

Criminal Procedure Review—Magistrates Courts
GPO Box 149
BRISBANE QLD 4001

27th June 2022

Email: Criminal-Procedure-R@justice.qld.gov.au

RE: SUBMISSION CRIMINAL PROCEDURES REVIEW MAGISTRATES COURT

We refer to the Criminal Procedures Review Magistrates Court Review Consultation Paper dated April 2022 and provide the following feedback.

Who are we?

The Queensland Sexual Assault Network (QSAN) is the peak body for sexual violence prevention and support organisations in Queensland. We have 21 member services, including specialist services for Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, women with intellectual disability, young women, men and children and our membership are located throughout Queensland, including in rural and regional locations.

Our network of non-Government services is funded to provide specialist sexual assault counselling, support, and prevention programs in Queensland. QSAN is committed to working towards ensuring all Queenslanders who experience sexual violence recently or historically, regardless of age, gender, sexual orientation, cultural background receive a high-quality response in line with best practice, client-centred principles. Our work and analysis of sexual violence is from a feminist perspective and addressed within a “trauma-informed framework”.

We are committed to engaging with government and other bodies to raise systemic issues of concern and to ensure the voices and experiences of our clients are considered in the formulation of policy and legislation that impacts on sexual violence victims in Queensland.

Legislate objectives for the criminal justice system

The Royal Commission into Institutional Child Sexual Abuse’s first recommendation in relation to reform of the criminal justice system was:

In relation to child sexual abuse, including institutional child sexual abuse, the criminal justice system should be reformed to ensure that the following objectives are met:

a. the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused

- b. criminal justice responses are available for victims and survivors*
- c. victims and survivors are supported in seeking criminal justice responses*

QSAN supports these objectives but that they be broadened to the entire criminal justice system and not limited to child sexual abuse.

This would provide clarity to participants in the criminal justice system including lawyers, complainants and defendants about the objectives and would have an overall educative value for the public and more specifically provide over-arching guidance to judges in their determinations of “fairness”.

Though efficiency in the use of time and resources are important, they should not be the overriding or only driver of reform.

Our recommendation below is informed by the Royal Commission’s recommendation and the Scotland approach to summary justice, as noted in paragraph 2.36 of the paper.

Recommendation One

The objectives of the Queensland criminal justice system be legislated as follows:

- a. the criminal justice system operates in the interests of seeking justice for society, including the victim survivors and the accused.*
- b. Is fair to victim survivors and accused.*
- c. Criminal justice responses are available for victim survivors.*
- d. Victim survivors are supported in seeking criminal justice response.*
- e. The system is efficient in its use of time and resources.*

Human Rights Act (HRA) –the need for victim’s rights to be specifically recognised and legislated

A problematic issue with the Human Rights Act (HRA) in Queensland is that it specifically recognises the rights of a “person charged in a criminal process” but does not specifically recognise the human rights of the victim of the offence, including the human rights of children who are victims in the criminal process.

The lack of specific reference to victims contributes to the rights of the defendant being elevated above other rights in the criminal process.

The human rights of defendants in criminal trials should be protected; however, they should always be balanced against other rights, including the rights of the victims and the rights of the community at large.

We are aware that the rights of victims in the criminal process *may* be recognised to a limited extent in other provisions of the HRA, however, the lack of specific reference for victims, whilst providing specific legislative protection for defendants, creates an imbalance and is problematic because:

- It reinforces the historical focus in the criminal justice system on defendant’s rights to the exclusion of all other rights.
- The defendant has a lawyer who can focus exclusively on the human rights of the defendant, but victims do not have their own lawyer who is able to provide this sole focus. This means that

opportunities and arguments for a victim's human rights protection, may be missed or not pursued by the ODPP who have a different focus than protecting victim's rights.

- How will victim's human rights in the criminal process be protected when the victim themselves has no "standing"?
- Specific clauses tend to be given precedence in interpretation than generalised protections – therefore, a defendant's rights that are 'specifically recognised' can be, in practice given precedence over other rights, even if they do exist.
- The specific focus on defendants has a systemic impact, as increasingly discourse around human rights in the criminal justice system in Queensland, equate human rights with defendant's rights. Please see to the recent Sentencing Council Issues Paper on Serious Violence Offenders¹ where the human rights section in the Issues Paper only references concern about the human rights of the offender, rather than the victim.

As a result of the combination of all these matters the result is the HRA has entrenched and legislatively legitimised victim disadvantage in the criminal justice system.

Our experience over decades working in this area is for victim's rights to be recognised, in any meaningful way in legislation, these rights need to be explicit and clear.

We believe therefore, that victim's rights could be better protected in the criminal justice process, if there was an amendment to the Human Rights Act to specifically recognise victims, as the current omission is creating an imbalance of rights that is increasingly problematic.

Recommendation Two

That the Human Rights Act 2019 QLD be amended to specifically recognise the human rights of people (including children) who are victims of crime in the criminal process to uphold justice, their safety, and their recovery to ensure a more balanced approach to the consideration of human rights in the criminal justice system is taken, both at an individual and systemic level.

Victim's Charter

The current Charter of Victim's Rights in QLD, as outlined in the Consultation Paper does not give legal rights, is not enforceable and a breach is not a ground to have a government decision reviewed. It is the experience of QSAN that it is commonly breached in Queensland, with no real or practical impact or recourse for victims.

QSAN members report frequent breaching of the Victims Charter including not advising victims or keeping them updated about the investigation or their criminal cases, not working in a trauma informed way, not being respectful in communication, failing to engage interpreters for police interviews and in court proceedings.

¹ [The '80 per cent rule': The serious violent offences scheme in the Penalties and Sentences Act 1992 \(Qld\) \(sentencingcouncil.qld.gov.au\)](https://www.sentencingcouncil.qld.gov.au) (p. 48 – Human Rights)

The complaints processes in relation to the Victim's Charter is of little consequence and clearly do not act as a deterrent for the numerous breaches that occur. A complaints process exists where complaints can be made to the Director of Victim Assist.

Our members advise that on occasions, where some local victim's interagency groups raise issues and concerns and VAQ is a member of these groups, there may be some consequences or change to the issue of concern. However, this change more likely relates to the interagency environment and the relationships that have developed, rather than the complaints mechanisms itself, that is not formally activated in these circumstances.

A complaint to the VAQ director can only be pursued after the victim has utilised the internal complaints mechanism of the agency/body they have an issue with. These internal processes can be lengthy, unwieldy, and impractical. Most victim-survivors are too exhausted by the legal process already engaged in and/or traumatised by the criminal act and are not able to make a complaint to the agency and then to VAQ (who in the end have no power over the agency in any case).

By the time any victim-survivor has endured the investigation and court process there is little energy for victim-survivors to then complain to the Director of Victim's Assist, especially when they have no power and not ability to enforce any of their findings.

We do not think that a victim's perspective is considered much if at all in criminal processes, and we have little confidence, with respect this process will change things. There really needs to be a deeper level of engagement with the issue and specialist expertise leading a specific project that can make recommendations and there needs to be the funding. The development of a specialist sexual violence court is strongly supported as a practical way forward. It could include strong elements of case management and controls over delays and inappropriate cross examination.

General feedback from QSAN members:

- There is generally little to no trauma informed approaches in the sexual violence system response in Queensland.
- A woman with intellectual disability was at court several times. She was to give evidence, but it kept getting adjourned. On each occasion she had to watch her video of giving the Section 93A statement several times (which took 4 hours), before she was cross examined and the constant adjournments and reliving the assault had a big impact on her mental health
- Very poor prosecutors as well. A young girl alleged rape by two older men in their twenties. The defence were alleging she was into "kinky sex". The prosecutors allowed the line of questioning to continue without any interference in it. Highly distressing to the young girl. There were two separate trials for the two defendants, and he was found not guilty. The other man pleaded guilty.
- In court they put women in another room to give evidence. Often this can go against them as not facing the jury. However, why not put the perpetrator in the room and let her give evidence in front of the jury?
- In rural and regional Queensland court support is almost non-existent because of resourcing.
- Court process also don't engage interpreters –the magistrate can also say "just use a friend".

Recommendation Three

That the Queensland Government either engage a specialist with necessary expertise and knowledge of the sexual violence victim's experience to make recommendations about how the court system can be improved from a victim's perspective. As a practical way forward it could develop and fund a specialist sexual violence court that is truly trauma informed at all levels.

Recommendation Four

That legislative amendments be introduced to increase judicial oversight, intervention and consequences for professionals who engage in deliberate delays in matters involving sexual violence.

Recommendation Five

That this review recommends the introduction of processes that will reduce delays and inefficiencies in the system including the greater use of technology and remote court services which can also enhance victim safety and reduce the trauma of court attendances.

Some further feedback from members includes:

- A matter involving child sexual violence matter that had gone to committal hearing in North Queensland. Most don't go to committal so unsure why this was the case. Very aggressive cross examination of a 12 yo child. Luckily the child was robust, in another room, they were discussing an issue that occurred when she was 8yo. Defence was trying to trick her up, called her a liar. She was annoyed and got upset. The judge reprimanded the defence but did not stop the harassing and inappropriate cross examination of such a young child.
- Timelines are extreme and delays are frequent. Timeline averages for trials is 3 to 7 years – standard is 3 to 4 years.
- Sexual violence matters should be considered a priority and get listed as a trial 1.
- Deliberate adjournments by defence – deliberate tactics.
- 3 different prosecutors in a case, on the day one turns up that has never met victim and they clearly do not know the case. What chance do women have in these circumstances?
- DPP can drop the case without explanation to the victim.
- A woman wanted to explore restorative justice, but DPP said no to this. They said it must proceed to trial as we need to make a statement to the community that this was unacceptable – he was found not guilty. Its DPP decisions re restorative justice.
- Very difficult and time consuming for victim-survivors.

Recommendation Six

That there be a presumption against cross examination in matters of sexual violence unless there is a substantive reason to do so.

Recommendation Seven

That the "substantive reasons" exemption be clearly defined and provided for in legislation especially if the matter involves child complainants.

Restorative Justice

QSAN's experience of restorative justice has mainly been through the youth justice program in Queensland and their feedback from this program is:

- There is little transparency about which cases are chosen as suitable and on what basis.
- Sometimes questionable cases are involved in the process including those with high levels of violence and potential for it to be ongoing (eg. family related).
- In one example, the member service supported a young woman who had experienced a one-off incident of sibling rape. They were now both adults. The woman had made "amends" with her sibling, but he was charged, and the matter went through criminal justice system. The young woman was horrified as she would have preferred a restorative justice option, but this was not offered and there was no real consultation between the ODPP and the victim.
- In other cases, there was ongoing sibling abuse, and QSAN believed it inappropriate for alternative processes, but the parties were offered restorative justice.
- QSAN members question whether some cases are chosen because the offender is caucasian, middle class and 'lawyered up' and can argue their way into the process? This may be because of a lack of transparency around the guidelines for restorative justice.
- The process, in their experience is very offender centric. Very little attention is given to the impact on the victim or what is best for them.
- One member was a support person for youths when they went through the process, and she said that by the time the youth are 15 – 17 years they are learning the image management tricks and DARVO (Deny, attack, reverse victim and offender) responses.
- That any restorative justice model should be developed at the same time as substantial changes to the criminal justice system's response to sexual violence, otherwise the restorative justice model will become the "poor person's" method of justice. Or it will not be under-utilised because the chances of success at trial are so good there is not incentive to plead guilty and utilise the process.

Recommendation Eight

That all restorative justice programs currently operating in Queensland be independently evaluated from a sexual violence victim's perspective and the report make recommendations for improvement, including developing publicly available guidelines to improve transparent decision-making in the process.

Recommendation Nine

That this evaluation be undertaken before any expansion of restorative justice to the broader criminal justice system take place in Queensland.

Recommendation Ten

That once the program is evaluated and if a broader restorative justice model is recommended, that any model be developed by an independent expert with extensive experience in working with victim-survivors of sexual violence, women, Aboriginal and Torres Strait women, culturally and linguistically diverse, LGBTIQ communities be engaged to develop a restorative justice model for use in sexual violence

matters in the criminal justice system in Queensland and that any model developed engage extensively with community experts such as QSAN.

Recommendation Eleven

That if a restorative justice model is recommended to be developed that this occurs at the same time and in unison with extensive amendments to the sexual violence provisions of the criminal justice system.

Interpreters

There has been little to no change in the uptake of interpreters despite the community constantly raising the issue, it being recommended by countless reports and inquiries and being part of OPMs and good practice guidelines.

QSAN member report ongoing difficulties and it is simply not appropriate for police officers or judges to assess for themselves whether someone needs an interpreter and quite frankly the right to an interpreter is a basic human right. In fact, the denial of a right to a qualified interpreter may also be a breach of the *Human Rights Act 2019* Section 15 (recognition and equality before the law), Section 21 (Freedom of expression) and Section 27 (cultural rights).

As the failure to engage interpreters in sexual violence matters continues to be raised in consultations and has for decades, clearly something further is required to make the police and professionals in the court system use them and be accountable if they do not.

As advised before, the very vulnerable complainant could complaint to the public entity about the failure to use an interpreter however they are often so traumatised by the sexual and/or domestic violence they have experienced they do not have the ability to make the complaint and endure the complaints process (which can take an inordinate period). They prefer to conserve their energy for surviving the ongoing harassment from the perpetrator of violence rather than opening a “fight” with another entity.

Recommendation Twelve

That a monitoring and accountability mechanism be introduced for professionals in public entities who fail to appropriately engage an interpreter, especially in highly sensitive matters such as sexual violence.

Recommendation Thirteen

That magistrates undertake training on culturally and linguistically diverse community issues including the need for interpreters and clear and publicly available guidelines be developed for use in the courts.

Aboriginal and Torres Strait Islander Women

It is acknowledged that Aboriginal and Torres Strait Islander women’s experience of sexual violence occurs in an historical context of colonisation; dispossession; loss of culture resulting in the breakdown of kinship

systems and of traditional law; racism; and government policies of forced removal of children from families.²

The *Wiyi Yani U Thangani (Women's Voices) Securing Our Rights, Securing Our Future Report* provides data and contextual backdrop to understanding Aboriginal and Torres Strait Islander women's experiences and some of this is set out below.

Compounding issues of poverty, discrimination, and failure to access basic rights impact on safety

"I have heard from our women and girls that they are living within a system that does not recognise their basic rights to things like housing, education, health, and financial security. This ingrained systems deficit perpetuates cycles of discrimination, poverty and trauma in our communities and further entrenches disadvantage and inequality. Women and girls tell me how these unsafe environments undermine and deny the full realisation of their rights and prevent them from breaking cycles of harm."³

Regional and remote

Comparatively, we make up 25.3% of the total population in remote areas, with some of our most remote communities being almost exclusively Aboriginal and Torres Strait Islander populations. This means that issues affecting remote and very remote communities disproportionately affect Aboriginal and Torres Strait Islander peoples.⁴

Disability

Almost half (45%) of Aboriginal and Torres Strait Islander peoples aged 15 years and over live with one or more disabilities or restrictive long-term health conditions. Disability is more prevalent among our women than our men, 47% compared with 43%.⁵

Young population

The median age of the Aboriginal and Torres Strait Islander population is 23 years old (compared to 37.8 years old for the non-Indigenous population). The Aboriginal and Torres Strait Islander population has a relatively larger proportion of young people and a smaller proportion of older people compared to the non-Indigenous population.⁶

Violence against women

Aboriginal and Torres Strait Islander people are between 2 and 5 times more likely than other Australians to experience violence as victims or offenders.

² [ourwatch reporting on a-ts family violence aa v1.pdf \(1800respect.org.au\)](#)

³ [ahrc wiyi yani u thangani report 2020 \(1\).pdf](#) page 37

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

Aboriginal and Torres Strait Islander women are 5 times as likely to experience physical violence, and 3 times as likely to experience sexual violence, than other Australian women⁷.

Recommendation Fourteen

There should be specific consultation with Aboriginal and Torres Strait Islander women around any proposed process changes, from a victim's perspective.

Private Prosecutions

We would support the continuation of private prosecutions but with some check on the eligibility and bona fides of such prosecutions. They may well provide an avenue for redress in matters involving violence against women if the police will not proceed with a charge. The NSW approach seems feasible and appropriate.

Recommendation Fifteen

That QLD adopt the NSW approach to Registrar sign off for private prosecutions and they are subject to not being accepted if they do not disclose grounds for the proceedings, are not in the required form and are frivolous, vexatious, without substance or no reasonable prospect of success.

If you require any further information, please do not hesitate to contact the Secretariat.

Kind Regards,

Angela Lynch

QSAN Secretariat

⁷ [ourwatch reporting on a-ts family violence aa v1.pdf \(1800respect.org.au\)](#)