

# Submission of the Law and Advocacy Centre for Women Ltd

## Victorian Law Reform Commission Inquiry: Improving the Response of the Justice System to Sexual Offences

### Background to the Law and Advocacy Centre for Women

The Law and Advocacy Centre for Women Ltd (LACW) is a community legal centre and member of the Federation of Community Legal Centres. It is the only legal service in Victoria whose primary focus is to provide a gender-specific approach to assisting women who are in, or at risk of entering, the criminal justice system. LACW was established in 2016, specifically in response to the rising rates of criminalisation and imprisonment for women. Its mandate is to combat these trends by providing a holistic approach to women in the justice system, providing a wraparound service that combines legal advice and representation with case management to address the underlying causes of women's criminalisation and imprisonment. The majority of LACW's legal work is in the provision of criminal defence advocacy. Other areas of practice include infringements and fines; victims of crime assistance; and family violence intervention orders.

### Introduction

LACW welcomes the opportunity to make this submission to the Victorian Law Reform Commission's (Commission) Inquiry into Improving the Response of the Justice System to Sexual Offences (the Inquiry). Our submission addresses the needs and experiences of woman who are victims of sexual assault that have also had experiences of the criminal justice system themselves. General responses to the matters raised in the Inquiry's issues papers A, D, G and H are set out below.

LACW welcomes the Commission's recognition that sexual harm is inherently gendered. Women are far more likely to be victims of sexual assault than men. Statistics from Victoria's Crime Statistics Agency in 2016 show that 79.7% of victim reports of sexual offences involved a female victim, with 18.8% involving a male victim (and the balance unknown). In addition, men are far more likely to be the perpetrator of sexual assault than women. Figures from the same period indicate that 95.2% of alleged offender incidents of sexual assault involved a male offender, with 4.2% involving a female offender (and the balance unknown).

A significant proportion of LACW's clients have reported being victims of sexual assault and violence, including family violence. For reasons that will be discussed further below, these incidents are often not reported to the police, and the incidences of victimisation for women in the criminal justice system are likely to be greater than official figures show. Our submission to the Inquiry will address issues that arise for criminalised women who are also victim/survivors of sexual assault, drawing from research and our own experiences working with criminalised women.

In making this submission, we would like to emphasise the importance of including the voices of women with lived experience as victim/survivors of sexual assault who have also had experience of

the criminal justice system in the planning, design and implementation of any programs or processes that are designed to improve outcomes for victim/survivors of sexual assault. Victim/survivors face multiple barriers when it comes to speaking about their experiences, owing to the stigma they may feel as a result of their experiences, power imbalances that exist when they are dealing with institutions, governments and people in positions of authority, and the risk of re-traumatisation that results from telling their stories. These barriers are exacerbated for criminalised women who may have had multiple negative interactions with government authorities, including police and courts, and are further stigmatised due to their criminalisation. A targeted and purposeful approach to including the voices of criminalised women in consultations and decision-making processes must be undertaken. It must specifically include the voices of Aboriginal and Torres Strait Islander women and women from culturally and linguistically diverse backgrounds, and it must also be informed by the knowledge gained by specialist organisations who work with criminalised women on a daily basis.

#### [Issues Paper A: Working together to respond to sexual offences: Systems.](#)

As identified by the Commission, there are a multitude of different organisations that victim/survivors may access when seeking support as a result of sexual harm. Yet there may be barriers to women accessing the services they need. These barriers can include services not being responsive to the needs of culturally and linguistically diverse women, Aboriginal and Torres Strait Islander women, women with disabilities or women who are transient or homeless. Criminalised women face additional barriers as a result of multiple layers of disadvantage which include the stigma arising from their own criminalisation. This can lead to mainstream services not viewing them as ‘deserving’ victims and dismissing their experience of trauma as being less significant.

Women in the criminal justice system have disproportionately high rates of prior victimisation, including as victims of sexual assault and family violence. These rates are even greater for Aboriginal and Torres Strait Islander women. They require highly specialised responses that do not replicate or further exacerbate the harm that they have already suffered.

As concluded by ANROWS following a review of extensive research on this topic, criminalised women who have experienced sexual violence require ‘holistic, consistent’ care.<sup>1</sup> Specifically, ANROWS concluded:

- Services and legal responses must be developed to respond to the specific needs of women in the criminal justice system and create clear pathways to support.
- Coordinated, wraparound services are necessary for women released from prison who are experiencing family violence and/or sexual violence.
- Services for women released from prison who are experiencing family violence and/or sexual violence need to operate in ways that do not reinscribe criminality.
- Culturally appropriate responses are imperative to addressing family violence and sexual violence in Aboriginal and Torres Strait Islander communities.

LACW is supportive of a collaborative and multi-agency approach in responding to sexual assault. However, it is vital that in the development of these responses, the experiences and support needs of

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<sup>1</sup> Australia’s National Research Organisation for Women’s Safety. (2020). *Women’s imprisonment and domestic, family, and sexual violence: Research synthesis* (ANROWS Insights, 03/2020). Sydney, NSW: ANROWS.

criminalised women are incorporated. This can be achieved by being guided by the voices of women with lived experience of the criminal justice system, and meaningfully engaging with specialist services who work with these women on a daily basis.

### Family violence and the Orange Door hubs

The high incidents of sexual assault within the family violence context means that any response to sexual offending must incorporate a detailed consideration of the underlying complexities of family violence. LACW welcomes the consideration of an interdisciplinary, cross-sector approach to responding to sexual assault where it occurs within the context of family violence. The inter-relationship between sexual assault services and the Orange Door hubs will be essential to this response, as will recommendations from the Royal Commission into Family Violence in relation to the integration of the family violence and sexual assault sectors.

In this context, however, it is important to highlight the enduring blind-spot in the implementation of reforms across the family violence sector in the wake of the Royal Commission when it comes to the needs of criminalised women. Specifically, the Orange Door hubs have not been set up to deal with circumstances where vulnerable women are identified as both the victim and perpetrator of family violence. We are aware of instances where Orange Door hubs have excluded women from victim support services on the basis that they are a respondent to an intervention order, even if they are also a protected person on a different order.

This can occur in a range of different circumstances, including:

1. Where a woman has been misidentified by police as the primary aggressor in a family violence incident, for instance, in circumstances where she has defended herself against intimate partner violence;
2. Where cross intervention orders have been made or sought; or
3. Where a woman is the protected person on an intervention order involving her partner or former partner, and is also identified as the perpetrator on an unrelated order involving other members of her family.

In considering how other services and systems work with the sexual assault system so that people are supported to seek justice, it is vital that the complexities of the interaction between family violence and sexual assault, in particular where a female victim has also been identified as a perpetrator of family violence, are understood and are not used as a means through which women are denied access to services that could assist in dealing with the harm that they have suffered.

Any service response involving family violence and sexual assault must avoid a fixed dichotomy between 'victims' and 'perpetrators' of family violence that fails to recognise the complexities that often exist when women are identified as perpetrators of family violence but have also been victims themselves.

Criminalised women who have been victims of sexual assault and family violence often have multiple, complex needs and present with intersecting issues including homelessness, substance abuse and poor mental health. This requires a flexible, non-judgemental and culturally appropriate response that has not, in the context of family violence, been provided in the initial roll-out of the Orange Door hubs.

## Issues Paper D: Report to Charge

Significant reforms to the ways in which police investigate sexual assault have no doubt improved the support available to victims throughout this process. Nonetheless, for women who have had negative experiences with police in the past, the justice system's centring of police will likely be a barrier not only to reporting sexual assault in the first instance, but also to maintaining trust and engagement throughout the process of any prosecution.

The vast majority – around 70-90% – of women in Australia's prison system have been the victim of violence, including sexual assault and family violence.<sup>2</sup> The Crime Statistics Agency in Victoria found that in 2018 7.8% and 7.7% of unsentenced and sentenced women respectively were reported as the victim of sexual assault in the two years prior to their reception into prison.<sup>3</sup> These figures are significantly higher than the general population.<sup>4</sup> Yet given that women in prison self-report a much greater incidence of victimisation, this suggests a lack of reporting for sexual assault by women in the criminal justice system.

Women who have themselves been charged with criminal offences at some point in their lives have had the experience of being arrested, charged and in many cases imprisoned by police and courts. As victims of sexual assault, they are then asked to disclose their intensely personal experiences to these same institutions, and to trust that they will be believed, treated fairly and that their matters will be investigated and prosecuted.

Anecdotally, LACW is aware that women may mistrust or fear police for many reasons. These include their involvement in child protection matters (including arresting young people on safe custody warrants and physically enforcing child removal), misidentifying women as primary aggressors in family violence matters,<sup>5</sup> arresting and remanding women in increasing numbers,<sup>6</sup> and on some occasions committing violence or harassment themselves with little to no accountability.<sup>7</sup> Further, for women who are criminalised due to their personal characteristics such as being an Aboriginal or Torres Strait Islander woman or a woman of colour, being a drug user, being recognisably unwell, being homeless or in insecure housing, and/or being poor, police are unlikely to be considered trustworthy or likely to help.

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<sup>2</sup> Justice Health and Forensic Mental Health Network, 2017, *2015 Network Patient Health Survey Report*, Sydney.

<sup>3</sup> Crime Statistics Agency, *Characteristics of offending of women in prison in Victoria, 2012-2018, November 2019*, p. 20.

<sup>4</sup> The 2016 ABS Personal Safety Survey (PSS) estimated that in Australia, 1.6% of women had been sexually assaulted at least once in the previous 12 months. Australian Institute of Health and Welfare, *Sexual Assault in Australia*, published August 2020, p. 3.

<sup>5</sup> No To Violence, *NTV Discussion Paper: Predominant Aggressor and Victim Misidentification* (November 2019) <https://ntv.org.au/wp-content/uploads/2020/06/20191121-NTV-Discussion-Paper-Predominant-Aggressor-FINAL.pdf>; Women's Legal Service Victoria, *Policy Paper 1 "Officer she's psychotic and I need protection": Police misidentification of the 'primary aggressor' in family violence incidents in Victoria* (July 2018) <https://www.womenslegal.org.au/files/file/WLSV%20Policy%20Brief%201%20MisID%20July%202018.pdf>.

<sup>6</sup> Imprisonment rates for women in Victoria have dramatically increased in recent years. In the past decade, the number of women in Australian prisons rose by 85%. In Victoria, there was a 137% increase (Australian Bureau of Statistics, *Prisoners in Australia, 2018, 'Prisoner characteristics, States and Territories (Tables 1 to 13)'*). The number of women imprisoned in Victoria has grown from 248 in 2008 to 581 in 2018 (Corrections Victoria (2019). *Annual Prisoner Statistical Profile 2006-2007 to 2017-2018*. Melbourne: Corrections Victoria).

<sup>7</sup> Nino Bucci, 'Victoria police officer dismissed for sexual harassment reinstated', *The Guardian* (online) 14 December 2020 <<https://www.theguardian.com/australia-news/2020/dec/14/victoria-police-officer-dismissed-for-sexual-harassment-reinstated>>; Hayley Gleeson, 'Victoria's 'staggering' record: 82 cops charged with family violence in five years, but only one found guilty', *ABC News* (online) 21 October 2020 <<https://www.abc.net.au/news/2020-10-21/dozens-of-victoria-police-officers-charged-with-family-violence/12757988>>.

Research from the Women’s Legal Service Victoria supports this, noting:

[t]he misidentified women we see through our duty lawyer service often present with the following demographic characteristics and indicators of disadvantage, which give necessary context to her victimisation:

- Indigenous women, with histories of complex, intergenerational trauma who in addition, may experience racial discrimination and prejudice when engaging with police
- Refugee and migrant women, who may also face discrimination in engaging with police
- Disability or mental health issue/s
- Substance misuse
- Caring responsibilities for children
- Male partner commonly has a criminal history
- Have complex needs and are known to police
- Have had police FVIOs made for their protection against the now alleged victim.

Another compounding factor is that occasionally the female party will also have a criminal history for low-level dishonesty offences – often linked to her experiences of victimisation and poverty.<sup>8</sup>

Our clients have told us of having their stories of abuse or assault dismissed or viewed with scepticism by police due to their criminal history, substance use, or mental health issues. More specifically, we are aware of specific examples where clients have not reported serious sexual offences perpetrated against them due to their fear that they will be arrested for unrelated matters.

That some women feel unable to report sexual violence due to fear of a system ostensibly intended to protect them is a serious access to justice and human rights issue.

To assist survivors of sexual and family violence, the Victorian government has established multidisciplinary centres (MDCs), which ‘co-locate a range of agencies in the one building to provide a victim-centred, integrated and holistic response to victim/survivors.’<sup>9</sup> These MDCs are located away from police stations are not marked as police buildings, and the police members who work there are not uniformed.<sup>10</sup> In our submission, it is essential that detailed, qualitative evaluations of the experiences of victim/survivors in accessing MDCs, and ongoing data collection on rates of reporting and prosecution, are undertaken to determine whether MDCs are actually beneficial to the community.

The needs and experiences of criminalised women must be included in planning for these centres and in the evaluation of their effectiveness. It is probable that criminalised women will still face significant barriers to reporting through these centres given their previous interactions with police and authority

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<sup>8</sup> Women’s Legal Service Victoria, *Policy Paper 1 “Officer she’s psychotic and I need protection”: Police misidentification of the ‘primary aggressor’ in family violence incidents in Victoria* (July 2018).

<sup>9</sup> Victoria Police, *Multidisciplinary Centres* (31 July 2020) < <https://www.police.vic.gov.au/sexual-offences-and-child-abuse-investigation-teams>>.

<sup>10</sup> Victoria Police, *Multidisciplinary Centres* (31 July 2020) < <https://www.police.vic.gov.au/sexual-offences-and-child-abuse-investigation-teams>>.

figures, and for this reason their stories and voices must be included in the design and ongoing implementation of these centres.

In Queensland, survivors may use ‘Alternative Reporting Options’, which are alternatives to official police complaints. These reports may be anonymous, may include consent for police to obtain medical evidence, and may – with the survivor’s consent – lead to a formal police investigation in the future. The information in the anonymous reports may also be used to assist police in other related investigations.<sup>11</sup> This approach may be broadly useful, in particular in the context of survivors reporting anonymously to try and ensure that the perpetrator does not offend again. Once again, ongoing evaluation and data collection around these types of processes is essential in ensuring that their effectiveness is properly assessed. The planned review from the Criminology Research Council for 2020-2021 titled ‘Alternative and Confidential Reporting Options for Sexual Assault: An Exploration of their Purpose, Use and Potential in Australia’<sup>12</sup> will no doubt assist with exploring available options that do not centre police, at least at the entry point.

### Police accountability

Following the above discussion, police accountability in investigating and prosecuting sexual offences must be improved urgently to ensure community faith in police and to build trust with victims of sexual offences who have had previous negative interactions with police.

Recent data from state and territory police agencies shows that police have rejected more than double the reports of sexual offences than they have reports of other offences. These figures indicate that while 2 to 5 percent of all reports to police are of incidents that did not occur, police reject 9 percent of sexual offence reports. This figure does not factor in what is known to be a lower rate of reporting of sexual offences, compared with other crimes.<sup>13</sup>

There is a small but growing body of jurisprudence relating to police accountability in this area. In the United Kingdom, the case of *DSD & another v Commissioner of Police of the Metropolis*<sup>14</sup> held that police have a duty of care to effectively investigate reports of crimes perpetrated by individuals – in this case being sexual offences. While the primary basis for the plaintiff’s argument in this case was that European human rights law prohibits torture or inhuman or degrading treatment, the appeal court (which dismissed an appeal against the finding of the existence of such a duty) confirmed that beyond this, the issue at hand was one of whether the policing *structures* were failing, or whether there were operation deficiencies.<sup>15</sup> In Australia, the Victorian Supreme Court in *Smith & Ors v the State of Victoria*<sup>16</sup> accepted that it is arguable police could owe a common law duty of care to specific victims of domestic violence to protect them from preventable harm.

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<sup>11</sup> Queensland Police, *Alternative Reporting Options* (26 October 2020) < [<sup>12</sup> Digital Ethnography Research Centre, \*Alternative and Confidential Reporting Options for Sexual Assault: An Exploration of their Purpose, Use and Potential in Australia\*, <<https://digital-ethnography.com/alternative-and-confidential-reporting-options-for-sexual-assault-an-exploration-of-their-purpose-use-and-potential-in-australia/>>](https://www.police.qld.gov.au/units/victims-of-crime/support-for-victims-of-crime/adult-sexual-assault/alternative-reporting#:~:text=Alternative%20Reporting%20Options%20(ARO)%20exists,survivors%20of%20a%20sexual%20assault.&text=ARO%20gives%20the%20survivor%20the,not%20involve%20any%20judicial%20process.></a></p></div><div data-bbox=)

<sup>13</sup> Inga Ting, Nathanael Scott and Alex Palmer, ‘Rough justice: How police are failing survivors of sexual assault’, *ABC News* (online) 3 February 2020 <<https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364?nw=0>>.

<sup>14</sup> [2015] EWCA Civ 646.

<sup>15</sup> *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11.

<sup>16</sup> [2018] VSC 475.

It is clear that the current process, which allows for police discretion and decision-making with little to no oversight, is unsatisfactory for survivors of sexual offences. It is also clear that the community's experiences of the current process are unsatisfactory, and that trust in police is compromised. Urgent, significant work to address police accountability must take place. In context of this submission, we would recommend the following:

- The development of clear, uniform frameworks and performance expectations for investigations of sexual offences, and decisions to prosecute or discontinue an investigation;
- Mandatory oversight of decisions to prosecute or discontinue an investigation;
- Mandatory record-keeping and publication of data relating to numbers of reports received, investigations commenced, prosecutions initiated, and resolutions achieved for sexual offences;
- Clear expectations relating to communication with a complainant;
- Police training and frameworks in responding to family violence incidents involving sexual offences;
- Meaningful engagement with CALD communities and Aboriginal and Torres Strait Islander communities and organizations already working in this space; and
- Extensive anti-racism work within the police force.

Oversight of the investigation of sexual offences should be undertaken by an independent review body, which could hear complaints and make recommendations if it appears police are not meeting their duty of care to a complainant during the course of an investigation or prosecution. Furthermore, it is vital that women who attend police stations to report instances of sexual assault are not arrested or interviewed for unrelated matters.

Finally, in order to ensure community trust in the police force, it is essential that an independent body be given the responsibility of investigating police complaints more generally, in particular where allegations of abuse are made against police.

### [G: Alternative and restorative justice models](#)

Alternative and restorative justice models may be preferable for survivors who do not wish to include police, courts, and/or the mainstream justice system in their experience of seeking justice.

In this regard, LACW endorses the submission by RMIT's Centre for Innovative Justice to this Inquiry in relation to issues paper G: Restorative and Alternative Justice Models. In particular, we wish to reiterate the following points made in that submission:

- Restorative justice processes that respond to sexual offences should be offered in addition to criminal justice system responses, not instead of them.
- Victim/survivors who wish to engage with the formal criminal justice system should be encouraged and supported to do so.
- Restorative justice should be offered as a process that victim/survivors can choose to engage with as well, as a complementary process that takes place alongside formal criminal justice processes.
- Victim/Survivors who do not report to police, or who report but charges are not pursued, should also be offered the opportunity of participating in restorative justice processes.



For criminalized women, it is vital that restorative justice models are available but do not replace formal criminal justice processes. This is to ensure that harm suffered by criminalized women is given equal weight in the eyes of the law, that criminalized women are entitled to the same protection as all victims, and that perpetrators of sexual violence against criminalized women are held to account.

## H: Civil law and other non-criminal responses

This section briefly addresses the Victims of Crime Assistance Tribunal (VOCAT) as an alternative means for victims to seek redress in relation to the harms they have suffered as a result of sexual violence. While the Commission has undertaken an extensive review of the VCOAT Act previously, we nonetheless consider it important to raise these issues in the specific context of improving responses to sexual offending.

VOCAT can potentially provide an accessible means through which victims of sexual assault can seek redress for the harm they have suffered. Importantly, it is also intended to provide them with an opportunity to tell their story and have access to practical support to deal with the ongoing impacts of their trauma. However, there are mechanisms under the VOCAT process that currently act as a barrier or deterrent to women who have had experience of the criminal justice system themselves. In particular:

- The VOCAT process appears designed around one-off acts of violence where a physical injury has resulted. While there is some ability to recognise that multiple injuries may have occurred, and recognition that psychological harm is an injury under the Act, the process is not equipped to deal with instances of family or sexual violence perpetrated against a victim over an extended period. It is likewise not well equipped to deal with the ongoing trauma and long-term impacts of sexual assault.
- While the process is intended to provide victims with an opportunity to tell their stories, Magistrates hearing VOCAT matters are not necessarily specialists in VOCAT matters or trained in sexual assault and family violence. In our experience some can approach matters as they would an adversarial process, with a degree of scepticism that undermines the role of the court as a mechanism for redress, further retraumatizes victims and undermines their trust in institutions to assist them.
- The requirement that victims satisfy the court that they are of 'good character' in circumstances where they have had previous involvement in the criminal justice system is degrading and demeaning to criminalised women who have suffered harm as a result of sexual assault and family violence. It perpetuates a false dichotomy between 'deserving' and 'undeserving' victims and further stigmatises women who have faced criminal charges in the past. Sexual assault can often be the trigger for or exacerbate underlying mental health or substance abuse issues, which in turn place women on a pathway towards criminalisation and imprisonment. Given the high instance of victimisation amongst women in the criminal justice system, this character test operates as a significant barrier to VOCAT assisting the victims that would most benefit from its assistance.
- The process for notifying an alleged offender where a criminal prosecution has not proceeded is also a significant barrier to victims of sexual assault accessing assistance through VOCAT. While the intention is that this only occur in relatively few matters, the mere possibility of this occurring can operate as a huge deterrent to victims pursuing claims.



In our experience, advice by the Tribunal to a claimant that it intends to notify a perpetrator of sexual violence that a claim is being made can be extremely traumatic for women.

While extensive reforms have been proposed by the Commission in relation to the VOCAT system, we submit that in the immediate term, a specialist family violence and sexual assault list should be established within VOCAT involving Magistrates and court staff who are trained to hear matters involving sexual offences and family violence. Alongside this, specialist support services should be made readily available through the court process to victims of crime who are not yet receiving assistance.

### Further information

Thank you for the opportunity to contribute to this Inquiry. For further information, please contact Elena Pappas (CEO) ([epappas@lacw.org.au](mailto:epappas@lacw.org.au)) or Jill Prior (PLO) ([jprior@lacw.org.au](mailto:jprior@lacw.org.au)).

We would like to acknowledge and thank Lauren Bull of LACW for her extensive input into this submission.

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*LACW acknowledges that it operates on Aboriginal country and that sovereignty over this land was never ceded. We pay our respects to the traditional owners of all the lands on which we operate, and in particular, to the Wurundjeri people of the Kulin nations, and to their elders past, present and emerging.*