 419; *Johnson v Johnson* [2000] HCA 48 [53] (Kirby J).
[134] *Johnson v Johnson* [2000] HCA 48 [53] (Kirby J).
[135] *Dair v Western Australia* [2008] WASCA 72, [66]-[67] (Steytler P).
[136] *PIM v the State of Western Australia* [2009] WASCA 131.

complaining of the wrongful admission of propensity evidence under the provision are testament to the pitfalls involved in its application.

In light of these complexities and practical consequences, as well as the comprehensive body of existing common law, the Criminal Law Committee does not believe there is sufficient basis to warrant changes to Queensland's similar fact and propensity evidence laws.

63. Are there misconceptions about sexual offending in Queensland and do jury directions currently effectively address them?

The QLRC canvassed the issue of misconceptions about sexual offending in Queensland. In relation to affirmative consent, the QLRC highlighted that (prior to the recent amendments to the Criminal Code) the existing aspects of an affirmative consent model 'may not be widely understood in the community' due in part to 'a consequence of some of those matters being found in case law rather than in the express terms of the Criminal Code'.[137] The QLRC noted 'there is a perception that the current law has the following practical effect at a trial for rape or sexual assault—that the recipient of a sexual advance has a responsibility to manifest consent or absence of consent to the sexual act that is greater than the responsibility of the person making the advance to ascertain the recipient's consent.'[138] The recent amendments made to the Criminal Code, discussed above in respect of questions 50 and 51, seek to counter this perception and 'give effect, or give better effect, to an affirmative consent model'.[139]

The QLRC also considered the issue of juror misconceptions and preconceptions about sexual offending, highlighting a lack of contemporary research.[140] Recent research conducted of jurors in England, Wales and Northern Ireland does, however, refute 'the claim that many jurors hold false preconceptions which would influence their decision making.[141] It is pertinent to highlight that this research 'does not support the view that false preconceptions have a significant impact on jury decision-making.'[142] The findings included that, of the jurors interviewed:

- 3% agreed that a rape probably did not happen if the victim had no bruises or marks;
- 3% agreed that it was not rape if a person did not physically fight back;
- 7% agreed that it is difficult to believe a rape allegation that is not reported immediately;
- 4% agreed that a woman who wears provocative clothing puts herself in a position to be raped; and,
- 4% agreed that a woman who goes out alone at night puts herself in a position to be raped.[143]

The findings also included that:

- 80% agreed that there are good reasons why a person who has been raped would be reluctant to tell anyone, or report it to the police;
- 77% agreed that rape can occur in relationships over long periods before any complaint is made; and,

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[137] QLRC (n 92) 86 [5.43].
[138] Ibid [5.44].
[139] Ibid [5.46].
[140] Ibid 205 [8.8].
[141] Ibid [8.9].
[142] Ibid 207 [8.17].
[143] Ibid.

- 77% agreed that it was a hard thing to give evidence about a rape in court.[144]

Various directions are given to jurors throughout a trial, and sometimes a judge may specifically mention that a juror might feel they cannot be impartial in the trial because the trial relates to alleged sexual offences.[145] There are four jury directions relating to sexual offending in Queensland:

1. Distressed condition
2. Preliminary complaint
3. Delay in prosecution and significant forensic advantage
4. Evidence of other sexual (or violent) acts or other discreditable conduct

The QLRC highlighted that 'the process of jury deliberations and the requirement that, except in limited circumstances, all 12 jurors must agree, will significantly reduce the likelihood of the false preconceptions of any single juror impacting on the verdict of the jury as a whole.'[146]

Taking into account these factors and submissions from various different organisations, the QLRC concluded:

> It is very difficult to determine whether false preconceptions have an effect upon jury verdicts. This has been an evolving area of research and understanding, but both the 2017 NCAS and recent research with jurors suggest that the influence of some of the 'rape myths' may be overstated.
>
> A strength of the jury system is that the jurors are chosen randomly from different backgrounds in society, in terms of their ethnicity, culture, age, gender, occupation, and socio-economic status, which helps ensure diversity. Usually, all 12 jurors must agree on a verdict and the deliberations on the evidence enable any false preconceptions held by a juror or jurors to be tempered by the collective decision-making process. Jurors are directed by the trial judge to put any preconceptions they might have to one side, to act impartially and to act only on the evidence before them. For example, the following is a standard form of direction:
>
> > When you sit as jurors in these trials, you are not just individuals anymore. You represent the community. You represent its sense of justice. The privilege which you have of sitting in judgment upon some of your fellow men is one which has corresponding duties and obligations. It is your duty to act with complete impartiality, complete detachment and without letting matters of sympathy, prejudice, sentiment or emotion play any part.
>
> The Commission does not consider that the existence of false preconceptions or 'rape myths' being commonly held by jurors, or the conclusion that any such false preconceptions affect jury deliberation or verdicts, is strongly supported by the currently available research.
>
> The Commission does not recommend any change to the existing law to deal with perceptions that jurors might harbour false preconceptions or that those false preconceptions might affect jury deliberations or verdicts.[147]

The Criminal Law Committee respectfully agrees with the QLRC's findings and considers current jury directions appropriately impress upon jurors the need for impartiality in such proceedings. The Criminal Law Committee suggests that further empirical research with real

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[144] Ibid [8.18].
[145] Ibid 208 [8.21].
[146] Ibid [8.23].
[147] Ibid 209-10 [8.28]-[8.31].

(i.e. not mock) jurors may shed further light on any preconceptions or misconceptions that jurors may or may not harbour in relation to sexual offending in Queensland.

64. What are the risks and benefits in introducing: legislation for jury directions based on those in Victoria and NSW as recommended by the VLRC; legislative amendments to enable expert advice to be admitted about sexual offending as in Victoria?

Legislation for jury directions based on those in Victoria and NSW

In 2009 the Victorian Law Reform Commission (**VLRC**) was tasked with:

- identifying any jury directions or warnings which may longer be required or could be simplified; and
- considering whether judges should be required to warn or direct a jury in relation to the matters not raised by Counsel at trial; and
- clarifying the extent to which the judge needed to summarise the evidence for the jury.[148]

The VLRC was instructed to have regard to the overall aims of the criminal justice system; namely, the prompt and efficient resolution of criminal trials and procedural fairness for accused people. However, the VLRC inquiry was initiated against a backdrop of a 2006 survey which found that:

> in one state, Victoria, the average length of a charge to the jury following a 10 day trial was 255 minutes, and effectively an entire day for a 20-day trial that figure increased to 349 minutes of about 1 ½ days. By contrast, the average length of a charge to the jury in New Zealand was 76 minutes for a 10 day trial and 108 minutes for a 20 day trial. It must be said that Victoria, and NSW, the two most populous states in Australia, stood alone as having the longest and most complex set of directions, not just in that country, but perhaps in the entire common law world (emphasis added)[149]

Thus, the problem of protracted jury directions and jury charges the genesis of the VLRC inquiry do not similarly affect Queensland. The VLRC's report contained 52 recommendations.[150] No legislative action followed. Rather, the 'Simplification of Jury Directions Project' was established, producing the 'Simplification Report'. The *Jury Directions Act 2013* (Vic) was then initiated in response to the reports, later replaced by the *Jury Directions Act 2015* (Vic).

Subsequently, the QLRC recommended amendments to the Criminal Code along the lines of the *Jury Directions Act 2015* (Vic), primarily requiring prosecution and defence to inform the Judge of the directions as to specific defences and warnings which they wish the Judge to include in, or omit from, the summing up. The QLRC report did not propose departure from the principal in *Pemble v The Queen*;[151] rather, it favoured relieving the trial judge of the obligation to give a direction that is not requested ***unless*** the direction was required to ensure a fair trial.[152]

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[148] Victorian Law Reform Commission, *Jury Directions* (Final Report 17, 27 July 2009) 5.
[149] James RP Ogloff et al, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australasian Institute of Judicial Administration, 2006) 27.
[150] VLRC (n 148) 13-17.
[151] (1971) 124 CLR 107; 45 ALJR 333.
[152] Queensland Law Reform Commission, *A Review of Jury Directions* (Report No 66, December 2009) vol 2, 371-398 [11.53]-[11.143].

The VLRC more recently considered the issue of jury directions and again recommended that new jury directions be introduced to address misconceptions about sexual violence.[153] However, it is important to recognise that the VLRC report deals with the state of law in Victoria, which suffers from long and complex jury directions. The law in Queensland already provides judges with a discretion to make comments to the jury where they feel it is necessary to do so. For example, in *R v Cotic*,[154] the Court of Appeal examined a trial Judge's comment that, 'there are no real rules about how people who engage in sexual abuse of children behave and no rules about how their victims behave'. The Court also stated:

> there was...nothing in his Honour's comments which endorsed the complainant's evidence. At their highest, his Honour's remarks did no more than suggest to the jury that they should avoid preconceived notions of how a complainant should behave; and his remarks were attended by the reminder that the jury was free to approach the matter as they wished. His Honour did not at any stage suggest that an acceptance of the complainant's evidence should follow... His Honour's comments in my view were unremarkable and did not display partiality. They were observations of the type which s 620 of the Criminal Code permits and were made with appropriate circumspection.[155]

The Criminal Law Committee does not consider there to be a sufficient basis to warrant legislation for jury directions based on those in Victoria or New South Wales. Such directions will only likely add unnecessary length and complexity to sexual offence trials.

Legislative amendment to enable expert evidence to be admitted about sexual offending as in Victoria

Regarding expert evidence concerning sexual offending, s 388 of the *Criminal Procedure Act 2009* (NSW) enables the Court to receive evidence of a person's opinion based on the persons specialised knowledge, not limited to children, concerning:

- the nature of sexual offences;
- social, psychological and cultural factors that may affect the behaviour of a person who has been a victim; and,
- the reasons that may contribute to delay in a victim of a sexual offence reporting the offence.

The law and practice surrounding expert evidence is notoriously complex. Expert evidence of this type may have the effect of elongating sexual offence proceedings, including by adding an additional layer of expense, complexity/technicality and likely pre-trial litigation. The duration and subject matter for the jury of trials will also be extended. The Criminal Law Committee considers there is a real risk of creating a trial within a trial regarding conflicting expert opinion. Such a process is apt to distract the jury from its primary task, in circumstances where much of the content is now within the realm of common sense.

There is also a live issue regarding whether expert evidence of this type is required in light of the current state of the law in Queensland.

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[153] Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 441.
[154] [2003] QCA 435
[155] Ibid 6-7 (Holmes J).

Section 4A(4) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) already proscribes a trial Judge from warning or suggesting in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint. Additionally, The Queensland Court of Appeal has ruled that it is permissible for a trial Judge to express opinion regarding how people who engage in sexual abuse of children and their victim's behave.[156]

The QLRC also considered the issue of expert evidence in rape and sexual assault trials, pointing to the fact that expert opinion 'that is relevant to the proof of a fact in issue is admissible as evidence, as an exception to the general rule at common law that evidence of opinions or beliefs is inadmissible.[157] To be admissible, the expert opinion must satisfy the requirements that:

- matters that would generally be regarded as common knowledge should not be the subject of expert evidence (the common knowledge rule);
- there must be a recognised and credible field of expertise (the area of expertise rule);
- the expert must have knowledge and experience that allows them to be regarded as an expert in the field (the expertise rule);
- the opinion must be based upon matters that the expert has observed directly or assumed facts that are independently proved (the basis rule); and,
- the evidence must not have the effect of supplanting the findings of the judge or jury to decide the ultimate issue before the court (the ultimate issue rule).[158]

The QLRC subsequently recommended against a provision authorising receipt of expert evidence that does not meet the requirements for admissibility at common law:

> The Commission considers that expert evidence of the nature envisaged by section 388 of the *Criminal Procedure Act 2009* (Vic) is unlikely to be admissible under current laws in Queensland in a rape or sexual assault trial.
>
> The Commission is not persuaded, given recent research of jurors' views, that juries are influenced in their decision-making by false preconceptions about rape or sexual assault or that where there is a need for jury guidance this is best achieved by making expert evidence admissible as provided by section 388 or some similar provision.
>
> The Commission considers that although the counter-intuitive evidence that is admissible in other jurisdictions may have an educative purpose, it is general in nature and does not answer the questions that a jury may have to consider in a particular case. A jury may derive little additional benefit in terms of enhancement of their understanding and weighing of the specific evidence before them.
>
> The Commission appreciates that a judge will ordinarily give directions to the jury not to act on any preconceptions and that some judges already give such directions about factors that may affect a complainant's behaviour.
>
> The Commission also considers that there may be some practical difficulties with the use of expert evidence of the proposed kind. Practical difficulties include the availability of appropriate

[156] *R v Cotic* [2003] QCA 435, 6-7 (Holmes J).
[157] QLRC (n 92) 210 [8.34].
[158] Ibid.

> experts, the increase in the length of trials where there is an expert evidence issue and the associated impacts upon complainants and defendants.
>
> In the result, the Commission does not recommend that a provision authorising the receipt of expert evidence that does not meet the requirements for admissibility at common law should be introduced.[159]

The Criminal Law Committee respectfully agrees with the QLRC's view. The risks that attend legislative amendment enabling expert evidence to be admitted about sexual offending, along with the substantial time and cost implications associated with doing so, outweigh any potential benefits and will result in further barriers to access to justice for an accused.

65. Should the use of preliminary complaint evidence be extended to those offences beyond sexual offences, including to the recommended new offence of coercive control?

The Criminal Law Committee does not support statutory amendment permitting the reception into evidence of preliminary complaint in proceedings for offences other than sexual offences. This includes a new/proposed offense of coercive control. We set out the Committee's reasons for the objection below.

In *Jones v The Queen*,[160] the High Court stated:

> It has been clear, at least since *R v Lillyman*, that upon a trial for rape or a kindred offence the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of the complaint, may be given in evidence. It is not evidence of the fact complained of, but of the consistency of the conduct of the prosecutrix with her account in the witness box of the relevant events including her non-consent to the act of sexual intercourse, to which she deposes (emphasis added)[161]

In *Kilby v The Queen*[162], the High Court examined the basis of the admissibility of evidence of preliminary complaint. After considering the historical common law, the Court said:

> Halsbury (1952), 3rd ed., vol. 10, p. 468, par. 859, in my opinion, puts the matter in proper perspective when it is there said:
>
> > The admissibility of the particulars of a complaint made soon after the commission of an alleged offence in the absence of the defendant by the person in respect of whom a crime is alleged to have been committed is peculiar to rape, indecent assault and similar offences upon females, and also offences of indecency between male persons. This evidence is not to be taken in proof of the facts complained of, but only as matter to be borne in mind by the jury in considering the consistency, and, therefore, the credibility, of the complainant's story, including the consideration of the question of consent if the prisoner raises that as a defence.[163]

The Court concluded:

> > The admission of a recent complaint in cases of sexual offences is exceptional in the law of evidence. Whatever the historical reason for an exception, the admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value

[159] Ibid 221-2 [8.72]-[8.77].
[160] [1997] HCA 12; 71 ALJR 538.
[161] Ibid [4].
[162] [1973] HCA 30; 129 CLR 460.
[163] Ibid [29]; 472.

> as to any fact in contest but, merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence.[164]

By reason of the exceptional grounds upon which evidence of preliminary complaint is admissible, a trial judge is bound as a matter of law to instruct a jury of the limited use to which it may be put, under s 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld).[165]

The strictures on admissibility contained within s 4A reflect the limited use/function of evidence of preliminary complaint, specifically in sexual offence proceedings.[166]

The Criminal Law Committee submits there is no evidence-based foundation supporting an extension of this exceptional category of hearsay evidence to offences other than those of a sexual nature. In light of the Taskforce's focus on domestic violence matters, this is especially so given s 132B(2) of the Evidence Act currently permits the tender of evidence of historical acts of domestic violence in prosecutions of that sort. It is not a precondition to the admissibility of this evidence that the test in Pfennig be satisfied.[167]

The Domestic and Family Violence Law Committee, however, considers that more research and consultation is required as to whether preliminary complaint evidence should be extended to those offences beyond sexual offences.

66. Is the legislation protecting counselling communications for victims operating effectively in Queensland?

The Criminal Law Committee and the Domestic and Family Violence Law Committee hold diverging views on the operation of the sexual assault counselling (**SACP**) framework.

Criminal Law Committee

The Criminal Law Committee acknowledges the trauma suffered by sexual assault victims, and the inherent benefit in encouraging victims to undertake counselling without fear that what they say in confidence can be later used in legal proceedings without strong justification. However, for the reasons outlined below, the Criminal Law Committee does not believe that the legislation protecting counselling communications for victims, being the SACP framework, is operating effectively in Queensland and submits that the SACP framework should be the subject of comprehensive independent review.

First, it needs to be acknowledged that "protected counselling communication" (**PCC**) records may contain evidence relevant and probative to a defendant's criminal responsibility, including: prior inconsistent statement(s) by a complainant; evidence of mental illness on the part of a complainant; and/or, evidence of animus or bias held by the complainant towards the defendant. In many cases, the complainant's evidence is uncorroborated. Accordingly, there is a merger between the jury's assessment of probability of the facts in issue and the complainant's credit. Evidence of the above types affects a rational assessment of a complainant's credibility.

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[164] Ibid [30]; 472.
[165] See *R v RH* [2005] 1 QDR 180; applying *Jones v The Queen* (1997) 71 ALJR 538, 539.
[166] *R v Riera* [2011] QCA 77 and *R v NM* [2013] 1 Qd R 374.
[167] See *Roach v The Queen* (2011) 242 CLR 601; *R v Toweel* [2019] QCA 303.

The two-staged process prescribed in the SACP framework is unwieldy and unduly costly. It places unnecessary pressure on superior Court resources and incurs substantial and undue legal costs for parties to criminal litigation.

The first stage of the SACP process is particularly problematic; in that, it requires the Court to adjudicate the question of whether there is substantial probative value warranting leave to issue subpoenas for the production of potential PCC documents, in the absence of the documents. It is extremely difficult to answer questions of whether PCC documents contain substantial probative value in the absence of the documents themselves. The current SACP framework can give rise to procedural unfairness where only the counselled person and their legal representative have access to the documents, and appear at a hearing in camera and *ex parte*.

A defendant is required to satisfy the Court that the material subject of the application will have substantial probative value, with no access to the material. The test under s 14H of the Evidence Act imposes a high bar to meet, and can prove almost impossible without prior reference to the material the subject of the argument. Conversely, the representative for the counsellor or counselled person is able to view the material and therefore oppose arguments from a much more advantageous position.

Compounding the unfairness is that, in many cases, the defendant is forced to rely upon Counsel for the counselled person complying with his/her paramount duty to the court to notify it if there is material subject of the application which would satisfy the test under 14H, such that leave should be given. There is a risk counsel for a counselled person would not draw focus to such material, either through genuine mistake or a lack of understanding of the defence case.

In many instances, if an assessment of the material could be made of the value of the evidence, much of the argument would be resolved at the first hurdle. It seems this would further, rather than hinder, the aim of the legislation. It would be rare that a complainant would be cross-examined on consistent recitations of his/her complaint to a counsellor. Rather, cross-examination would likely only occur where there was some serious question of credibility or reliability, a prior inconsistent statement, or the existence of a mental health condition which may be relevant etc.

Similar observations as to the unworkability of the current SACP framework have been made by Applegarth J, in the context of highlighting that the regime thrusts responsibility onto the counselled person to assist the Court regarding the issues, where they are not the appropriate part to do so. In particular, Applegarth J stated:

> There should be a workable process by which parties who are best placed to assist the court to decide issues of leave are given access, on suitable terms, to the material that will enable them to assist the court. Such a process depends, in part, upon such a party being given the resources required to assist the court. Enough experienced judges of the District Court have identified problems associated with the drafting and workability of the provisions to make these matters the subject of urgent attention by government, prosecuting authorities and policy makers. It is in the interests of persons facing trial on serious charges, counselled persons and others to make the law and practices more workable than they presently are.[168]

[168] *TRKJ v Director of Public Prosecutions (Qld); Kay v Director of Public Prosecutions (Qld)* [2021] QSC 297, [203]-[205].

For these reasons, the Criminal Law Committee submits that a more appropriate balance between an accused's right to a fair trial and a complainant's right to privacy would be struck where the legislation is amended to allow access to the material prior to the advancement of an application for leave. The Criminal Law Committee also supports a longer term and comprehensive review of the SACP framework.

Domestic and Family Violence Law Committee

The Domestic and Family Violence Law Committee supports initiatives that lessen barriers to sexual assault victims seeking support in dealing with their trauma, noting also that confidentiality of counselling records is important in encouraging the community in general to seek mental health support and the SACP framework also applies to communication made before any alleged sexual assault.

The Domestic and Family Violence Law Committee is of the view that the counselled person should have standing in an application for leave so that they or their legal representative have the opportunity to make comprehensive submissions to the court. The need to protect the counselled person from harm, as an aspect of weighing up the public interest in s 14H(c)(ii) of the Evidence Act is highly personal to the counselled person. Likewise, some of the matters the court must consider under s 14H(2) are axiomatic but also potentially personal and particular to the counselled person, such as:

- that the effectiveness of counselling is likely to be dependent on maintaining the confidentiality of the counselling relationship (s 14H(2)(b));
- that disclosure of the PCC is likely to damage the relationship between the counsellor and the counselled person (s 14H(2)(d));
- whether disclosure of the communication is sought on the basis of a discriminatory belief or bias (s 14H(2)(e)); and,
- that the disclosure of the communication is likely to infringe a reasonable expectation of privacy (s 14H(2)(f)).

Granting standing allows the counselled person broader ambit to argue under s14H(1)(c) the public interest does not favour disclosure of their confidential and sensitive information compared to making only a personal statement about potential harm. The Domestic and Family Violence Law Committee is of the view that allowing standing to a counselled person to assert their rights in respect of confidentiality is aligned with community expectations and growing understanding in contemporary society of the difficulties faced by victims of sexual assault in pursuing complaints through the justice system (which contribute to underreporting and to reported sexual assaults not being pursued to trial).

The Domestic and Family Violence Law Committee is also supportive of a more detailed review of the SACP framework.

67. Should restorative justice approaches for sexual offences be expanded in Queensland?

The Criminal Law Committee supports the expansion of restorative justice approaches for sexual offences in Queensland. Restorative justice approaches can be employed in Queensland at various stages:

- at the time of the complaint and as an alternative to commencing criminal proceedings;

- after proceedings have been commenced;
- after a guilty finding but before sentence; and,
- in some cases, post-sentence.

While sexual offences in Queensland are not excluded from the restorative justice process, our members report it is seldom practiced. Anecdotally, our members report that referrals to restorative justice for sexual offences are often met with resistance by prosecutorial authorities and rejected before a victim is consulted.

The Criminal Law Committee considers that the Charter of Victims' Rights included in sch 1AA of the *Victims of Crime Assistance Act 2009* (Qld) requires mandatory consultation with the victim of a sexual offence in relation to any potential restorative justice approach or diversionary program. Victims should be given adequate time and information to make a fully informed choice as to whether they wish to participate in any restorative justice process.

The VLRC has recently endorsed the increased use of restorative justice approaches, in its 2021 report, *Improving the Justice System Response to Sexual Offences* (**2021 VLRC Report**):

> [I]n too many cases, criminal justice does not redress the wrong at all. In others, it deals with it in a way that does not meet the needs of victim survivors. Clearly, more justice options should be available. Restorative justice has powerful potential to provide choice, voice, acknowledgment and healing for some survivors of sexual violence.[169]
>
> ...
>
> We agree with submissions which stressed that restorative justice should be part of an integrated justice response. It should supplement but not replace other criminal or civil justice options. This will ensure sexual violence is taken seriously and is not treated as private. If restorative justice is part of an integrated justice response, people who have experienced sexual violence will have more justice options available to them.[170]

While the Criminal Law Committee supports the expansion of restorative justice approaches for sexual offences, any approach must balance the risk of harm to the complainant. As the VLRC has recognised, in such processes 'the person responsible for the harm can speak, so there is a risk they will repeat the dynamics of the original harm. They may denigrate the person they harmed and challenge their account of what happened. The person harmed may feel silenced and violated, as they were during the sexual violence.'[171]

Accordingly, the Criminal Law Committee would support the design and implementation of a principle-based scheme, as has been recommended in the Victorian context which set out eight guiding principles, including: voluntary participation; accountability; the needs of the person harmed take priority; safety and respect; confidentiality; transparency; an integrated justice response; and, clear governance.[172]

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[169] Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Violence* (Report, September 2021) 196 [9.60].
[170] Ibid 205 [9.126].
[171] Ibid 195 [9.54].
[172] Ibid 197 [9.64].

68. How could the use of restorative justice processes improve the experience of victims of sexual offences whilst holding those responsible accountable?

Key objectives of restorative justice include accountability by the perpetrator and the opportunity for reparation for the victim through appropriately managed interactions with the perpetrator. Restorative justice processes can provide victims with an opportunity to take part in a process that is devised to address harm.

Victims of sexual offending regularly report their justice needs include (among others): establishing a sense of control and power by telling their story; having input into a resolution; receiving an acknowledgment of wrongdoing by the perpetrator; reparation; reassurances of future safety; and, having a process that does not victim blame or trivialise their experience or re-traumatise them.[173]

Restorative justice can meet the needs of victims of sexual offences in a number of ways:

- Victims can tell their story in their own way unrestricted by the rules of evidence.
- There is acknowledgment by the offender of wrongdoing, establishing accountability.
- There is validation as the victim is believed without contest and their credit is not attacked under cross-examination.
- The victim has a say as to how the perpetrator can make reparations and address future conduct (for example, an agreement for the offender to attend certain courses to address their behaviour).

The restorative justice approach also holds perpetrators of sexual offences accountable given there must be an acceptance of wrongdoing for the process to work. Such accountability is not guaranteed in the conventional criminal justice system noting that sexual offences are met with higher attrition rates; lower rates of guilty pleas; and higher numbers of acquittals compared to other offence types.[174]

71. Should a special sexual violence court be trialled in Queensland? What would be the risks and benefits?

It was stated in *Kirk v Industrial Court of New South Wales*:[175]

> Our legal system has often had to balance the advantages of creating specialisation over the disadvantages of doing so. It is commonly thought better, for example, that allegations of crimes be tried by judges expert in criminal law and procedure. The same is true, *mutatis mutandis*, of company work, bankruptcy, personal injury claims, planning law and many other categories of litigation. Sometimes the legislature elects to create separate courts for the particular litigation. Sometimes it creates separate divisions within a court. Sometimes it leaves it to the courts themselves to create appropriate lists, the precise nature of which may readily be changed from time to time. A writer in the late 20th century said:
>
> > History teaches us to be suspicious of specialist courts and tribunals of all descriptions. They are usually established precisely because proceedings conducted in accordance with normal judicial standards of fairness are not producing the outcomes that the

[173] S Jeffries, WR Wood and T Russell, 'Adult Restorative Justice and Gendered Violence: Practitioner and Service Provider Viewpoints from Queensland, Australia' (2021) 10(1) *Laws* 13.
[174] Denis Lievore, 'Prosecutorial decisions in adult sexual assault cases: An Australian Study' (2005) [2005] *Trends & issues in crime and criminal justice* 291.
[175] [2010] HCA 1; 239 CLR 531.

> government wants. From the Court of Star Chamber to the multitude of military courts and revolutionary tribunals in our own century, this lesson has been repeated time and time again.
>
> However that may be, the Appellants referred in submissions to the danger of conferring jurisdiction to hear criminal proceedings on courts the practitioners in which are unfamiliar with all the relevant rules. There is a related danger in that course in that the courts on which the jurisdiction has been conferred, while in some sense specialist, are not familiar with all the relevant rules. Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. It thus forgets fundamental matters like the incapacity of the prosecution to call the accused as a witness even if the accused consents. Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up. Medical students usually detect in themselves at a particular time symptoms of the diseases they happen to be studying at that time. Academic lawyers interested in a particular doctrine can too often see it as almost universally operative. So too courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are 'preoccupied with special problems', like tribunals or administrative bodies of that kind, are 'likely to develop distorted positions.' Thus Jaffe said, discussing the factual position illustrated by *R v Bradford*: '[R]oad-maintenance authorities sorely pressed to find gravel within the parish will not place a high value on the amenities of the gentry's parks.' It may be that something like this underlay the process by which the Industrial Court adopted the construction of ss 15, 16 and 53 of the OH&S Act which the majority have rejected, and failed to notice the closely related difficulty of the unsatisfactory way the charges were pleaded. To say that is not to negate the importance of increased industrial safety, or the importance of giving full effect to the statutory language, properly construed, which creates methods of increasing it. Nor is it necessarily to question whether creating specialist courts devoted to the fulfilment of that and other vital public goals is the best way of increasing industrial safety. It is merely to raise a caveat about accepting too readily the validity of what specialist courts do – for there are general and fundamental legal principles which it can be even more important to apply than specialist skills.[176]

These observations are an appositive starting point whenever considering implementing a specialist Court.

The push for specialised sexual violence courts in Australia can be traced to the Criminal Justice Sexual Offences Taskforce (**SJSO Taskforce**) established by the NSW Attorney General in 2004. Chapter 9 of the SJSO Taskforce's report outlines a desire for such specialist courts and what they would look like.[177] Nothing substantial has been done with these recommendations in the 15 years since.

According to the CJSO Taskforce, a specialist court would involve elements such as: a dedicated and separate case management list; a specially trained prosecution team; a dedicated co-ordinator to facilitate specialist listings; specialist witness support; specialised

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[176] Ibid [122] (Heydon J).

[177] Criminal Justice Sexual Offences Taskforce, Attorney-General's Department of NSW, *Responding to Sexual Assault: The Way Forward* (Report, 2005) 147-176.

court staff; and, specialist police training.[178] In identifying those features, the NSW Taskforce acknowledged that they do not address all of the problems in respect of sexual assault prosecutions. The CJSO Taskforce also noted: ambiguity regarding the aims or objectives sought to be achieved; the risk that a specialist sexual violence Court may create a perception that sexual offences will be handled differently to other criminal matters; inadequacy of resources; ambiguity in the criteria for screening and assignment cases; and, a lack of appropriate methods of evaluation and assessment of outcomes to determine effectiveness.[179]

In particular, the CJSO Taskforce identified:

> Specialised or specialist courts are not a magic panacea. One criticism of the models that exist elsewhere, is that there is a potential for special courts to emulate the same problems of existing courts, if training is incomplete or inadequate, common goals are not implemented in practice and responses are not adequately resourced. For example, lack of funding for the prosecution service, courts, technology and administrative support. 'It appears that a specialist court could have the potential to simply become 'repackaging or relabelling'. ... In addition, if the goals and expectations of the specialised court are not explained to victims, they may feel as though their matter is not being treated seriously or they are receiving lesser justice.[180]

Further, a specialist sexual violence court should not be implemented with the intent of "tackling" perceived low conviction rates. Such courts have been established in South Africa and New Zealand. In South Africa, negative consequences of specialist sexual violence courts include a perceived lack of fairness; limited effectiveness in reducing impact upon victims; and, a lack of uniform expertise and training necessary to render the participants sufficiently expert to discharge the Court's function.[181]

More recently, the VLRC considered the issue of a specialist court for sexual offences in that jurisdiction. The 2021 VLRC Report highlighted 'the most important reason that people supported [a specialist court for sexual offences] ... was the value of more specialised training about sexual violence'.[182] The Criminal Law Committee agrees with the VLRC's findings that a specialist court is not desirable, where any benefits of a specialist court can be achieved in other ways, for example through 'improved case management and processes, and quality training.'[183]

77. Are women and girls being diverted from the criminal justice system? If so, what are their experiences? What works and what could be done better?

The Criminal Law Committee highlights Queensland's limited sentencing options and recommends that funding be re-directed to increasing diversion from the criminal justice system and to community-based orders as a way of reducing recidivist offending and avoiding women receiving sentences of imprisonment. Such options, however, should be available to all Queenslanders and not subject to gender.

Our members highlight, in particular, the underutilisation of adult cautions and referrals for adult restorative justice conferences organised by relevant prosecution authorities.

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[178] Ibid 162.
[179] Ibid.
[180] Ibid 170.
[181] Ibid 149-153.
[182] VLRC (n 169) 392 [18.15].
[183] Ibid 395 [18.37].

There is currently no legislation authorising or regulating the police cautioning of adults. Despite this, Queensland Police Operational Procedure Manuals (**OPMs**) provide that prior to commencing proceedings against a person an officer must consider whether the circumstances warrant an appropriate alternative, including (but not limited to):

- administering a caution;
- referring the offence for a restorative justice conference; or
- if the offence is a minor drugs offence and the person is eligible, offering the person an opportunity to participate in a drug diversion assessment program

The purpose of adult cautioning as outlined in the Queensland Police OPMs is to:

- manage lower-end offending in a manner that positively contributes to behaviour change and reduced recidivism;
- divert appropriate offenders from the criminal justice system; and,
- reduce the disproportionate use of prosecution resources for minor matters by finalising matters in an efficient and effective manner.

Unfortunately, adult cautions do not apply to matters under the *Drugs Misuse Act 1986* (Qld).

There are numerous benefits to diverting all offenders, female and male, away from the criminal justice system. Our members report the use of the above options is sporadic and inconsistent, where more transparency around consideration of these options by Queensland Police would be highly beneficial.

As already mentioned, our members report there is often also an unwillingness on the part of Police Prosecutions and the ODPP to allow referrals to the Adult Restorative Justice Program for any offence and especially for those involving physical or sexual acts. This ignores the "trauma informed approach in prosecution" to which the DPP are subject. The Criminal Law Committee recommends that every prosecuting body should consult with a complainant about a proposed referral to the Adult Restorative Justice Program/mediation.

The Criminal Law Committee also considers the expansion of drug courts. This is especially so in regional and remote areas where access to such resources is already limited. Such courts provide another method for all offenders to avoid imprisonment and seek in some cases much needed rehabilitation. These programs should provide gender specific support for females which would involve achieving stable accommodation and medical/psychological treatment. This is particularly important because a lack of stable accommodation often leads to breaches of community-based orders, parole and bail.

Imprisoned mothers face a variety of challenges being separated from their children. It can prove difficult to maintain relationships upon their release. Programs designed to restore such relationships for women and their children may prevent these women from returning to prison.

79. Are there any barriers to women and girls accessing good quality legal advice, support and services?

There are currently a number of support services available specifically for women and women's issues. The Women's Legal Service provides a number of services for women and girls, inclusive of the following (all of which are provided free of charge):

- Statewide Legal Advice Hotline for women throughout Queensland seeking assistance with family law and domestic violence matters;
- Statewide Rural, Regional and Remote Priority Advice service providing free legal advice by telephone for women from rural, regional and remote areas of Queensland on domestic violence, child protection, child support and complex family law matters;
- Evening drop-in legal advice sessions for women with family law, domestic violence and child protection matters;
- Counselling Notes Protection Service providing advice and representation in court proceedings regarding counselling notes being made available to the Court;
- Divorce clinic to assist women with divorce application paperwork;
- Duty lawyer services for women with domestic violence proceedings at the Holland Park, Ipswich and Caboolture Magistrates Courts;
- Advice and assistance with family law, child protection and domestic violence matters to women at the Brisbane Women's Correctional Centre;
- Advice at Family Relationship Centres for women who are going through the mediation process;
- Domestic Violence Units providing intensive support for women with complex needs who are experiencing high risk domestic violence- providing legal advice, safety planning and assessment, referral to services, assistance with drafting documents, representation, legal aid applications and lawyer assisted mediation;
- Social work providing assistance for victims of domestic violence including accommodation, counselling and support groups, financial assistance, health services and Centrelink payment and services; and,
- Temporary Visa Holders Experiencing Violence Pilot Project working with women on temporary visas experiencing family violence to support them with migration and family law needs.

Sisters Inside also provides a number of services for women and girls in custody, including:

- Sexual assault counselling and support to sexual assault victims in all women's prisons in Southeast Queensland;
- Crisis counselling with women prisoners who have experienced domestic and family violence and/or sexual assault or related issues arising from imprisonment;
- Health support program providing health support and referrals to women in custody and who have recently been released from custody;
- Supreme Court bail program with legal, advocacy and social support for women in custody on remand;
- Accommodation support for women prisoners when released from custody (the "Next Step Home" Program)
- "Decarceration Program" supporting women being held in police watch houses and/or appearing in court to assist with successful bail applications, including ensuring access to housing, legal representation and community based services and support;
- Re-Entry program for women arranging to meet their post release needs from custody and supporting women to meet obligations to statutory authorities (eg. Probation & Parole, Centrelink and Child Safety)
- Parole Support for women in custody throughout Southeast Queensland;
- Blue Card support for women with a criminal history; and,

- Migration advocacy and support services for women in custody facing immigration issues.

In addition to the above services, Legal Aid Queensland (**Legal Aid**) provides a number of support services and grants particularly for women, including the women's domestic violence court support service.

Barriers to access

Women may face unique barriers in seeking to access the legal system, whether to enforce their rights or seek protection from violence. They face financial barriers, lack of access to information about their rights, and difficulty accessing services because of child minding responsibilities. As the Taskforce has already highlighted, women and girls face particular barriers in accessing the law because their experience is different from that of men; such as their experience as victims of sexual violence and criminal assault within the home, as prisoners in a corrective services infrastructure that caters predominantly to men, as partners in domestically violent relationships, and as primary caregiver of children and other family members.

Women come from diverse backgrounds and some women will face additional barriers due to compounding circumstances, for example women who are single mothers, who are from culturally and linguistically diverse communities or who live in regional, rural and remote areas. Some of the increased barriers faced by particular groups include:

- Women who have experienced trauma including domestic violence and/or childhood abuse – may be high users of service provision or may be so disadvantaged they do not understand their legal rights, how to access them, or even that they may have a right to seek redress.
- Aboriginal and Torres Strait Islander Women – face barriers stemming from inter-generational trauma and poor health outcomes, as well as higher rates of violence and overrepresentation in the child protection system and the prison system. Such women face unique challenges in accessing the law due to large kinship systems, and in navigating a legal system that, broadly, does not recognise their customs, practices and laws.
- Women from culturally and linguistically diverse (**CALD**) backgrounds:
    - Women who are on temporary visas are particularly vulnerable to experiencing family violence and relationship breakdown. They may be unable to seek legal advice because they are isolated from family support and reliant on an abusive partner. They may be fearful of the impact of seeking legal advice on their visa status.
    - Women who come from countries that have very different legal systems to that of Australia may have no knowledge of Australia's criminal law system.
    - Access to interpreters and relevant legal materials may be limited in a person's native language, making access to legal advice virtually impossible.
- Women with disabilities – may face additional barriers to seeking legal advice where they have cognitive disabilities or do not have capacity to give instructions. Women with disabilities may also face barriers due to their reliance on others (including abusive partners, family members or carers if living in state accommodation) and social isolation.

The cost of legal representation is a significant barrier to accessing quality legal advice for women. Legal assistance providers are not meeting the demand for legal services, and substantial and sustained funding increases are required to address the core barriers women face.

Legal aid funding

Access to justice is fundamental to the rule of law and the realisation of human rights. To achieve effective access to justice in criminal matters, people require access to quality legal advice and representation. Those who lack the means to pay for legal representation require access to an effective legal aid system. Legal Aid plays a critical role in the community by providing legal information and services to those who cannot afford private legal services.

One of the ways in which Legal Aid strives to meet the legal needs of the community is through outsourcing certain work to Legal Aid preferred suppliers. As you know, preferred suppliers are private legal practitioners who have agreed to undertake Legal Aid work on behalf of Legal Aid and are remunerated by Legal Aid in line with Legal Aid's preferred supplier scale of fees.

QLS is concerned that the fees paid by Legal Aid to preferred suppliers cannot sustain an effective and viable Legal Aid practice within Queensland. Since the beginning of the preferred supplier scheme in Queensland in 1997, there have been few increases in the Legal Aid preferred supplier rates. Hourly rates under the Legal Aid scale of fees are low and this issue is compounded by the 'capped' fees for most services, and the fact that Legal Aid rates are often expressed in a lump sum.

We **enclose** a copy of our correspondence to the Attorney-General, setting out QLS' concerns relating to Legal Aid preferred supplier rates. QLS considers that women's (and indeed all Queenslanders) access to good quality legal advice would be improved with raises in Legal Aid preferred supplier rates, and appropriate funding for legal assistance service providers like Women's Legal Service and Sisters Inside.

81. How are Queensland's existing sentencing principles, factors and options applied to women and girls? What works? What needs to be improved?

Judges and Magistrates apply their judicial discretion in determining the appropriate sentence by considering all the specific circumstances of the offence and the offender appearing before the court. Under this sentencing regime, judges must consider several factors associated with the offence and the offender.

The purposes under Queensland law for which an adult offender can be sentenced are: *punishment, rehabilitation, deterrence, denunciation and community protection.* None of these principles is more important than the others but depend on the individual circumstances of the offending and offender. They are non-gendered and should remain so to ensure equality before the law for all people regardless of gender.

Courts must then consider several principles and factors when sentencing an adult offender.

There are several relevant mitigating factors which are often applicable to women in the criminal justice system. These include the background of the offender, for example, they may have had an abusive, neglectful childhood. They may have just fled a domestically violent relationship and/or they may be living in poverty. The *Penalties and Sentences Act 1992* (Qld) already allows

for these and other factors which are often more relevant to women to be considered under the principles stated above.

Women are often the primary care givers to children and other family members. This is also a factor which is already considered by the court. The authorities are clear, however, that it may be taken into account when the degree of hardship that imprisonment will involve is exceptional or when the offender is the mother of young children, or where imprisonment will result in the children being deprived of parental care. In all cases, however, it depends on the gravity of the offence and the circumstances of the case. As highlighted earlier, the Criminal Law Committee recommends that the court should take into account the best interests of the child be a factor to be considered when sentencing a person with a dependent child.

Women and girls with a cognitive or intellectual disability

When sentencing women and girls, the justice system must consider an individual's trauma history and any disability that impacts on their behaviour and capacity for rehabilitation. Incarceration will likely have a minimal preventative effect for a woman or girl with a cognitive or intellectual disability when they fail to understand the crime they are alleged to have committed and the trauma leading up to an offence has not been appropriately addressed.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Kara Thomson
President