

## **Sexual violence:**

### **Law reform and access to justice**

#### **Issues paper**

**17 May 2017**

#### **About AWAVA**

Australian Women Against Violence Alliance (AWAVA) is one of the five National Women's Alliances funded by the Australian Government to bring together women's organisations and individuals across Australia to share information, identify issues and contribute to solutions. AWAVA's focus is on responding to and preventing violence against women and their children. AWAVA's role is to ensure that women's voices and particularly marginalised women's voices are heard by Government, and to amplify the work of its member organisations and Friends and Supporters. AWAVA's members include organisations from every state and territory in Australia, representing domestic and family violence services, sexual assault services, and women's legal services, as well as organisations representing Aboriginal and Torres Strait Islander women, young women, women educators, women in the sex industry and other groups.

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## Introduction

In Australia, sexual violence is recognised as a serious crime and an extreme violation of human rights in which the Australian Government has an obligation to exercise 'due diligence' in establishing effective measures to prevent, investigate and prosecute such cases of violence.

The criminal justice system remains the primary institution for responding to sexual violence offences and over the years there has been increased awareness that survivors/victims experiences of the criminal justice system must improve if they are to pursue and access justice for these crimes. As such, reforms have been made to sexual assault law and policy to redress some of shortcomings of the system to improve the situation of sexual assault survivors in the criminal justice system and to increase the low reporting rates and poor practices that lead to the unnecessary attrition of sexual assault cases.<sup>1</sup>

However, despite some advances, research indicates that these reforms have not translated into significant change at an operational level and shortcomings of the system continue to undermine and restrict survivors/victims ability to access protection, redress and justice for these crimes.<sup>2</sup> In many instances, institutional biases against survivors/victims of violence persists and survivors/victims are often re-traumatised and placed at a heightened risk of further violence when seeking protection through the criminal justice process. In addition, reporting rates remain low, attrition rates are high and low conviction rates persist.<sup>3</sup>

In response to the limitations of legal reform, Daly (2011) has argued for consideration of a variety of responses to sexual assault within and outside the legal system, ranging from the conventional to the innovative, in order to improve both criminal justice system efficacy and victims/survivors' experiences following sexual assault. While we agree with Daly's aim and scope, this issues paper has a more limited intention: to contextualise the challenges for improving victims'/survivors' experiences

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<sup>1</sup> Clark, H. (2010) 'What is the criminal justice system willing to offer?' Understanding sexual assault victim/survivors' criminal justice needs', *Family Matters* 58, pp. 28–37; Daly, K (2011) 'Conventional and innovative justice responses to sexual violence', *ACSSA Issues* 12, [Australian Centre for the Study of Sexual Assault] <https://aifs.gov.au/publications/conventional-and-innovative-justice-responses-sexual-violence>

<sup>2</sup> Australian Law Reform Commission [ALRC] (2010) *Family Violence – A National Legal Response* (ALRC Report 114) <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>

<sup>3</sup> Daly, K. and Bouhours, B. (2010) 'Rape and Attrition in Legal Process: A Comparative Analysis of five countries', *Crime and Justice* 39(1), pp. 565–650.

and system efficacy, to survey specific issues already identified by advocates and for which reform or policy options are fairly well-developed, and to update readers on recent developments.

This document build on AWAVA's work on access to justice and deals mainly with sexual assaults involving adults (not children). It is recognised, however, that sexual abuse of children is a related but distinct topic requiring sensitive, well-informed attention from services and policy-makers. It is also acknowledged that human trafficking into the sex industry constitutes a form of sexual violence and that access to justice for survivors/victims of trafficking is extremely limited. Although relevant to the matters discussed here, the specific legal and social issues involved in human trafficking are largely beyond the scope of this paper.

The paper is structured as follows: first, the paper surveys background issues relating to sexual assault and the limitations of the criminal justice system, before identifying the reasons for limited reporting to formal authorities. Following this the paper discusses data and reporting mechanisms, and makes some proposal for improvements. The paper then turns to specific reforms that could improve the justice system in relation to sexual assault, focusing on the protection of sexual assault communications, presumption of joint trial, and judicial training. The paper concludes with sections discussing the justice needs of particular groups of people and in particular settings, highlighting recommendations relating to Aboriginal and Torres Strait Islander women, women with disability, people in migration detention, sexual assault and harassment at university, and technology facilitated abuse and online safety.

## Consolidated recommendations

### Recommendation 1

That governments and funding bodies at all levels provide greater financial and institutional support to effective local and state based organisations and programs working in the area of sexual violence prevention, in line with governments' commitments under the National Plan.<sup>4</sup>

### Recommendation 2

That the Commonwealth Government provide greater financial and institutional support for Our Watch to lead implementation of Change the Story (the shared framework on primary prevention of violence against women and their children) and The Line (a primary prevention behaviour change campaign for young people aged 12 to 20 years).

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<sup>4</sup> For example, a variety of approaches exist in the Tasmanian context; see analysis in Campbell, E. (2017), Primary Prevention of Male Violence against Women and Girls: Tasmanian Perspectives on the Inadequacy of Current Programmes, Honours thesis, University of Tasmania.

### Recommendation 3

That specialist women's services in their diversity across the full range of service types and target groups be resourced and supported to assist and advocate for women through the justice system and legal processes.

### Recommendation 4

Law reform and policy development should focus on measures to enhance safe mechanisms of disclosure, promote reporting and challenge community and judicial attitudes to sexual assault that continue to reinforce its invisibility.

### Recommendation 5

AWAVA supports the Australian Law Reform Council (ALRC) Recommendation 26–1 of its report *Family Violence - A National Legal Response* (ALRC Report 114, 2010):

The Australian Centre for the Study of Sexual Assault, the Australian Institute of Criminology and similar state and territory agencies should prioritise the collection of comprehensive data in relation to sexual assault perpetrated in a family violence context. In particular on:

- (a) attrition rates, including reasons for attrition and the attrition point;
- (b) case outcomes; and
- (c) trends in relation to particular groups including Aboriginal and Torres Strait Islander peoples.

### Recommendation 6

Further, we recommend that these institutions should prioritise data collection on sexual assault beyond as well as within the family violence context, noting that the clearinghouse functions of the Australian Centre for the Study of Sexual Assault became the responsibility of Australia's National Research Organisation for Women's Safety (ANROWS) at the time of ANROWS's establishment in 2013, so implementation of Recommendation 5 and Recommendation 6 would entail ANROWS prioritising the collection of comprehensive data in relation to sexual assault.

### Recommendation 7

ANROWS should consult with Project Respect, women in the sex industry, and other relevant organisations to identify the barriers to collecting data about violence against women who are in the sex industry.

### Recommendation 8

Data on sexual violence (and other forms of violence) should be disaggregated as far as possible by characteristics including disability and mental illness status, and should be responsive to concerns raised by disability advocates about the inclusion of people in institutional residential settings and people requiring communication support.

### Recommendation 9

That all State and Territory Governments, with the support and facilitation of the Australian Government, urgently adopt a statutorily established and securely funded specialist death review unit, with a mandate to review deaths involving sexual violence as well as domestic and family violence; or ensure that current units are statutorily based, securely funded and comply with best practice principles, including mandating agency responses to and public monitoring of implementation of review recommendations.<sup>5</sup>

### Recommendation 10

That the federal government immediately commence work on the best model that should be established to systemically analyse family child and adult deaths in the family law system (family law courts, Family Relationship Centres, Family Dispute Resolution Services) with the purpose of investigating deaths to make recommendations for immediate and long term systemic change and that such a team be multi-disciplinary, independent and accountable.<sup>6</sup>

### Recommendation 11

AWAVA supports the following Australian Law Reform Council (ALRC) Recommendations 27–8 from its report *Family Violence - A National Legal Response* (ALRC Report 114, 2010):

Federal, state and territory legislation and court rules relating to subpoenas and the operation of the sexual assault communications privilege should ensure that the interests of complainants in sexual assault proceedings are better protected, including by requiring:

- (a) parties seeking production of sexual assault communications, to provide timely notice in writing to the other party and the sexual assault complainant;
- (b) that any such written notice be accompanied by a pro forma fact sheet on the privilege and providing contact details for legal assistance; and
- (c) that subpoenas be issued with a pro forma fact sheet on the privilege, also providing contact details for legal assistance.

### Recommendation 12

[Recommendation 27–9 of ALRC Family Violence - A National Legal Response (ALRC Report 114, 2010)]

The Australian, state and territory governments, in association with relevant non-government organisations, should work together to develop and administer training and education programs for judicial officers, legal practitioners and counsellors about the sexual assault communications privilege and how to respond to a subpoena for confidential counselling communications.

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<sup>5</sup> YWCA Australia (2014) *CEDAW Shadow Report*.

<sup>6</sup> Women's Legal Services Australia (2015), *Response to Family Law Council Discussion Paper: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems Complex Needs inquiry*.

### Recommendation 13

AWAVA supports the Australian Law Reform Council (ALRC) Recommendation 26–5 of its report *Family Violence - A National Legal Response* (ALRC Report 114, 2010):

Federal, state and territory legislation should:

(a) establish a presumption that, when two or more charges for sexual offences are joined in the same indictment, those charges are to be tried together; and

(b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.

A court should only be able to order separate trials if satisfied that there would be a likelihood of prejudice to the accused by the joinder of two or more charges, and that this prejudice could not be avoided by a direction to the jury.

### Recommendation 14

That the Australian Government funds, and together with the Judicial College of Australia develops, a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence. We recommend that this training package includes content on family violence (including recognising dynamics of family violence and unconscious bias), cultural competency, working with victims of trauma, family law (for state and territory judges) and child protection.

### Recommendation 15

That the Australian Government adopt recommendations 215 and 216 of the 2016 Victorian Royal Commission into Family Violence Report such that (215) material on the dynamics of family violence be included in general judicial officer training and (216) the comprehensive family violence learning and development program for court staff and magistrates in Victoria continue to be developed and expanded Australia-wide.

### Recommendations 16

That governments in all relevant jurisdictions Improve court processes (including prosecution responses and witness support).

### Recommendation 17

That governments in all relevant jurisdictions ensure that offender programs directed at intervention or prevention in the context of intimate partner violence include a focus on sexual violence.

### Recommendation 18

That governments in all relevant jurisdictions train and encourage police to include questions about sexual violence when responding to family violence.

### Recommendation 19

That all relevant government and non-government agencies work to train and encourage domestic violence support workers to include questions about sexual violence when working with survivors of domestic violence.

### Recommendation 20

That governments in all relevant jurisdictions increase funding to sexual violence services to meet existing and increasing demand for services.

### Recommendation 21

That Aboriginal communities be empowered to respond to sexual assault that may be occurring in their community through the provision of education and the development and support of local initiatives.<sup>7</sup>

### Recommendation 22

That the Commonwealth Government funds Family Violence Prevention Legal Services and specialist Aboriginal and Torres Strait Islander legal services so that they are accessible to every community.<sup>8</sup>

### Recommendation 23

That every Family Violence Prevention Legal Service include (and be resourced to include) a specialist child sexual assault position.<sup>9</sup>

### Recommendation 25

That agencies and organisations be trained appropriately, including trauma-specific training being made available to all child protection workers, particularly on issues of child sexual assault.

### Recommendation 26

That the Commonwealth Government develop an economic strategy/funding strand to fund Aboriginal sexual violence prevention initiatives.<sup>10</sup>

### Recommendation 27

That the Commonwealth Government provide untied funds to child sexual assault programs.<sup>11</sup>

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<sup>7</sup> ACSAT (2006), *Breaking the Silence*, p. 114

<sup>8</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 5(a)

<sup>9</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 5(b)

<sup>10</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 7(a)

<sup>11</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 7(b)

### Recommendation 28

That government and other relevant agencies continue to research and develop new evidence based initiatives to address sexual assault in Aboriginal communities more effectively, especially child sexual assault<sup>12</sup>

### Recommendation 29

That government and other relevant agencies comprehensively research the relationship between family violence and sexual violence especially child sexual assault in Aboriginal communities to develop policies and strategies that can address the issues in a holistic way.<sup>13</sup>

### Recommendation 30

That government and other agencies develop a framework for collecting data about sexual assault that is adopted by all relevant agencies to clearly establish prevalence, patterns and trends relating to the incidence of adult and child sexual assault and the outcomes of intervention in order to continuously identify gaps and improve service delivery.<sup>14</sup>

### Recommendation 31

That further research be undertaken to investigate the relationship between child sexual assault victimisation and criminally offending behaviour in Aboriginal detainees (both adults and children and young people) in order to improve the evidence base for future programming to address offending behaviour.<sup>15</sup>

### Recommendation 32

That governments, in consultation with Aboriginal and Torres Strait Islander communities, research, develop and implement new models to sexual assault, especially child sexual assault through the continuum of the legal process from initial investigation through to sentencing.<sup>16</sup>

### Recommendation 33

That police provide an efficient and appropriate response to reports of sexual assault within Aboriginal and Torres Strait Islander communities.<sup>17</sup>

### Recommendation 34

That governments ensure police practices prevent the arrest of an Aboriginal or Torres Strait Islander person on an outstanding warrant if they have come to the police station to report sexual assault or to support someone who is reporting sexual assault, by:

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<sup>12</sup> ACSAT (2006), *Breaking the Silence*, p. 114

<sup>13</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 1

<sup>14</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 2

<sup>15</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 100

<sup>16</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 119

<sup>17</sup> ACSAT (2006), *Breaking the Silence*, p. 26

- (a) Ensuring that training of the existing policy occurs
- (b) Developing a community education strategy to inform the community of the policy
- (c) Developing an education strategy or process/policy that especially relates to child sexual assault<sup>18</sup>

#### Recommendation 35

Develop protocols for taking reports of sexual assault from Aboriginal and Torres Strait Islander people, to include:

- (a) A clear understanding of the risk factors of underreporting
- (b) Automatic referral to appropriate support services
- (c) Obtaining training to deal with child sensitive issues
- (d) Adults survivors reporting their child sexual assault experience<sup>19</sup>

#### Recommendation 36

That the Commonwealth and State/Territory governments develop strategic plans to respond to and address issues of sexual assault in Aboriginal and Torres Strait Islander communities, to include child sexual assault, where such plans do not yet exist.<sup>20</sup>

#### Recommendation 37

That Commonwealth and State/Territory governments ensure that standard data collection questions regarding the Indigenous status of both victims and offenders are asked and recorded as a part of the response procedures for sexual assault.<sup>21</sup>

#### Recommendation 38

That the NSW Government revisit the Breaking the Silence Report and consider ways of resourcing the recommendation.

#### Recommendation 39

That the Australian Government establish a Royal Commission into violence against people with disability.

#### Recommendation 40

That, in order to address access to justice concerns affecting people with disability, 'all Australian jurisdictions, in partnership with people with disability, develop and implement Disability Justice Strategies that identify and address barriers to justice for people with disability and that are in line

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<sup>18</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 43

<sup>19</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 44

<sup>20</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 50

<sup>21</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 51

with the recommendations from the Australian Human Rights Commission's report, *Equal Before the Law: Towards Disability Justice Strategies*.<sup>22</sup>

#### Recommendation 41

That the Australian Government end the system of detaining people seeking asylum in offshore immigration detention centres.

#### Recommendation 42

That, in the interim, any contracts associated with the provision of medical and support services in offshore processing centres should require the delivery of services that meet Australian standards, including services for people seeking asylum who have been alleged or been found to have been subject to abuse, neglect or self-harm while in the centres or nearby communities as a result of seeking asylum.

#### Recommendation 43

That all sexual assaults (together with other assaults and injuries) occurring in immigration detention centres both in Australia and offshore be reported and investigated.

#### Recommendation 44

That women working in the sex industry and women who have been trafficked be recognised as specific high-risk cohorts in policy development and legal reform relating to sexual violence, recognising that their needs in terms of access to justice are likely to be different from other groups.

#### Recommendation 45

That universities create or clarify reporting procedures for incidents of assault and harassment as a matter of priority. These should be widely publicised as part of student orientation and should be easily accessible from the university website. Information about how to obtain support in the reporting process should also be readily available.

#### Recommendation 46

That all residential colleges and halls, whether private or owned by the university, be made to adhere to the university's broader policy on harassment and sexual assault and required to report to the university the number of incidents reported under their care and how these incidents were dealt with once reported.

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<sup>22</sup> Frohmader, C. and Sands, T. (2015), *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings*, Disabled People's Organisations Australia (formerly ACDA), Recommendation 42.26. <http://dpoa.org.au/submissions/acda-submission-to-senate-inquiry-into-violence-abuse-and-neglect-against-people-with-disability-in-institutional-and-residential-settings/>

### Recommendation 47

That a new offence be legislated in the Australian criminal code to criminalise the unauthorised sharing of intimate images (image-based sexual abuse and exploitation).

### Recommendation 48

That the E-Safety Commissioner's and Australian Government's work in the area of technology safety (including image-based sexual abuse and exploitation) be trauma-informed, integrated with existing sexual assault services and women's specialist services responding to violence, and be attentive to the specific needs of different groups of women and girls.

## Background: The justice system in responses to sexual violence

The criminal justice system remains the primary institution for responding to sexual violence offences and plays a potentially powerful role in providing access to justice and safety to survivors/ victims of sexual violence and their families, re-affirming and re-establishing their rights to live free of violence.<sup>23</sup> It also plays an important role in preventing future violence; both by sending a strong message to the community that sexual violence will not be tolerated and by ensuring perpetrators are held to account and appropriately rehabilitated to reduce further re-offending.

While the criminal justice system is crucial to responding to sexual violence offences, research highlights that survivors/victims of sexual violence encounter unique and systematic disadvantage, discrimination and marginalisation within the criminal justice process, which is an extension of community attitudes more generally.<sup>24</sup> This point was made strongly in a major 2015 report published by the Australian Institution of Criminology, *No Longer Silent*:

Whether [the needs of women who are sexually victimised] are met is contingent on the understandings and responses of the formal and informal support sources available to them. In turn, women's decisions about where to seek help and the responses of the recipients of their disclosures are patterned by a spectrum of social and personal factors that, for the most part, perpetuate the silencing of survivors.<sup>25</sup>

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<sup>23</sup> For workers in the sex industry, the *Fair Work Act* (2009) sets the framework to provide the standards required to prevent labour exploitation, while the Criminal Code provides the prosecution framework if serious labour exploitation does happen. Where the civil framework fails to protect women in the sex industry, the Criminal Code should come into effect; however, due to the nature of the industry, women are often either unable or unwilling to come forward to the authorities if they have experienced exploitation, or they may not recognise their experience as being exploitative. Moreover, enforcement and regulatory bodies are often not responsive to issues of exploitation within the sex industry. For further information, see the Project Respect website <http://www.projectrespect.org.au/research>

<sup>24</sup> ALRC (2010), *Family Violence – A National Legal Response*, p. 1111.

<sup>25</sup> Lievore, D. (2015), *No Longer Silent: A study of women's help-seeking decisions and service responses to sexual assault* [A report prepared by the Australian Institute of Criminology]

The historical treatment of sexual offences, and particularly consent, is often said to epitomise the justice system's inherent bias against women, in which the justice system continues to draw on "rape myths" and preconceived ideas about and biases about women, children, men, sexual violence, and sexual relationships more generally. This exacerbates the feelings of self-blame, guilt, and unworthiness that is often representative of the impacts of sexual violence. It also contributes to the low reporting of sexual offences to the police.

The nature of an adversarial trial positions survivors/victims in a passive role, with no formal standing and unable present their views or concerns during a trial, except when being questioned as a witness.<sup>26</sup>

The burden of proving guilt beyond reasonable doubt is placed on the prosecution, which means that issues of corroboration of a complaint and credibility at the point of trial are the responsibility of the survivors/ victims, rather than the defendant. Further problems are posed by the public nature of the criminal justice system, the focus on what happened instead of the impact, the emphasis on aggressive cross-examination, and rules of evidence that restrict the way in which a victim can communicate.<sup>27</sup>

Many survivors feel their role in the trial requires them to retell and therefore relive the trauma of the crime while simultaneously denying them the ability to voice the circumstances in a way that is meaningful to them. Victims have described the process of giving evidence as humiliating, degrading and manipulative, and as adding to the trauma of the original crime.

Unsurprisingly, studies show that survivors/victims experience the adversarial criminal trial process as secondary victimisation,<sup>84</sup> which compounds the trauma experience of the original event.<sup>85</sup> Judith Herman, an expert in traumatic stress, has observed that: "*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>86</sup>

## Reforms in response to system problems

In response to the problems identified above, significant law and policy reform across state and territories has been introduced to better address the disadvantages survivors/victims of sexual violence face within the criminal justice system. This work has been ongoing since the 1970s and has largely driven by feminist activism on behalf of survivors/ victims of gender-based violence.

These reforms have mainly focussed on: expanding the definition of rape and sexual offences<sup>28</sup>, shifting attention towards the behaviour of offenders and away from the victim's character,

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for the Australian Government's Office for Women], p. 154

<http://www.aic.gov.au/publications/previous%20series/publications-archive/2000s/no%20longer%20silent.html>

<sup>26</sup> Braun, K. (2014), 'Legal Representation for Sexual Assault Victims – Possibilities for Law Reform', *Current Issues in Criminal Justice* 25(3), pp. 819–837, pp. 820–823

<http://www.austlii.edu.au/au/journals/CICrimJust/2014/6.pdf>

<sup>27</sup> ALRC (2010), *Family Violence – A National Legal Response*, p. 1334

<sup>28</sup> The definition of rape was expanded from a single offence (vaginal intercourse with the penis) to a series of graded offences, associated with aggravating circumstances and acts. Sexual intercourse was broadened to

eliminating the witness corroboration rule and other physical evidence requirements to prove non-consent ('rape shield laws'),<sup>29</sup> banning direct cross-examination of the complainant by an unrepresented accused,<sup>30</sup> and enabling victim witnesses to give evidence via video technology or while being accompanied by a support person.<sup>31</sup> Legal reforms have also been accompanied by changes to administrative procedures and services for victims, which led to, for example, police officers receiving specialised training in sexual assault and advocate services being expanded to better assist victims.<sup>32</sup>

But while positive reforms have been made to sexual assault law and policy and there has been an increasing emphasis on responding to the needs of survivors/victims of sexual violence within Australian criminal justice systems, research indicates that reforms have not translated into significant change at an operational level; instead, damaging practices continue despite legal change and there is very little evidence to suggest that survivors'/ victims' experiences within the criminal justice system have improved.<sup>33</sup>

The inability of legal reforms to bring about substantive change for survivors/ victims is highlighted by the 2003 Victorian Law Reform Commission (VLRC), which states:

During the late 1980s and early 1990s substantial reforms were made to procedure and evidence in sexual offence cases. The outcomes of our research and consultations suggest that these reforms have had limited success in improving the experience of complainants in sexual offence cases.<sup>34</sup>

This was again reaffirmed in 2010 by the Australian Law Reform Commission (ALRC), which further highlighted that the traumatic experience that so often characterises sexual assault trials for

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include oral and anal penetration, and marital rape was criminalised in all jurisdictions. Comprehensive changes were introduced in New South Wales in 1981, in the Australian Capital Territory in 1985, and in Victoria in 1991 [see ALRC (2010), *Family Violence – A National Legal Response*, pp:1130–1131 and Daly (2011), Part I. Sexual assault law reform].

<sup>29</sup> Rape shield laws were enacted to restrict the introduction of evidence at trial about a victim's past sexual history. See Bluett-Boyd, N. and Fileborn, B. (2014), *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions* AIFS Research Report No. 27, part 3.2 <https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-criminal-justice>

<sup>30</sup> Loughman, J. (2016), 'Protecting vulnerable witnesses in family law', *Law Society Journal* - Law Society of NSW, February, pp. 26-27; p. 27.

<sup>31</sup> ALRC (2010), *Family Violence – A National Legal Response*, pp. 1121–1122.

<sup>32</sup> ALRC (2010), *Family Violence – A National Legal Response*, pp. 1121–1122.

<sup>33</sup> Daly (2011); Lievore, D. (2004). *Prosecutorial decisions in adult sexual assault cases: An Australian study*. Canberra: Office of the Status of Women, Commonwealth of Australia, [http://www.aic.gov.au/media\\_library/archive/publications-2000s/prosecutorial-decisions-in-adult-sexual-assault-cases.pdf](http://www.aic.gov.au/media_library/archive/publications-2000s/prosecutorial-decisions-in-adult-sexual-assault-cases.pdf)

<sup>34</sup> Victorian Law Reform Commission (2003), *Sexual Offences: Interim Report* <http://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-interim-report> Section 4.4.

survivors/victims remains a major contributing factor as to why complainants have labelled the criminal trial process being akin to a "second rape".<sup>35</sup>

In addition to improving the experience of sexual assault survivors, legal and policy reform aimed to increase the low reporting and correspondingly low convictions rates of sexually offences, supporting the progression of cases through the criminal justice system. Unfortunately, this challenge remains and is highlighted by the limited changes in key measures of the impact of law reform, such as the progression of cases through the criminal justice system - from being reported to police through to being heard in court - and prosecution and conviction rates for sexual violence offences. Such indicators continue to show that of those offences that are reported and come to the attention of the criminal justice system, only a small proportion proceed to trial and an even smaller percentage result in conviction.<sup>36</sup>

The limitations of the reform effort to date need to be interpreted in relation to the capacity of key sectors to push for change and develop well-supported policy positions. Specifically, the relevant non-government sexual assault services and peak bodies find it difficult to do the systemic advocacy and representation necessary to develop platforms to drive productive change, when they are under-resourced and when, concurrently, government service provision is being expanded through medical settings instead of specialist non-government services. Sexual assault services and advocates continue to face barriers when trying to improve understanding of sexual assault issues within broader policy, legal and NGO settings.

Concluding her review of 48 approaches that have been proposed or used (nationally and internationally) to improve criminal justice system efficacy and victims' experiences in the aftermath of sexual assault (both within and outside the legal process), Kathleen Daly notes that educational campaigns about gender and ethical sexual relations are likely to be more effective in preventing sexual violence than criminal law and justice system sanctions.<sup>37</sup> We note that the Third Action Plan of the National Plan to Reduce Violence against Women and their Children includes a commitment to "Deliver an evidence-based community initiative to understand and counter the impact of pervasive pornography..." and we support such efforts to de-normalise sexual objectification and exploitation. Campaigns are also needed to challenge and change, at a community level, the stereotypes and rape myths that continue to undermine responses to sexual assault from within the justice system and more broadly. In addition to reforms to the justice system, and consideration of alternative pathways for justice, greater support for evidence-based primary prevention efforts is needed.

It is also important that reforms strengthen the role of specialist women's services in supporting and advocating for women through the justice system and processes. Timely and relevant access to specialist support and advocacy services is a crucial pathway into access to justice and ensuring the

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<sup>35</sup> ALRC (2010), *Family Violence – A National Legal Response*, p. 1115

<sup>36</sup> In Victoria, the most up-to-date statistics on the attrition of sexual offence incidents come from the Crime Statistics Agency, which found that only a third of sexual offences recorded by the police throughout 2009 and 2010 progressed to prosecution by police (33.7%). Of those that progressed, just over a third (69%) were matched to the court case, indicating that the offences went to the court.

<https://www.crimestatistics.vic.gov.au/media-centre/media-releases/attrition-of-sexual-offence-incidents-across-the-victorian-criminal>

<sup>37</sup> Daly (2011), 'Conventional and innovative justice responses to sexual violence'.

legal needs and rights of victim/survivors are met. Innovative models such as the Victorian Multidisciplinary Centres, in which all key services are located in a single building separate from police stations, should also be considered.<sup>38</sup>

#### Recommendation 1

That governments and funding bodies at all levels provide greater financial and institutional support to effective local and state based organisations and programs working in the area of sexual violence prevention, in line with governments' commitments under the National Plan.<sup>39</sup>

#### Recommendation 2

That the Commonwealth Government provide greater financial and institutional support for Our Watch to lead implementation of Change the Story (the shared framework on primary prevention of violence against women and their children) and The Line (a primary prevention behaviour change campaign for young people aged 12 to 20 years).

#### Recommendation 3

That specialist women's services in their diversity across the full range of service types and target groups be resourced and supported to assist and advocate for women through the justice system and legal processes.

## Severe under-reporting of sexual violence

It is widely recognised that there is extensive under-reporting of sexual violence. The Australian Centre for the Study on Sexual Assault (ACSSA) found that high non-reporting rates make it extremely difficult to estimate the prevalence of sexual assault and that "there is no single data source that is able to provide all of the information required to paint a detailed picture of the full extent of sexual assault and abuse in the Australian community ...".<sup>40</sup>

### Survivor/victim related barriers to reporting

The severe under-reporting of sexual violence is, in part, due to the significant barriers related to the nature and extent of sexual violence. It has also been shown that sexual violence perpetrated in the context of family and domestic violence is even more difficult for survivors/victims to disclose and

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<sup>38</sup> Powell, M.B. and Wright, R. (2012), 'Professionals' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police', *Current Issues in Criminal Justice*, 23 (3), pp. 333–352.

<sup>39</sup> For example, a variety of approaches exist in the Tasmanian context; see analysis in Campbell, E. (2017), *Primary Prevention of Male Violence against Women and Girls: Tasmanian Perspectives on the Inadequacy of Current Programmes*, Honours thesis, University of Tasmania.

<sup>40</sup> Tarczon, C., & Quadara, A. (2012). *The nature and extent of sexual assault and abuse in Australia* (ACSSA Resource Sheets). Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, <https://aifs.gov.au/publications/nature-and-extent-sexual-assault-and-abuse-australia>

therefore report. Some of the barriers that prevent survivor/victim disclosure of sexual violence may include: notions of shame, embarrassment, stigma, trauma and self-blame or blame of others; the belief that the incident is trivial, not serious enough or that the victim should deal with it as a private matter; the desire to protect their family and children and/ or the offender. Literature also suggests that fear of negative repercussions is a major obstacle to the reporting of sexual violence. Survivors/victims fear that disclosure may lead to further violence, cultural punishment, stigmatisation and further tension and conflict within and between families and the wider community.<sup>41</sup>

Practice-based knowledge also highlights that many survivors of sexual violence may not recognise that what happened to them constituted sexual violence. For example, ANROWS reports that most women who have experienced sexual violence by an intimate partner or a family member did not label the incident as a sexual assault and do not believe that what happened to them is rape or sexual assault.<sup>42</sup> The Women's Services Network's (WESNET) submission to the 2010 ALRC report on Family Violence – A National Legal Response further reaffirms this:

Workers report that quite often women do not see what they have experienced as sexual abuse until the worker provides a definition. At that point many women acknowledge that they have experienced sexual violence.<sup>43</sup>

The Victorian Royal Commission into Family Violence also highlights that a failure to ask about sexual violence when women seek help around family violence also contributes to the severe under-reporting. This highlights that the lack of reports of sexual violence do not necessarily mean that sexual violence is not happening, but rather reflects a trend of silence and failure of our culture and systems to adequately acknowledge, report and address sexual violence.

Furthermore, the reluctance to disclose sexual violence in the context of family and domestic violence may also reflect a lack of willingness in society more generally to recognise the criminality of such behaviour. Against this backdrop it is unsurprising that the majority of sexual assaults never come to the attention of and/or enter the criminal justice system.<sup>44</sup>

This is further exacerbated for diverse groups of women who may face increased and intersecting difficulties in recognising sexual assault. For example, for some Aboriginal and Torres Strait Islander women the 'normalisation of violence' may be a barrier; and for women from culturally and linguistically diverse (CALD) backgrounds language issues may make it difficult to identify that sexual violence was perpetrated —as can the fact that 'there may not be a concept of sexual violence occurring in marriage and no definitions of consenting sexual activity'.<sup>45</sup>

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<sup>41</sup> ALRC (2010), *Family Violence – A National Legal Response*, section 24.

<sup>42</sup> Breckenridge, J. et al (2015), *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integration Interventions and Service Responses to Violence Against Women*, State of Knowledge Paper No 11, ANROWS, [http://media.aomx.com/anrows.org.au/Integrated%20Responses%20Meta-Evaluation%20-Landscapes%20\(State%20of%20knowledge\)%20Issue%20Eleven.pdf](http://media.aomx.com/anrows.org.au/Integrated%20Responses%20Meta-Evaluation%20-Landscapes%20(State%20of%20knowledge)%20Issue%20Eleven.pdf)

<sup>43</sup> WESNET—The Women's Services Network, Submission FV 217, 30 June 2010, cited in the ALRC (2010), *Family Violence – A National Legal Response*, p. 1193.

<sup>44</sup> ALRC (2010), *Family Violence – A National Legal Response*, section 26.

<sup>45</sup> ALRC (2010), *Family Violence – A National Legal Response*, section 26.

## Barriers related to reporting in the criminal justice system

The barriers survivors/victims face when they engage with the criminal justice system also contribute to the extensive under-reporting. There are significant barriers that the criminal justice system imposes on survivor/victims when they report sexual violence including, for example: police unwillingness to file a case or to take it seriously; lack of confidence in the criminal justice system to assist; previous negative experiences with reporting; fear by the survivor/victim of not being believed or being treated with hostility; lack of knowledge or information about the legal process and how to report. The RCFV also highlights that survivors/victims of sexual violence may fear that the police will respond to their allegations with scepticism and social and cultural insensitivity.

Literature also shows that the relationship that the survivor/victim has with the perpetrator also constitutes one of the biggest impediments to reporting. The likelihood of reporting sexual violence decreases as the relational distance between victim and perpetrator decreases, meaning that sexual assaults are more likely to be reported if they are perpetrated by strangers, followed by estranged partners or known non-intimate perpetrators. This reflects the reification of the “real rape” misconception.<sup>46</sup>

There is also evidence that highlights barriers are further exacerbated for survivors/victims of sexual assault from and of diverse backgrounds. For instance, research suggests that approximately 90% of the violence experienced by Aboriginal and Torres Strait Islander women is not brought to the attention of authorities.<sup>47</sup> The over-representation of Aboriginal and Torres Strait Islander peoples in the justice system, high rates of death in custody, the current and historical rates of children being removed from the family (particularly non-offending family members) and the general distrust in authorities is also likely influence individuals’ choice to report or not.<sup>48</sup> There is also significant under-reporting of sexual assault of people from culturally and linguistically diverse backgrounds, women with disability, older and younger people, children, LGBTIQ+ and women who work in the sex industry, all of whom face increased and intersecting forms of violence.<sup>49</sup>

In relation to women who have been trafficked, Project Respect has registered its concerns that eligibility for the Support for Trafficked People Program is conditional on women reporting crimes, stating:

We believe that participating in criminal justice proceedings can be re-traumatising for survivors. The conditional focus on evidence can force women to recount their experiences when they are not ready to do so, often without appropriate psychological

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<sup>46</sup> Lievore, D. (2002) ‘Non-reporting and hidden recording of sexual assault in Australia’, paper to the Third Australasian women and policing conference, Canberra, 23 October, p. 7

[http://www.aic.gov.au/media\\_library/conferences/policewomen3/lievore.pdf](http://www.aic.gov.au/media_library/conferences/policewomen3/lievore.pdf)

<sup>47</sup> Willis, M. (2011), ‘Non-disclosure of violence in Australian Indigenous communities’, *Trends & issues in crime and criminal justice* 405 <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi405.html>

<sup>48</sup> Willis (2011), ‘Non-disclosure of violence in Australian Indigenous communities’

<sup>49</sup> Lievore, D. (2003), Non-reporting and Hidden Recording of Sexual Assault: An International Literature Review, report by the Australian Institute of Criminology for the Office of the Status of Women, [http://www.aic.gov.au/media\\_library/archive/publications-2000s/non-reporting-and-hidden-recording-of-sexual-assault-an-international-literature-review.pdf](http://www.aic.gov.au/media_library/archive/publications-2000s/non-reporting-and-hidden-recording-of-sexual-assault-an-international-literature-review.pdf)

assistance. It is our understanding that survivors are not being assessed by a psychologist/counsellor when re-calling traumatising events may cause further harm.

We believe that the current support system does not protect the rights of the trafficked or exploited person and that there is an overwhelming and unbalanced expectation for trafficked persons to contribute to the Australian criminal justice system but inadequate support services to empower them to do so. We strongly recommend that support needs to be de-linked from criminal proceedings and that the Australia needs to find other ways to encourage survivors to in the investigations.<sup>50</sup>

Recognising that the majority of sexual assaults never come to the attention of and/or enter the criminal justice system is crucial contextual information when considering the criminal administrative data and responses of the criminal justice system to survivors/victims of sexual violence.

#### Recommendation 4

Law reform and policy development should focus on measures to enhance safe mechanisms of disclosure, promote reporting and challenge community and judicial attitudes to sexual assault that continue to reinforce its invisibility.

## Strengthening data collection and reporting mechanisms

Comprehensive, quality data collection regarding sexual violence and sexual assault cases, and the evaluation and analysis of this data, is crucial to understanding the nature and extent of sexual violence. It is also vital for identifying key points of attrition and associated barriers in sexual violence cases, assessing and informing policy measures and services in relation to how the criminal justice system deals with sexual assault, estimating needed resources and tracking progress over time.<sup>51</sup> But while the importance of such data has been universally recognised as a central component of a national and integrated approach to achieving effective responses to violence, major gaps remain and data collection and analysis mechanisms continue to be identified as a pressing issue that needs to be addressed across governments and non-government agencies.

In *Time for Action*, the National Council stated that 'data relating to violence against women and their children in Australia is poor', and suggested that one of the tasks of the National Centre of Excellence for the Prevention of Violence against Women (now ANROWS) would be to 'coordinate a national research agenda and data collection effort'.<sup>52</sup> It has also been recognised that there is a general

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<sup>50</sup> Project Respect, email communication 26 April 2017.

<sup>51</sup> Tarczon, C., & Quadara, A. (2012). *The nature and extent of sexual assault and abuse in Australia*.

<sup>52</sup> National Council to Reduce Violence against Women and their Children (2009), *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021*, p. 49  
<https://www.dss.gov.au/our-responsibilities/women/publications-articles/reducing-violence/national-plan-to->

inadequacy of current data on the reporting and prosecution of sexual offences, particularly in relation to sexual violence perpetrated against children and women from and of diverse backgrounds, particularly Aboriginal and Torres Strait Islander women and children, women working in the sex industry, women with disability, and women from culturally and linguistically diverse backgrounds.

While contributing factors include the very nature of extreme under-reporting of sexual violence and inconsistencies in definitions of this type of violence, research highlights that there are significant limitations associated with current methods of data collection and evaluation of criminal administrative data<sup>53</sup>, including a lack of comparable and consistent data across jurisdictions.<sup>54</sup> The Australian Institute of Family Studies (AIFS) highlights the complexity of collecting and evaluating such data in its submission to the ALRC report on Family Violence – A National Legal Response (2010):

[T]here is great complexity involved in estimating attrition rates of sexual assault cases and case outcomes in Australia. This complexity results from the need to collect police and court data from different jurisdictions with different record keeping systems and legislation. Data collection systems may not be compatible or readily available. Yet it is important to grapple with these issues to begin to understand attrition in sexual assault cases.<sup>55</sup>

In response, the ALRC 2010 report states that national agencies should prioritise the collection of comprehensive data in relation to sexual assault - particularly when perpetrated in a family violence context, including attrition rates (including reasons for attrition and the attrition point); case outcomes; and trends in relation to particular groups including Aboriginal and Torres Strait Islander peoples. NASASV, in their submission to the ALRC report on Family Violence – A National Legal Response, further stress that data ‘should be collected that specifies exactly when the case fell out, how far along the process it got and exactly why it was not pursued/successful’.<sup>56</sup>

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[reduce-violence-against-women-and-their-children/time-for-action-the-national-councils-plan-for-australia-to-reduce-violence-against-women-and-their-children-2009-2021-a](#)

<sup>53</sup> In Australia, the primary sources of sexual assault statistics come from criminal administrative data, which include, for example, official police statistics, crime victimisation surveys, and more customised or targeted surveys.

<sup>54</sup> Tarczon, C., & Quadara, A. (2012). *The nature and extent of sexual assault and abuse in Australia*.

<sup>55</sup> Australian Institute of Family Studies (2010), Submission FV 222, cited in ALRC (2010), *Family Violence – A National Legal Response*, p. 1191; also see Chapter 26, of the same report: Reporting, Prosecution and Pre-trial Processes.

<sup>56</sup> National Association of Services Against Sexual Violence (2010) Submission FV 195 to ALRC (2010), *Family Violence – A National Legal Response*; Canberra Rape Crisis Centre (2010), Submission FV 172, cited in cited in ALRC (2010), *Family Violence – A National Legal Response*, p. 1191.

### Recommendation 5

AWAVA supports the Australian Law Reform Council (ALRC) Recommendation 26–1 of its report *Family Violence - A National Legal Response* (ALRC Report 114, 2010):

The Australian Centre for the Study of Sexual Assault, the Australian Institute of Criminology and similar state and territory agencies should prioritise the collection of comprehensive data in relation to sexual assault perpetrated in a family violence context. In particular on:

- (a) attrition rates, including reasons for attrition and the attrition point;
- (b) case outcomes; and
- (c) trends in relation to particular groups including Aboriginal and Torres Strait Islander peoples.

### Recommendation 6

Further, we recommend that these institutions should prioritise data collection on sexual assault beyond as well as within the family violence context, noting that the clearinghouse functions of the Australian Centre for the Study of Sexual Assault became the responsibility of Australia's National Research Organisation for Women's Safety (ANROWS) at the time of ANROWS's establishment in 2013, so implementation of Recommendation 5 and Recommendation 6 would entail ANROWS prioritising the collection of comprehensive data in relation to sexual assault.

### Recommendation 7

ANROWS should consult with Project Respect, women in the sex industry, and other relevant organisations to identify the barriers to collecting data about violence against women who are in the sex industry.

### Recommendation 8

Data on sexual violence (and other forms of violence) should be disaggregated as far as possible by characteristics including disability and mental illness status, and should be responsive to concerns raised by disability advocates about the inclusion of people in institutional residential settings and people requiring communication support.

## Death review

While there are domestic violence death review mechanisms in most Australian jurisdictions, the current lack of a comprehensive and comparable data collection aimed at reviewing and analysing deaths resulting from violence has also been identified as a significant gap that limits improvements to systems responses and preventing future deaths. The Magistrates' Court and Children's Court of Victoria noted that a "comprehensive and systematic review of family violence deaths provides a significant opportunity to examine the success or otherwise of integrated responses to family violence." Women's Legal Services Australia (WLSA) and DV Victoria have also identified the need to better monitor and analyse deaths resulting from domestic, family and sexual violence, highlighting that a comprehensive review would help to specify risk factors, barriers to effective intervention and gaps in service delivery or the integration of responses, thereby enabling improvements to systems responses and preventing future deaths. They also highlight that national leadership is also important

in ensuring that data and research from the various reviews are centrally coordinated so that jurisdictions are able to learn from one another about effective family violence death prevention.

In the End of Mission Statement following her country visit to Australia in 2017, the UN Special Rapporteur on Violence against Women, Dubravka Šimonović encouraged the Australian Government to:

further improve collection of comparable data on gender-related killings of women and to expand homicide/femicide review panels to all States and Territories, to consider expansion of their work as femicide panels or to establish or designate other bodies to do so...<sup>57</sup>

A similar point was made in the 2014 NGO report on Australia's obligations under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), which called for a strengthened and consistent system for reviews of women's deaths relating to gender-based violence.<sup>58</sup> A report in 2017 by the Human Rights Commission likewise advocated for expanding domestic and family death review mechanisms to all Australian jurisdictions and to ensure that recommendations made to Federal Government agencies in death review processes are actioned.<sup>59</sup>

#### Recommendation 9

That all State and Territory Governments, with the support and facilitation of the Australian Government, urgently adopt a statutorily established and securely funded specialist death review unit, with a mandate to review deaths involving sexual violence as well as domestic and family violence; or ensure that current units are statutorily based, securely funded and comply with best practice principles, including mandating agency responses to and public monitoring of implementation of review recommendations.<sup>60</sup>

#### Recommendation 10

That the federal government immediately commence work on the best model that should be established to systemically analyse family child and adult deaths in the family law system (family law courts, Family Relationship Centres, Family Dispute Resolution Services) with the purpose of

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<sup>57</sup> End of mission statement by Dubravka Šimonović, United Nations Special Rapporteur on Violence against women, its causes and consequences, on her visit to Australia from 13 to 27 February 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21243&LangID=E#sthash.8jCOVpv3.lmUH6TCE.dpuf>

<sup>58</sup> YWCA Australia (2014) *CEDAW Shadow Report: A non-government perspective on Australia's implementation of the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*, pp. 85, 86, 88. [http://www.equalityrightsalliance.org.au/wp-content/uploads/2017/01/YWCA\\_CEDAW\\_Main-Report\\_final.pdf](http://www.equalityrightsalliance.org.au/wp-content/uploads/2017/01/YWCA_CEDAW_Main-Report_final.pdf)

<sup>59</sup> Australian Human Rights Commission (2017) *A National System for Domestic and Family Violence Death Review* <https://www.humanrights.gov.au/our-work/family-and-domestic-violence/publications/national-system-domestic-and-family-violence>

<sup>60</sup> YWCA Australia (2014) *CEDAW Shadow Report*.

investigating deaths to make recommendations for immediate and long term systemic change and that such a team be multi-disciplinary, independent and accountable.<sup>61</sup>

## Protection of Sexual Assault Communications

Sexual assault communications are communications made in the course of a confidential relationship between a counsellor and a person who has had sexual assault perpetrated against them.<sup>62</sup> These communications can include a broad range of counselling and therapeutic record such as, for example, sexual assault counselling notes, case notes or doctors files in sexual assault trials. The disclosure of such information can be extremely traumatic and harmful for victims of sexual assault in sexual assault legal proceedings; not only can it undermine the integrity of counselling and therapeutic relations and have long-term implications for the survivor/victim, but it also has the potential to lead to deductions and assumptions about the “moral worthiness” of sexual assault survivors/victims in reports of sexual assault.<sup>63</sup> This can lead to the unnecessary withdrawal of sexual assault complaints and discourage sexual assault survivors/ victims from reporting sexual offence. The potential outcomes of disclosing such information in court proceedings is recognised as being contrary to public interest<sup>64</sup> and advocates highlight that counselling is not designed to investigate allegations of crime or produce evidence as it does not have an investigative or forensic purpose; it is therefore not relevant to a sexual offence trial.<sup>65</sup>

In response to the growing practice of subpoenas for sexual assault communications, on-going reform of sexual assault laws has included legislation to protect sexual assault communications of sexual assault complainants by limiting access to and use of such communications. Every State and Territory now has a specific legislation protecting counselling communications in sexual violence proceedings, with some variations.<sup>66</sup> While models of such legislation differ across jurisdictions they are commonly

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<sup>61</sup> Women’s Legal Services Australia (2015), *Response to Family Law Council Discussion Paper: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems Complex Needs inquiry*.

<sup>62</sup> ALRC (2010), *Family Violence – A National Legal Response*, p. 1257

<sup>63</sup> Heath, M. (2005) *The law and sexual offences against adults in Australia*, ACSSA Issues No. 4, <https://aifs.gov.au/publications/law-and-sexual-offences-against-adults-australia>

<sup>64</sup> Hon Jeff Shaw MLC, Second Reading Speech, Evidence Amendment (Confidential Communications) Bill 1997 (NSW Hansard, Legislative Council, 22 May 1997, pp. 1120-1121

<http://23.101.218.132/prod/parliament/hansart.nsf/V3Key/LC19971022003?open&refNavID=>

<sup>65</sup> Heath, M. (2005) *The law and sexual offences against adults in Australia*. See section on Protection of counselling communications, <https://aifs.gov.au/publications/law-and-sexual-offences-against-adults-australia/protection-counselling-communications>

<sup>66</sup> *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s54; *Criminal Procedure Act 1986* (NSW), s296–396; *Evidence Act 1939* (NT) s56; *Evidence Act 1929* (SA) s67D–67F; *Evidence Act 2001* (Tas) s 127B; *Evidence Act 1958* (Vic) Division 2A s32B–32G; *Evidence Act 1906* (WA) s 19A–19L; Victims of Crime Assistance and Other Legislation Amendment Act. 2017 (Qld). On variations between the State and Territory laws (to 2012) see Jilliard, A., Loughman, J. and MacDonald, E. (2012), ‘From Pilot Project to Systemic Reform: Keeping sexual assault victims’ counselling records confidential’, *Alternative Law Journal*, 37(4), pp. 254-258.

referred to as the Sexual Assault Communications Privilege (SACP).<sup>67</sup> SACP has been considered by a number of law reform bodies, which have generally reaffirmed that the privilege is in the public's interest.<sup>68</sup> In some jurisdictions such as NSW there are services that support sexual assault victims to claim the privilege when their confidential records are subpoenaed.<sup>69</sup> Nevertheless, there are serious shortcomings nation-wide in terms of the operation of the privilege in practice.

There are two major challenges that hinder the enforcement of the privilege. The first challenge is that those who may be affected by the disclosure of the communication in sexual assault trials often need information and legal representation to enable them to claim or seek to enforce this privilege; without representation in criminal proceedings, people may not be in a position to do this.<sup>70</sup>

The second challenge arises from the privilege not being respected in practice. For instance, the Victorian Law Reform Commission (2004) found that the legislation has not prevented subpoenas being issued and, in most jurisdictions, defence lawyers are still able to issue a subpoena requiring a person to produce counselling communications. Rather, the onus of the protection of privileged material lies on the recipient of a subpoena that seeks counselling records, such as, for example, a private counsellor who has to oppose the subpoena. In some instances, such as those highlighted by the Centres against Sexual Assault, a private counsellor may be compelled to pay lawyers to oppose subpoenas requesting their files at considerable expense; a burden which private counsellors may simply not be able to meet.<sup>71</sup>

In its report *Sense and Sensitivity: Family Law, Family Violence, and Confidentiality* Women's Legal Service NSW has found that "many sexual assault services, women's health centres and other counsellors rarely object to the production of sensitive counselling and therapeutic records despite a desire by the client and/or the service provider to do so." The report further stated that this is largely due to a lack of knowledge or fear of the legal process and limited resources to attend court events to speak to the objection. For example, a private counsellor or therapist would have to give up at least part of a day of work to attend court. This is compounded if the service is not located near the relevant court registry.<sup>72</sup> As a result, subpoenas are frequently used to "require counsellors to attend and give evidence or produce notes" and "[p]rivate counsellors who are unaware that the law protects

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<sup>67</sup> For an outline of these models, see Heath, M. (2005) *The law and sexual offences against adults in Australia*, section on Protection of counselling communications, <https://aifs.gov.au/publications/law-and-sexual-offences-against-adults-australia/protection-counselling-communications>

<sup>68</sup> Australian Law Reform Commission [ALRC] (2009), *Making Inquiries: A New Statutory Framework*, Report 111, section 3.20 <http://www.alrc.gov.au/report-111>

<sup>69</sup> Sexual Assault Communications Privilege Service NSW website <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

<sup>70</sup> ALRC (2010), *Family Violence – A National Legal Response*, p. 1257

<sup>71</sup> Heath, M. (2005) *The law and sexual offences against adults in Australia*, section on Protection of counselling communications.

<sup>72</sup> Women's Legal Service NSW (2016), *Sense and Sensitivity: Family Law, Family Violence, and Confidentiality* <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Sense-and-Sensitivity-web.pdf>

confidential counselling communications may produce records, rather than appearing in court to resist a subpoena".<sup>73</sup>

Furthermore, the fact that complainants frequently do not receive notice that a subpoena has been issued or that a party seeks to use evidence of their counselling records until it is too late raises further concerns about the level of awareness of the legislation among private counsellors who may be unaware of the provisions and the protection they provide. Western Australia is the only jurisdiction to bring in legislative changes that would prevent the burden of responding to a subpoena from resting on the service or counsellor, in which a person can only be required to produce a document with the court's agreement.

In 2009 WLS NSW initiated and co-ordinated the SACP Pilot project in with the Office of the Director of Public Prosecutions, law firms Ashurst, Clayton Utz and Freehills, and the NSW Bar Association.<sup>74</sup> The project aimed to: provide a temporary measure to meet the legal service needs of some complainants; demonstrate how a victim's advocate model of legal service delivery could work in Australia; identify the extent and nature of legal need in relation to privilege claims; and gather information about the day-to-day operation of the privilege which we could use as evidence for the need to change.<sup>75</sup> Representation through the project successfully resulted in preventing or limiting access to victims' confidential records in 91 per cent of subpoenas.<sup>76</sup> Reports from the Office of the Director of Public Prosecutions, NSW (ODPP) stated that complainants involved in the SACP Pilot gave 'very positive' feedback about the assistance they had received and acknowledged that that the SACP Pilot increased awareness of the privilege and the complainant's rights. As well as amendments to the Criminal Procedure Act, the SACP Pilot resulted in the establishment of the Sexual Assault Communications Privilege Service (SACP Service) within Legal Aid NSW in 2012. The SACP Service continues to provide legal advice and representation to victims of sexual assault and other "protected confiders" who want to prevent or restrict the disclosure of sensitive sexual assault communications in court, as well as assisting complainants who wish to consent to the release of private documents in an informed way.<sup>77</sup> The service also provides education and training to the legal profession, police, sexual assault counsellors, medical records staff and other health professionals to promote awareness of the privilege.<sup>78</sup>

WLS NSW advocates for the establishment of a service, similar to the SACP Service, to provide advice and representation in family law and child protection matters for individuals and services wishing to object to subpoenas of sensitive records.<sup>79</sup> Other organisations have also expressed views about how to improve the operation of the privilege in practice for sexual assault complainants. For example,

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<sup>73</sup> Victorian Law Reform Commission (2004) *Sexual Offences: Final Report*, section 4.74

[http://www.lawreform.vic.gov.au/sites/default/files/FinalReport\\_0.pdf](http://www.lawreform.vic.gov.au/sites/default/files/FinalReport_0.pdf)

<sup>74</sup> Jilliard, A., Loughman, J. and MacDonald, E. (2012), 'From Pilot Project to Systemic Reform: Keeping sexual assault victims' counselling records confidential', *Alternative Law Journal*, 37(4), pp. 254-258.

<sup>75</sup> ALRC (2010), *Family Violence – A National Legal Response*, p. 1257

<sup>76</sup> Jilliard, Loughman and MacDonald (2012), 'From Pilot Project to Systemic Reform'.

<sup>77</sup> Sexual Assault Communications Privilege Service NSW website <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

<sup>78</sup> Sexual Assault Communications Privilege Service NSW website <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

<sup>79</sup> Sexual Assault Communications Privilege Service NSW website <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

Women's Legal Service Queensland, in their submission to the ALRC Family Violence – A National Legal Response, supported the development of processes to better enable unrepresented people to assert the privilege. The Canberra Rape Crisis Centre supported absolute protection of communications unless the complainant consents to their production and NASASV suggested that measures should target third parties who hold confidential records to ensure that they are informed about the communications privilege.<sup>80</sup>

Efforts to improve information-sharing in relation to family law and domestic and family violence should be pursued within a framework that is victim-centric, supports informed consent and is more responsive to disclosures of violence, as detailed in WLS NSW's 2016 report *Sense and Sensitivity: Family Law, Family Violence, and Confidentiality*.<sup>81</sup>

### Recommendation 11

AWAVA supports the following Australian Law Reform Council (ALRC) Recommendations 27–8 from its report *Family Violence - A National Legal Response* (ALRC Report 114, 2010):

Federal, state and territory legislation and court rules relating to subpoenas and the operation of the sexual assault communications privilege should ensure that the interests of complainants in sexual assault proceedings are better protected, including by requiring:

- (a) parties seeking production of sexual assault communications, to provide timely notice in writing to the other party and the sexual assault complainant;
- (b) that any such written notice be accompanied by a pro forma fact sheet on the privilege and providing contact details for legal assistance; and
- (c) that subpoenas be issued with a pro forma fact sheet on the privilege, also providing contact details for legal assistance.

### Recommendation 12

[Recommendation 27–9 of ALRC *Family Violence - A National Legal Response* (ALRC Report 114, 2010)]  
The Australian, state and territory governments, in association with relevant non-government organisations, should work together to develop and administer training and education programs for judicial officers, legal practitioners and counsellors about the sexual assault communications privilege and how to respond to a subpoena for confidential counselling communications.

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<sup>80</sup> ALRC (2010), *Family Violence – A National Legal Response*, p. 1257

<sup>81</sup> Women's Legal Service NSW (2016), *Sense and Sensitivity*

## Presumption of Joint Trial

Sexual assault cases, particularly within a family violence context, commonly involve multiple incidents and multiple complainants. In circumstances where there are two or more complainants who have allegedly been sexually assaulted by the same defendant, the prosecution can apply to have a joint trial so that all allegations against a particular accused can be heard and determined in one trial. For survivors/victims of violence, this can be beneficial as it allows for multiple charges to be heard together and may help decrease the potential for re-traumatisation and emotional stress by reducing the requirement for those involved to have to give evidence numerous times. Advocates have also highlighted that joint trials may also support juries to see the 'full picture' of the context and circumstances of the alleged crimes, which is particularly important given the frequency and serial nature of sex offending behavioural patterns, particularly for interfamilial matters in which the offender and survivors have a form of connection or relationship.

However, joint trials are not often ordered and, instead, separate trials are favoured. This is because a trial judge, when deciding whether to order joint or separate trials, has to determine whether or not each complainant's evidence will be cross-admissible (that is, whether or not each survivors' / victims' evidence will be admissible in respect of the charges involving the other complainant(s)).<sup>82</sup> One of the main reasons given against ordering a joint trial is the possibility of prejudice to defendants. For instance, jurors might 'use evidence relating to a different offence charged in one count to decide that the person also committed a different offence, even though there may be insufficient evidence to support a conviction for a second offence'.<sup>83</sup> Because of this a trial judge will often decide to separate trials, or exclude evidence that is made on the basis that it may cause unfair bias against to the accused or work against the 'interests of justice'.

However, the interests of justice should include justice to all parties, not only the defendant but also each complainant in severed trials as well as victims/survivors who face barriers to disclosing this violence in the first place. As such, law reform bodies have recommended that concerns about prejudice against the defendant need to be balanced with the research that shows that the existing legal system is significantly weighted against complainants of sexual offences.<sup>84</sup> In particular, research on juries shows a significant proportion of jurors and jury eligible citizens believe in various myths and hold a range of prejudices and misconceptions about women and children who report sexual violence; all of which create systematic bias and prejudice against women and children complainants and witnesses of sexual offences in the criminal justice system<sup>85</sup>. Advocates have highlighted that they have spoken to clients who have not reported sexual assaults, but indicate they would if other victims

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<sup>82</sup> ALRC (2010), *Family Violence – A National Legal Response*, Ch 26. Reporting, Prosecution and Pre-trial Processes - Joint or separate trial.

<sup>83</sup> Victorian Law Reform Commission (2001), *Sexual Offences: Discussion Paper*, section 8.51  
[http://www.lawreform.vic.gov.au/sites/default/files/Final%2BSexual%2BOffences\\_0.pdf](http://www.lawreform.vic.gov.au/sites/default/files/Final%2BSexual%2BOffences_0.pdf)

<sup>84</sup> Victorian Law Reform Commission (2001), *Sexual Offences: Discussion Paper*

<sup>85</sup> ALRC (2010), *Family Violence – A National Legal Response*, Ch 26. Reporting, Prosecution and Pre-trial Processes - Joint or separate trial.

were to come forward and they could support each other through the trial. The severing of trials is likely to lead to attrition at the point when individuals are told the trial is to be severed.<sup>86</sup>

It has also been stressed that the decision to order a single trial also needs to be understood in the context of the experience of an actual trial, which has a greater potential to cause unfairness and injustice towards the survivor/victim; for example, the prosecution's case 'will be considerably weakened', during a separate trial and particularly in family violence context, and that when a complainant's credibility is attacked in a separate trial, 'evidence that would support his or her credibility is disallowed and the jury are kept in ignorance of the fact that there are multiple allegations of abuse against the accused'.<sup>87</sup> The practice of separating trials for separate counts to prevent the possibility of concoction and prejudice to the accused, and the exclusion of much 'tendency' and 'coincidence' evidence, means that juries do not get a full picture of the context and circumstances of the alleged offence. As such, decisions to hold separate trials or refuse to admit, and therefore exclude relevant tendency, propensity or coincidence evidence about a defendant's sexual behaviour can be seen as barriers to the successful prosecution of sex offences.<sup>88</sup>

For these reasons, it has been suggested a "presumption of joint trial" be introduced in sexual assault cases, and that this presumption should not be rebutted merely because evidence on one charge is inadmissible on another charge. This has been recommended by the Australian Law Reform Commission<sup>89</sup> and is already in place in Victoria under section 194 of the Criminal Procedure Act 2009.<sup>90</sup> In addition, the creation of a presumption for joint trials in sexual offence cases would still allow courts to order that trials be held separately when it was deemed to be necessary. However a presumption is necessary to increase the number of trials heard together given that the separation of trials decreases the likelihood of conviction, and increases survivors' distress.<sup>91</sup>

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<sup>86</sup> Women's Legal Service NSW (2016), Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse in response to the Royal Commission's Criminal Justice Consultation Paper, p. 4 <https://www.childabuseroyalcommission.gov.au/getattachment/95b7a5c8-cc08-44a1-ad0c-fdff1657f4e7/Women-s-Legal-Service-NSW>

<sup>87</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84, pp. 334–335 <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf>

<sup>88</sup> ALRC (2010), *Family Violence – A National Legal Response*, section 26.131

<sup>89</sup> ALRC (2010), *Family Violence – A National Legal Response*, recommendation 26–5

<sup>90</sup> ALRC (2010), *Family Violence – A National Legal Response*, section 26.136.

<sup>91</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse has also considered the question of joint trials. In its submission in response to the Royal Commission's discussion paper on this topic, Women's Legal Services NSW likewise argue in favour of a presumption of joint trial. See <http://www.wlsnsw.org.au/wp-content/uploads/WLS-to-RC-Issues-Paper-Criminal-Justice-fa.pdf>

### Recommendation 13

AWAVA supports the Australian Law Reform Council (ALRC) Recommendation 26–5 of its report *Family Violence - A National Legal Response* (ALRC Report 114, 2010):

Federal, state and territory legislation should:

(a) establish a presumption that, when two or more charges for sexual offences are joined in the same indictment, those charges are to be tried together; and

(b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.

A court should only be able to order separate trials if satisfied that there would be a likelihood of prejudice to the accused by the joinder of two or more charges, and that this prejudice could not be avoided by a direction to the jury.

## Judicial training

Australia is a party to two human rights treaties that include obligations for freedom from gender-based stereotyping; this extends to the justice system<sup>92</sup>. However, within the legal system stereotyping can act as barrier to justice for women subjected to violence<sup>93</sup>. In such instances gender-stereotyping can distort a judicial official's perception of the facts, understanding of who is culpable for violence and their assessment of the credibility of witnesses, ultimately compromising the intended impartiality of the justice system<sup>94</sup>. This may be particularly so in cases of sexual violence, for reasons discussed above.

The call for better training of judicial officers dealing with sexual assault cases has been made over many years, for example in submissions to the ALRC (*Family Violence – A National Legal Response*), which recommended that that training for police, legal practitioners, judicial officers and victim referral and support services should encompass areas such as: the myths and stereotypes surrounding sexual assault (including the damaging belief that by definition women working in the sex industry cannot be raped since providing sex is 'part of the job'); the emotional, psychological and social impact of sexual assault on victims; and the different experiences and needs of particular marginalised

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<sup>92</sup> *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) entered into force 3 September 1981 <https://unwomen.org.au/wp-content/uploads/2015/11/CEDAW-Factsheet.pdf>; *Convention on the Rights of Persons with Disabilities* (CRPD), entered into force 3 May 2008 <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

<sup>93</sup> Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation on Women's Access to Justice* (2015), section C [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf)

<sup>94</sup> Cusack, S. (2014), *Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases*, p. 20 [http://cedaw-in-action.org/en/wp-content/uploads/2016/04/judicial\\_stereotyping2014.pdf](http://cedaw-in-action.org/en/wp-content/uploads/2016/04/judicial_stereotyping2014.pdf)

victims, such as those with a cognitive impairment, Indigenous people and those from CALD and gay, lesbian, bisexual, transgender and intersex communities.<sup>95</sup> In its report, the ALRC recommended continuing legal professional and judicial education to ensure that judges and lawyers practising in criminal law understand the nature and dynamics of family violence.<sup>96</sup> A step towards that goal was made with the release in 2016 of the first stage of the National Domestic and Family Violence Bench Book, a reference for judges, which includes a section explaining sexual and reproductive abuse.<sup>97</sup> Related resources include references such as the Judicial Commission of NSW's Sexual Assault Trials Handbook (2016) for judges.<sup>98</sup>

While services and advocates call for better training for judges (often in response to incidents of bias and prejudice against complainants), the principle of judicial independence continues to be perceived as limiting the scope for education that might challenge and seek to change the attitudes of judges towards sexual assault.

AWAVA notes and endorses the following recommendations from Women's Legal Services Australia in relation to family violence, and emphasises that knowledge about sexual assault is a critical part of judicial officers' and court staff's capacity to respond to domestic and family violence and gender-based violence generally:

#### Recommendation 14

That the Australian Government funds, and together with the Judicial College of Australia develops, a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence. We recommend that this training package includes content on family violence (including recognising dynamics of family violence and unconscious bias), cultural competency, working with victims of trauma, family law (for state and territory judges) and child protection.

#### Recommendation 15

That the Australian Government adopt recommendations 215 and 216 of the 2016 Victorian Royal Commission into Family Violence Report such that (215) material on the dynamics of family violence be included in general judicial officer training and (216) the comprehensive family violence learning and development program for court staff and magistrates in Victoria continue to be developed and expanded Australia-wide.

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<sup>95</sup> ALRC (2010), *Family Violence – A National Legal Response*, Ch. 26.

<sup>96</sup> ALRC (2010), *Family Violence – A National Legal Response*, Ch. 26.

<sup>97</sup> Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book*, Part 3.1.2, Sexual and Reproductive Abuse <http://www.dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/sexual-and-reproductive-abuse/>

<sup>98</sup> Judicial Commission of NSW (2016), *Sexual Assault Trials Handbook* [https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Sexual\\_Assault\\_Trials\\_Handbook.pdf](https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Sexual_Assault_Trials_Handbook.pdf)

## Sexual violence within and as a form of domestic and family violence

Sexual violence occurs in a range of settings and types of relationship, among which are intimate partner and/or domestic partner relationships. A recent report from Sexual Assault Support Service (Tasmania) highlights that 40-45% of women who experience physical abuse from an intimate partner are also forced into sexual activities by them, while 5-12% of women in Australia have sexual violence inflicted upon them by a partner within their lifetime.<sup>99</sup> Women living with the effects of childhood sexual abuse are both more likely to be subjected to domestic violence and more likely to have sexual violence inflicted upon them by an intimate partner in later life.<sup>100</sup>

Where sexual violence is perpetrated within a domestic violence relationship, it increases the likelihood that more severe physical violence, including lethal violence, is also inflicted. Victims/survivors of intimate partner sexual violence experience more negative impacts, such as decreased self-esteem and coping skills, compared with victim/survivors who have lived in family violence situations in which they did not have sexual violence inflicted upon them.<sup>101</sup> Sexual violence as a form of domestic and family violence is therefore a significant issue and needs to be clearly identified and addressed within efforts to eliminate violence against women generally.

Across Australia, all legal definitions of family and domestic violence include sexual violence perpetrated by a partner. However, sexual violence within intimate partner relationships is still largely a hidden problem, with low levels of reporting, even where a victim/survivor discloses other forms of abuse. The SASS report points out that where intimate partner sexual abuse is reported, it is less likely to result in prosecutions and convictions than assault by a stranger.

SASS made a number of recommendations directed at improving service responses and shifting community attitudes about sexual violence in partner relationships. Alongside these recommendations are some with direct application for justice systems (see below).

AWAVA supports SASS's advocacy in this area and acknowledges that more work needs to be done to integrate understanding of sexual violence into domestic and family violence prevention and response, including access to justice. This would include training and encouraging domestic violence support workers to include questions about sexual violence when working with survivors of domestic violence. We note that Action 4.3 of the Third Action Plan is "Support frontline services to better recognise and respond to women and their children who have experienced sexual violence, including the knowledge and confidence to refer to specialist sexual violence services." This entails adequate resourcing and capacity building for women's domestic violence services, as well as funding for sexual violence services to meet increased demand for services resulting from increased referrals.

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<sup>99</sup> Sexual Assault Support Service (SASS Tas) (2015), Brief - Intimate Partner Sexual Assault and Family Violence.

<sup>100</sup> Cox, P. (2015), *Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper*, Australia's National Research Organisation for Women's Safety <http://anrows.org.au/publications/landscapes/co-occurrence-and-re-victimisation>

<sup>101</sup> Cox (2015), *Sexual assault and domestic violence*

AWAVA supports the following recommendations, adapted from SASS's report:

Recommendations 16

That governments in all relevant jurisdictions Improve court processes (including prosecution responses and witness support).

Recommendation 17

That governments in all relevant jurisdictions ensure that offender programs directed at intervention or prevention in the context of intimate partner violence include a focus on sexual violence.

Recommendation 18

That governments in all relevant jurisdictions train and encourage police to include questions about sexual violence when responding to family violence.

Recommendation 19

That all relevant government and non-government agencies work to train and encourage domestic violence support workers to include questions about sexual violence when working with survivors of domestic violence.

Recommendation 20

That governments in all relevant jurisdictions increase funding to sexual violence services to meet existing and increasing demand for services.

## Aboriginal and Torres Strait Islander women and children

Oppression in all of its forms is among the root causes of sexual violence. Sexual violence does not occur in isolation. Aboriginal and Torres Strait Islander women and children who are victims of sexual violence are affected by many forms of oppression, including racism, sexism, classism, ableism, with increasing evidence of the incident of sexual violence against people with disability (see below). Some of these forms of oppression emanated from colonising factors of white supremacist privilege and ideals. These forms of oppression often compound the effects of sexual victimisation, exacerbating the trauma and isolation victims and survivors experience. Aboriginal and Torres Strait Islander women who live in poverty and those who are discriminated against are affected by sexual violence in devastating ways. In Aboriginal communities these deplorable acts against women and children are as a result of colonising behaviours, parental neglect, and government neglect.

There is enormous pressure on Aboriginal and Torres Strait Islander women and families not to report sexual violence to the authorities, as they have to live in communities or situations that do not allow them to break free due to a number of reasons. Many Aboriginal and Torres Strait Islander families live on the poverty line and so this does not allow them to pick up and move; some live in remote communities and have nowhere to go and want to remain with their families; others are just

frightened to report for fear of their lives or their families. For some it is just denial, shame and embarrassment.

There is also the matter of reporting which has been problematic for Aboriginal and Torres Strait Islander people as there has been a distrust of the authorities such as the Church, who were in the early days meant to be there to protect them. Reports, for example to the Victorian Royal Commission on Family Violence, indicate that police sometimes do not attend call-outs in a timely manner if they know the family is Aboriginal and/or Torres Strait Islander.<sup>102</sup> At times, even where police are aware of abuse and violence, families and individuals may not be willing to assist police investigations. State and Territory government child protection services are meant to provide support to at-risk families; yet these services are removing children at increasing rates often in circumstances involving sexual and family violence, and at present do not appear to be working effectively to support families to achieve safety from perpetrators.<sup>103</sup> The 2007 *Little Children Are Sacred* report in the Northern Territory noted some submissions had made the point that “the removal of the child victims from communities appears to be a simpler option under the present justice system than the removal of the perpetrator.”<sup>104</sup>

Too often sexual violence is seen as an individual matter, and the conduct of the victim/survivor is questioned, for example in terms of what they might have done to encourage their rape. Yet no-one woman or child should have their rights violated. Sexual violence should be addressed at the community level, and the systems and historical norms that permit or encourage this violence need to be held accountable (such as prison systems or, historically, the practice of land owners taking Aboriginal girls for sexual abuse<sup>105</sup>).

<sup>102</sup> Victorian Royal Commission into Family Violence (2016), *Report and recommendations* Volume III, p. 10 <http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-Vol-III.pdf>

<sup>103</sup> Overall child removal rates are increasing, as documented in the Australian Family Law Council’s *Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015), p. 6

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx> This report also states that despite removal of children being a ‘last resort’ there has been an increase in the removal of Aboriginal and Torres Strait Islander children. The Victorian Commission for Children and Young People’s 2016 report *Always was, always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria* likewise notes that “In 2013, peak Aboriginal and community service organisations warned the Victorian government that the rate of Aboriginal child removal in Victoria was exceeding levels seen at any time since white invasion” (p.34)

<http://www.ccp.vic.gov.au/downloads/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf>

The same report notes that sexual abuse is one of the drivers of child protection involvement and entry to out of home care (alongside the major drivers of family violence and alcohol or substance abuse) – see part 4.1. The Family Law Council’s report ‘Improving the Family Law System for Aboriginal and Torres Strait Islander Clients’ (2012), documents that the number of Aboriginal children removed from families is significantly higher than the number of non-Indigenous children removed, p. 22

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>

<sup>104</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007), *Ampe Akelyernemane Meke Mekarle - Little Children are Sacred*

[http://www.inquirysaac.nt.gov.au/pdf/bipacsa\\_final\\_report.pdf](http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf), p 125.

<sup>105</sup> Behrendt, L. 2000, ‘Consent in a (Neo)Colonial Society: Aboriginal Women as Sexual and Legal Other’, *Australian Feminist Studies*, 15(33).

Sexual violence against Aboriginal and Torres Strait Islander children is becoming more prominent. For its 2006 *Breaking the Silence* report, the Aboriginal Sexual Assault Taskforce (ACSAT) interviewed more than 300 Aboriginal people in 29 communities across NSW and found that not one could name a family unaffected by the scourge of child sexual assault.<sup>106</sup> Despite various steps taken in NSW and elsewhere, on the whole the recommendations of the *Breaking the Silence* report were not adequately resourced.<sup>107</sup> A number of the recommendations of that report are particularly worth revisiting and could inform responses to sexual violence against adult women as well as sexual assault against children.

Sexual violence is preventable through collaborations of community members at multiple levels of society—in our homes, communities, schools, faith-based settings, police and justice settings, workplaces, and other settings. We all play a role in preventing sexual violence and continuing (and where appropriate establishing) norms of respect, safety, equality, and helping others.

The following recommendations, although not in their entirety, are adapted from the *Breaking the Silence* report. Original recommendation numbers and page numbers are given in footnotes.

#### Recommendation 21

That Aboriginal communities be empowered to respond to sexual assault that may be occurring in their community through the provision of education and the development and support of local initiatives.<sup>108</sup>

#### Recommendation 22

That the Commonwealth Government funds Family Violence Prevention Legal Services and specialist Aboriginal and Torres Strait Islander legal services so that they are accessible to every community.<sup>109</sup>

#### Recommendation 23

That every Family Violence Prevention Legal Service include (and be resourced to include) a specialist child sexual assault position.<sup>110</sup>

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<sup>106</sup> How NSW fails its most vulnerable, Sydney Morning Herald, 30 June 2007, <http://www.smh.com.au/news/national/how-nsw-fails-its-most-vulnerable/2007/06/29/1182624165333.html>; See full report: Aboriginal Sexual Assault Taskforce (ACSAT) (2006), *Breaking the Silence: Creating the Future - Addressing child sexual assault in Aboriginal communities in NSW* [https://web.archive.org/web/20070929103023/http://www.lawlink.nsw.gov.au/lawlink/acsat/acsat.nsf/vwFiles/80001%20CP%20Rep-all\\_sml.pdf/\\$file/80001%20CP%20Rep-all\\_sml.pdf](https://web.archive.org/web/20070929103023/http://www.lawlink.nsw.gov.au/lawlink/acsat/acsat.nsf/vwFiles/80001%20CP%20Rep-all_sml.pdf/$file/80001%20CP%20Rep-all_sml.pdf)

<sup>107</sup> NSW Ombudsman (2012), *Responding to Child Sexual Assault in Aboriginal Communities: A report under Part 6A of the Community Services (Complaints, Reviews and Monitoring) Act 1993* [http://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0005/7961/ACSA-report-web1.pdf](http://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/7961/ACSA-report-web1.pdf)

<sup>108</sup> ACSAT (2006), *Breaking the Silence*, p. 114

<sup>109</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 5(a)

<sup>110</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 5(b)

### Recommendation 25

That agencies and organisations be trained appropriately, including trauma-specific training being made available to all child protection workers, particularly on issues of child sexual assault.

### Recommendation 26

That the Commonwealth Government develop an economic strategy/funding strand to fund Aboriginal sexual violence prevention initiatives.<sup>111</sup>

### Recommendation 27

That the Commonwealth Government provide untied funds to child sexual assault programs.<sup>112</sup>

### Recommendation 28

That government and other relevant agencies continue to research and develop new evidence based initiatives to address sexual assault in Aboriginal communities more effectively, especially child sexual assault<sup>113</sup>

### Recommendation 29

That government and other relevant agencies comprehensively research the relationship between family violence and sexual violence especially child sexual assault in Aboriginal communities to develop policies and strategies that can address the issues in a holistic way.<sup>114</sup>

### Recommendation 30

That government and other agencies develop a framework for collecting data about sexual assault that is adopted by all relevant agencies to clearly establish prevalence, patterns and trends relating to the incidence of adult and child sexual assault and the outcomes of intervention in order to continuously identify gaps and improve service delivery.<sup>115</sup>

### Recommendation 31

That further research be undertaken to investigate the relationship between child sexual assault victimisation and criminally offending behaviour in Aboriginal detainees (both adults and children and young people) in order to improve the evidence base for future programming to address offending behaviour.<sup>116</sup>

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<sup>111</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 7(a)

<sup>112</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 7(b)

<sup>113</sup> ACSAT (2006), *Breaking the Silence*, p. 114

<sup>114</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 1

<sup>115</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 2

<sup>116</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 100

### Recommendation 32

That governments, in consultation with Aboriginal and Torres Strait Islander communities, research, develop and implement new models to sexual assault, especially child sexual assault through the continuum of the legal process from initial investigation through to sentencing.<sup>117</sup>

### Recommendation 33

That police provide an efficient and appropriate response to reports of sexual assault within Aboriginal and Torres Strait Islander communities.<sup>118</sup>

### Recommendation 34

That governments ensure police practices prevent the arrest of an Aboriginal or Torres Strait Islander person on an outstanding warrant if they have come to the police station to report sexual assault or to support someone who is reporting sexual assault, by:

- (a) Ensuring that training of the existing policy occurs
- (b) Developing a community education strategy to inform the community of the policy
- (c) Developing an education strategy or process/policy that especially relates to child sexual assault<sup>119</sup>

### Recommendation 35

Develop protocols for taking reports of sexual assault from Aboriginal and Torres Strait Islander people, to include:

- (a) A clear understanding of the risk factors of underreporting
- (b) Automatic referral to appropriate support services
- (c) Obtaining training to deal with child sensitive issues
- (d) Adults survivors reporting their child sexual assault experience<sup>120</sup>

### Recommendation 36

That the Commonwealth and State/Territory governments develop strategic plans to respond to and address issues of sexual assault in Aboriginal and Torres Strait Islander communities, to include child sexual assault, where such plans do not yet exist.<sup>121</sup>

### Recommendation 37

That Commonwealth and State/Territory governments ensure that standard data collection questions regarding the Indigenous status of both victims and offenders are asked and recorded as a part of the response procedures for sexual assault.<sup>122</sup>

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<sup>117</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 119

<sup>118</sup> ACSAT (2006), *Breaking the Silence*, p. 26

<sup>119</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 43

<sup>120</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 44

<sup>121</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 50

<sup>122</sup> ACSAT (2006), *Breaking the Silence*, Recommendation 51

### Recommendation 38

That the NSW Government revisit the Breaking the Silence Report and consider ways of resourcing the recommendation.

## Women with disability

In Australia, 22% percent of women and girls with disability have been affected by violence and women with disability are at increased risk of sexual violence.<sup>123</sup> Women with disability experience violence and sexual violence in circumstances similar to women without disability; they will be assaulted by someone who is known to them, will most likely be assaulted by a man and it will most likely be in private, in their 'place of residence', or in the home of a friend or relative.<sup>124</sup>

Women with disability experience many of the same barriers that women without disability face when engaging with the criminal justice system, such as police unwillingness to take a case seriously, a fear of not being believed or a lack of awareness or understanding about the legal process.<sup>125</sup> In addition to these, women with disability face further barriers, including those found in legislation, policies and attitudes. Discriminatory stereotypes and perceptions about disability often intersect with the previously mentioned preconceived ideas about women and sexual violence. These beliefs, especially those relating to the reliability of women with disability as witnesses, or the legal capacity of these individuals, can lead to cases involving women with disability not being taken seriously or investigated adequately.<sup>126</sup>

Statistics collated by Women With Disability Australia (WWDA) indicate that between 83% and 90% of women with intellectual disabilities are sexually abused in their lifetime, while 68% of women with an intellectual disability will be subjected to sexual abuse before they reach 18. Approximately one third of women with physical disability surveyed in one study had experienced sexual abuse at some stage in their life, and a study of Canadian women with all forms of disability found that 40% experienced abuse and 12% had been raped.<sup>127</sup>

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<sup>123</sup> Plummer, S.-B., & Findley, P. A. (2012), 'Women with disabilities' experience with physical and sexual abuse: Review of the literature and implications for the field', *Trauma, Violence & Abuse* 13(1), 15–29.

<sup>124</sup> Advocacy for Inclusion (2017), *The Right to Escape without Restriction for Women with Disabilities: Reply to call for Submissions on Protection Orders & Shelters as Two Ways of Prevention & Protection of Violence Against Women*, p. 5 <http://www.advocacyforinclusion.org/index.php>

<sup>125</sup> Frohmader, C. (2011), *Submission to the Preparation Phase of the UN Analytical Study on Violence against Women and Girls with Disabilities*, (A/HRC/RES/17/11). Prepared for Women With Disabilities Australia (WWDA). Further discussion of the barriers to accessing justice experienced by people with disability can be found in Australian Human Rights Commission, (2014). *Equal Before the Law: Towards disability justice strategies*

[https://www.humanrights.gov.au/sites/default/files/document/publication/2014\\_Equal\\_Before\\_the\\_Law.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf)

<sup>126</sup> French, P. (2007) *Disabled Justice: The Barriers to Justice for Persons With Disability In Queensland* (Report, Queensland Advocacy Incorporated).

<sup>127</sup> Salthouse, S. and Frohmader, C. (2004), "Double the Odds" – Domestic Violence and Women with Disabilities', paper presented to the 'Home Truths' Conference, Sheraton Towers, Southgate, Melbourne 15 - 17 September <http://wwda.org.au/issues/viol/viol2001/odds/>

It is concerning that due to a lack of access to justice for women with disabilities facing violence and sexual violence in Australia, there are continuing serious violations of human rights under Article 16 of the United Nations Convention on the Rights of Persons with Disability (CRPD).

Disabled People's Organisations Australia, comprised of WWDA, First Peoples Disability Network Australia, National Ethnic Disability Alliance and People with Disability Australia, has called for a Royal Commission into violence against people with disability. Such a Royal Commission would be able to devote considerable time and resources to investigating claims of abuse and neglect against people with disabilities, including women with disabilities, in institutional and residential settings. AWAVA supports this call for a robust investigation into violence against people with disability.

Current plans by the Australian Government to address violence through the Quality and Safeguarding Framework of the National Disability Insurance Scheme (NDIS) will not have the same coverage, resources and capacity as a Royal Commission, which would be able to "examine the adequacy of systems, processes and accountability mechanisms."<sup>128</sup> The NDIS Quality and Safeguarding Framework would not be sufficient to address issues of violence including sexual violence against women with disabilities, particularly in terms of the collection of much-needed data to report, investigate and eliminate such violence in its entirety.

#### Recommendation 39

That the Australian Government establish a Royal Commission into violence against people with disability.

#### Recommendation 40

That, in order to address access to justice concerns affecting people with disability, 'all Australian jurisdictions, in partnership with people with disability, develop and implement Disability Justice Strategies that identify and address barriers to justice for people with disability and that are in line with the recommendations from the Australian Human Rights Commission's report, *Equal Before the Law: Towards Disability Justice Strategies*.'<sup>129</sup>

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<sup>128</sup> Disabled People's Organisations Australia (2017), 'Disability Groups Call For Royal Commission Into Violence Against People With Disability', media statement 27 March <http://dpoa.org.au/news/disability-groups-call-for-royal-commission-into-violence-against-people-with-disability/>

<sup>129</sup> Frohmader, C. and Sands, T. (2015), *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings*, Disabled People's Organisations Australia (formerly ACDA), Recommendation 42.26. <http://dpoa.org.au/submissions/acda-submission-to-senate-inquiry-into-violence-abuse-and-neglect-against-people-with-disability-in-institutional-and-residential-settings/>

## People in immigration detention

As stated elsewhere, AWAVA believes that the offshore detention system should be discontinued, as this system has demonstrably failed to keep people seeking asylum safe from violence and abuse, including sexual violence, and since access to justice is not possible for people in this system.<sup>130</sup> The reproductive and sexual health rights of women and girls in immigration detention require specific attention and must be upheld, and while offshore detention continues, relevant services should be required to meet Australian standards.<sup>131</sup> At present, sexual assaults (together with other injuries and incidents) in immigration detention centres both in Australia and offshore are routinely not reported or investigated, as documented by a Freedom of Information release obtained by the Australian Lawyers Alliance in 2016.<sup>132</sup>

### Recommendation 41

That the Australian Government end the system of detaining people seeking asylum in offshore immigration detention centres.

### Recommendation 42

That, in the interim, any contracts associated with the provision of medical and support services in offshore processing centres should require the delivery of services that meet Australian standards, including services for people seeking asylum who have been alleged or been found to have been subject to abuse, neglect or self-harm while in the centres or nearby communities as a result of seeking asylum.

### Recommendation 43

That all sexual assaults (together with other assaults and injuries) occurring in immigration detention centres both in Australia and offshore be reported and investigated.

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<sup>130</sup> Australian Women Against Violence Alliance (2015), 'AWAVA condemns sexual violence in offshore detention', media release 8 October <https://awava.org.au/2015/10/08/media-release/awava-condemns-sexual-violence-in-offshore-detention>

<sup>131</sup> Refugee Council of Australia (2016), *Submission on the inquiry into the conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea* <http://www.refugeecouncil.org.au/publications/submissions/conditions-nauru-manus/>

<sup>132</sup> Hall, B. and Towell, N. (2016), 'Hundreds of detention centre abuses go unreported', Sydney Morning Herald, 5 June <http://www.smh.com.au/federal-politics/political-news/hundreds-of-detention-centre-abuses-go-unreported-20160605-gpbw89.html>

## Women working in the sex industry

Many women in the sex industry experiencing sexual violence and family violence (and other forms of exploitation or disadvantage) face particular barriers to accessing help. They experience and fear being treated differently and more harshly, including by services intended to help women experiencing family violence. This includes family violence services, lawyers, courts, Child Protection, police and health practitioners. At times discrimination is significant, and the consequences are dangerous. However, even where women do not experience discrimination, fear stops many women from accessing help. This in turn means that violence against women working in the sex industry is underreported.

One of the positive changes brought about by decriminalisation of prostitution in many parts of Australia has been the challenge to the stigmatisation of women in the sex industry. However, stigma has not been eradicated. A 2008 study of 97 women in the sex industry in licensed brothels found that 47 per cent were worried about community attitudes to prostitution.<sup>133</sup> Focus groups conducted with a small group of women in the sex industry found that the women 'agreed that despite the legalisation of sex work, there had not been an improvement in society's perception of their work'.<sup>134</sup> Respondents felt that they were forced to live a 'double life' and were forced to lie to family and friends about their job.<sup>135</sup> A UK study of women in the sex industry found that 52 of 55 women surveyed kept their work secret from some or all people in their private lives.<sup>136</sup> Stigma is globally linked to difficulty accessing health services.<sup>137</sup>

### Recommendation 44

That women working in the sex industry and women who have been trafficked be recognised as specific high-risk cohorts in policy development and legal reform relating to sexual violence, recognising that their needs in terms of access to justice are likely to be different from other groups.

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<sup>133</sup> Groves J., Newton, D.C., Chen, M.Y., Hocking, J., Bradshaw, C.S. and Fairley C.K. (2008), 'Sex workers working within a legalised industry: their side of the story', *Sexually Transmitted Infections* 84(5), pp. 393-394.

<sup>134</sup> Begum, S., Hocking, J.S., Groves, J., Fairley, C.K. and Keogh, L.A. (2013), 'Sex workers talk about sex work: six contradictory characteristics of legalised sex work in Melbourne, Australia', *Culture, Health & Sexuality* 15(1), pp. 85-100, p.89.

<sup>135</sup> Begum et al (2013), 'Sex workers talk about sex work'

<sup>136</sup> Sanders, T. (2004), 'A continuum of risk? The management of health, physical and emotional risks by female sex workers', *Sociology of Health & Illness* 26(5), pp. 557-574, p. 568.

<sup>137</sup> Lazarus, L., Deering, K.N., Nabess, R., Gibson, K., Tyndall, M.W. and Shannon, K. (2012), 'Occupational stigma as a primary barrier to health care for street-based sex workers in Canada', *Culture, Health & Sexuality* 14(2), pp. 139-150.

## Sexual assault and harassment at university

The National Union of Students Women's Department recently published the results of a major survey of women and non-binary identifying students at tertiary education institutions<sup>138</sup>, finding among other results that nearly three quarters had experienced some form of sexual harassment or assault during their time at university. Of these respondents, fewer than six per cent had reported the incident(s) to somebody in an official role at their university or to police. Among those few who did report the incident(s), less than one third were satisfied with the outcome.

The NUS Women's Department made several recommendations based on the survey results, two of which relate directly to access to justice. AWAVA endorses these recommendations:

### Recommendation 45

That universities create or clarify reporting procedures for incidents of assault and harassment as a matter of priority. These should be widely publicised as part of student orientation and should be easily accessible from the university website. Information about how to obtain support in the reporting process should also be readily available.

### Recommendation 46

That all residential colleges and halls, whether private or owned by the university, be made to adhere to the university's broader policy on harassment and sexual assault and required to report to the university the number of incidents reported under their care and how these incidents were dealt with once reported.

AWAVA supports these recommendations and will continue working with the NUS Women's Department and others to advocate for changes to universities' policies and procedures, to improve access to justice for women assaulted or harassed while at university.

More recently, Universities Australia has announced that all 39 universities that participated in the Australian Human Rights Commission's survey on sexual assault and harassment on campus will release university-specific data.<sup>139</sup> This decision was made after Universities Australia came under pressure from survivors, advocates and student groups, led by End Rape on Campus, the National Union of Students, and journalist Nina Funnell, for not initially agreeing to release data relating to individual universities.

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<sup>138</sup> National Union of Students Women's Department, *Talk About It Report 2015*, [https://d3n8a8pro7vhmx.cloudfront.net/nus/pages/144/attachments/original/1454369041/Talk\\_about\\_it\\_Survey\\_Report.pdf?1454369041](https://d3n8a8pro7vhmx.cloudfront.net/nus/pages/144/attachments/original/1454369041/Talk_about_it_Survey_Report.pdf?1454369041)

<sup>139</sup> Wahlquist, C. (2017), 'Sexual assaults on campus: universities to release survey results', *The Guardian*, 6 April, [https://www.theguardian.com/australia-news/2017/apr/06/sexual-assaults-on-campus-universities-to-release-survey-results?CMP=share\\_btn\\_tw](https://www.theguardian.com/australia-news/2017/apr/06/sexual-assaults-on-campus-universities-to-release-survey-results?CMP=share_btn_tw)

## Technology facilitated abuse and online safety

Sexual harassment, abuse and assault are recognised as crimes, but the law has yet to catch up with developments in the online environment. Over the years, technology, such as the internet, social media, mobile phones, computers and surveillance devices, is increasingly being used against women by perpetrators as a tactic of control and abuse within a wider context of VAW. Research has found that this violence, including the non-consensual sharing of intimate images, or the threat of sharing such images, can traumatise and isolate victims and constitutes a major barrier to the full enjoyment of social life and autonomy. In terms of sexual assault, technology is another weapon with which assault is perpetrated. At Canberra Rape Crisis Centre (CRCC), for example, young women have now overtaken mature/older women as the largest group accessing services, due in large part to the impacts of trauma where sexual violence and technology violence are among the dynamics present. While the role of technology in domestic and family violence is becoming more widely understood, the kinds of cases to which CRCC responds to are not included in domestic violence statistics, since the relationships involved are often not formal or legitimised, unlike 'domestic' relationships.

It is important that legislation be both amended to reflect the realities of technology-facilitated violence and also respond to the misuse and abuse of new and emerging forms of technology. It is also important that the justice system is appropriately trained to respond to and address technology facilitated violence. In 2016 The Senate Standing Committees on Legal and Constitutional Affairs provided recommendations for the Commonwealth, State and Territory governments. These included, but are not limited to, legislating offences for knowingly or recklessly recording and/or sharing an intimate image(s) without consent; and as well as threatening to take and/or share an intimate images without consent, irrespective of whether or not those images exist; empowering an agency to take down these images; and training for police.<sup>140</sup>

This is further stressed in the COAG Advisory Panel report referred to above, which acknowledges the need to address technology-facilitated stalking and abuse (also referred to as technology-facilitated domestic violence). The Panel also acknowledges the important role police can play in collecting digital evidence and that this requires training and it is important that police can access such training. The Panel also acknowledges the role of technology in supporting victims/survivors of violence. The implementation of such recommendations would help to provide safety and protection from violence both online and off-line and also make sure that perpetrators of violence are not rewarded while women and girls are further marginalised by being restricted from engaging with the online environment. New developments in the area of technology safety and training, such as that undertaken by the Women's Services Network (WESNET) and the e-Safety Commissioner provide insight into ways technology can be used as a positive measure to support such recommendations and initiatives. Policy-makers should ensure that the safety of victims/survivors is placed at the centre of all decisions and developments in this area. The specific needs of groups including young women and

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<sup>140</sup> Senate Standing Committees on Legal and Constitutional Affairs (2015), *Inquiry into [the phenomenon colloquially referred to as 'revenge porn': Final report](#)*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Revenge\\_porn/Report/b01](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/Report/b01)

women who are working in the sex industry and/or who have been trafficked need to be addressed in consultation with relevant representative and service organisations.

AWAVA has called for the creation of a new offence in the Australian criminal code to criminalise the unauthorised sharing of intimate images (image-based sexual abuse and exploitation).<sup>141</sup> The Australian Government has expanded the role of the e-Safety Commissioner, with a new portal to be established to enable women to report imaged based sexual abuse, and has committed to releasing a discussion paper in the first half of 2017 to work towards the establishment of a civil penalties regime (instead of a criminal offence).<sup>142</sup>

#### Recommendation 47

That a new offence be legislated in the Australian criminal code to criminalise the unauthorised sharing of intimate images (image-based sexual abuse and exploitation).

#### Recommendation 48

That the E-Safety Commissioner's and Australian Government's work in the area of technology safety (including image-based sexual abuse and exploitation) be trauma-informed, integrated with existing sexual assault services and women's specialist services responding to violence, and be attentive to the specific needs of different groups of women and girls.

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<sup>141</sup> AWAVA (2015), Submission on the Exposure Draft of Criminal Code Amendment (Private Sexual Material) 2015; AWAVA (2016) Submission to the Inquiry into the phenomenon colloquially referred to as 'revenge porn', <http://awava.org.au/wp-content/uploads/2016/04/AWAVA-submission-to-Senate-inquiry-on-phenomenon-colloquially-referred-to-as-revenge-porn-Jan-2016.pdf>

<sup>142</sup> Senator The Hon Mitch Fifield, Minister for Communications, and Senator The Hon Michaelia Cash, Minister for Women (2016), 'Joint media release: New eSafety Commissioner appointed in expanded role to combat non-consensual sharing of intimate images', [http://www.minister.communications.gov.au/mitch\\_fifield/news/new\\_esafety\\_commissioner\\_appointed\\_in\\_expanded\\_role\\_to\\_combat\\_non-consensual\\_sharing\\_of\\_intimate\\_images#.WRoJalyGPIU](http://www.minister.communications.gov.au/mitch_fifield/news/new_esafety_commissioner_appointed_in_expanded_role_to_combat_non-consensual_sharing_of_intimate_images#.WRoJalyGPIU)

## Appendix - National Priority Area 4: Sexual violence, excerpt of the Third Action Plan (2016–2019) of the National Plan to Reduce Violence Against Women and their Children (2010–2022)

Nearly 1.5 million women in Australia have experienced sexual assault since the age of 15. In 93 per cent of cases, the perpetrator was known to the victim; frequently they were intimate partners, friends, colleagues or dates. Women are far less likely to report sexual assaults when the perpetrator is a partner or someone known to them and there is research suggesting as many as 70 per cent of cases of sexual assault are not reported to police.

While the National Plan has always incorporated sexual assault and violence in its mandate, the prevailing national conversation to date has centered on domestic and family violence. The Third Action Plan seeks to sharpen our focus on sexual violence as a key component of the overall blueprint for women's safety, so that women and children who have experienced sexual violence have the same status in our responses as other groups.

A growing and significant problem in Australia and internationally is the non-consensual sharing of intimate images, known as 'revenge pornography'. This has a severe impact on victims, including serious psychological injury; humiliation and distress; and loss of reputation, social standing and employment.

The Third Action Plan will have a focus on better understanding and countering the impact of pornography given increasing evidence showing a correlation between exposure to online pornography and the sexual objectification of women and girls, the development of rape cultures and the proliferation of sexual assault.

<b>KEY ACTIONS</b>	
<b>NATIONAL PRIORITY AREA 4: SEXUAL VIOLENCE</b>	
<b>4.1:</b> Governments consider giving the same priority and support in relevant policies and programs to victims/survivors of sexual violence as to those who have experienced domestic or family violence.	4.1(a) Governments to review guidelines for programs, policies and information materials to ensure that victims of sexual violence receive the same level of support as those who experience domestic or family violence.
<b>4.2:</b> Provide improved training and resources to Aboriginal and Torres Strait Islander leaders who are working to respond to and prevent sexual violence in their communities.	
<b>4.3:</b> Support frontline services to better recognise and respond to women and their children who have experienced sexual violence, including the knowledge and confidence to refer to specialist sexual violence services.	4.3(a) Ensure frontline services have the information they need to identify and refer all women who require specialist sexual violence services, including Aboriginal and Torres Strait Islander women; women from culturally and linguistically diverse backgrounds; lesbian, gay, bisexual, transgender, intersex and queer women; older women; and women with disability.

<p><b>4.4:</b> Deliver an evidence-based community initiative to understand and counter the impact of pervasive pornography and promote positive, healthy behaviours in young people negotiating sexual relationships.</p>	<p>4.4(a) Undertake developmental research to inform effective strategies and messages to engage young people and the broader community.</p> <p>4.4(b) Develop a communication activity and support the development of resources and tools for influencers so they can have conversations with children and young people about healthy relationships, choice, respect, and pornography.</p> <p>4.4(c) Provide resources for young women and men to enable them to have the information and confidence to make respectful and empowered sexual and relationship choices.</p>
<p><b>4.5:</b> State and territory governments to support women and children in rural, remote and isolated communities who have experienced sexual violence to have improved access to the collection of forensic evidence.</p>	<p>4.5(a) Work with Attorneys-General, justice departments, health workers (doctors and nurses) and professional associations to broaden the categories of health workers who can collect forensic evidence.</p> <p>4.5(b) Trial different models for the appropriate collection of forensic evidence and victim support in rural and regional locations.</p>
<p><b>4.6:</b> Respond to the distribution of intimate material without consent, including what is known as 'revenge pornography'.</p>	<p>4.6(a) Develop a national portal to assist women in the removal of intimate images that are distributed online without their consent.</p> <p>4.6(b) Work with internet content hosts / services / telecommunication companies and social media services to facilitate consistent and responsive approaches for removal of intimate material.</p> <p>4.6(c) Undertake a national legislative review of the adequacy of criminal legislation for those distributing intimate material without consent to identify any jurisdictional amendments that may be required.</p> <p>4.6(d) Provide information to the broader community that highlights the impacts and consequences of distributing intimate material.</p>

### Working Group

Under the Third Action Plan a working group will be established to ensure a continuing focus on addressing sexual violence throughout the life of this plan. The working group will be led by NSW and will comprise government and community representatives, academics and service providers. It will be responsible for scoping the extent to which services, policies and legislation support victims of sexual violence as well as providing advice on the development of the community initiative and national portal.<sup>143</sup>

<sup>143</sup> This section is an excerpt obtained from the Department of Social Services website, *Third Action Plan 2016–2019*, <http://plan4womenssafety.dss.gov.au/the-national-plan/third-action-plan/>