

Submission to the Australian Law Reform Commission Justice Responses to Sexual Violence Inquiry

June 2024

Acknowledgement of Traditional Owners

Safe and Equal acknowledges Aboriginal and Torres Strait Islander peoples as the traditional and ongoing custodians of the lands on which we live and work. We pay respects to Elders past and present. We acknowledge that sovereignty has never been ceded and recognise First Nations peoples' rights to self-determination and continuing connections to land, waters, community and culture.

Recognition of Victim Survivors

Safe and Equal recognises the strength and resilience of adults, children and young people who have experienced family violence and recognise that it is essential that responses to family violence are informed by their expert knowledge and advocacy. We pay respects to those who did not survive and acknowledge friends and family members who have lost loved ones to this preventable and far-reaching issue.

About Safe and Equal

Safe and Equal is the peak body for Victorian organisations that specialise in family and gender-based violence across the continuum, including primary prevention, early intervention, response and recovery. Our vision is a world where everyone is safe, respected and thriving, living free from family and gender-based violence.

Our work prioritises the safety of all people experiencing, recovering from or at risk of family and gender-based violence. While we know that most family violence is perpetrated by men against women and children, we recognise that family violence impacts people across a diversity of gender identities, social and cultural contexts, and within various intimate, family and other relationships. We apply an intersectional feminist lens in our work to address the gendered drivers of violence, and how these overlap and intersect with additional forms of violence, oppression and inequality.

We believe in and work towards a world where people are not only safe and free from family and gender-based violence, but are respected for who they are and thriving in their lives.

Introduction

Safe and Equal welcomes the opportunity to provide a submission into the Australian Law Reform Commission Justice Responses to Sexual Violence inquiry.

Safe and Equal has had the opportunity to review the submission made by Sexual Assault Services Victoria (SAS Vic) and we endorse that submission.

As the peak body for Victorian organisations that specialise in family and gender-based violence across the continuum, this submission will focus on the co-occurrence of sexual violence within a family violence context, and relevant recommendations to safely respond to and support victim-survivors of sexual violence.

Sexual assault that occurs within the context of family violence is common and under-reported¹ and whilst reform activity since the Victorian Royal Commission into Family Violence (RCFV) has resulted in specialist family violence responses being developed by the justice system², the reality for many victim-survivors of sexual assault in the family violence context is that they still confront barriers in accessing justice, safety and support. These barriers are compounded by the hidden nature of sexual assault, the misconceptions that continue to persist that most sexual assault is committed by strangers³ and the lack of understanding about the nature and dynamics of sexual assault in the context of family violence.

For victim-survivors who do seek safety and support, they are still often required to simultaneously navigate multiple fragmented and complex systems as the ‘siloes’ service responses identified by the RCFV have not yet been resolved⁴. Unfortunately, this can result in some victim-survivors finding their involvement in criminal proceedings “more distressing than the crime itself”⁵, being retraumatised by the interaction they have with the justice system and experiencing the criminal justice process and the outcome as not being just or fair. It is therefore critical that focus is maintained on improving justice system responses to family violence and sexual offences to ensure that barriers that prevent people from accessing the system are removed and victim-survivors are not re-traumatised or harmed by their engagement with the justice system. It is essential that a victim-survivor's access to justice is not determined by the context in which sexual assault occurs.

Prevalence of sexual assault within the context of family violence

Sexual assault that occurs in the context of family violence is common, with data showing that most perpetrators of sexual assault are known to a victim-survivor⁶. In the familial context, sexual assault is more often perpetrated within an intimate relationship with data from the most recent Personal Safety Survey showing that for women who had experienced a recent sexual

¹ Family Safety Victoria (2018). *Family Violence Multi-Agency Risk Assessment and Management Framework: A Shared Responsibility for Assessing and Managing Family Violence Risk*. Melbourne, VIC: State of Victoria; State of Victoria (2014-16), Royal Commission into Family Violence: Report and recommendations, Vol II, Parl Paper No 132.

² For example, the development of a Specialist Family Violence Court model and roll-out of Specialist Family Violence Courts.

³ Tidmarsh, P. and Hamilton, G. (2020). *Misconceptions of sexual crimes against adult victims: Barriers to justice*. Australian Institute of Criminology. Canberra. p8; ANROWS. (2017). *Are we there yet? Australians' attitudes towards violence against women & gender equality: Summary findings from the 2017 National Community Attitudes towards Violence Against Women Survey (NCAS)*. Sydney, NSW. <<https://www.anrows.org.au/research-program/ncas/>>

⁴ State of Victoria. (2014-2016). Vol II. Op. cit.

⁵ Victorian Law Reform Commission (VLRC). (2020). *Committals Report*. Victoria. p9.

⁶ Family Safety Victoria (2018). Op. cit. p12; Department of Premier and Cabinet (DPC). (2020). *Family Violence Reform Rolling Action Plan 2020-2023: Sexual Assault and Family Violence*. <<https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023>>; AIHW (2018). Op. Cit.; State of Victoria (2014-2016). Vol II. Op. cit.

assault by a male, 85% knew their perpetrator, whether they were an intimate partner, cohabiting partner, boyfriend or date⁷. We note however that the co-occurrence of sexual assault and family violence is likely to be much higher than what is reflected in available data as sexual assault often goes unreported and/or is not asked about when a victim-survivor seeks safety and support from services and systems⁸. This results in it still being a “profoundly hidden crime”⁹. The higher co-occurrence is reflected in data gathered from family violence and sexual assault services with practitioners estimating that “80 per cent of adult women presenting for family violence had experienced sexual assault, and that more than 70 per cent of adults, young people and children presenting for sexual assault had experienced family violence”¹⁰.

Research shows that “certain populations are more likely to experience sexual assault” including people from Aboriginal and Torres Strait Islander and LGBTIQ communities, people who are homeless, people who are living with disabilities and people who have previously been victims of sexual assault at any point throughout life¹¹.

The Issues Paper recognises that some groups within the community are disproportionately reflected in the sexual assault statistics. We propose that victim-survivors of family violence are recognised as one of these groups.

Nature and dynamics of sexual violence in the context of family violence

Sexual violence has devastating and life-long impacts on all victim-survivors, but the nature and dynamics of sexual assault that occurs in the context of intimate partner relationships is different from sexual assault that is perpetrated outside the family/familial context. Sexual violence in the intimate partner context remains a ‘taboo’ subject and is poorly recognised by victim-survivors, friends/family, the community, and response systems¹². Misconceptions that perpetuate the myth that sexual assault is more likely to be perpetrated by strangers and the relatively recent criminalisation of rape within marriage¹³ are likely to contribute to this lack of recognition and shame and stigma for victim-survivors. This can lead to poor identification of sexual violence in the intimate partner context, create barriers to reporting and impact on service responses.

As noted by the RCFV, sexual assault that occurs within the intimate partner context is frequently violent and repeated and “forms part of a controlling pattern of behaviour, designed to dominate, humiliate and denigrate a victim”¹⁴. Perpetrators are likely to be using other forms of physical and non-physical violence resulting in a victim-survivor experiencing an ongoing pattern of abuse that they are living with all the time¹⁵.

Sexual violence in the context of family violence is part of an ongoing pattern of abuse, not a single incident. As recognised in the Issues Paper, trauma is known to impact the memory of

7 Australian Bureau of Statistics (2023). Personal Safety Survey – Sexual Violence <https://www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/2021-22>. Accessed 5 June 2024.

8 State of Victoria (2014-2016). Vol II. Op. cit. p215

9 Tidmarsh and Hamilton (2020). Op. cit. p1

10 Watt, J. (2020). Progressing Recommendation 31: Phase 1 Project Final Report. Prepared for DV Vic and CASA Forum. p20.

11 AIHW (2020). Sexual assault in Australia. Cat. No. FDV 5. Canberra: AIHW. p3

12 Backhouse, C. & Toivonen, C. (2018). National Risk Assessment Principles for domestic and family violence: Companion resource. A summary of the evidence-base supporting the development and implementation of the National Risk Assessment Principles for domestic and family violence (ANROWS Insights 09/2018). Sydney, NSW: ANROWS.

13 Australian Women’s History Network (2016). *Rape in marriage: Why is it so hard to criminalise sexual violence?* Accessed 5 June 2024 <<https://www.auswhn.com.au/blog/marital-rape/>>

14 State of Victoria (2014-2016). Vol II. Op. cit. p216

15 Family Safety Victoria (2018). Op. cit. p29; Cox, P. (2015). Op. cit.

victim-survivors. In the family violence context this is likely to be further exacerbated with the consequence of victim-survivors being incorrectly judged as having questionable credibility.

Where sexual assault is perpetrated by an intimate partner, intervention by the justice system does not mean that the relationship will end. As noted by Tidmarsh and Hamilton (2020):

Victims often stay in a relationship with their abuser. This may be for a multitude of reasons: fearing for their own safety or the safety of others such as children, friends, family or pets; feeling ashamed and responsible for their own rape; believing they can change the abuser's behaviour; or realising that they are isolated or without financial support¹⁶

If separation does occur, it does not mean that the sexual violence will stop, and engagement with the justice system can create opportunities for 'systems abuse'¹⁷ to occur or prolong contact with the perpetrator. Certain types of violence may cease, but other forms of violence or tactics may continue to be used by a perpetrator. This context means that even if a victim-survivor has 'physically' left a relationship, they will be living with the traumatic impacts of the violence they have experienced and are likely to still be living with violence and in fear of the perpetrator. Therefore, it is essential that when victim-survivors engage with the justice system, they encounter a victim-centred and trauma-informed response that ensures they feel safe throughout the process, they are not retraumatised or revictimised and does not make them responsible for managing their own safety throughout the process. A victim-centred and trauma-informed response would keep victim-survivors engaged and informed throughout the processes and provide them with choice, autonomy and agency.

Sexual assault and family violence risk

Sexual assault that occurs within the context of intimate partner violence is a "high-risk indicator of further violence and death"¹⁸ and is included in family violence risk assessments such as the Victorian Multi-Agency Risk Assessment and Management framework (MARAM) and the National Risk Assessment Principles¹⁹ (NRAP). As noted in the NRAP, "survivors' who are sexually abused by their partners are at a much higher risk of being killed, particularly if they are also being physically assaulted, and Intimate Partner Sexual Violence is a significant indicator of escalating frequency and severity of domestic and family violence"²⁰. Further, research conducted by Campbell et al. "found that physically abused women who also experienced forced sexual activity or rape, were seven times more likely than other abused women to be killed".²¹ We note that a risk factor specific to children has also been included in the MARAM framework recognising that "perpetrators who demonstrate sexualised behaviours towards a child are also more likely to use other forms of violence against them"²².

Evidence also shows that planning to leave or separate is a high-risk period for victim-survivors and in the review of family violence deaths between 2010 and 2014, actual or intended separation was a characteristic in over half of cases where women were killed by a

¹⁶ Tidmarsh and Hamilton (2020). Op. cit. p9

¹⁷ The Australian Institute of Judicial Administration. (2019). National Domestic and Family Violence Benchbook. <<https://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>>

¹⁸ Family Safety Victoria (2018). Op. cit. p12

¹⁹ Backhouse and Toivonen (2018). Op. cit. The evidence-based high-risk factors have been developed from a review of "empirical studies, academic and practice-based literature, and reports produced by international and Australian domestic violence death review committees and Coroner's Courts". p42.

²⁰ Ibid, p4

²¹ Campbell et al. (2003) cited in Backhouse and Toivonen (2018). Op. cit. p43

²² Family Safety Victoria (2018). Op. cit. p30

male intimate partner²³. Engagement with the justice system is also recognised as a time when violence can escalate²⁴ and it is therefore critical that the high-risk nature of this time is reflected in justice responses to victim-survivors.

Sexual assault in childhood in the context of family violence

The 2023 Child Maltreatment in Australia study indicated an overall national prevalence of childhood sexual abuse in Australia of 28.5 percent, with girls being 2.4 times more likely than boys to have experienced childhood sexual assault. This means that more than one in three girls and almost one in five boys experience childhood sexual abuse.

The study also estimates that approximately one third of all childhood sexual abuse is perpetrated by an adult family member²⁵ and that this is consistent with most sexual abuse being inflicted by adults and adolescents known to the child. The majority of people who reported childhood abuse reported multiple types of abuse, meaning that a child who has been sexually assaulted is also likely to have experienced other forms of abuse including physical and/or emotional abuse, neglect and/or exposure to family violence.

Given the complexity of the nature of sexual assault within the family unit and the additional burden this creates for children, it is essential that trauma informed, developmentally appropriate supports are available for children who disclose sexual assault. It is imperative that all justice responses are also trauma informed and developmentally appropriate, holding the safety and wellbeing of the child as paramount.

Whole-of-system responses to sexual violence

Given the complex nature and dynamics of sexual assault that occurs in the context of intimate partner violence and the high risk it presents to victim-survivors, it is critical that all parts of the family violence and sexual assault system work together to remove barriers to reporting and accessing justice to ensure victim-survivors receive safe, trauma-informed and victim-centred responses.

Given the interconnectedness of the sexual assault system, this necessitates taking a 'whole-of-system' view to ensure that all parts – including all elements of the justice system - are working together in a way that places victim-survivors at the centre and provides them with the tailored support they need. Critical to the success of a 'whole-of-system' response is coordination between services, particularly legal services²⁶ and between Specialist Family Violence Services and Sexual Assault Services, as well as a common and consistent understanding of family violence (inclusive of sexual violence) across systems and services.

There is also an opportunity for better coordination within organisations themselves to improve victim-survivors experiences of the justice system. One such example is Victoria

²³ Australian Domestic and Family Violence Death Review Network (2018). *Data Report 2018*. Domestic Violence Death Review Team, Sydney, p12 <[https://www.coroners.nsw.gov.au/documents/reports/ADFVDRN_Data_Report_2018%20\(2\).pdf](https://www.coroners.nsw.gov.au/documents/reports/ADFVDRN_Data_Report_2018%20(2).pdf)>

²⁴ Family Safety Victoria (2018). Op. cit.: an 'imminence' risk factor was added to the MARAM recognising that "certain situations can increase the risk of family violence escalating in a very short timeframe". p27.

²⁵ Mathews B et al. (2023) The prevalence of child maltreatment in Australia: findings from a national survey. *Med J Aust*. 218 (6).

²⁶ Salter, M., Conroy, E., Dragiewicz, M., Burke, J., Ussher, J., Middleton, W., Vilenica, S., Martin Monzon, B., & Noack-Lundberg, K. (2020). "A deep wound under my heart": *Constructions of complex trauma and implications for women's wellbeing and safety from violence* (Research Report, 12/2020). Sydney: ANROWS.

Police responses to sexual offences and family violence – specifically the Sexual Offences & Child Abuse Investigation Teams (SOCIT) and duty police managing family violence matters outside of the specialist Family Violence Investigation Units (FVIU).

The FVIU manage a small percentage of family violence cases overall and when there are family violence matters and sexual assault charges, these are considered and managed separately and typically there is no communication between duty police and SOCIT as matters progress. This often leads to confusion for a victim-survivor, by way of conflicting information or lack of clarity around who is supporting and responsible for which aspects of the process.

Strengthened communication, processes and collaboration between SOCIT and duty police managing family violence matters would uplift internal capability and support streamlined pathways and identification of potential options for victim-survivors reporting to police.

Recommendation 1: Specialist Family Violence Services and Sexual Assault Services to be provided with the sustainable, long-term funding needed to support victim-survivors of sexual violence, regardless of a victim-survivor's engagement with the justice system.

Recommendation 2: Increased, sustainable funding to community legal centres to ensure victim-survivors receive affordable and timely legal support

Recommendation 3: Funding to explore pathways for cross-collaboration between specialist family violence services and sexual violence services to ensure victim-survivors are supported across their continuum of needs.

Recommendation 4: Strengthen communication and collaboration between SOCIT and duty police managing family violence matters.

Trauma-informed and victim-centred justice responses

As noted in SAS Vic's submission to the commission, participating in a criminal trial can take a profound emotional toll on victim-survivors of sexual violence. This is because the adversarial system of justice is in many respects antithetical to the recovery needs of victim-survivors of sexual violence. Many victim-survivors report engagement with the justice system as being as traumatising, if not more traumatising, than the assault itself.

Multiple studies, including Gilbert (2024)²⁷ recognise that sexual assault is significantly under-reported in Australia. In addition, those that are reported frequently are not progressed at various stages of engagement with the justice system. When charges are withdrawn at the request of the victim-survivor, it is frequently due to fear of being re-traumatised by the justice system and/or fear of retaliation by the perpetrator. This is a particularly significant issue in intimate partner sexual assault, as well as childhood sexual assault, where the victim-survivor may be required to have ongoing contact with the perpetrator after the

²⁷ Gilbert, B. (2024). Attrition of sexual assaults from the New South Wales criminal justice system (Bureau Brief No. 170). Sydney: NSW Bureau of Crime Statistics and Research

criminal matter is finalised, for example if there are family court orders in place for child access.

Trauma-informed and victim-centred approaches within the justice system acknowledge a person's inherent strengths, autonomy and dignity, maximising their choices and control over their lives. Such responses place the victim at the centre of the justice process and acknowledge the trauma they have experienced/are still experiencing and the impact that trauma may have on how they engage with the system. Some of the elements of trauma-informed and victim-centred justice system responses identified in research and literature include:

- Treating victim-survivors with dignity and respect. This would include access to a safe, supportive, compassionate, and non-judgmental environment.
- Mechanisms that enhance victim-survivors' sense of wellbeing and safety (physical, emotional and cultural)
- Providing education and training for professionals working in the criminal justice system who interact and engage with victim-survivors. This may include "ensuring that all service providers receive training in the causes, consequences and intersecting dynamics of violence against women, the many forms this violence takes and the impact on victims/survivors"²⁸.
- Understanding that victim-survivors have individual responses to trauma that "explicitly acknowledge how systems of privilege and oppression interact to impact a women's experience with trauma"²⁹.

On this final point however, we know a lack of understanding and misconceptions about the impact trauma has on memory³⁰ can result in victim-survivors being viewed as lacking credibility as they may not be able to recall specific details which contributes "to the high attrition rates of rape cases in the criminal justice system"³¹.

Currently the evidence-base and research on trauma effects on memory, recall and the brain for sexual and family violence survivors as witnesses is not introduced as mandatory practice directions in criminal cases. This evidence base is introduced on a case-by-case basis through expert testimony. As expert testimony is open to challenge, this approach significantly undermines the clear evidence base supporting trauma effects on memory recall and witness testimony.

The Victims of Crime Commission (VOCC) 2023 inquiry report³² speaks to victim-survivors feeling overwhelmed, confused and excluded from genuine participation in their own justice response. Victims stated that the requirement to navigate the justice system without assistance, while trying to recover from their trauma, was a significant additional burden for

²⁸ UN Women Virtual Knowledge Centre to End Violence against Women and Girls <https://www.endvawnow.org/en/articles/1790-victim-survivor-centred-approach.html>; Garza, M.R., Rich, K. & Omilian, S.M. (2019). A Trauma-Informed Call to Action: Culturally-Informed, Multidisciplinary Theoretical and Applied Approaches to Prevention and Healing. *Journal of Aggression, Maltreatment & Trauma*, 28:4, 385-388; De La Rue, L. & Ortega, L. (2019). Op. cit.; Crosby, S.D. (2016). Trauma-Informed Approaches to Juvenile Justice: A Critical Race Perspective *Juvenile and Family Court Journal* 67, No. 1. National Council of Juvenile and Family Court Judges; Slade, N., Ministry of Social Development Te Manatu Whakahiato Ora. (2020). Op. cit.

²⁹ Lisa De La Rue and Lilyana Ortega. (2018). Intersectional Trauma-Responsive Care: A Framework for Humanizing Care for Justice Involved Girls and Women of Color. *Journal of Aggression, Maltreatment & Trauma*, 28:4, 502-517.

³⁰ Tidmarsh and Hamilton (2020). Op. cit. p6

³¹ *ibid.* p6

³² Silenced and sidelined: Systemic inquiry into victim participation in the justice system. (2023). Available at: https://victimsofcrimecommissioner.vic.gov.au/media/lpufjx5h/silenced-and-sidelined_systemic-inquiry-into-victim-participation.pdf.

them to manage. 74 percent of respondents stated that they were not consistently treated as a participant in their own case and 58 percent indicated that having access to their own legal representation to advise them and ensure their rights were upheld would have assisted them. 45 percent of respondents reported they would not proceed with a justice response again, and many spoke to avoiding this by not reporting the assault at all. The VOCC report makes a total of 55 recommendations for making the justice system safer and more trauma informed for victim-survivors.

Recommendation 5: That the relevant recommendations of the VOCC inquiry report and recommendations be considered, including training on trauma informed responses for all professionals working within the justice system, that victim survivors have access to their own legal representation and that all victim-survivors have the choice to pre-record their testimony rather than having to be present during court proceedings.

Recommendation 6: The evidence base on trauma effects on memory, recall and the brain for sexual and family violence survivors as witnesses should be included in any criminal case as mandatory practice directions for all court procedures. This should also include recognition that sexual assault occurring in the context of family violence is often recurrent and can significantly impact a victim-survivor's ability to provide a cohesive, consistent statement.

Restorative and Alternative Justice Models

We support the exploration of alternative justice models as the current adversarial nature of court proceedings can be intimidating and harmful for victim-survivors and can replicate the power and control dynamics of an abusive relationship. For victims and witnesses who have experienced trauma, involvement in the adversarial criminal justice system can be a particularly difficult and damaging experience³³.

An inquisitorial and/or restorative justice model may offer an alternative to the adversarial model and should be explored. We encourage the Commission to look at any evaluations of the Family Violence Restorative Justice Service which was established in response to Recommendation 122 of the RCFV to see how successful the model has been and to determine whether a similar model may be suitable in sexual offence cases³⁴.

Recommendation 7: Alternative and restorative justice models are explored and evaluated in consultation with victim-survivors, particularly the Family Violence Restorative Justice Service model in Victoria.

Conclusion

The complex nature and dynamics of sexual assault that occurs in the context of childhood and intimate partner violence and the high risk it presents to victim-survivors means that it is

³³ *ibid.* p9

³⁴ Department of Justice and Community Safety (n.d.). *Restorative Justice for Victim Survivors of Family Violence*. <<https://www.justice.vic.gov.au/fvrjservice>>

critical that all parts of the family violence and sexual assault system work together to remove barriers to reporting and accessing justice to ensure victim-survivors receive safe, developmentally appropriate, trauma-informed and victim-centred responses.

Given the interconnectedness of the sexual assault system, this necessitates taking a 'whole-of-system' view to ensure that all parts – including all elements of the justice system - are working together in a way that places victim-survivors at the centre and provides them with the tailored support they need. Strengthening collaboration between all parts of the system is required to build a bridge between fragmented systems and siloed service responses to ensure that victim-survivors have access to a seamless support system and to reduce the potential of being re-traumatised by their engagement with the system.

In developing improved responses to sexual offences, victim-survivors must be central to the process, their safety must be prioritised, they must be believed, their traumatic experiences validated, and tailored support provided so they can recover from the trauma and harm they have experienced.