

## **Response to Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact**

**Prepared by Women's Legal Service Western Australia (WLSWA)**

### **Women's Legal Service Western Australia**

Women's Legal Service Western Australia (**WLSWA**) welcome the opportunity to make this submission to the Law Reform Commission of Western Australia in response to the Sexual Offences reform – Volume 1: Objectives, Consent and Mistake of Fact Discussion Paper (**Discussion Paper**).

WLSWA is the only specialist, gender-specific community legal centre in Western Australia. For over twenty five years we have delivered state-wide specialist legal assistance to women in the areas of family law, care and protection, family and domestic violence and criminal injuries compensation. Our tailored, needs-matched legal services model ensures continuity in support and mitigates re-traumatising clients that present with complex and multiple legal and social challenges. WLSWA prioritise women who experience intersecting disadvantages.

Through our community legal education and evidence-based advocacy on law and policy, we are working towards the redress of inequalities, promotion of human rights and legal and social change for women.

WLSWA do not advise on criminal sexual offences. However, most of our clients have experienced sexual violence within a family and domestic violence and coercive control context. WLSWA therefore has an understanding of the sexual violence experiences of women at both individual and collective levels, including experiences when reporting to police and interacting with the justice system.

### **Acknowledgments**

WLSWA acknowledge the Traditional Owners of the country on which we live and work, the Whadjuk people of the Noongar nation, and pay respects to their Elders past and present. We understand that all forms of oppression against First Nations peoples are interlinked, and that we cannot speak to gender inequality without also considering racial inequality. We recognise the strength and foresight of the First Nations women who are leading the work in this space. The strength of their commitment is both an act of resistance and triumph.

WLSWA also recognise the strength and resilience of the women with whom we work. It is essential that any response to domestic, family and sexual violence is informed by the nuance and reality of their lived experience.

## Introduction

The Law Reform Commission of Western Australia's (LRCWA) Discussion Paper is a solid starting point in modernising Western Australia's laws on consent, and we are pleased that this coincides with the ongoing national conversation on family and domestic violence (FDV), sexual violence and consent.

Sexual violence and FDV are interrelated and underpinned by the same gender-based drivers. We will fail to understand and respond effectively if we continue to conceptualise them as distinct types of violence. In 2017, the National Community Attitudes towards Violence against Women survey (NCAS), measured 17,500 Australians' knowledge of, and attitudes towards violence against women, and confirmed an association between gender stereotypes and the acceptance, minimisation and justification of violence against women.<sup>1</sup> It found that 'dominance' and 'coercion' were seen as acceptable expressions of masculinity which, in our experience, function to normalise perpetrator behaviours.<sup>2</sup> NCAS also found that society views intimate partner sexual violence (IPSV) as less severe and more acceptable than sexual violence committed by a stranger or acquaintance.<sup>3</sup> Further, 1 in 5 Australians could not identify sexual violence in marriages as an offence.<sup>4</sup> According to Patricia Easteal et. al., (2016), women who do not have physical injuries are not seen as "real rape victims".<sup>5</sup>

Sexual violence in intimate partner or domestic relationships has received substantially less attention than "stranger" sexual violence.<sup>6</sup> This is despite the fact that women are three times more likely to be sexually assaulted by someone known to them.<sup>7</sup> Across a literature review of 333 papers on FDV, sexual assault and IPSV, Australia's National Research Organisation for Women's Safety found that intimate partner sexual coercion was reported by between 24%-62% of women, while IPSV was reported by between 1.7%-46% of women.<sup>8</sup> Anecdotal evidence from FDV workers puts this figure at closer to 90-100% of their female clients.<sup>9</sup> The 'official' statistics are likely to be an underestimation due to the stigma, silence and lack of reporting.

In our preliminary submission to the LRCWA we called for a greater emphasis on data collection and analysis of the proportion of sexual violence cases reported that are convicted.<sup>10</sup> This data must be disaggregated for sexual offences committed in the context of intimate partner relationships, domestic relationships and by strangers to inform specific policy responses.

In September 2021, Western Australia's Office of the Commissioner for Victims of Crime and the Department of Communities announced that together they are leading a project to develop Western

<sup>1</sup> Kim Webster, Kristin Diemer and Nikki Honey et. al., (2018), Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (Research report), Sydney, NSW: ANROWS, pp. 27-28 < [anr001-NCAS-report-WEB-1019.pdf \(anrowsdev.wpenginepowered.com\)](#)>.

<sup>2</sup> Ibid, pp. 65 and 152.

<sup>3</sup> Ibid, p.9.

<sup>4</sup> Patricia Easteal and Jessica White et. al., (2016) in Alison Evans (2020), Spotlight on Sexual Violence in Western Australia, Centre for Women's Safety and Wellbeing, p. 14 < [Spotlight on Sexual Violence in Western Australia \(cws.org.au\)](#)>.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Kim Webster, Kristin Diemer and Nikki Honey et. al., (2018), Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (Research report), Sydney, NSW: ANROWS, p.9 < [anr001-NCAS-report-WEB-1019.pdf \(anrowsdev.wpenginepowered.com\)](#)>.

<sup>8</sup> Peta Cox (2015), Sexual assault and domestic violence in the context of co-occurrence and re-victimisation (State of knowledge paper), Sydney, NSW: ANROWS, p. 2 < [embargoed-Landscapes-Sexual-assault-and-domestic-violence-in-the-context-of-co-occurrence-and-re-victimisation-1.pdf \(d2m9qno7zhxqg.cloudfront.net\)](#)>.

<sup>9</sup> Cherie Toivonen and Corina Backhouse (2018), National Risk Assessment Principles for domestic and family violence (ANROWS Insights 07/2018). Sydney, NSW: ANROWS in Centre for Women's Safety and Wellbeing WA, Preliminary Submission to the Law Reform Commission of Western Australia's review of sexual offences and the law relating to consent (Project 113), 10 June 2022, pp. 8-9.

<sup>10</sup> Women's Legal Service Western Australia, Preliminary Submission to the Law Reform Commission of Western's preliminary review of Chapter XXXI, and related sections, of the Criminal Code Compilation Act 1913, 3 June 2022, p. 5.

Australia's first Sexual Violence Prevention and Response Strategy.<sup>11</sup> The purpose of the strategy is to improve outcomes for victim-survivors, focusing on primary prevention, recovery, support and perpetrator accountability.<sup>12</sup> Western Australia is the fourth state to develop a strategy specific to sexual violence, following New South Wales, Queensland and the Northern Territory. WLSWA welcome this commitment by the Government and hope that this concurrent sexual offences reform will signal long-term investment in preventing violence against women.

### Affirmative Consent Model

**WLSWA recommends an affirmative consent model ensuring the positive act of communicating consent rather than the absence of communicating no.**

The core principle of affirmative consent is that consent cannot be presumed. Consent must be a continuous process of mutual decision-making that places emphasis on the sexual autonomy of the parties. Affirmative consent does not view the victim-survivor as the 'passive' recipient of the sexual activity. These perceptions are outdated and only reinforce stereotyped binaries that women are submissive and capable of being possessed.<sup>13</sup>

Western Australia and Queensland are the only Australian jurisdictions that define consent in terms of 'giving consent'.<sup>14</sup> The 'giving' of consent is unilateral and implies that the woman has a lack of power. Under the current definition of consent in Western Australia, a perpetrator can intimidate, threaten violence or use force to obtain any indication that consent was 'given' but not necessarily 'agreed to'. Consent should be defined in terms of 'freely and voluntarily agreeing' to sexual activity to bring our laws in-line with Victoria, New South Wales, Northern Territory, South Australia and Tasmania.<sup>15</sup> In short, there must be a requirement to 'say or do something' to confirm that there is consent.<sup>16</sup>

WLSWA also support legislation (as in Victoria) which recognises that consent can be vitiated in the context of FDV, particularly where sexual activity is submitted to as a result of fear, harm, coercion or intimidation.<sup>17</sup> Consent is generally seen as incident-based and contingent on proximity or the immediacy of force as evidence of sexual violence. This approach will not work for victim-survivors of FDV and IPSV. Sexual violence in intimate partner relationships often occurs within the context of sexual routine, previous consensual activity and a presumption of ongoing consent. This can create situations where victim-survivors agree to unwanted sex or where asking for sex to stop is not felt as a possibility.<sup>18</sup> It is essential that any definition of consent balances victim-survivor agency and autonomy to engage in

<sup>11</sup> Government of Western Australia, 'Sexual Violence Prevention and Response Strategy' (Media Release, 2 March 2023) < [Sexual Violence Prevention and Response Strategy \(www.wa.gov.au\)](https://www.wa.gov.au/government/media-releases/sexual-violence-prevention-and-response-strategy)>.

<sup>12</sup> Department of Justice and Communities and Centre for Women's Safety and Wellbeing (2022), Sexual violence strategy Consultative forum background paper, Government of Western Australia, p. 2 < [Sexual Violence Strategy Consultative Forum Background Paper \(www.wa.gov.au\)](https://www.wa.gov.au/government/media-releases/sexual-violence-strategy-consultative-forum-background-paper)>.

<sup>13</sup> Annie Cossins (2019), Why Her Behaviour Is Still On Trial: The Absence Of Context In The Modernisation Of The Substantive Law On Consent, *UNSW Law Journal*, Vol. 42(2) < [Cossins, Annie --- "Why Her Behaviour Is Still On Trial: The Absence Of Context In The Modernisation Of The Substantive Law On Consent" \[2019\] UNSWLawJl 17; \(2019\) 42\(2\) UNSW Law Journal 462 \(austlii.edu.au\)](https://www.unsw.edu.au/law/journal/vol42/issue2/cossins)>.

<sup>14</sup> *Criminal Code Act 1899* (Qld), s 348(1).

<sup>15</sup> s 5(1) of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) which substitutes s 36 and inserts a new s 36AA to the *Crimes Act 1958* (Vic), *Crimes Act 1900* (NSW), s 61HI(1), *Criminal Code Act 1983* (NT), s 192(1), *Criminal Law Consolidation Act 1935* (SA), s 46(2) and *Criminal Code Act 1924* (Tas), s 2A(1).

<sup>16</sup> Premier of Victoria, Affirmative Consent Model Now Law In Victoria (Media Release, 31 August 2022) < [Affirmative Consent Model Now Law In Victoria | Premier of Victoria](https://www.premier.vic.gov.au/news/affirmative-consent-model-now-law-in-victoria)>.

<sup>17</sup> s 5 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) which substitutes s 36 and inserts a new s 36AA to the *Crimes Act 1958* (Vic).

<sup>18</sup> Australia's National Research Organisation for Women's Safety, Submission to the New South Wales Law Reform Commission on: Consent in relation to sexual offences (draft proposals), 18 November 2019, p.6 < [CO67.pdf \(anrowsdev.wpenginepowered.com\)](https://www.anrowsdev.wpenginepowered.com/wp-content/uploads/2019/11/CO67.pdf)>.

consensual sexual activity, while also recognising the ways in which the abusive relationship context can undermine capacity to freely consent.

To this end, we encourage a definition of consent that includes a single incident or is part of an ongoing pattern. This approach will benefit victim-survivors of FDV and IPSV, as the victim-survivor will not have consented if they participated due to the cumulative effects of a pattern of coercive and controlling behaviour. It may be useful to use existing FDV legislation as another avenue for victim-survivors of IPSV to access justice.<sup>19</sup>

### Mistake of Fact Defence and Special Verdicts

**WLSWA recommends Mistake of Fact Defence and Special Verdicts are only used in exceptional circumstances and that this is informed by the highest standard of expert evidence.**

WLSWA is concerned that the ‘mistake of fact defence’ is used to argue an ‘honest and reasonable but mistaken’ belief in consent, and places the onus on the victim-survivor to prove that consent was not given to the alleged sexual offence(s) – particularly in the absence of physical resistance.<sup>20</sup> An analysis of 2018 sexual violence trials in Queensland by the Queensland Law Reform Commission found that the mistake of fact defence had been invoked in one in three trials.<sup>21</sup> An estimated 66% of perpetrators who use the mistake of fact defence in Queensland were acquitted despite evidence that they forced themselves on the victim-survivor and that the victim-survivor resisted.<sup>22</sup>

The affirmative consent model has been adopted in numerous jurisdictions to alter the direction of sexual violence trials to focus on whether the perpetrator said or did anything to ascertain consent, as opposed to putting the victim-survivors’ actions on trial. Victoria, for example, does not have an excuse of mistaken belief as to consent. The Victorian law provides that ‘a person must reasonably believe that another person is consenting to an act’ and requires the perpetrator to procure evidence of reasonable belief.<sup>23</sup> This belief will not be reasonable if there was no affirmative consent.

While WLSWA supports the right to a fair trial we remain concerned that ‘special verdicts’ – like the mistake of fact defence – are a potential loophole for recidivist offending.<sup>24</sup> Currently, a judge can exercise their discretion to require a special verdict in a sexual violence trial if the accused unsuccessfully raises the mistake of fact defence.<sup>25</sup>

We are particularly concerned that a perpetrator can rely on a cognitive or mental health impairment as a defence for failing to ascertain consent. We strongly recommend the use of expert witnesses and evidence in possible cases of special verdict. We further recommend that where a perpetrator is acquitted on a special verdict there must still be a criminal history report of the alleged offence.

<sup>19</sup> Reform of WA Sexual Offence Laws – Key Learnings from other States and Territories, Women’s Legal Services Western Australia and Women’s Centre for Safety and Wellbeing Western Australia, 17 March 2023.

<sup>20</sup> Louise Ellison and Vanessa Munro (2009), ‘Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation’, *Social & Legal Studies*, Vol. 18, 291.

<sup>21</sup> Justice Jackson, Judge (now Chief Judge) Devereaux and Margaret Wilson QC (2020), Review of consent laws and the excuse of mistake of fact, Queensland Law Reform Commission, pp. 38-39 < [qlrc-report-78-final-web.pdf](#)>.

<sup>22</sup> Amy MacMahon, ‘Response to the Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020’ (Media Release, 25 March 2021) < [Response to the Criminal Code \(Consent and Mistake of Fact\) Amendment Bill 2020 - Amy for South Brisbane 2020 \(amymacmahon.com\)](#)>.

<sup>23</sup> *Crimes Act 1958 (Vic)*, s 36A.

<sup>24</sup> Women’s Legal Service Western Australia, Preliminary Submission to the Law Reform Commission of Western’s preliminary review of Chapter XXXI, and related sections, of the Criminal Code Compilation Act 1913, 3 June 2022, p. 3.

<sup>25</sup> Stella Tarrant, Heather Douglas and Hilde Tubex (2022), Project 113 Sexual Offences: Background Paper, Law Reform Commission of Western Australia, p. 196 < [Law Reform Commission - Project 113 - Sexual Offences \(www.wa.gov.au\)](#)>.

## Penalties for Perpetrators of Sexual Violence

**WLSWA recommends penalties for sexual violence offences in Western Australia are increased to align with other Australian jurisdictions.**

Inadequate penalties for sexual violence offences in Western Australia can deter victim-survivors from reporting violence. In Western Australia, a person who sexually penetrates another person without consent or compels another to engage in sexual activity via coercion is liable for up to 14 years imprisonment.<sup>26</sup> This is 25 years in Victoria, 21 years in Tasmania, and life imprisonment in Northern Territory, Queensland and South Australia.<sup>27</sup>

Penalties for sexual violence offences across Australia must be consistent. Victim-survivors in Western Australia should not feel that their experiences are any less than victim-survivors in other jurisdictions. Maximum penalties should reflect the long-term impact of sexual violence on not only the victim-survivors but their family networks. Victim-survivors of IPSV are more likely to experience greater frequency and intensity of trauma because of their relationship with the perpetrator.<sup>28</sup> There needs to be commensurate validation of their experiences.

## Legislative Reform Must Be Accompanied by a Justice System Response

**WLSWA recommends that reform is required at each stage of the justice system from reporting, police response and investigation, trials to post-trial recovery.**

WLSWA is concerned that the LRCWA's review is limited in scope to sexual offence laws only and that the LRCWA have not addressed the systemic drivers of sexual violence and current failures of the justice system response to sexual violence in the Discussion Paper.<sup>29</sup> This is despite the LRCWA referring to our preliminary submission in the Discussion Paper and identifying a range of non-legal measures at paragraph 1.53 to accompany legislative change. As we noted in our preliminary submission to the LRCWA: "Properly addressing sexual violence is a complex task that involves many legal and non-legal measures. It requires a holistic approach from government and the community, to address the various social, cultural and systemic factors that allow sexual violence to thrive".<sup>30</sup>

To review consent laws through a narrow prism risks exacerbating the well documented issues associated with current justice system responses. The recent consent inquiries across other Australian jurisdictions have consistently found that the justice system "...does not hold the majority of perpetrators accountable, too often silences and re-traumatises victim-survivors and makes them feel unsafe".<sup>31</sup> The

<sup>26</sup> *Criminal Code Act Compilation Act 1913* (WA), s 325.

<sup>27</sup> *Crimes Act 1958* (VIC), s 38(2), *Criminal Code Act 1924* (TAS), s 389, *Criminal Code Act 1983* (NT), s 192(3), *Criminal Code Act 1899* (QLD), s 349(1) and *Criminal Law Consolidation Act 1935* (SA), s 48.

<sup>28</sup> Elyssa Barbash Ph.D., *Overcoming Sexual Assault: Symptoms & Recovery*, *Psychology Today* (Blog Post, 18 April 2017) < [Overcoming Sexual Assault: Symptoms & Recovery | Psychology Today](#)>.

<sup>29</sup> Stella Tarrant, Heather Douglas and Hilde Tubex (2022), *Project 113 Sexual Offences: Background Paper*, Law Reform Commission of Western Australia, p. 13 < [Law Reform Commission - Project 113 - Sexual Offences \(www.wa.gov.au\)](#)>.

<sup>30</sup> Women's Legal Service Western Australia, *Preliminary Submission to the Law Reform Commission of Western's preliminary review of Chapter XXXI, and related sections, of the Criminal Code Compilation Act 1913*, 3 June 2022, pp. 5-6.

<sup>31</sup> Centre for Women's Safety and Wellbeing (2022), *Domestic, Family and Sexual Violence Reader*, Spring Edition, p. 6 < [Spring-Reader-2022.pdf \(csws.org.au\)](#)>.

Safety and Justice Taskforce in Queensland has also recognised the need for significant and meaningful investment in systems reform along with legislative amendments.<sup>32</sup>

### Reporting of Sexual Violence

Underreporting of sexual violence is greater among women who experience IPSV, as compared to women who experience sexual violence perpetrated by a stranger or women who experience non-sexual tactics of FDV.<sup>33</sup> Nearly 90% of victim-survivors of sexual violence offences do not go to police which indicates substantial barriers to reporting.<sup>34</sup>

The Personal Safety and Security survey (PSS) (2016), which surveyed 639,000 women who had experienced sexual assault by a male perpetrator in the 10 years prior to the survey, found that 22% did not report as they did not think there was anything police could do, 16.1% felt that they would not be believed, 9.8% were fearful of the legal process and 5.8% did not trust police.<sup>35</sup>

Victim-survivors who co-report IPSV and FDV already experience feelings of shame, possible guilt at reporting and the breakdown of their family along with low self-esteem.<sup>36</sup> There are also perceived taboos around discussing one's 'sex life' or 'private matters'. Shame is an isolating experience for victim-survivors of IPSV and it contributes to underreporting.<sup>37</sup>

The literature on IPSV paints a picture of shame as being “sufficiently overwhelming to render a person powerless and diminish their sense of self and status. This makes shame an effective tool for perpetrators to exploit the vulnerability of their victim and enhance their own power in the relationship dynamic”.<sup>38</sup>

As a result, many women with whom we work are not able to articulate their experiences as sexual violence or they minimise the violence. Women may also internalise the “cultural sense of sexual obligation in a marital relationship due to the perceptions that a woman is obliged to be sexually available to her partner once a past sexual relationship has been established”.<sup>39</sup>

Normative understandings of ‘real rape’ also affect how IPSV is viewed and contributes to its minimisation and underreporting. We routinely hear that women “agree to sex rather than take the risk of triggering an escalation of violence or abuse by refusing to engage in sexual activity”.<sup>40</sup>

<sup>32</sup> Women's Safety and Justice Taskforce (2022), Hear her voice – Report two – Women and girls' experiences across the criminal justice system < [Publications | Women's Safety and Justice Taskforce \(womenstaskforce.qld.gov.au\)](#)>.

<sup>33</sup> Australia's National Research Organisation for Women's Safety (2019), Intimate partner sexual violence: Research synthesis (2nd Ed.; ANROWS Insights, 08/2019). Sydney, NSW: ANROWS, p. 4 <[IPSV-Research-Synthesis-2ed.pdf \(anrowsdev.wpenginepowered.com\)](#)>.

<sup>34</sup> Australian Institute of Health and Welfare (2020), Sexual assault in Australia, InFocus, Australian Government, p. 5 < [Sexual assault in Australia \(aihw.gov.au\)](#)>.

<sup>35</sup> Australian Bureau of Statistics (2016), Personal Safety Survey, ABS: Australia <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>>.

<sup>36</sup> Peta Cox (2016), Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey (ANROWS Horizons, 01.01/2016 Rev. ed.). Sydney, NSW: ANROWS <[PSS\\_2016update.pdf \(anrowsdev.wpenginepowered.com\)](#)>.

<sup>37</sup> Liz Wall (2012), The many facets of shame in intimate partner sexual violence, Australian Centre for the Study of Sexual Assault, p. 2 <[The many facets of shame in intimate partner sexual violence \(aifs.gov.au\)](#)>.

<sup>38</sup> Ibid, p. 6.

<sup>39</sup> Peta Cox (2015), Sexual assault and domestic violence in the context of co-occurrence and re-victimisation (State of knowledge paper), Sydney, NSW: ANROWS, p. 26 < [embargoed-Landscapes-Sexual-assault-and-domestic-violence-in-the-context-of-co-occurrence-and-re-victimisation-1.pdf \(d2m9qno7zhxgg.cloudfront.net\)](#)>.

<sup>40</sup> Yvette Cehtel (Women's Legal Service Tasmania) cited in Reform of WA Sexual Offence Laws – Key Learnings from other States and Territories, Women's Legal Services Western Australia and Women's Centre for Safety and Wellbeing Western Australia, 17 March 2023.

### Case Illustration – Jessica\*

*In response to Sam's\* increasingly coercive and controlling and violent behaviour, Jessica left him. Jessica was on tenterhooks during this time but did not take out a VRO because she feared that this would exacerbate her situation since Sam frequently showed disregard for the law.*

*After several weeks, Sam came to her home and insisted she have sex with him. Whilst Jessica did not explicitly refuse to do this, she felt she had no choice but to comply given his propensity to violence. She was also anxious for her dog's wellbeing, since Sam had often insinuated that he was willing to hurt her pet if she didn't do as he asked.*

*Following this incident, Sam returned to the house a week later and confronted Jessica in the front yard. He punched her in the head when she wouldn't go into the house with him. The neighbours called the police and with WLSWA support, Jessica applied for a VRO after the 24 hour Police Order expired. This application only cited the incident involving physical violence that the neighbours witnessed, and not the sexual assault which was not reported.*

*\*Names have been changed to protect the anonymity of the victim-survivor*

### Specialist Response

**WLSWA recommends all stakeholders in justice system response to sexual violence have a level of specialisation.**

In order to effectively respond to sexual violence offences all stakeholders in the justice system who engage in these matters must have a level of specialisation. This includes police, prosecutors, court staff, judges and interpreters. Specialisation requires trauma-informed and culturally sensitive responses. Police, prosecutors, judges and jurors need to understand the impact of trauma on memory. On the impact of trauma on those who have experienced violence, Russell Strand (2014) has said: "One of the mantras of the criminal justice system is 'inconsistent statements equals a lie'. Nothing can be further from the truth when stress and trauma impact memory, research shows [...] In fact ... when a person is stressed or traumatised, inconsistent statements are not only the norm but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma".<sup>41</sup>

The need for a specialist response is consistent with our previous recommendations to the Western Australian Government's inquiry into coercive control (**Coercive Control Submission**), that ongoing, trauma-informed training must be mandatory for all justice system stakeholders.<sup>42</sup> This was also a recommendation of the New South Wales Law Reform Commission and Victorian Law Reform Commission, particularly with respect to training on the freeze response.<sup>43</sup>

<sup>41</sup> Russell Strand, The Forensic Experiential Trauma Interview, USA Army Military School, pp. 1-2 in Reid, The Forensic Experiential Trauma Interview (Web Page) < [The Forensic Experiential Trauma Interview \(FETI\) | John E. Reid and Associates, Inc.](#) >.

<sup>42</sup> Women's Legal Service Western Australia, Submission to Government of Western Australia in response to the Legislative Responses to Coercive Control in Western Australia Discussion Paper, 8 August 2022.

<sup>43</sup> New South Wales Reform Commission, Consent in Relation to Sexual Offences (Report No 148, September 2020) [10.32]; Rec 10.2; Victorian Law Reform Commission, Improving the Response of the Justice System to Sexual Offences (Report, September 2021) Rec. 69 < [Publication \(nsw.gov.au\)](#) >.

Perpetrators of coercive control and perpetrators of IPSV employ similar strategies to degrade, control, isolate and punish victim-survivors.<sup>44</sup> In our Coercive Control Submission, we said that the police and the judiciary are, at this stage, unable to consistently and appropriately identify the signs of coercive control. This is because what may appear as compliance to an untrained eye may actually be a compromise of consent in order to manage safety.<sup>45</sup> WLSWA reiterate that IPSV is perpetrated in clusters and that within intimate partner and domestic relationships, initial consent to a particular act can devolve into further acts where there is no consent or where consent has been withdrawn.

WLSWA represent victim-survivors of IPSV in Family Court proceedings. We work with other legal centres on an as needs basis including migration law. The below case illustration is a good example of the importance of adequately funding the legal assistance sector so that we can provide holistic services to victim-survivors of FDV and IPSV.

#### **Case Illustration – Laila\***

*Laila arrived in Perth with her husband, Abas\*, and young children in 2019. Laila's relationship was characterised by significant violence towards her by Abas. They separated in early 2020. English was Laila's second language, and an interpreter was needed for all appointments.*

*Laila was referred to WLSWA lawyer during outreach to a women's health centre for assistance with divorce. The lawyer identified multiple legal issues impacting on her and her children, including immediate risk of harm due to FDV, family law issues, parenting and migration.*

*During this time, Abas was still visiting Laila's home to see the children and would continue to use violence against Laila. Abas frequently threatened to kill Laila, the children and himself if she told anyone about their separation. Abas also used Laila's uncertain visa situation to frighten her and control her efforts to seek help.*

*The lawyer assisted Laila to access more secure accommodation and develop a safety plan. The lawyer assisted Laila to make an application for a FVRO protecting herself and the children.*

*Laila, receiving help for the first time, felt stronger and more confident of her rights and her options. She decided that she wanted to relocate to another state, away from Abas and closer to other members of her community. She also wanted to apply for a divorce from Abas, which she was now able to do.*

*The lawyer assisted Laila and support workers to agree on an action plan which included filing concurrent applications in the Magistrates Court for a FVRO and the Family Court for parenting orders and a divorce. The WLSWA lawyer worked alongside a lawyer from Circle Green for Laila to access migration advice and advocacy for her visa issues.*

*Before the plan could be put in place, Abas broke into Laila's home and committed a horrific assault against her, including physical and sexual assault, and in front of the children. The police were called and assisted Laila and the children to move to a women's refuge.*

<sup>44</sup> Australia's National Research Organisation for Women's Safety (2019), Intimate partner sexual violence: Research synthesis (2nd Ed., ANROWS Insights, 08/2019). Sydney, NSW: ANROWS <[IPSV-Research-Synthesis-2ed.pdf \(anrowsdev.wpenginepowered.com\)](#)>

<sup>45</sup> Women's Legal Service Western Australia, Submission to Government of Western Australia in response to the Legislative Responses to Coercive Control in Western Australia Discussion Paper, 8 August 2022, p.2.



*The lawyer urgently prepared and lodged Laila's application for parenting orders, including permission to relocate with the children, and requested the matter be heard on an urgent basis. An ex-parte FVRO was also applied for and obtained by the lawyer the same day.*

*The Family Court Magistrate made a finding that given the extensive family violence and need to protect the children from harm, the presumption that the children had a right to a meaningful relationship with their father was not applicable. Orders were made that unless Abas filed documents and engaged in the Family Court, the case would be brought back before the judge in Chambers and final orders made. Abas did not engage, and final orders were made providing Laila with sole parental responsibility and restraining the father from having any contact with her or the children.*

*Despite initially lodging an objection, Abas failed to attend the trial for the FVRO matter, and that order was made final for 5 years. The final piece of protection of Laila was provided by the lawyer assisting Laila to apply for and obtain a divorce from Abas.*

*\*Names have been changed to protect the anonymity of the victim-survivor*

There is a need for specialist support services for women who have experienced sexual violence (including within intimate partner and domestic relationships). This must include access to wrap around services spanning intensive case management, early specialist legal advice and advocacy supports. There is a severe shortage of specialist services for sexual assault victim-survivors in Western Australia including only one – the Sexual Assault Resource Centre – in metropolitan Perth.

### Inadequate Police Response

**WLSWA recommends an investment in Police systems and processes and culture change to facilitate and support reporting sexual violence, and that officers are sustainably trained to provide competency-based and trauma-informed responses to victim-survivors.**

FDV is estimated to account for 40-60% of callouts for general duty police, but we routinely hear that police are dismissive of reports, label FDV work as a 'waste of time', repeatedly (and unnecessarily) interrogate victim-survivors and often misidentify the victim-survivor as the primary aggressor.<sup>46</sup> Adequate police response cannot be left to chance. WLSWA has consistently called for responses to FDV that are based in operational guidelines, trauma-informed, ethical and consistent.

Experiences of police response will influence whether women will report repeat incidences of sexual violence.<sup>47</sup> Low conviction rates for rape in the United Kingdom,<sup>48</sup> have been directly correlated to rape stereotypes and poor investigation of sexual violence offences by police.<sup>49</sup> Katrin Hohl's et. al., (2015) large-scale representative study of rape complaints made to the London Metropolitan Police Service,

<sup>46</sup> Micah Projects, Submission to the Commission of Inquiry to Examine Queensland Police Service Responses to Domestic and Family Violence, July 2022, p. 13 <[Micah Projects.pdf \(gpsdfvinquiry.qld.gov.au\)](#)> and New South Wales Law Reform Commission (2020), Consent in Relation to Sexual Offences, Report No. 148, p. 25 <[Publication \(nsw.gov.au\)](#)>.

<sup>47</sup> Australia's National Research Organisation for Women's Safety (2019), Intimate partner sexual violence: Research synthesis (2nd Ed.; ANROWS Insights, 08/2019). Sydney, NSW: ANROWS, p. 4 <[IPSV-Research-Synthesis-2ed.pdf \(anrowsdev.wpenginepowered.com\)](#)>.

<sup>48</sup> Only 1.4% of rapes in 2019-2020 resulted in a charge or summons, with even fewer than 1,500 convictions.

<sup>49</sup> Caelian Barr and Alexandra Topping, 'Fewer than one in 60 rape cases lead to charge in England and Wales', *The Guardian* (Online, 24 May 2021) <[Fewer than one in 60 rape cases lead to charge in England and Wales | Rape and sexual assault | The Guardian](#)>.

found that nearly all cases of attrition were influenced by rape stereotypes held by police including real rapist, victim resistance and ‘respectable woman’ stereotypes.<sup>50</sup>

The pressure that police place on victim-survivors during the investigation stage contributes to attrition. Victim-survivors are often assumed to be compliant and willing to participate in every stage of the investigation process – including the handing over of personal and sometimes irrelevant information to police. When victim-survivors refuse, police may become disinclined to finding an alternative investigative route and the case may be dropped. This prescriptive approach of police and the Office of the Director of Public Prosecutions does not work for all victim-survivors and in fact perpetuates victim-blaming attitudes.

Inadequate police response and barriers to reporting IPSV are particularly pronounced for victim-survivors who face systemic disadvantage. While First Nations women are overrepresented in the FDV justice system, our experience is that culturally and linguistically diverse (CaLD) women are underrepresented and their needs are not responded to effectively.

A 2020 study on migrant and refugee womens’ experiences of controlling behaviours and help-seeking patterns (**Safety and Security Study**) by Harmony Alliance and Monash University noted that CaLD women who had experienced FDV did not generally perceive police as “procedurally fair and just”.<sup>51</sup> CaLD women are more likely to report violence to a family member or friend (84%), healthcare professionals e.g., nurses and psychologists (28%) and doctors (21%) than police.<sup>52</sup> Only 19% of survey respondents to the Safety and Security Study disclosed violence to police.<sup>53</sup>

CaLD women – like First Nations women – are disproportionately misidentified as perpetrators of violence by police. CaLD women also report that police do not listen to them when they report violence and do not arrange necessary interpreters.<sup>54</sup> Access to interpreting services at all stages of the justice system is crucial for victim-survivors, particularly as sexual violence is nuanced and the context is highly relevant.

WLSWA work closely with CaLD victim-survivors of IPSV and reproductive coercion through our health justice partnerships. We have targeted this programming to CaLD women due to the barriers and vulnerabilities this community faces in reporting violence and interacting with the justice system. This work has highlighted a gap in data and research on IPSV in CaLD communities, CaLD womens’ use of services and systems and outcomes in sexual violence trials. This should be a focus of Government going forward otherwise we cannot effectively target policy to this group.

## Specialist Courts

**WLSWA recommends establishing specialist courts which adopt trauma-informed practice for sexual violence victim-survivors. This would involve fast-tracking sexual violence matters via an earlier listing.**

<sup>50</sup> Katrin Hohl and Elisabeth A. Stanko (2015), Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales, *European Journal of Criminology*, Vol.12(3).

<sup>51</sup> Marie Segrave, Rebecca Wickes and Chloe Keel (2021), Migrant and refugee women in Australia: The safety and security study, Monash University, p. 10 <[Migrant and refugee women in Australia | Monash](#)>.

<sup>52</sup> Ibid, p. 43.

<sup>53</sup> Ibid.

<sup>54</sup> See also: InTouch (2022), The Causes and Consequences of Misidentification on Women from Migrant and Refuge Communities Experiencing Family Violence (Position Paper), p. 2 <[inTouch-Position-Paper-Misidentification-February-20221.pdf \(bickdev.com.au\)](#)>.

Victim-survivors who have gone through the justice system have reported that the court process is “aggressive and insensitive”, “repetitive” and “intimidating”.<sup>55</sup> This follows reports from our clients who raise concerns such as having to wait in common areas near the perpetrator (particularly in magistrates courts or regional areas), needing to request a screen in court to block-out the perpetrator (which should be standard practice) and having to re-tell their abuse multiple times. There is also a general concern that some judges permit improper cross-examination.

Many judicial officers lack a robust understanding of the impacts of complex trauma on criminal proceedings. It is necessary that those in the justice system are able to identify, recognise and support victim-survivors.

Specialist courts would work towards creating a justice process that is emotionally and psychologically safe for victim-survivors. A literature review of international and domestic specialist courts by Patrick Parkinson (2016) found that there are efficiency gains, including reduced pre-trial delays, from specialist courts.<sup>56</sup> Additional benefits include that specialists can usually work faster than generalists because they are more familiar with the tasks, there is reduced investment and resource in ongoing training, there are greater knowledge and trauma-informed decisions and specialist judges are less likely to make errors in law with reduced likelihood of decisions being appealed.<sup>57</sup>

An evaluation of 24 family violence courts in New York found that specialist courts are more likely to convict male defendants and impose prison sentences.<sup>58</sup> It was further observed that: “...one of the intended benefits of having dedicated domestic violence court judges is the special training they receive in the ways that abusive males may attempt to manipulate both their victims and the criminal justice system”.<sup>59</sup>

### Alternate Justice Avenues

**WLSWA recommends the exploration of alternative avenues to hold perpetrators to account, including civic pathways such as restorative justice, that are preferred by the person who has experienced sexual violence.**

Women who are subjected to IPSV may be more likely than others to seek alternative avenues including restorative justice because of historical or current familial relationships with the perpetrator, financial constraints and/or shared parental responsibilities.

For these reasons, any restorative justice model(s) for sexual offences should be integrated with the family violence response system, including the legal assistance sector. A restorative justice model should be co-designed with victim-survivors, academics and lawyers who practice in the areas of family law, care and protection and sexual violence. Restorative justice must always be victim-led. A perpetrator’s

<sup>55</sup> Louise Milligan, *Witness: An investigation into the brutal cost of seeking justice* (Hachette Australia, First Edition, 2020) p. 120.

<sup>56</sup> Patrick Parkinson (2016), *Specialist prosecution units and courts: a review of the literature*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney < [Research Report - Specialist Prosecution Units and Courts A review of the literature - Government responses \(ug.edu.au\)](#)>.

<sup>57</sup> *Ibid*, pp. 11-12 and 42.

<sup>58</sup> *Ibid*, p. 30.

<sup>59</sup> *Ibid*.

participation in restorative justice or alternatives to prison must be motivated by genuine remorse and empathy for the victim-survivor.<sup>60</sup> Restorative justice cannot be a bid to reduce a prison sentence.

The New South Wales, Victorian and Queensland sexual offence inquiries consistently found that victim compensation schemes are difficult to access and navigate, entrenched with systemic discrimination and are not trauma-informed.<sup>61</sup>

The Criminal Injuries Compensation (CIC) scheme must respond effectively to this inquiry as the consequences for victim-survivors extends far beyond just the assessment of merits of a particular application for compensation. WLSWA regularly support victim-survivors to obtain their entitlements under the CIC scheme and welcome the opportunity to consult with the LRCWA on the operation and limitations of the CIC scheme in Western Australia.

### Safeguards Against Adversarial Cross-Examination

**WLSWA recommends an enforceable code of conduct to guide and monitor against aggressive interrogation of victim-survivors.**

Sexual violence trials are fundamentally flawed as the core principle of the adversarial system is ‘innocence until proven guilty’. Victim-survivors are neither centred in their own trials and nor is there adequate justice when rates of conviction are unacceptably low. We refer to U.S. psychiatrist Judith Herman (2005) who notes that:

“Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control [...] Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience ... Indeed, if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law”.<sup>62</sup>

Dr. Annie Cossins (2020) reports that trials can increase the activation of the autonomic nervous system in victim-survivors, and that this higher arousal state leads to the resurfacing of vivid memories of the assault(s) and re-traumatisation.<sup>63</sup> A further study on 251 victim-survivors involved in sexual violence trials in Germany found that 69% were diagnosed with post-traumatic stress disorder due to re-traumatisation from the court process, including from aggressive and probing cross-examination.<sup>64</sup>

A longitudinal study on the questioning of Australian adult sexual violence victim-survivors in contemporary trials, to trials run in the 1950s finds that defence lawyers in contemporary sexual violence trials use more tactics during cross-examination than they did historically.<sup>65</sup> Dr. Andy

<sup>60</sup> Sexual Assault Services Victoria (2020), Submission to Victorian Law Reform Commission: Improving the Response of the Justice System to Sexual Offences, December 2020, p. 49.

<sup>61</sup> Alison Evans (2020), Spotlight on Sexual Violence in Western Australia, Centre for Women’s Safety and Wellbeing, p. 6 < [Spotlight on Sexual Violence in Western Australia \(csws.org.au\)](#) >.

<sup>62</sup> Kerstin Braun and Mary Iliadis, ‘Sexual assault victims can easily be re-traumatised going to court — here’s one way to stop this’, *The Conversation* (Online, 25 March 2021) < [Sexual assault victims can easily be re-traumatised going to court — here’s one way to stop this \(theconversation.com\)](#) >.

<sup>63</sup> Annie Cossins, ‘Achieving Best Evidence for Vulnerable Witnesses: The Use of Trauma-Informed Theory to Reform the Sexual Assault Trial’ in *Closing the Justice Gap for Adult and Child Sexual Assault*, (Springer Nature B.V., ed. 1, 2020), pp. 533-576.

<sup>64</sup> Ulrich Orth and Andreas Maercker (2004), Do Trials of Perpetrators Retraumatize Crime Victims? *Journal of Interpersonal Violence*, Vol. 19(2).

<sup>65</sup> Andy Kaladelfos, Rachel Zajac, Nina Westera (2018), The “Good Old Days” of Courtroom Questioning: Changes in the Format of Child Cross-Examination Questions Over 60 Years. *Child Maltreatment*, Vol. 23(2), 186–195 <[The “Good Old Days” of Courtroom Questioning: Changes in](#)

Kaladelfos (2017) et. al., finds that victim-survivors today are asked 3 times as many cross-examination questions as they were 60 years ago, and that cross-examinations have expanded by about 30% or longer since the 1950s.<sup>66</sup>

Inappropriate cross-examination is “systemic”.<sup>67</sup> We routinely hear that victim-survivors are asked about their sexual history, clothing attire and behaviour leading up to the assault. This is despite ‘rape shield laws’ aimed at protecting victim-survivors from being questioned about their sexual history or ‘reputation’.<sup>68</sup> Some victim-survivors of IPSV have been asked why they did not leave the perpetrator or report the violence sooner which is outrageous.

WLSWA acknowledge that there are mechanisms in place to safeguard victim-survivors of sexual violence against adversarial cross-examination, but they are routinely ignored. We support the exploration of an inquisitorial system for victim-survivors of sexual violence or the use of a ‘well-qualified interviewer’.

In Norway, a well-qualified interviewer – someone who is trained in best practice procedures for eliciting complete and accurate evidence – interviews vulnerable victim-survivors in lieu of lawyers.<sup>69</sup> After the interviewer takes a comprehensive account of the events, the judge, prosecution and defence, who watch via CCTV link, have the opportunity to ask the interviewer to put further questions on their behalf to the witness. Defence counsel do not devise the precise questions to be asked or put questions directly to the victim-survivor. If the court is satisfied with the interview, then there is no need for the victim-survivor to be cross-examined.<sup>70</sup>

Another alternative would be for the parameters of questioning of the victim-survivor to be agreed to so that the questioning is not improper, irrelevant or insensitive and the needs of the victim-survivor considered.<sup>71</sup> This approach works to limit re-traumatisation and facilitate adducing the best quality evidence.<sup>72</sup>

WLSWA recommend developing best practice guidelines during questioning of all victim-survivors and not just those experiencing vulnerabilities. Guidelines have the potential to direct questioning in an appropriate manner and format that avoids problematic conventions. Additionally, they provide judges with a standard by which to better monitor cross-examination. Best practice guidelines relevant to the prevalence of sexual offending, the underreporting of sexual violence and circumstances in which sexual violence commonly occurs, have been codified in Victoria.<sup>73</sup> However, guidelines on their own are likely to have limited effect unless they are supported by an enforceable code of conduct and further education and judicial training.

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[the Format of Child Cross-Examination Questions Over 60 Years - Rachel Zajac, Nina Westera, Andy Kaladelfos, 2018 \(sagepub.com\)](#)> and Elise Kinsella, ‘Questioning of sexual assault victims during trials ‘worse’ than in the 1950s, criminologist finds’, *ABC News* (Online, 25 March 2021) <[Questioning of sexual assault victims during trials ‘worse’ than in the 1950s, criminologist finds - ABC News](#)>.

<sup>66</sup> Ibid.

<sup>67</sup> Phoebe Bowden, Terese Henning and David Plater (2014), Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: an impossible triangulation? *Melbourne University Law Review*, Vol.37(539), p. 566 <[STAT.0950.001.0031.pdf \(childabuseroyalcommission.gov.au\)](#)>.

<sup>68</sup> *Evidence Act 1906* (WA) ss 36B and 36BC.

<sup>69</sup> Phoebe Bowden, Terese Henning and David Plater (2014), Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: an impossible triangulation? *Melbourne University Law Review*, Vol.37(539), p. 579 <[STAT.0950.001.0031.pdf \(childabuseroyalcommission.gov.au\)](#)>.

<sup>70</sup> Ibid.

<sup>71</sup> Full Stop Australia, Submission in respect of Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022, 23 February 2022, Rec 17(b), p. 4 <[FSA-sub-Cth-Bill-2022.pdf \(fullstop.org.au\)](#)>.

<sup>72</sup> Ibid.

<sup>73</sup> *Crimes Act 1958* (VIC), s 37B(a),(c)-(e).

## Charter of Rights

**WLSWA recommends the development of a Charter of Rights for those who have experienced sexual violence.**

WLSWA is concerned that although the Commissioner for Victims of Crime sits within the Department of Attorney-General of Western Australia, their functions do not appear to be set out in law. This means that Victims' Rights Guidelines in Western Australia, arguably, lack visibility and consequence.

The Safety and Justice Taskforce criticised the Queensland Charter of Victims' Rights as more closely resembling a "statement of standards" with no power to enforce compliance with resolution process and outcomes.<sup>74</sup> In a justice system that constantly emphasises the perpetrator's rights to a fair trial, there is a danger that the protections and safeguards for victim-survivors are overlooked. Over 45% of all complaints made to the Queensland Victims of Crime Commissioner from 2018-2021 were related to police conduct, with the most common complaint being that the victim-survivor was not treated with respect, courtesy and dignity.<sup>75</sup> We encourage greater transparency on reporting of complaints received by Government agencies and what action, if any, was taken to remedy the complaint – particularly for victim-survivors of sexual violence.

The Western Australian Department of Justice in 2021 also recommended that Western Australia move towards a "rights-based framework" to encourage greater compliance by public bodies and officers and create an enforceable remedy.<sup>76</sup> WLSWA believe that using the language of "rights" or "charter" signals an increased commitment to victim-survivors. We also note that Australian Capital Territory and South Australia have statutory principles governing the treatment of victim-survivors. And we would encourage the LRCWA and Western Australian Government to similarly strengthen existing guidelines.

Western Australia should also establish a Sexual Violence Commissioner/Commission to provide expert advice to Government and strengthen cross-government collaboration. This would further Western Australia's commitment to preventing FDV and sexual violence.

## Jury Directions in Sexual Violence Trials

**WLSWA recommends codified jury directions that challenge misconceptions about sexual violence, FDV and consent in intimate partner and domestic relationships.**

Jury directions should be codified. WLSWA supports the inclusion of a 'family violence' jury direction. Victoria has partially codified jury directions and is considered the current 'gold standard' in Australia.<sup>77</sup> As an example, in Victoria, a judge may direct a jury that sexual acts can occur without consent between people who are married to each other and people who are in a relationship to each other.<sup>78</sup>

Jury directions in Western Australia must be developed and regularly reviewed with input and overview from experts. WLSWA also recommend a code of conduct that guides on ethical legal approaches and

<sup>74</sup> Queensland Women's Safety and Justice Taskforce (2022), Hear Her Voice: Report Two, Volume 1, Women and girls' experience across the criminal justice system, Queensland Government, p. 134 < [WSJT Discussion Paper 2 \(parliament.qld.gov.au\)](#)>.

<sup>75</sup> Ibid.

<sup>76</sup> Department of Justice (2021), A report on the statutory review of the Victims of Crime Act 1994 (WA), Government of Western Australia, p. 24 < [tp+1017+-+a+report+on+the+statutory+review+of+the+vicims+of+crime+act+1994+\(wa\).pdf \(parliament.wa.gov.au\)](#)>.

<sup>77</sup> Royal Commission into Institutional Responses to Child Sexual Abuse (2017), Criminal Justice Report: Preface and Executive Summary, 212 <[Final Report - Preface and executive summary \(childabuseroyalcommission.gov.au\)](#)>.

<sup>78</sup> Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic), s 47H(b)(ii)-(iii).

behaviours that do not re-traumatise and penalties for unduly harsh and aggressive cross-examination techniques that perpetuate victim-blaming and rape myths (as recommended above).

WLSWA remain acutely aware, however, that rape myths operate almost unconsciously and are, on their own, unlikely to bring about a change in juries' attitudes towards sexual violence. This is because conversations on gender-based violence have historically centered on how victim-survivors 'put themselves in vulnerable positions' and respond to violence, rather than holding the perpetrator to account. The perfect victim narrative places an expectation on women to avoid, resist and respond to gender-based violence in ways which fit cultural expectations. These expectations themselves are informed by the very systems which, despite many decades of law reform, advocacy and community education, foster gender-based violence in the first place.<sup>79</sup> Jury directions – like affirmative consent models – need to be supported by broad and concurrent education to raise awareness of these changes and advocate for maturing community perceptions.

On the efficacy of jury directions as a mechanism for change, the New South Wales and Victorian Law Reform Commission's and Safety and Justice Taskforce endorsed "[jury directions] to...correct possible misconceptions or assumptions that jurors may hold about consensual and non-consensual sexual activity, and deter jurors from falling back on these misconceptions when making decisions in a trial".<sup>80</sup> But since we have no way of vetting jurors to discover the rape myths they subscribe to prior to the trial, jurors will be influenced by their internalised beliefs in rape myths and stereotypes.<sup>81</sup> Numerous studies reveal the "positive correlation between relatively high levels of rape myth acceptance and a tendency to acquit in sexual [violence] trials".<sup>82</sup>

Julia Cooper (2022) argues that there are two factors that have the potential to undermine the efficacy of any jury direction: juror comprehension and timing.<sup>83</sup> There is considerable evidence confirming that jurors struggle to understand and apply jury directions during trials. A 2020 study estimated that jurors comprehend between 50-70% of jury directions,<sup>84</sup> while a 2010 study from the UK estimated juror comprehension to be as low as 31%.<sup>85</sup> The lay juror is not versed in the law, and they are unlikely to weigh and consider evidence in accordance with judicial instruction. Instead, they are more likely to "base their decisions on past experience, personal values and cognitive mechanisms such as scripts, schemas and stereotypes".<sup>86</sup>

One way theorised to simplify the decision-making process is to provide jurors with written directions, fact-based directions, visual aids, checklists and flowcharts that lead the jury through the legal steps/process to determining an outcome.<sup>87</sup> WLSWA understand that under section 67(2) of the *Jury Directions Act 2015* (Vic), a trial judge may give jury directions that address and break down the elements of the offence.<sup>88</sup> Whilst this is a welcome inclusion, WLSWA warn that there is not enough

<sup>79</sup> Women's Legal Service Western Australia, Preliminary Submission to the Law Reform Commission of Western's preliminary review of Chapter XXXI, and related sections, of the Criminal Code Compilation Act 1913, 3 June 2022, p. 6.

<sup>80</sup> New South Wales Law Reform Commission (2020), Consent in Relation to Sexual Offences, p. 168 <[Publication \(nsw.gov.au\)](#)>.

<sup>81</sup> Annie Cossins (2019), Why her behaviour is still on trial: The absence of context in the modernisation of the substantive law on consent, *UNSW Law Journal*, Vol. 42(2), 462.

<sup>82</sup> *Ibid.*

<sup>83</sup> Julia Cooper (2022), Judges as myth-busters: a re-examination of jury directions in rape trials, *Griffith Law Review*, Vol. 31(4).

<sup>84</sup> Chantelle M Baguley, Blake M McKimmie and Barbara M Masser (2020), Re-Evaluating How to Measure Jurors' Comprehension and Application of Jury Instructions, *Psychology Crime & Law*, Vol. 26, p. 54 in Cooper (2022), as above n x, p. 498.

<sup>85</sup> Cheryl Thomas (2010), Are Juries Fair, *Research Series Ministry of Justice*, p. 38 in Cooper (2022), as above n x, p. 498.

<sup>86</sup> Louise Ellison and Vanessa Munro (2015), 'Telling tales': exploring narratives of life and law within the (mock) jury room, *Legal Studies*, Vol. 35(2).

<sup>87</sup> Julia Cooper (2022), Judges as myth-busters: a re-examination of jury directions in rape trials, *Griffith Law Review*, Vol. 31(4), p. 498.

<sup>88</sup> *Jury Directions Act 2015* (Vic), s 67(2).

evidence to show that written directions or visual aids can prevent jurors from falling back on their (misguided) beliefs about ‘normal’ victim-survivor behaviour.

WLSWA suggest jury directions similar to section 52 of the *Jury Directions Act 2015* (Vic) that would empower a judge to give a mid-trial direction, temporally adjacent to the evidence in question, but required (‘as soon as is practicable’).<sup>89</sup> Jury directions given after the victim-survivor’s evidence and/or at the summation of the trial will do little to sway a juror’s position. As Professor Jane Goodman-Delahunty (2021) explains, “jurors start deliberating early and throughout the trial. If you only give them the rules of the game right at the end, it’s difficult to retrospectively undo the process of the decision”.<sup>90</sup> However, there is still a level of discretion and flexibility afforded to judges in Victoria to give jury directions ‘at any time’.<sup>91</sup> Research shows that this has “bred inconsistency and hampers efficacy”.<sup>92</sup> WLSWA recommends standardised statutory language so that judges are incentivised to deliver directions ‘as soon as practicable’.<sup>93</sup> It remains to be seen whether mid-trial directions can shift deeply embedded views about sexual violence.

### Victim-Survivors Are Not Served Legally

**WLSWA recommends Government-funded legal representation to enhance victim-survivors’ agency in the legal process and reduce the likelihood – or extent of – re-traumatisation.**

Sexual violence offences are, by their nature, profoundly violating and demoralising to a person’s sense of self. We must extend support and access to services for these women to exercise their rights and seek justice. Victim-survivors who have gone through a sexual violence trial have described being “completely dispossessed of [their] own story”.<sup>94</sup> Victim-survivors should be centred in sexual violence trials, but instead they are sidelined, treated as mere witnesses and often kept in the dark about key aspects of their case.

WLSWA support independent legal representation for victim-survivors of sexual violence so that victim-survivors can retain agency in decision-making and can be assured that their privacy and interests will be protected.<sup>95</sup> WLSWA endorse this statement from Michael O’Connell – the former South Australian Commissioner for Victims’ Rights – who opined in 2017 that independent legal representation can allow victim-survivors to feel like “integral players [...] rather than mere bystanders in the criminal justice system”.<sup>96</sup>

An independent legal representative can draft pre-trial and trial applications, advise on unnecessary intrusions into victim-survivors’ privacy (through subpoenas for counselling records), facilitate victim-survivors’ access to medical and psychological assistance, provide information of the justice process and victim-survivors’ role and responsibilities as a witness and provide accurate and timely information

<sup>89</sup> Jury Directions Act (2015) Vic, s 52.

<sup>90</sup> Victorian Law Reform Commission (2021), Improving the Justice System Response to Sexual Offences: Report, Chapter 20 – Juries and Sexual Offence Trials, para. 20.51 < [20. Juries and sexual offence trials - Victorian Law Reform Commission](#)>.

<sup>91</sup> See for example: Jury Directions Act (2015) Vic, s 52(3).

<sup>92</sup> Julia Cooper (2022), Judges as myth-busters: a re-examination of jury directions in rape trials, *Griffith Law Review*, Vol. 31(4), p. 504.

<sup>93</sup> Ibid.

<sup>94</sup> SBS Insight (2018), Rape on Trial, 18:00 < [Rape On Trial | SBS On Demand](#)>.

<sup>95</sup> Kerstin Braun and Mary Iliadis, ‘Sexual assault victims can easily be re-traumatised going to court — here’s one way to stop this’, *The Conversation* (Online, 25 March 2021) < [Sexual assault victims can easily be re-traumatised going to court — here’s one way to stop this \(theconversation.com\)](#)>.

<sup>96</sup> Michael O’Connell, Commissioner for Victims’ Rights South Australia (2017), Victims’ Rights: Integrating victims in criminal proceedings, Speech delivered at The Australasian Institute of Judicial Administration Inc., p. 1 < [Speech \(aija.org.au\)](#)>.



about the investigation, the charges laid, the outcome of a bail application, cross-examination, court etiquette and the outcome. Ideally an independent legal representative is engaged as early as possible, from disclosure, and which may be prior to reporting of sexual violence in some scenarios.

There also needs to be a clear distinction between the Crown Prosecutor and an independent legal representative. In our experience, many victim-survivors confuse the Director of Public Prosecutions (DPP) or the Crown Prosecutor as their own legal advocate. But the interests of the DPP – who represents the public – is often misaligned with the interests of the victim-survivor.

WLSWA understand that the Federal Government has committed \$8.4 million in funding from 2023-24 for sexual assault victim-survivors to access dedicated legal services to support their engagement with the justice system.<sup>97</sup> The Federal Government must extend this scheme to regional and remote communities, particularly as 53% of all sexual assault cases are in the country lists.<sup>98</sup> Further, First Nations representatives must be available for First Nations victim-survivors.

### Consent Education

**WLSWA recommends broad and concurrent education around changes to the law of consent to raise awareness, address community perceptions and advocate for ethical sexual practices.**

Law reform must be accompanied if not driven by communication and community education.<sup>99</sup> The failure to establish a concurrent public awareness and education campaign further harms victim-survivors as research continues to show that even progressive sexual violence laws can fail to deliver justice and change resultant of the knowledge gap.<sup>100</sup> As noted in the Discussion Paper: “[A]wareness of the alignments between broader social relations (including those surrounding gender and race) and individual sexual offending is directly relevant to the criminal law. The problem with not incorporating this awareness is that the very existence of harm in individualised sexual conduct can be difficult to perceive and/or its nature and extent go unquestioned”.<sup>101</sup>

Consent education must be evidence-based, developed by front line experts and delivered by various stakeholders in the community encompassing teachers, parents, carers, hospital staff, social workers, police and the legal assistance sector. It must address gender tropes and stereotypes, male entitlement, rape myths and victim-blaming attitudes.

Consent education must also be attuned to cultural differences and geographical contexts. Education schemes will fail to alter values and belief-systems if they are not appropriately curated for that demographic. WLSWA work closely with the CaLD women and can advise on the best approach to engaging this community.

<sup>97</sup> Attorney-General’s Department, Investing in Integrity, Human Rights and Safety (Media Release, 25 October 2022) < [Investing in Integrity, Human Rights and Safety | Our ministers – Attorney-General’s portfolio \(ag.gov.au\)](#)>.

<sup>98</sup> Judicial Commission of NSW, Sexual Assault Trials Handbook (2019) *Foreward* at p. i

<sup>99</sup> Australian Law Reform Commission and NSW Law Reform Commission (2010), Family Violence – A National Legal Response, ALRC Report No. 114, NSWLRC Report No. 128, p. 1150 in Full Stop Australia, Submission to National Inquiry into Current and Proposed Sexual Consent Laws, March 2023, p. 36.

<sup>100</sup> Wendy Larcombe et. al., (2016), “I Think It’s Rape and I Think He Would be Found Not Guilty’: Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law”, *Social and Legal Studies*, Vol. 25(5), 611, p. 612 in Full Stop Australia, Submission to National Inquiry into Current and Proposed Sexual Consent Laws, March 2023, p. 35.

<sup>101</sup> Stella Tarrant, Heather Douglas and Hilde Tubex (2022), Project 113 Sexual Offences: Background Paper, Law Reform Commission of Western Australia, p. 11 < [Law Reform Commission - Project 113 - Sexual Offences \(www.wa.gov.au\)](#)>.

## First Nation Victim-Survivors' Experience of the Justice System

The experiences of First Nations victim-survivors are fundamentally different to the experiences of non-Indigenous women.<sup>102</sup> Experiences of colonisation, dispossession of land, discrimination, forced child removal and the intergenerational impacts of resulting trauma impact on, and influence, First Nations women's experiences and responses to sexual violence. WLSWA strongly believe that reducing the multiple intersecting and compounding disadvantages that drive violence – including sexual violence – in First Nations communities may reduce the prevalence and impacts of IPSV.<sup>103</sup>

WLSWA has submitted to the national Senate Inquiry on Missing and Murdered First Nations Women and Children (**Missing and Murdered Women Submission**) where we provided a substantive response on the disproportionate rates of violence perpetrated against First Nations women and failed justice system responses in prevention.<sup>104</sup> WLSWA direct the LRCWA to our Missing and Murdered Women Submission for a broader discussion on FDV.

For close to ten years, WLSWA ran Djinda – a specialist service for Aboriginal and Torres Strait Islander victim-survivors in the Perth metropolitan area – in partnership with Relationships Australia Western Australia. WLSWA also provide legal assistance to First Nations women in our general program areas. In the last 12 months, WLSWA has supported over 1,100 clients state-wide. Over 18% of all WLSWA clients were First Nations women.

We are acutely aware that First Nations women experience disproportionately high rates of sexual violence and victimisation compared to non-Indigenous women. Between 75-88% of First Nations victim-survivors of sexual assault are women and around two-fifths are victims of IPSV.<sup>105</sup> These figures – as with non-Indigenous women – are likely to underestimate the true scale of sexual violence. PSS data does not include Indigenous status and neither do the National Aboriginal and Torres Strait Islanders Social Survey and the National Aboriginal and Torres Strait Islander Health Survey separately record incidents of sexual assault.

As with barriers to reporting IPSV, there are complex barriers to accurately recording data on IPSV perpetrated against First Nations women including a lack of culturally appropriate services for victim-survivors, language barriers and lack of trust in police.<sup>106</sup> There is also a general reluctance in First Nations communities to talk about sex. Through Djinda, we learnt that conversations on sex are generally held between mother and daughter or father and son.<sup>107</sup> This is an important cultural nuance which must inform data collection, education and public awareness responses to sexual violence against First Nations women.

<sup>102</sup> Our Watch (2018), Changing the picture, Background paper: Understanding violence against Aboriginal and Torres Strait Islander women and their children, p. 43 <[Changing the picture: Background Paper \(ourwatch.org.au\)](https://www.ourwatch.org.au/~/media/ourwatch/ourwatch-2018-changing-the-picture-background-paper-understanding-violence-against-aboriginal-and-torres-strait-islander-women-and-their-children.pdf)>.

<sup>103</sup> Jill Guthrie, Katherine Thurber, Raymond Lovett and Matthew Gray et al., (2020), The Answers Were There Before White Man Come In: Stories of Strength and Resilience for Responding to Violence in Aboriginal and Torres Strait Islander communities – Family and Community Safety for Aboriginal and Torres Strait Islander Peoples Study Report, The Australian National University College of Health and Medicine, pp. 7, 15 and 17 <[CHM200082 TAWTBWMC1 v9 WEB\\_1.pdf \(anu.edu.au\)](https://www.anu.edu.au/~/media/ANU/colleges/College%20of%20Health%20and%20Medicine/Research/2020/2020082_TAWTBWMC1_v9_WEB_1.pdf)>.

<sup>104</sup> Women's Legal Service Western Australia, Submission to the National Senate Inquiry into Missing and Murdered First Nations Women and Children, 8 December 2022.

<sup>105</sup> Department of Social Services input, Australian Bureau of Statistics, Recorded crime-Victims 2020 (only including data from NSW, QLD, SA and the NT) in United Nations Office of the High Commissioner (2022), Special Rapporteur on Violence Against Women, its Causes and Consequences – Indigenous Women and Girls, p. 1 <<https://www.ohchr.org/sites/default/files/documents/issues/women/sr/violenceagainstindigenouswomensgirls/2022-07-07/australia.docx>>.

<sup>106</sup> [Sexual assault in Australia \(aihw.gov.au\)](https://www.aihw.gov.au/~/media/aihw/pubs/sexual-assault-in-australia/sexual-assault-in-australia.pdf)

<sup>107</sup> Also see: Kantar Public (2022), Reducing Sexual Violence – research informing the development of a national campaign, Commissioned by the Australian Government Department of Social Services, pp. 44 and 46 <[reducing-sexual-violence-research-informing-development-national-campaign-february-2022.pdf \(dss.gov.au\)](https://www.dss.gov.au/~/media/DSS/2022/02/reducing-sexual-violence-research-informing-development-national-campaign-february-2022.pdf)>.

It is within this unique context that First Nations women may consent to sexual activity to prevent escalating physical violence or other forms of abuse and control, out of fear of retribution from the perpetrator's family and threats of involvement with child protection authorities. Access to secure housing is a significant barrier, particularly in regional and remote areas, that increases vulnerability to sexual violence. Western Australia has a higher proportion of victim-survivors of all forms of abuse accessing specialist homeless services compared to the national average (41% vs 38%).<sup>108</sup> Many First Nations women would be rendered homeless if they reported IPSV.

WLSWA recommend a specialist response to IPSV perpetrated against First Nations women. As we noted in our Missing and Murdered Women Submission, the frequency of justice system failures to act, as well as the nature of these failures (including police officer's deliberate decisions to refrain from taking further action and judges falsely convicting victim-survivors), suggests that justice system apathy towards First Nations women's victimhood is both systemic and institutional.

This is significant in sexual violence trials where there are already a number of factors weighed against the victim-survivor – the accused cannot be compelled to give evidence, IPSV occurs in private spaces where there may be no corroborating witnesses and it is the victim-survivor's behaviour that is heavily scrutinised. A study by the Australian Institute of Criminology confirmed that First Nations women and CaLD women are "highly disadvantaged" in the trial process, particularly if they are "...unable to explain why they acted in certain ways".<sup>109</sup>

#### Case Illustration – Lily\*

*Lily is a young single First Nations mother living in a remote area of WA. She was out with friends one night (one of her rare nights out) and went to a couple of different pubs.*

*She was relaxed and happy and got talking to a young guy who told her he was originally in the navy, but it was not for him, and he had now gone into business for himself.*

*Lily admits she was a bit tipsy, but the young man seemed very personable and eventually offered her a lift home, stating it was 'not safe for an attractive young girl like you to be walking the streets at night.'*

*Instead of dropping her off to her own place, Lily found herself at the man's apartment where she had one more drink. Contrary to the man saying he would call her a taxi to take her home, he put his hand on her leg.*

*Lily tried to stop him, but he kept going and eventually held her down and pulled her underwear off, despite her protests, and he digitally penetrated her. Lily remembers crying and feeling so ashamed that she did not disclose the offence to anyone. Eventually her mother, who she lived with, encouraged Lily to go to the police.*

*Lily disclosed that this was an even bigger mistake, because the police accused her of being intoxicated and, despite her making a statement, they told her to be more responsible and stay home next time or*

<sup>108</sup> Australian Institute of Health and Welfare (2019), Specialist homelessness services 2018–19: Western Australia, Canberra < [Specialist homelessness services 2018–19: Western Australia Fact sheet \(Full Publication:29Nov2019Edition\)\(AIHW\)](#)>.

<sup>109</sup> Denise Liveore (2004), Victim Credibility in Adult Sexual Assault Cases, Trends and Issue in crime and criminal justice, Australian Institute of Criminology, p.4 < <https://www.aic.gov.au/sites/default/files/2020-05/tandi288.pdf>>.

*not talk to strangers. Lily strongly feels that it was because she is a First Nations woman, and the man was a 'respectable white fella'.*

*Lily said that it was the interaction with police that burned the long-lasting sense of shame into her, preventing her from making a criminal injuries compensation claim sooner. Because her limitation date expired for a claim, she now has to wait to find out if the CIC Assessor will accept this out of time.*

*\*Names have been changed to protect the anonymity of the victim-survivor*

There is a critical shortage of dedicated gender specific Aboriginal Community Controlled Organisations (**ACCOS**) across the country, risking non-disclosure by First Nation victim-survivors over concern they will be dismissed by mainstream services.<sup>110</sup> Where ACCOs do exist, First Nations women have been unable to access these services because of a perceived or real conflict of interest if that service is also engaging with the person who committed the sexual offence.

Specialist ACCOs delivering sexual violence and family violence services are best placed to provide trauma-informed and culturally sensitive care. First Nations women and specialist ACCOs must hold a central role in developing and guiding government strategies, policies and programs. First Nations women hold the cultural knowledge and lived experiences to understand the decisions that will be accepted by their communities.

We refer to the Tangentyere Women's Family Safety Group in Alice Springs – a successful grassroots intervention – which has been recognised as elevating First Nations victim-survivors' voices and increased visibility of FDV support services in regional and remote communities similar in landscape to communities in regional and remote Western Australia.<sup>111</sup>

Without input from community, any response risks embedding further trauma and disadvantage for victim-survivors. This is particularly so for First Nation communities who are already at risk of further oppression when interacting with law. More effective outcomes are achieved when First Nations communities are empowered to control their responses.<sup>112</sup>

<sup>110</sup> Victorian Aboriginal Child Care Agency, 'Aboriginal women and children deserve a future free from violence: An urgent call to close the gap' (Media Release) <<https://www.vacca.org/page/media/aboriginal-women-and-children-deserve-a-future-free-from-violence-an-urgent-call-to-close-the-gap>> in Women's Legal Service Western Australia, Submission to the National Senate Inquiry into Missing and Murdered First Nations Women and Children, 8 December 2022, p. 11.

<sup>111</sup> Chay Brown (2020), From the roots up: Principles of good practice to prevent violence against women in the Northern Territory, Thesis submitted for the degree of Doctor of Philosophy at The Australian National University, p. 179 <[Open Research: From the roots up: Principles of good practice to prevent violence against women in the Northern Territory. \(anu.edu.au\)](https://openresearch.anu.edu.au/handle/1865/17444)>.

<sup>112</sup> Safe State NSW (2019), Acting to End Sexual, Domestic and Family Violence, p. 35 <[A-Safe-State-Full-Policy-Platform-Oct-2018-Mar-2019.pdf](https://www.safestate.nsw.gov.au/files/2019/10/A-Safe-State-Full-Policy-Platform-Oct-2018-Mar-2019.pdf) ([whnsw.asn.au](https://www.safestate.nsw.gov.au))>.

**Concluding Remarks**

WLSWA again thank the LRCWA for the opportunity to provide feedback to the Discussion Paper. We are heartened by the commitment of the LRCWA and Western Australian Government to determine the most appropriate solutions to reform the system for sexual violence matters.

WLSWA reiterate that an affirmative consent model on its own will not improve outcomes for victim-survivors without significant and meaningful justice system reform.

Please do not hesitate to contact us if you require additional information.

Kind regards

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

Dr Jennie Gray  
Chief Executive Officer

5 April 2023