

Australian Law Reform Commission
Justice Responses to Sexual Violence
May 2024

Advocacy and collaboration to improve access and equity

Royal Australian and New Zealand College of Psychiatrists submission

Justice Responses to Sexual Violence

About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness, and advises governments on mental health care. The RANZCP is the peak body representing psychiatrists in Australia and New Zealand and, as a binational college, has strong ties with associations in the Asia-Pacific region. The RANZCP is responsible for training, educating, and representing psychiatrists in Australia and New Zealand.

The College has over 8400 members, including more than 5900 qualified psychiatrists and over 2400 members who are training to qualify as psychiatrists.

The RANZCP welcomes the opportunity to contribute to the Australian Law Reform Commission's (ALRC) Justice Responses to Sexual Violence Issues Paper consultation. This submission has been developed in consultation with several RANZCP committees, including the Family Violence Psychiatry Network and psychiatrists with direct experience of working with victim survivors of sexual violence. As such, the RANZCP is well positioned to provide advice about this issue due to the breadth of academic, clinical and service delivery expertise it represents.

Introduction

This submission responds to the questions outlined in the Issues Paper which the RANZCP is most equipped to provide insights. As the peak body representing psychiatrists in Australia and New Zealand, this submission will limit comment to the questions concerning memory and responsive behaviour in the context of sexual violence trauma and how relevant stakeholders and the wider judicial process would benefit from trauma-informed training and trauma-informed adaptations to the system.

This submission builds upon the RANZCP's ongoing work in improving the mental health outcomes of those who experience violence. This commitment is detailed in the [Position Statement 102: Family violence and mental health](#) and our [submission](#) to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

The RANZCP is also a strong advocate for trauma-informed practice, as detailed in its [Position Statement 100: Trauma-informed practice](#) and endorsement of the [Australian Guidelines for the Prevention and Treatment of Acute Stress Disorder, Posttraumatic Stress Disorder and Complex PTSD](#).

Throughout this submission, the term 'victim survivor' is used to align with the terminology used in the Issues Paper. The RANZCP acknowledges that the preferred terminology differs across the community, however this term acknowledges the ongoing effects and harm caused by abuse and violence as well as honouring the strength and resilience of people with lived experience of family violence. Ultimately, it is imperative to follow the lead of the person seeking support, given the journey from victim to survivor is unique to each person.

Recommendations

The RANZCP recommends:

- Enhance integration and consideration in the justice system of the evidence on the impacts of trauma on memory and responsive behaviour.
- Psychiatrists experienced and expert in working with people and trauma be routinely included as expert witnesses to contextualise victim survivor testimonies and explain what can be rationally expected in terms of traumatic memory recollection and behaviour.

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- Mandatory and ongoing trauma-informed training for police, judiciary and other relevant stakeholders, co-designed with psychiatrists with expertise and experience in trauma-informed approaches.
- The implementation of court modifications and special measures similar to those used for accessibility and mental health conditions to minimize re-traumatization and address myths about memory and responsive behaviour.
- Stronger provisions to protect the disclosure and use of a complainant's personal information obtained during counselling or other therapeutic intervention.

Memory and responsive behaviour in the context of sexual violence trauma

Are you aware of the research about memory and responsive behaviour in the context of sexual violence trauma? Do you have views about that research?

The effects of both trauma and posttraumatic stress disorder (PTSD) on memory and responsive behaviour are well established by research spanning across multiple disciplines. Trauma, in this context, refers to an event that is psychologically overwhelming for an individual and it is broadly understood as a state that impairs integration across many domains of memory. [1] Victimization by sexual violence is also strongly associated with the development of posttraumatic stress disorder (PTSD), which can have further impacts on memory. At least half of rape victims develop PTSD, and rape and sexual assault account for two of the three traumas with the highest proportions of PTSD worldwide.[2,3]

The way in which trauma and PTSD in the context of sexual violence impacts on memory and responsive behaviour varies and can be influenced by numerous factors. Victim survivors of one-off traumatic events typically recall only three to five clear details.[4] Following rape trauma, memories may be impaired with amnesia or amnesic gaps, or may contain differences between accounts. [5,6,7] Memory suppression, repression and dissociation are common coping mechanisms used by victim survivors, which can exacerbate periods of amnesia or difficulty accessing memories of the traumatic event.[8] Trauma can also lead to delays in reporting of sexual violence due to confusion, guilt or shock, fear of the perpetrator, fear they will not be believed, contextual factors such as rape myth acceptance and to avoid re-traumatization.[8]

First Nations in Australia are also more likely to experience intersecting forms of trauma and remain one of the most at-risk demographics for sexual violence and experience a higher burden of PTSD compared to other Australians. Literature indicates around 90% of violence (including sexual violence) against First Nations women goes undisclosed. [9] Intergenerational trauma from practices associated with colonisation contributes to this reluctance to engage authorities, with First Nations victim survivors identifying fears around cultural insensitivity, racism, re-victimisation during the criminal justice process and fear of the police and the authorities as barriers to report violence.[9]

Even in the absence of trauma, memories tend to be fragmented, inconsistent, and lacking in detail, with omissions and variations between recollections typical aspects of everyone's memory.[10] Memories represent only short time segments of an experience, rather than a complete record.[11] Memories for details also tend to become weaker over time[12] and there is no significant link between confidence in and the accuracy of a memory.[13] As such, it is neither realistic, nor rational, to expect victim survivors of sexual assault to recall all aspects of their traumatic experiences with detailed accuracy from start to finish.

Despite this, the impacts of trauma on memory and broader interpretations of how memory works continue to be both poorly understood and considered throughout the judicial process. Misconceptions about human memory contribute to the high attrition rates of rape cases in the criminal justice system.[8] Inconsistencies in recollection and delays in reporting continue to be used to undermine the credibility and reliability of

victim survivor testimonies.[8] Sexual assault cases involving adult victims often come down to the word of the victim against that of the defendant, with little or no corroborating evidence. As such, the probability of conviction usually relies on the victim's ability to articulate the events and convince a jury beyond reasonable doubt that a crime has occurred.

The role of expert evidence and traumatic recollection and behaviours

Do you have views about whether prosecutors should call expert evidence about that research (that is, about how people recall traumatic events and/ or about how victim survivors of sexual violence typically respond)? Is that expert evidence being called in your jurisdiction? If so, how is it working? If it is not being called, do you know why not?

As highlighted above, knowledge on how people recall and respond to traumatic events continues to be poorly understood and considered throughout the judicial process. The RANZCP understands that to be considered admissible, expert evidence must consist of opinions beyond the common understanding of the jury and must fall within the specialised field of the expert witness.[14] If the jury can reach conclusions independently, expert evidence will not be accepted. However, the law acknowledges situations where specialised knowledge or skills are necessary for drawing accurate inferences from established facts, which may not be within the jury's expertise.[14]

It is therefore imperative that expert evidence is routinely included in sexual violence trials to educate and contextualise victim survivor testimonies and explain what can be realistically and rationally expected in terms of traumatic memory recollection and behaviour.[15] Other manifestations and behaviours related to trauma can also be misconstrued and misinterpreted in the absence of an expert witness to explain the behaviours and their potential evidential and testimonial relevance.[15]

Consistent with our [Position Statement 80: The Role of the Psychiatrist in Australia and New Zealand](#), psychiatrists have a responsibility to educate patients, carers and the broader community to ensure that the complexities of mental health are understood in ways that prevent stigma and discrimination. The RANZCP therefore recommends that psychiatrists and specifically, those experienced and expert at working with people and trauma in the context of sexual violence, be routinely included to provide expert evidence as part of the judicial process.[15]

Other recommendations for reform and to mitigate myths and misconceptions about memory and responsive behaviour

Do you have a view about the other recommendations that have been made (educative videos, mixed juries, judge-alone trials, and education and training)? Do you have other ideas for reform based on research which suggests the evidence of complainants is assessed according to myths and misconceptions about memory and responsive behaviour?

Trauma-informed training for police, judiciary and other relevant stakeholders

Consistent with our [Position Statement 100: Trauma-informed practice](#), trauma-informed practice includes recognising diversity in trauma presentation, appreciating the unique experiences of particular communities, and practicing in a manner that supports recovery and limits risks of re-traumatisation.

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The importance of trauma-informed practice has been raised repeatedly by victim survivors and the RANZCP supports their calls for professional training in trauma-informed practice to be made mandatory for service providers such as police, first responders, teachers, medical professionals and judges.[16]

This training should include how to identify signs of trauma, awareness of potential triggers, and how to create a secure and supportive environment to minimise re-traumatisation. In line with our [Position Statement 105: Cultural Safety](#), this training also needs to consider the intergenerational and intersectional impacts of trauma on First Nations and other culturally diverse victim survivors and how to create and deliver culturally safe reporting spaces that consider their distinct cultural needs.

This training (potentially online) should be co-designed between RANZCP as subject matter experts on trauma alongside police and other relevant stakeholders.

Court modifications and considerations to minimise the risk of re-traumatisation and mitigate the impact of myths and misconceptions about memory and responsive behaviour.

Victim survivors frequently report experiencing re-traumatisation at multiple stages in the criminal justice process with court proceedings often exposing victim survivors to triggering experiences that leave them feeling further disempowered, stigmatised, and shamed.[15]

The RANZCP advocates for court modifications and considerations, much like what is done in other situations regarding accessibility and severe mental health conditions. These considerations, which could be established in pre-court proceedings, include but are not limited to:

- Reduction of delays in finalising proceedings, which draws out trauma.[16]
- Greater provision and availability of special measures currently available in various specialist domains, such as pre-recordings, screens, removal of wigs and gowns, and closed courts.[16]
- Greater consistency in and utilisation of the legislation and conduct rules designed to reduce the risk of inappropriate questioning by defence counsel.[16]
- Consideration of whether juries for sexual violence cases are appropriate, particularly when myths and misconceptions about memory and responsive behaviour continue to persist.[8]

Stronger provisions to protect the disclosure and use of a complainant's personal information obtained during counselling or other therapeutic intervention.

Consistent with our [Position Statement: Patient–psychiatrist confidentiality: the issue of subpoenas](#), the subpoenaing of a victim survivors' medical history can exacerbate trauma and further deter reporting due to fears around private records being exposed. Counselling is also therapeutic as opposed to investigative; therefore, notes are often unsuitable for court and may be used instead to undermine the credibility and character of victim survivors. It can also impact victim survivor recovery, with the accessing of counselling records undermining the confidentiality of therapeutic relationships.

The RANZCP urges law reform that recognises the importance of confidentiality in mental health care, confining breaches to rare cases where an overriding medical or legal purpose is served, such as ensuring patient safety. Overseas models can serve as a guide to law reform – in particular, the stronger protections available under New Zealand law.[17] Otherwise, the RANZCP recommends reforms that support more limited disclosure in the form of contextually relevant reports limited to clinical impressions specific to the investigation.

Further information

The RANZCP thanks the ALRC for the opportunity to provide this submission. If you have any questions or wish to discuss any details further, please contact Nicola Wright, Executive Manager, Policy, Practice, and Research via nicola.wright@ranzcp.org or on (03) 9236 9103.

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