

THE TRAUMA-INFORMED TRIAL: A CONCEPTUAL FRAMEWORK TO GUIDE PRACTICE

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The criminal trial (and broader legal system) replicates trauma dynamics. For court participants who have experienced traumatic events (such as victims, defendants and other witnesses), this creates a risk of re-traumatisation. The concept of trauma-informed practice aims to guide practices so that re-traumatisation is minimised and no further harm is done. While a number of conceptual frameworks for trauma-informed practice have been developed, these have limitations, including that a conceptual framework for application in the context of the criminal trial (and, indeed, the legal system more broadly) has not yet been settled. This article presents a conceptual framework for the 'trauma-informed trial'. Such a framework will be an invaluable tool for those seeking to assess the extent to which existing criminal trial practices are trauma-informed and to assist with development of trauma-informed reforms to the trial. In this way, application of the framework may contribute towards minimising the re-traumatisation of criminal trial participants. By applying the methodology utilised in this article, similar conceptual frameworks could be developed for application to other legal system contexts.

I INTRODUCTION

[Trauma] results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional or spiritual wellbeing.¹

Research shows that many defendants — along with victims of (often interpersonal) crime — have suffered from traumatic experiences and, in fact, may be suffering from post-traumatic stress disorder when they engage with the

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¹ Substance Abuse and Mental Health Services Administration, US Department of Health and Human Services, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (Report, July 2014) 7 ('SAMHSA's Concept').

criminal justice system.² Yet, legal systems are said to replicate trauma dynamics, posing risks of re-traumatisation or secondary victimisation to those who become involved with the criminal justice system.³

Several features of the criminal trial may act as triggers for trauma survivors, leading to re-traumatisation. These include its adversarial nature (which, amongst other things, requires witnesses to be questioned in a way that challenges their honesty and credibility); the emphasis on orality in testimony (which requires witnesses to testify verbally in front of others); the formality of court (such as its strict rules and procedures, including rules around examination); the presence of an impartial and authoritarian decision-maker, and; depending on the nature of the case, the persistence of myths and misconceptions about the victim, defendant and/or crime.⁴ Owing to these features of the criminal trial, it has been suggested that a trauma-informed approach to the trial is necessary to minimise the inherently re-traumatising effects of the system and do no further harm to those who become involved with the trial process.⁵ Minimising further harm to these people might have other benefits too, such as eliciting better evidence from witnesses.⁶ As Melanie Randall and Lori Haskell argue:

While it may not be the role of law to ‘heal’ those harmed by crime, law does represent itself as playing a crucial role in creating the parameters around acceptable human conduct, and creating the conditions for a just and law-abiding society in which people can expect to have their rights and freedoms respected. If law in general, and the criminal law in specific, is to play such a fundamental role in human life, clearly its

² See, eg, Ronald C Kessler et al, ‘Trauma and PTSD in the WHO World Mental Health Surveys’ (2017) 8(5) *European Journal of Psychotraumatology* 1353383; C Benjet et al, ‘The Epidemiology of Traumatic Event Exposure Worldwide: Results from the World Mental Health Survey Consortium’ (2016) 46(2) *Psychological Medicine* 327; Emma Facer-Irwin et al, ‘PTSD and Complex PTSD in Sentenced Male Prisoners in the UK: Prevalence, Trauma Antecedents, and Psychiatric Comorbidities’ (2022) 52(13) *Psychological Medicine* 2794; Natasha Sindicich et al, ‘Offenders as Victims: Post-Traumatic Stress Disorder and Substance Use Disorder among Male Prisoners’ (2014) 25(1) *Journal of Forensic Psychiatry and Psychology* 44.

³ See, eg, Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan, 2020) 55–60, ch 11; Negar Katirai, ‘Retraumatized in Court’ (2020) 62(1) *Arizona Law Review* 81; Deborah Epstein and Lisa A Goodman, ‘Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences’ (2019) 167(2) *University of Pennsylvania Law Review* 399; Judith Herman, *Trauma and Recovery: The Aftermath of Violence* (Basic Books, 1997).

⁴ Cossins (n 3) 55–60, ch 11; Katirai (n 3) 85–6; Epstein and Goodman (n 3) 420–38; Herman (n 3) 160.

⁵ See, eg, Cossins (n 3) 554–5, 569; Cathy Kezelman and Pam Stavropoulos, ‘Trauma and the Law: Applying Trauma-Informed Practice to Legal and Judicial Contexts’ (Background Paper, Blue Knot Foundation, 9 October 2016) 9–11 (‘Trauma and the Law’).

⁶ Cossins (n 3) 555, 561, 569.

practices and processes should begin from an enhanced appreciation of human psychology, human capacities, and how traumatic events shape and disrupt these.⁷

The concept of trauma-informed practice was developed to guide the practices of those delivering human services so that they would ‘do no further harm’.⁸ To achieve this, trauma-informed practice requires service providers to recognise that clients may have a trauma history, to understand trauma and its impacts, and to minimise (as much as possible) the re-traumatisation of clients when delivering services to them (by applying certain principles of trauma-informed practice).⁹

While trauma-informed practice originated in the field of human services, it has since been applied in the legal system context as well as in fields such as physical health care, child welfare, schooling, domestic violence support services, social work, the military and prisons.¹⁰ Like the criminal trial, it is recognised that many institutions and systems in these fields are themselves trauma-inducing because they replicate trauma dynamics, making a trauma-informed approach all the more necessary.¹¹ Potentially trauma-inducing practices in these fields

⁷ Melanie Randall and Lori Haskell, ‘Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping’ (2013) 36(2) *Dalhousie Law Journal* 501, 533. See also Kezelman and Stavropoulos who argue that the law is pivotal in regulating human behaviour and adjudicating disputes: Kezelman and Stavropoulos, ‘Trauma and the Law’ (n 5) 3, 8.

⁸ Joshua M Wilson, Jenny E Fauci and Lisa A Goodman, ‘Bringing Trauma-Informed Practice to Domestic Violence Programs: A Qualitative Analysis of Current Approaches’ (2015) 85(6) *American Journal of Orthopsychiatry* 586, 588; Maxine Harris and Roger D Fallot, ‘Envisioning a Trauma-Informed Service System: A Vital Paradigm Shift’ [2001] 89 *New Directions for Mental Health Services* 3, 3–4, 10 (‘Envisioning a Trauma-Informed Service’). See also Denise E Elliot et al, ‘Trauma-Informed or Trauma-Denied: Principles and Implementation of Trauma-Informed Services for Women’ (2005) 33(4) *Journal of Community Psychology* 461, 462–3. Trauma-informed practice has also been referred to as trauma-informed care, trauma-informed practice and care, a trauma-informed approach, trauma-informed theory, and trauma-informed interactions (amongst other variations). This article uses the term ‘trauma-informed practice’ to emphasise that application of the conceptual framework is intended to guide *practices* used in the context of the criminal trial.

⁹ See generally Elliot et al (n 8); Jill Levenson, ‘Trauma-Informed Social Work Practice’ (2017) 62(2) *Social Work* 105; Sarah Katz and Deeya Haldar, ‘The Pedagogy of Trauma-Informed Lawyering’ (2016) 22(2) *Clinical Law Review* 359; SAMHSA’s *Concept* (n 1); Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8); Pam Stavropoulos, ‘The Principles of Trauma-Informed Care and the Need for Cultural and Organisational Change’ in Richard Benjamin, Joan Haliburton and Serena King (eds), *Humanising Mental Health Care in Australia: A Guide to Trauma-Informed Approaches* (Routledge, 2019) 307.

¹⁰ See, eg, SAMHSA’s *Concept* (n 1) 3; Kezelman and Stavropoulos, ‘Trauma and the Law’ (n 5) 2; Nicole C McKenna and Kristy Holtfreter, ‘Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness’ (2021) 30(4) *Journal of Aggression, Maltreatment and Trauma* 450, 451–2; Randall and Haskell (n 7) 404–5; Victoria A Anyikwa, ‘Trauma-Informed Approach to Survivors of Intimate Partner Violence’ (2016) 13(5) *Journal of Evidence-Informed Social Work* 484, 485; Levenson (n 9) 107; Yvonne Jewkes et al, ‘Designing “Healthy” Prisons for Women: Incorporating Trauma-Informed Care and Practice (TICP) into Prison Planning and Design’ (2019) 16(20) *International Journal of Environmental Research and Public Health* 3818, 3819.

¹¹ SAMHSA’s *Concept* (n 1) 2–3; Herman (n 3) 72–3; Stavropoulos (n 9) 312; Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 9–10.

include, for example, harsh disciplinary practices in school systems or the abrupt removal of a child from its abusive family in the child welfare system.¹²

Several different trauma-informed practice frameworks have been developed over the last two decades. While many of these frameworks have evolved from earlier iterations, each has articulated different sets of principles that are intended to guide practice. Some of these frameworks are argued to be generalisable across fields (although may be implemented in different ways across — and even within — fields),¹³ while others are said to be developed for application within a certain field (such as the legal system).¹⁴ However, as this article will show, each of these frameworks has limitations. In addition, different frameworks have been applied to the legal system context, indicating that a trauma-informed practice framework for the legal system is not yet settled. Indeed, Queensland's Women's Safety and Justice Taskforce recognised that currently 'there is no clear and instructive trauma-informed framework for practice for lawyers in Queensland'.¹⁵

In the light of this, this article presents a conceptual framework — the 'trauma-informed trial' — that applies to one aspect of the legal system: the criminal trial. This framework also aims to address limitations of existing frameworks. The trauma-informed trial framework is intended to be used as a tool by law and policymakers, law reformers, academics, lawyers and others to assess the extent to which existing criminal trial practices are trauma-informed and to inform development of trauma-informed reforms to the trial. The article does not intend to put forth a set of trauma-informed trial *practices* because the nature of such practices will differ depending on the specific context in which the conceptual framework is being applied (for example, whether it is being applied by prosecutors to their interactions with victim-witnesses or by law reformers to the reform of sexual violence trials). It is intended that specific trauma-informed practices be developed by others, however, through the application of the conceptual framework presented in this article.

The article begins, in Part II, by examining the concept of trauma-informed practice. This Part discusses some of the different sets of principles of trauma-informed practice that have been articulated over the years, highlighting their strengths and limitations. These sets of principles include those articulated by Maxine Harris and Roger D Fallot (the 'Harris and Fallot framework'),¹⁶ Denise E Elliot et al (the 'Elliot et al framework')¹⁷ and the United States' Substance Abuse

¹² SAMHSA's *Concept* (n 1) 2.

¹³ See, eg, Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8); Elliot et al (n 8); SAMHSA's *Concept* (n 1).

¹⁴ See, eg, Kezelman and Stavropoulos, 'Trauma and the Law' (n 5).

¹⁵ Queensland, Women's Safety and Justice Taskforce, *Hear Her Voice: Report One* (Report, 2 December 2021) 610.

¹⁶ Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8).

¹⁷ Elliot et al (n 8).

and Mental Health Services Administration ('SAMHSA's framework').¹⁸ These more general frameworks are considered in this article because they have previously been applied in the context of the legal system.¹⁹ This analysis is followed by a brief discussion of the key critiques of trauma-informed practice. The article then considers how the principles of trauma-informed practice have been applied in the context of the legal system and briefly discusses a fourth framework that has been designed specifically for the legal practice context, that articulated by Cathy Kezelman and Pam Stavropoulos (the 'Kezelman and Stavropoulos framework').²⁰

Part III presents the conceptual framework for the trauma-informed trial. The Part begins by making an argument for why the concept of trauma-informed practice could be compatible with the adversarial trial. It then justifies why SAMHSA's framework was chosen as the foundation for the trauma-informed trial conceptual framework and explains how its assumptions and principles have been operationalised to the criminal trial context. It also explains how some of the limitations of SAMHSA's framework (and the concept of trauma-informed practice more broadly) have been addressed. The Part concludes by suggesting that the methodology utilised in this article could be applied by others to develop similar conceptual frameworks for application to other contexts within the legal system.

II TRAUMA-INFORMED PRACTICE

Trauma-informed practice is argued by scholars to be an emergent paradigm.²¹ It originated in the field of human services, specifically mental health care and substance abuse treatment, in the early 2000s.²² Its central tenet is that all aspects of service delivery should be designed to be responsive to the effects of trauma on clients and to 'do no further harm'.²³ The ultimate goal (in this context) is to 'provide services in a manner that is welcoming and appropriate to the special

¹⁸ SAMHSA's *Concept* (n 1). Sets of principles other than those discussed in this article have also been developed. For example, Wilson, Fauci and Goodman identified six core principles of trauma-informed practice in domestic and family violence services which were based on qualitative content analysis of literature describing trauma-informed approaches in domestic and family violence services. However, these principles are largely the same as those articulated by SAMHSA: Wilson, Fauci and Goodman (n 8) 589–93.

¹⁹ See Part II below.

²⁰ Kezelman and Stavropoulos, 'Trauma and the Law' (n 5).

²¹ Stavropoulos (n 9) 307; Antonia Quadara and Cathryn Hunter, *Principles of Trauma-Informed Approaches to Child Sexual Abuse: A Discussion Paper* (Discussion Paper, Royal Commission into Institutional Responses to Child Sexual Abuse, 3 November 2016) 35.

²² See, eg, Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8) 4–5; Wilson, Fauci and Goodman (n 8) 587.

²³ Wilson, Fauci and Goodman (n 8) 587–8; Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8) 3–4. See also Elliot et al (n 8) 462–3.

needs of trauma survivors²⁴ so that services help to resolve trauma (rather than exacerbate it) and avoid re-traumatising clients.²⁵ This requires service providers and their practices and policies to understand trauma and its far-reaching impacts, and to recognise that clients may have a trauma history.²⁶

Some scholars have argued that an underlying assumption of trauma-informed practice is the ‘universal precautions’ approach, which provides that it is best practice to treat all clients as trauma survivors because service providers are not trained (or may not have the time) to diagnose trauma and may not recognise trauma symptoms.²⁷ It has been argued by some scholars that treating all clients as if they have a history of trauma will ensure that no one is re-traumatised through their interactions with services and institutions.²⁸ Even where clients do not have a trauma history, it is claimed that trauma-informed practices will only benefit their experience of human service delivery.²⁹ However, the universal precautions approach has been criticised by some feminist scholars who argue that it has the potential to overlook individual experiences, identity and personal characteristics.³⁰

Trauma-informed practice emphasises organisational and systems-level change.³¹ It focuses on service providers themselves and how clients are treated in everyday interactions with service systems.³² It differs from trauma-specific services (such as psychological counselling) which specifically aim to address trauma-related symptoms and help clients work towards recovery from traumatic experiences.³³ Trauma-specific services, however, may aim to use and build upon trauma-informed practices.³⁴

Over the last two decades, stakeholders have articulated various sets of principles of trauma-informed practice that are intended to guide practice so that re-traumatisation is minimised.³⁵ Many of these frameworks have evolved from and built upon previous frameworks. As described in Part I, this article focuses on four frameworks: the Harris and Fallot framework, Elliot et al framework,

²⁴ Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 5.

²⁵ Stavropoulos (n 9) 307–9; *SAMHSA’s Concept* (n 1) 2–3; Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 4–5.

²⁶ See generally Elliot et al (n 8); Levenson (n 9); Katz and Haldar (n 9); *SAMHSA’s Concept* (n 1); Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8); Stavropoulos (n 9).

²⁷ See, eg, Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 10; Elliot et al (n 8) 463, 474; *SAMHSA’s Concept* (n 1) 10; Wilson, Fauci and Goodman (n 8) 594.

²⁸ See, eg, Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 10; Elliot et al (n 8) 463, 474; *SAMHSA’s Concept* (n 1) 10.

²⁹ Kezelman and Stavropoulos, ‘Trauma and the Law’ (n 5) 7.

³⁰ This is discussed further in Part IIIB below.

³¹ Quadara and Hunter (n 21) 15.

³² Wilson, Fauci and Goodman (n 8) 587.

³³ Cossins (n 3) 540; Anyikwa (n 10) 487; Elliot et al (n 8) 472. Cossins notes that recovery from trauma is not a goal of the criminal trial but rather its goal is to adjudicate criminal charges: Cossins (n 3) 535.

³⁴ See, eg, Elliot et al (n 8) 472; Cossins (n 3) 548–50.

³⁵ See, eg, Quadara and Hunter (n 21) 51.

SAMHSA's framework and Kezelman and Stavropoulos framework. The next section explains the content of the first three of these frameworks (which are all general frameworks that are not specific to the legal context) and canvasses their strengths and limitations. The Kezelman and Stavropoulos framework is discussed in Part IIC (which considers how trauma-informed practice has been applied in the context of the legal system) as it has been developed specifically for the legal practice context. This analysis informs decisions around which framework should form the basis of the trauma-informed trial conceptual framework, discussed in Part III.

A Principles of Trauma-Informed Practice

Although the aim of trauma-informed practice is not to engage in recovery processes, the concept developed in response to and draws on trauma theory.³⁶ Psychiatrist Judith Herman set out a highly influential theory of trauma in her landmark book, *Trauma and Recovery*.³⁷ There she wrote that '[t]raumatic events are extraordinary, not because they occur rarely, but rather because they overwhelm the ordinary human adaptations to life. ... They confront human beings with the extremities of helplessness and terror, and evoke responses of catastrophe'.³⁸ These responses persist past the traumatic event itself in 'an altered and exaggerated state long after the actual danger is over', creating profound changes in physiological arousal, emotion, cognition and memory.³⁹ Herman theorised that the symptoms of trauma (and post-traumatic stress disorder) fall into three main categories: hyperarousal (persistent physiological arousal which reflects a continual expectation of danger), intrusion (reliving of the traumatic event as flashbacks or nightmares) and constriction (which reflects the numbing response of surrender).⁴⁰ These symptoms are reflected in the DSM-5 and ICD-11 diagnostic criteria for post-traumatic stress disorder.⁴¹ Not only do traumatic events affect survivors' psychological structures, but they also have a significant impact on systems of attachment and relations with others, such that survivors become disconnected from those around them.⁴²

³⁶ See, eg, Herman (n 3).

³⁷ *Ibid.*

³⁸ *Ibid* 33.

³⁹ *Ibid* 34.

⁴⁰ *Ibid* 35–50.

⁴¹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013) 271–2; World Health Organisation, '6B40 Post Traumatic Stress Disorder', *ICD-11 for Mortality and Morbidity Statistics* (Database, January 2024) <<https://icd.who.int/browse11/1-m/en#/http%3a%2f%2fid.who.int%2f%2fid%2f2070699808>>.

⁴² Herman (n 3) 51–73.

As ‘the core experiences of psychological trauma are disempowerment and disconnection from others’, Herman theorised that recovery from trauma requires empowerment of the survivor (including by restoring choice and control) and the creation of new, trusting connections.⁴³ When a therapist is involved in recovery, the relationship must be collaborative and based on ‘persuasion rather than coercion, ideas rather than force, mutuality rather than authoritarian control’.⁴⁴ Herman suggested that the recovery process proceeds in three stages (although this is not always a linear process): first, the survivor establishes a sense of safety; second, she remembers the trauma and integrates it into her life story, and; third, she reconnects with ordinary life by developing a new self and new relationships.⁴⁵ Bessel van der Kolk, author of the influential book on recovery from trauma, *The Body Keeps the Score*, has also emphasised the importance of language and voice in the recovery of trauma survivors.⁴⁶

Trauma-informed practice has drawn on characteristics of both the trauma response and recovery process to inform its principles. The concept recognises that interactions with trauma survivors may need to be adjusted because of the profound psychological and relational impacts of trauma, and it uses the various principles to guide how these interactions should be adjusted. Because the principles of trauma-informed practice have been taken from literature on trauma theory — and later sets of principles have generally evolved from earlier iterations — the different sets of principles have commonalities. For example, the principles tend to focus on safety, choice, voice, empowerment and collaboration. However, they also have important differences. Table 1, below, lists each of the principles articulated by Harris and Fallot, Elliot et al, SAMHSA and Kezelman and Stavropoulos. It also lists the assumptions of trauma-informed practice that form part of SAMHSA’s framework.

Table 1: Principles of Trauma-Informed Practice Articulated by Different Authors.

Harris and Fallot	Elliot et al	SAMHSA	Kezelman and Stavropoulos
<ol style="list-style-type: none"> 1. Safety 2. Trustworthiness 3. Choice 4. Collaboration 5. Empowerment 	<ol style="list-style-type: none"> 1. Recognise the impact of violence and victimisation on survivors’ development and coping strategies 	<p style="text-align: center;"><u>Assumptions</u></p> <ol style="list-style-type: none"> 1. Have a realisation about trauma and understand how it can affect individuals, families, groups, 	<ol style="list-style-type: none"> 1. Basic knowledge of the impacts of stress on the brain and body 2. Consistent emphasis on safety, trustworthiness, choice,

⁴³ Ibid 133–6. See also Bessel van der Kolk, *The Body Keeps the Score* (Penguin Books, 2015) 169, 212–14.

⁴⁴ Herman (n 3) 136.

⁴⁵ Ibid chs 8–10.

⁴⁶ van der Kolk (n 43) ch 14.

<ol style="list-style-type: none"> 2. Identify recovery from trauma as a primary goal 3. Employ an empowerment model 4. Strive to maximise women’s choices and control over their recovery 5. Engage in a therapeutic relationship that is collaborative, empowering and safe 6. Create an atmosphere that provides safety, respect and acceptance (such as by providing clear information, being consistent and predictable, and giving clients as much control and choice as possible) 7. Emphasise clients’ strengths 8. Minimise re-traumatisation 9. Strive to be culturally competent and to understand women in the context of their life experiences 10. Solicit consumer input in designing and evaluating services 	<ol style="list-style-type: none"> 2. Organisations and communities 2. Recognise the signs of trauma 3. Respond by applying principles of trauma-informed practice (taking a universal precautions approach where staff expect trauma in the lives of all people) 4. Resist re-traumatisation <p style="text-align: center;"><u>Principles</u></p> <ol style="list-style-type: none"> 1. Safety 2. Trustworthiness and transparency 3. Peer support 4. Collaboration and mutuality 5. Empowerment, voice and choice 6. Cultural, historical and gender issues 	<p>collaboration and empowerment (emphasis on ‘doing with’ rather than ‘for’ or ‘to’)</p> <ol style="list-style-type: none"> 3. Consistent emphasis on the way in which a service is provided (ie the ‘how’ as much as the ‘what’; the context in which the services are delivered, not just what the service is) 4. Consistent emphasis on what may have happened to a client, rather than what is wrong with a client 5. Recognition that difficult behaviour and/or symptoms may be the product of coping mechanisms and attempted self-protection in the light of prior adverse experiences 6. A strengths-based approach which acknowledges people’s skills, notwithstanding the enormity and effects of overwhelming experiences with which they may be struggling
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1 Harris and Fallot’s Framework

Harris and Fallot were the first to outline a set of principles and a philosophy of trauma-informed practice.⁴⁷ They developed these principles through their

⁴⁷ Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 21; Wilson, Fauci and Goodman (n 8) 587.

practice at Community Connections (a private mental health and substance abuse treatment agency in Washington DC), drawing on trauma research.⁴⁸ First, the agency began to think about trauma and its impact during the clinicians' assessments of every client.⁴⁹ Over time, the focus on trauma shifted to the centre of clinicians' interactions with clients, 'in part because consumers responded so positively to [clinicians'] appreciation of the role that violence and victimization had played and continued to play' in the lives of clients.⁵⁰ Once trauma had moved to the centre of the agency's understanding, Harris and Fallot then developed approaches that would avoid re-traumatizing and re-victimizing clients.⁵¹ In their own words, '[w]ithout even consciously intending to do so, we evolved the philosophy and principles of a trauma-informed system'.⁵²

Over subsequent years and following 'a large number of conversations discussing trauma-informed changes with program administrators, staff, and consumer-survivors',⁵³ the practitioners distilled five principles of trauma-informed practice that are intended to guide how services are delivered so that they can become responsive to the needs of trauma survivors.⁵⁴ These principles include:

- 1) Safety;
- 2) Trustworthiness;
- 3) Choice;
- 4) Collaboration; and
- 5) Empowerment.⁵⁵

In and of themselves, these principles are relatively vague and do not provide much guidance on their scope or how they are to be applied (including how they could be applied in the context of the legal system or criminal trial). Therefore, Harris and Fallot further defined their five principles through a series of questions that service agencies should ask themselves:

To what extent do current service delivery policies, practices, and settings: (1) ensure the physical and emotional safety of consumers? Of staff members? (*Safety*); (2) provide clear information about what the consumer can expect? Ensure consistency in practice? Maintain boundaries, especially interpersonal boundaries, appropriate for the program? (*Trustworthiness*); (3) prioritize consumer experiences of choice and

⁴⁸ See Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8) 21.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Roger D Fallot and Maxine Harris, 'Trauma-Informed Approaches to Systems of Care' (2008) 3(1) *Trauma Psychology Newsletter* 6, 6 ('Trauma-Informed Approaches').

⁵⁴ Ibid. These principles have been applied to, for example, social work practice: Levenson (n 9) 106–11.

⁵⁵ See generally Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8); Fallot and Harris, 'Trauma-Informed Approaches' (n 53).

control? (*Choice*); (4) maximize collaboration and the sharing of power with consumers? (*Collaboration*); and (5) emphasize consumer empowerment? Recognize consumer strengths? Build skills? (*Empowerment*).⁵⁶

While these questions provide some guidance on how the five principles are meant to be applied, ultimately they have been developed for service agencies and do not provide much clarity as to how they should be applied in the legal system (and trial) context.

2 *Elliot et al's Framework*

Building on the work of Harris and Fallot, Elliot et al created another set of trauma-informed principles applicable to human services.⁵⁷ Unlike Harris and Fallot's work, which involved 'unconsciously' developing trauma-informed principles through practice, Elliot et al's more detailed principles were developed through a collaboration of researchers, practitioners and trauma survivors in the United States over several years.⁵⁸ Furthermore, Elliot et al focused specifically on principles to be applied in the context of women survivors of domestic violence and childhood sexual abuse (although they stressed that their principles are intended to apply to both women and men seeking human services generally).⁵⁹

Elliot et al developed ten principles of trauma-informed practice (see Table 1, above).⁶⁰ Joshua M Wilson, Jenny E Fauci and Lisa A Goodman suggest that Elliot et al's principles repeated the original contribution of Harris and Fallot but expanded on these original principles to also include provision of trauma-specific treatments (principle two), while placing increased emphasis on the importance of an empowering and collaborative approach.⁶¹ This, however, is not an entirely accurate depiction of how the principles differ. While Elliot et al's principles do incorporate Harris and Fallot's principles, these have been combined and/or duplicated throughout the principle set. For example, Elliot et al include: employ an empowerment model,⁶² emphasize clients' strengths⁶³ and engage in a therapeutic relationship that is empowering.⁶⁴ All of these principles encompass 'empowerment' (although, this repetition does support the notion that Elliot et al placed greater emphasis on empowering clients compared to Harris and Fallot).

Furthermore, collaboration can be found in the principles of 'engage in a therapeutic relationship that is collaborative'⁶⁵ and 'solicit consumer input in

⁵⁶ Fallot and Harris, 'Trauma-Informed Approaches' (n 53) 6 (emphasis in original).

⁵⁷ Elliot et al (n 8).

⁵⁸ *Ibid* 463–4.

⁵⁹ *Ibid* 463, 474.

⁶⁰ *Ibid* 464–9.

⁶¹ Wilson, Fauci and Goodman (n 8) 587.

⁶² Elliot et al (n 8) 465.

⁶³ *Ibid* 467.

⁶⁴ *Ibid* 466.

⁶⁵ *Ibid*.

designing and evaluating services'.⁶⁶ Safety can be found in both principles of 'engage in a therapeutic relationship that is safe'⁶⁷ and 'create an atmosphere that provides safety, respect and acceptance'.⁶⁸ Choice can be found in the principle of 'strive to maximize a woman's choices and control over her recovery'⁶⁹ and as an example of what it means to create a safe, respectful and accepting atmosphere ('give the woman as much control and choice over her experience as possible').⁷⁰ Additionally, safety appears to have been combined with trustworthiness (in principle six) and empowerment and collaboration (in principle five). This creates a somewhat confusing and repetitive set of principles, even though they provide slightly more detail than Harris and Fallot's five principles.

As well as incorporating the Harris and Fallot principles, Elliot et al included an additional four principles of trauma-informed practice. Improving on Harris and Fallot's contribution, Elliot et al included a principle of 'recognize the impact of violence and victimization on development and coping strategies'.⁷¹ This principle is necessary because recognition of the impact of trauma on individuals is the very foundation — and the justification — for trauma-informed practice. A further improvement on Harris and Fallot's principles, Elliot et al also included a principle of cultural competence — something that is arguably necessary to adequately understand trauma and its impact.⁷² They described cultural competence to include having 'the knowledge and skills to work within a client's culture, understanding how one's own cultural background and the program influence transactions with the client'.⁷³

However, Elliot et al added two principles that are of questionable appropriateness — 'identify recovery from trauma as a primary goal'⁷⁴ and 'minimize the possibilities of re-traumatization'.⁷⁵ Minimising re-traumatisation is one of the central aims of trauma-informed practice and principles are developed so that this aim can be achieved. It is illogical for the very aim of the paradigm to itself be one of its principles. Furthermore, recovery from trauma is *not* a primary goal of trauma-informed practice — this is the domain of trauma-specific services. It is not always possible for human services (or other systems, such as law or schooling) to engage in recovery practices (although they can assist recovery by minimising further re-traumatisation). This makes 'identifying recovery from trauma as a primary goal'⁷⁶ an inappropriate principle of trauma-informed practice.

⁶⁶ Ibid 469.

⁶⁷ Ibid 466.

⁶⁸ Ibid 467.

⁶⁹ Ibid 466.

⁷⁰ Ibid 467.

⁷¹ Ibid 465.

⁷² Ibid 468.

⁷³ Ibid.

⁷⁴ Ibid 465.

⁷⁵ Ibid 467.

⁷⁶ Ibid 465.

Ultimately, while Elliot et al's principles provide more detail than Harris and Fallot's principles, they are repetitive, unnecessarily confusing and include principles that should not be included as principles. In addition, as with Harris and Fallot's framework, Elliot et al's framework does not reflect the legal system (or criminal trial) context, which makes it difficult to determine how the framework should be applied in that context.

3 SAMHSA's Framework

More recently, SAMHSA produced guidance on the trauma-informed approach to services and systems, building upon the work of Harris and Fallot, Elliot et al and other scholars.⁷⁷ Its aim was to develop a 'unified working concept' to advance the understanding of trauma and a trauma-informed approach for behavioural health service sectors,⁷⁸ but it stressed that its approach could be applied universally to other sectors too (although terminology and specific application of the principles might differ depending on the setting).⁷⁹

Unlike Harris and Fallot and Elliot et al's frameworks, SAMHSA's guidance articulated both assumptions and principles of trauma-informed practice. These were based on more recent research into the effects of and recovery from trauma, clinical practice in the field of trauma interventions, and lessons articulated by survivors who had been involved in multiple service sectors.⁸⁰ SAMSHA argued that four key assumptions (the 'four R's') underlie trauma-informed practice. That is, for an organisation or system to be trauma-informed, it is assumed that all people in the organisation or system:

- 1) Have a realisation about trauma and understand how it can affect individuals, families, groups, organisations and communities;
- 2) Recognise the signs of trauma;
- 3) Respond by applying principles of trauma-informed practice (taking a universal precautions approach where staff expect trauma in the lives of all people); and
- 4) Resist re-traumatisation.⁸¹

⁷⁷ SAMHSA's *Concept* (n 1).

⁷⁸ *Ibid* 17.

⁷⁹ *Ibid* 10.

⁸⁰ *Ibid* 5–6.

⁸¹ *Ibid* 9–10. Reflecting these assumptions, Cossins explained that 'the goals of trauma-informed care include staff training about the impact of trauma on behaviour and memory, identification of trauma-based symptoms, minimisation of re-traumatisation and identification of the ways in which institutions re-enact the dynamics of trauma': Cossins (n 3) 541–2.

SAMHSA's six principles (listed in Table 1, above) largely reflect Harris and Fallot's principles.⁸² However, SAMHSA has combined some principles (empowerment and choice) and expanded on other principles (trustworthiness as well as transparency; collaboration as well as mutuality; empowerment and choice as well as voice). It has also included a principle originally introduced by Elliot et al — cultural issues — and expanded upon that principle to include historical and gender issues. Wilson, Fauci and Goodman note that this principle attends to social oppression and identity,⁸³ which are both crucial to understanding trauma and its impact. Finally, SAMHSA added a new principle not previously included by Harris and Fallot or Elliot et al — peer support. Based on the work of Herman, peer support is arguably important to help survivors reconnect with others and overcome trauma.

Despite this, SAMHSA's principles replicate some of the limitations of Harris and Fallot and Elliot et al's principles. Most notably, SAMHSA's principles are relatively vague and ambiguous. In themselves, the principles do not provide much information about what they actually mean or how they should be applied (including in legal contexts). However, SAMHSA has provided some limited explanation of each principle. It explained that safety refers to the physical, psychological and interpersonal safety of clients and staff.⁸⁴ Trustworthiness and transparency requires operations and decisions to be conducted transparently, with the goal of building trust with clients.⁸⁵

Peer support involves building supportive relationships with other trauma survivors to promote safety and hope, build trust, enhance collaboration, and promote recovery and healing.⁸⁶ Collaboration and mutuality focuses on partnering and leveling power differences between clients and staff by promoting collaborative relationships.⁸⁷ Empowerment, voice and choice refers to emphasising individuals' strengths, recognising and building upon their experiences, empowering them, giving them their voice and allowing them to make their own decisions.⁸⁸ The final principle — cultural, historical and gender issues — requires the organisation to move past cultural stereotypes and biases, offer access to gender responsive services, recognise and address historical

⁸² SAMHSA's *Concept* (n 1) 10–11. The approach taken by Bessel van der Kolk and colleagues to training school staff on trauma is very similar to SAMHSA's approach: 'We try to teach everyone in a school community — office staff, principals, bus drivers, teachers, and cafeteria workers — to recognize and understand the effects of trauma on children and to focus on the importance of fostering safety, predictability, and being known and seen': van der Kolk (n 43) 354.

⁸³ Wilson, Fauci and Goodman (n 8) 587.

⁸⁴ SAMHSA's *Concept* (n 1) 11.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

trauma, and incorporate policies and processes that are responsive to the racial, ethnic, cultural and gender needs of clients.⁸⁹

The inclusion of assumptions as well as principles is one of the strengths of SAMHSA's framework. This is because it explicitly articulates some of the assumptions of trauma-informed practice that would otherwise remain unspoken (ie the various things it is assumed an organisation or system does to be 'trauma-informed'). These assumptions differ from principles in that application of the principles might change from setting to setting, but all organisations or systems must satisfy the assumptions to be trauma-informed. Specifically, SAMHSA forthrightly states that it assumes that all trauma-informed systems respond to the growing knowledge of trauma by applying trauma-informed principles (assumption three), rather than a standard set of practices or procedures.⁹⁰ Principles provide greater flexibility, allowing trauma-informed practice to be applied in many different sectors — with application of the principles (ie the practice) tailored to the particular setting (or, indeed, individual).⁹¹

SAMHSA's assumptions one and four reflect principles articulated by Elliot et al — specifically, the assumption that people in organisations and systems have a 'realization about trauma' and understand how it can affect individuals (which is similar to Elliot et al's principle one), and that organisations and systems 'resist re-traumatization' (which is similar to Elliot et al's principle eight).⁹² However, while resisting re-traumatisation could be characterised as an assumption (it is assumed that all trauma-informed systems are designed to resist re-traumatisation), as discussed above, it is better described as the overarching aim of trauma-informed practice.

Furthermore, as also discussed previously, understanding trauma and its impacts underpins the entire trauma-informed paradigm. As such, it is better characterised as an assumption (as in SAMHSA's framework) rather than a principle (as in Elliot et al's framework) — it is assumed that all trauma-informed systems and their personnel understand the nature of trauma and how it impacts individuals and communities. While this assumption appears to be very similar to SAMHSA's assumption two (trauma-informed systems and their personnel recognise the signs and symptoms of trauma), this latter assumption refers specifically to actual signs and symptoms of trauma in people who interact with the system, not more broadly to the prevalence of trauma and its general (or potential) impacts.

⁸⁹ Ibid.

⁹⁰ Ibid 10.

⁹¹ Ibid.

⁹² Ibid 9.

B Key Critiques of Trauma-Informed Practice

Each of the three frameworks discussed in Part IIA have drawn on the literature on trauma and recovery from trauma to inform their principles. For this reason, trauma-informed practice has been lauded for having the potential to reduce further harm and minimise re-traumatisation. Despite this, the concept (and its various principles) has also been critiqued. This section discusses some of those key critiques.

As alluded to above, trauma-informed practice is fraught with the use of inconsistent terminology (which is perhaps a result of its emergent nature).⁹³ Reflected in the discussion above, academics have developed various sets of principles and principles have been defined and explained differently (or not explained at all).⁹⁴ Where academics and practitioners agree on the applicable principles, at times they have disagreed as to their relative importance. For example, some scholars believe that safety should be prioritised,⁹⁵ yet confirmatory factor analysis performed by Travis Hales et al suggests that — in relation to Harris and Falloot's five principles — each principle is unique, equally important and interrelated, and shares a single underlying dimension.⁹⁶ That is, primacy need not be given to safety; implementation of any principle will enhance the others.⁹⁷

Furthermore, the principles of trauma-informed practice can be vague and, as such, it can be difficult to determine how they could (or should) be implemented in practice.⁹⁸ It is argued that the principles of trauma-informed practice are amorphous, broad and ambiguous,⁹⁹ and are therefore difficult to concretely implement and assess. Antonia Quadara and Cathryn Hunter have argued that there is little guidance on how organisations can actually embed these broad principles into their practices.¹⁰⁰ While this may create the flexibility necessary for the principles to be applied in different settings, it also creates a risk that the principles may be applied inconsistently within the same setting or that principles will not be applied as intended.

⁹³ Shira Birnbaum, 'Confronting the Social Determinants of Health: Has the Language of Trauma-Informed Care Become a Defense Mechanism?' (2019) 40(6) *Issues in Mental Health Nursing* 476, 477; Lucy Berliner and David J Kolko, 'Trauma-Informed Care: A Commentary and Critique' (2016) 21(2) *Child Maltreatment* 168, 169.

⁹⁴ Furthermore, scarcely any of these frameworks have been empirically tested for validity (except for Harris and Falloot's model): see Travis Hales, Nancy Kusmaul and Thomas Nochajski, 'Exploring the Dimensionality of Trauma-Informed Care: Implications for Theory and Practice' (2017) 41(3) *Human Service Organizations* 317, 318.

⁹⁵ See, eg, Stavropoulos (n 9) 310: '[t]he principle of safety is central and non-negotiable and underpins all trauma-informed values and priorities'. See also Hales, Kusmaul and Nochajski (n 94) 318.

⁹⁶ Hales, Kusmaul and Nochajski (n 94) 323.

⁹⁷ *Ibid.*

⁹⁸ Berliner and Kolko (n 93) 169; Hales, Kusmaul and Nochajski (n 94) 318; Quadara and Hunter (n 21) 35.

⁹⁹ Birnbaum (n 93) 477–8.

¹⁰⁰ Quadara and Hunter (n 21) 36.

In addition, specific considerations arise in relation to the application of trauma-informed practice to the legal system, given it was originally developed for use in the field of human services (and many of the conceptual frameworks have been developed to reflect this). For example, SAMHSA has argued that its assumptions and principles could be applied universally and not just to behavioural health service sectors, although specific application of the principles might differ between settings.¹⁰¹ However, there are uncertainties around how those principles should be applied in the context of the legal system. Furthermore, given the adversarial and authoritarian nature of the criminal trial (as opposed to the behavioural health service sector's focus on the wellbeing of individuals), there are real questions around the compatibility of the goals of trauma-informed practice with the criminal trial. I return to this issue in Part III.

Ultimately, the discussion in this Part demonstrates that the precise content of the principles of trauma-informed practice has not yet been settled and, indeed, the entire concept of trauma-informed practice is still developing (including as it applies to the criminal trial and legal system more broadly). This provides the impetus for the trauma-informed trial conceptual framework presented in this article.

C Trauma-Informed Practice and the Legal System

Before I turn to the trauma-informed trial conceptual framework, this section briefly considers how trauma-informed practice has already been applied in the context of the legal system. Although not developed specifically for application in this context, most of the frameworks discussed above have already been applied to certain aspects of the legal system. For example, Elliot et al's framework has been applied by researchers to inform reforms to restorative justice practices¹⁰² and the sexual assault trial,¹⁰³ while researchers have applied SAMHSA's framework to legal practice,¹⁰⁴ court processes¹⁰⁵ and sentencing.¹⁰⁶

In contrast to the three frameworks discussed in Part IIA, the Kezelman and Stavropoulos framework was developed specifically to be applied in the context

¹⁰¹ SAMHSA's Concept (n 1) 10.

¹⁰² Randall and Haskell (n 7).

¹⁰³ Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) 17(1) *International Journal of Evidence and Proof* 74.

¹⁰⁴ Katherine Swanson, 'Barristers Tips: Providing Trauma-Informed Legal Services' (2019) 42 *Los Angeles Lawyer* 15.

¹⁰⁵ McKenna and Holtfreter (n 10); Substance Abuse and Mental Health Services Administration, *Essential Components of Trauma-Informed Judicial Practice* (Report, 2013).

¹⁰⁶ Katherine J McLachlan, 'Trauma-Informed Sentencing in South Australian Courts' (2022) 55(4) *Journal of Criminology* 495; Katherine J McLachlan, 'Using a Trauma-Informed Practice Framework to Examine How South Australian Judges Respond to Trauma in the Lives of Aboriginal Defendants' (2022) 11(2) *Journal of Qualitative Criminal Justice and Criminology* 181.

of legal practice.¹⁰⁷ In their previous work regarding practice guidelines for trauma-informed care and service delivery, Kezelman and Stavropoulos relied on the Harris and Fallot framework.¹⁰⁸ This was expanded upon in their guide for applying trauma-informed practice to legal and judicial contexts (the Kezelman and Stavropoulos framework discussed in this article).¹⁰⁹ That framework's six trauma-informed practice principles are listed in Table 1, above. Although developed for legal practice, these principles do not adequately reflect this context — by, for example, referring to legal system personnel (such as lawyers and judges) or legal system participants (such as defendants, victims or other witnesses). Rather, the framework refers to 'services' and 'clients'.¹¹⁰ This can make it challenging to determine exactly how the principles should be applied and assessed within the legal system.

To an extent, Kezelman and Stavropoulos' principles reflect many of the other principles of trauma-informed practice discussed in Part IIA. Principles one and five, for example, align with SAMSHA's first and second assumptions (realisation about trauma and recognition of the signs of trauma) while principles two and six encompass SAMSHA's principles of trauma-informed practice. Principle three seems to reflect SAMHSA's assumption three — that services should not just be concerned with the services they provide, but that they must consider *how* they provide those services (ie how they provide services should be trauma-informed). Despite this, Kezelman and Stavropoulos's third principle has not been included in any of the other frameworks discussed above and, additionally, no explanation was given as to why it was included.

Furthermore, while it is necessary that principles are adequately defined (which has not been done by, for example, Harris and Fallot and SAMHSA), such definitions must not come at the expense of clarity and ease of application. Kezelman and Stavropoulos have provided greater detail for their principles, but in doing so have created a framework that is confusing, repetitive and appears to have blurred assumptions with principles. In addition, like SAMHSA they did not explain the scope of safety, trustworthiness, choice, collaboration or empowerment (contained in principle two) which appear to be key principles that are intended to guide trauma-informed legal practice. As such, not only does Kezelman and Stavropoulos's framework not reflect legal practice, but it is less clear than the three frameworks discussed in Part IIA (including in relation to how its principles should be applied in practice). Despite this, the framework has been applied by Queensland's Women's Safety and Justice Taskforce in its work on

¹⁰⁷ Kezelman and Stavropoulos, 'Trauma and the Law' (n 5) 5–6.

¹⁰⁸ Cathy Kezelman and Pam Stavropoulos, 'The Last Frontier': Practice Guidelines for Treatment of Complex Trauma and Trauma-Informed Care and Service Delivery (Report, 28 September 2012) 21 ('The Last Frontier').

¹⁰⁹ Kezelman and Stavropoulos, 'Trauma and the Law' (n 5).

¹¹⁰ *Ibid* 4.

addressing coercive control and domestic violence, and women and girls' experiences across the criminal justice system.¹¹¹

Other scholars, as well as government inquiries and law reform bodies, have argued that trauma-informed reforms to the law must occur, but have not linked their suggested reforms to a particular framework.¹¹² Similarly, legislative reforms have occurred in Australia in recent years that aim to (at least in part) reduce re-traumatisation experienced during the criminal trial process, including reforms for vulnerable, special and child witnesses.¹¹³ However, there is little evidence to suggest that these reforms were introduced specifically as a result of application of a trauma-informed practice conceptual framework.

While Elliot et al, SAMHSA and Kezelman and Stavropoulos' frameworks have been applied in the context of the legal system, the fact that different frameworks have been applied — or that no explicit framework has been applied — demonstrates that a trauma-informed practice framework for the legal system has not yet been settled. Indeed, Australia's *Royal Commission into Institutional Responses to Child Sexual Abuse* recognised that '[c]urrently, the coordination and translation of knowledge about trauma-informed approaches into practice is ad hoc'.¹¹⁴ More recently, Queensland's Women's Safety and Justice Taskforce emphasised that 'there is no clear and instructive trauma-informed framework for practice for lawyers in Queensland' and, on this basis, recommended creation and implementation of such a framework.¹¹⁵ The trauma-informed trial conceptual framework presented in this article intends to take a step towards addressing this gap.

Scholars have put forth different reasons why trauma-informed practice should be applied to the legal system. As discussed in Part I, some have argued that legal systems replicate trauma dynamics and therefore risk re-traumatising those who become involved with the legal system.¹¹⁶ Because of this, a trauma-informed approach is necessary to minimise re-traumatisation and ensure no further harm is done.¹¹⁷ Other scholars have argued that a trauma-informed approach to the legal system is necessary to 'facilitate justice',¹¹⁸ for legal

¹¹¹ Queensland, Women's Safety and Justice Taskforce (n 15).

¹¹² Katz and Haldar (n 9); *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) ('*Royal Commission into Institutional Responses to Child Sexual Abuse*'); Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021).

¹¹³ See, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) chs 2, 4; *Crimes Act 1914* (Cth) pt IAD; *Criminal Procedure Act 1986* (NSW) ch 6, pts 4B–7; *Evidence Act 1939* (NT) pt 3; *Evidence Act 1977* (Qld) pt 2, divs 4–4A; *Evidence Act 1929* (SA) ss 12, 13–13A; *Evidence (Children and Special Witnesses) Act 2001* (Tas); *Criminal Procedure Act 2009* (Vic) pt 8.2, divs 4–6; *Evidence Act 1906* (WA) ss 106E–106F, 106H–106HA, 106I–106K, 106N, 106R–106RA.

¹¹⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse* (n 112) 35.

¹¹⁵ Queensland, Women's Safety and Justice Taskforce (n 15) 610.

¹¹⁶ See, eg, Cossins (n 3) 555–60, ch 11; Katirai (n 3); Epstein and Goodman (n 3); Herman (n 3) 160.

¹¹⁷ See, eg, Cossins (n 3) 555, 569; Kezelman and Stavropoulos, 'Trauma and the Law' (n 5) 9–10.

¹¹⁸ Kezelman and Stavropoulos, 'Trauma and the Law' (n 5) 10.

responses to be ‘more effective, fair, intelligent, and just’¹¹⁹ and to ‘achieve best evidence’ which the ‘interests of justice requires’.¹²⁰ Other scholars have focussed on the benefits to lawyers in their dealings with clients. For example, trauma-informed lawyering has been argued to help lawyers develop client management skills,¹²¹ to understand the client’s interests better¹²² and to ‘competently and zealously represent clients who have experienced trauma’ to make them better advocates.¹²³ These reasons for applying trauma-informed practice to the legal system inform considerations around what the overarching goal of the trauma-informed trial should be (discussed in Part III below).

As lawyers, judges and other legal system personnel are generally not trained to recognise trauma and its effects, scholars have argued that a universal precautions approach should be taken by these personnel (and the system as a whole) when it comes to interacting with every person who makes contact with the legal system.¹²⁴ This approach is said to benefit all people, including lawyers and legal system personnel.¹²⁵ Such an approach is argued, however, to require a ‘paradigm shift’ in how the legal system operates and sweeping cultural change within the system¹²⁶ because the very nature of the legal system is the antithesis to supporting the recovery (or at least minimising further traumatisation) of traumatised individuals. Indeed, Herman writes in relation to victims:

Victims need social acknowledgment and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience by directly confronting the perpetrator.¹²⁷

Whether the trauma-informed trial should take a universal precautions approach, or an approach that focuses on the individual, is discussed further in Part III.

¹¹⁹ Randall and Haskell (n 7) 505.

¹²⁰ Cossins (n 3) 555, 561, 569.

¹²¹ See Swanson (n 104).

¹²² Katirai (n 3) 112.

¹²³ Katz and Haldar (n 9) 393.

¹²⁴ See, eg, Kezelman and Stavropoulos, ‘Trauma and the Law’ (n 5) 3–4, 7.

¹²⁵ *Ibid* 3–4.

¹²⁶ *Ibid* 3; Cossins (n 3) 562.

¹²⁷ Herman (n 3) 160.

III THE TRAUMA-INFORMED TRIAL

Part II established that trauma-informed practice is still a developing concept and that a trauma-informed practice conceptual framework for application in the context of the legal system is yet to be settled. It also raised some key critiques and limitations of the concept and its principles. This Part presents a trauma-informed trial conceptual framework that (i) is operationalised to the criminal trial context (with the intention of making the framework easier to apply and assess in this context), and (ii) aims to address key criticisms and limitations of the concept and its principles that were raised in Part II.

As explained in Part I, the trauma-informed trial framework is intended to be used as a tool by lawmakers, policymakers, law reformers, academics, lawyers and others to evaluate the extent to which existing criminal trial practices are trauma-informed and to inform development of new trauma-informed practices and other measures (which may be used by, for example, lawyers, judges and other court personnel).¹²⁸ Indeed, this is something that has already been occurring, with trauma-informed practice used to inform recommendations made by law reform bodies and government inquiries.¹²⁹

The trauma-informed trial framework presented in this Part uses SAMHSA's framework as its foundation. The Part begins by explaining why SAMHSA's framework has been chosen as the basis for the trauma-informed trial conceptual framework. It then details how SAMHSA's framework has been operationalised to the criminal trial context, and how it has been interpreted and applied to address key criticisms and limitations of SAMHSA's framework and trauma-informed practice more broadly (as discussed in Part II). The Part concludes by briefly explaining how the methodology utilised in this article could be applied to develop trauma-informed practice conceptual frameworks for application to other legal system contexts.

Before delving into these issues, however, it is necessary to consider whether the concept of trauma-informed practice is even compatible with the adversarial criminal trial. The adversarial criminal trial can be conceptualised as a contest between two opposing parties — the prosecution and the defendant (although

¹²⁸ This is consistent with trauma-informed practice as a framework to effect organisational and systems-level change: Quadara and Hunter (n 21) 35. Additionally, Quadara and Hunter have argued that it may be challenging to translate principles into practice so concrete strategies and tools for people to use may be necessary: at 8. This could include, for example, system-wide measures in the criminal justice system.

¹²⁹ In Australia see, eg, *Royal Commission into Institutional Responses to Child Sexual Abuse* (n 112); Victorian Law Reform Commission (n 112); Queensland, Women's Safety and Justice Taskforce (n 15). Queensland Law Reform Commission, *Non-fatal Strangulation: Section 315A Review — Our Terms of Reference* (Background Paper 1, November 2024).

prosecutors are model litigants and, as such, should not try to win at all costs).¹³⁰ The trial centres on whether the prosecution can prove the case beyond reasonable doubt (and consequently on whether the defence can establish doubt) as well as whether the defendant's fair trial rights (which include, for example, the presumption of innocence and the right to examine/confront witnesses) are being upheld.¹³¹ If victims play a role, they are mere witnesses for the prosecution to assist in proving the case against the defendant.¹³² Victims, defendants and other witnesses who choose to give evidence are open to being challenged as to the truthfulness and reliability of their evidence. Their credibility might also be challenged.

As described in Part II, the central aim of applying trauma-informed practice as it was originally conceptualised is to do no further harm. Within the adversarial system, it may be difficult to achieve this goal, especially with respect to court participants (such as defendants, victims and other witnesses). For example, it may not be possible to do no further harm to victim-witnesses if they are required to recount — and be challenged on — what may have been a traumatic event in front of strangers as well as the alleged perpetrator.¹³³ Defendants, too, are at risk of suffering further harm by being subject to the authoritarian criminal justice process. The very nature of the criminal trial exposes court participants to potential re-traumatisation which means that it may not be realistic to strive for a trial that does no further harm whatsoever.¹³⁴

However, this does not mean that things should remain as they are, especially if such practices put the wellbeing of court participants at risk. As the Victorian Victims of Crime Commissioner told the Victorian Law Reform Commission:

Trauma-informed responses are key to reducing the risk of secondary victimisation by the criminal justice system. ... While there are some aspects of the adversarial criminal justice system that, by their very nature, will not be victim-centred, even laws and processes that advance the interests of the state and the rights of the accused should be reviewed with a trauma-informed lens.¹³⁵

While a trauma-informed trial that aims to completely prevent re-traumatisation of court participants may be out of reach (at least for the time being), there is scope for the trial to be more trauma-informed in criminal cases — that is, for the trial to strive to *minimise* re-traumatisation. Not only could an approach such as this

¹³⁰ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 7, 35; Chief Justice Jeffrey Miles, 'The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused' (1995) 19(4) *Criminal Law Journal* 193, 195. See also 'Model Litigant Principles', *Department of Justice and Attorney-General* (Web Page, 21 August 2023) <<https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles>>.

¹³¹ *Woolmington v Director of Public Prosecutions* [1935] AC 462, 482; *Dietrich v The Queen* (1992) 177 CLR 292, 298; Jeremy Gans et al, *Criminal Process and Human Rights* (The Federation Press, 2011) 376–7.

¹³² Doak (n 130) 1–7; Chief Justice Miles (n 130) 195.

¹³³ Herman (n 3) 160; Cossins (n 3) 551–60.

¹³⁴ Herman (n 3) 160; Katirai (n 3) 84–6.

¹³⁵ Victorian Law Reform Commission (n 112) 396 [18.45].

improve the trial experience for court participants (and potentially facilitate justice by ensuring best evidence is collected),¹³⁶ but it could be compatible with the adversarial criminal trial. A trauma-informed trial would still focus on the prosecution proving the defendant's guilt beyond reasonable doubt while upholding the defendant's fair trial rights but, at the same time, consideration would be given to how court participants experience the trial process and what could be done to make their experience less traumatising. In the light of this, the primary goal of the trauma-informed trial is to minimise re-traumatisation.

A The Foundation: SAMHSA's Framework

Although there are similarities between the four trauma-informed practice frameworks discussed in Part II, and each framework has its own strengths and limitations, there are several reasons why SAMHSA's framework has been chosen as the foundation for the trauma-informed trial conceptual framework. First, Elliot et al and Kezelman and Stavropoulos' frameworks contain double barrelled principles, principles that repeat other principles in the set and principles that should not be principles (because they are better characterised as, for example, aims or assumptions). This creates frameworks that are confusing and repetitive. In contrast, SAMHSA's framework is far simpler and clearer, and does not contain repetition. It also encompasses many of the principles articulated in the other three frameworks (reflecting its evolution from previous frameworks and all four frameworks' reliance on the literature on trauma theory).

Secondly, while SAMHSA's principles were criticised in Part II for being vague and ambiguous, the vagueness of its principles (and breadth of its assumptions) means that its framework may be applicable in various fields, including fields that do not deliver trauma-specific services (such as the criminal trial). Specifically, it is possible for criminal trial personnel to have a realisation about trauma and understand how it can affect people, to recognise the signs and symptoms of trauma, and to respond by applying principles of trauma-informed practice. SAMHSA's principles of trauma-informed practice could all potentially be applied within the criminal trial. Despite this, there is a need to clarify how SAMHSA's relatively ambiguous assumptions and principles should be applied in the criminal trial context.

Thirdly, a significant strength of SAMHSA's framework is that it contains assumptions as well as principles. These assumptions explicitly acknowledge that there are certain things that it is assumed that an organisation or system does for it to be trauma-informed. While application of principles may change from setting to setting, all organisations or systems must satisfy the assumptions to be trauma-informed.

¹³⁶ See Part IIC above.

Fourthly, SAMHSA specifically set out to develop a conceptual framework for trauma-informed practice that could be applied across various services,¹³⁷ as opposed to simply ‘evolving’ the concept over time as Harris and Fallot did.¹³⁸ To do this, SAMHSA drew on literature on trauma, practice-generated knowledge about trauma interventions, and survivors’ experiences; consulted a group of experts in the field; and obtained feedback from the public (in the form of over 20,000 comments) on a draft framework.¹³⁹ While Harris and Fallot and Elliot et al also consulted practitioners, researchers and trauma survivors to develop their principles,¹⁴⁰ SAMHSA’s framework was articulated much more recently than Harris and Fallot and Elliot et al’s frameworks (in 2014 as opposed to in 2001 and 2005, respectively) and, as such, is based on more recent literature and practice in the field of trauma and trauma-informed practice.

Lastly, although Kezelman and Stavropoulos developed a set of trauma-informed principles to apply to the legal system, their framework does not reflect the legal system context. Rather, it essentially encapsulates SAMHSA’s assumptions and principles.

B Operationalising SAMHSA’s Assumptions and Principles

As described in Part II (and listed in Table 1, above), SAMHSA’s framework consists of a set of four assumptions and six principles.¹⁴¹ While SAMHSA argued that its framework could be applied across different settings, it noted that terminology may need to be altered to reflect the specific setting in which the framework is being applied.¹⁴² This section operationalises SAMHSA’s assumptions and principles to the criminal trial context in which the trauma-informed trial conceptual framework is intended to be applied. This process also aims to address the critiques and limitations raised in Part II.

1 Assumptions

There are three key ways that SAMHSA’s assumptions must be refined to make them a more effective tool for application in the criminal trial: they must be operationalised to the criminal trial context, they must be clarified and simplified, and they must be modified to make them easier to apply and assess in practice.

First, the assumptions must be operationalised to the criminal trial itself. Specifically, instead of referring to ‘people in the organization or system’,¹⁴³ the

¹³⁷ SAMHSA’s *Concept* (n 1) 3.

¹³⁸ Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 21.

¹³⁹ SAMHSA’s *Concept* (n 1) 3–4.

¹⁴⁰ Fallot and Harris, ‘Trauma-Informed Approaches’ (n 53) 6; Elliot et al (n 8) 463–4.

¹⁴¹ SAMHSA’s *Concept* (n 1) 9–11.

¹⁴² *Ibid* 10.

¹⁴³ *Ibid* 9.

assumptions should refer to ‘criminal trial personnel’. Such personnel could include lawyers, judges and other court personnel. Additionally, the assumptions should identify to whom the framework is being applied. Although court personnel can suffer from vicarious trauma (and therefore it has been argued that a trauma-informed approach to the whole legal system is necessary),¹⁴⁴ for the purposes of this article, the focus of the trauma-informed trial is on court participants (such as victims, defendants and witnesses). This is because these people are most at risk of being re-traumatised throughout the trial process (by being exposed to what is likely an unfamiliar environment with many potential triggers).¹⁴⁵ As discussed below, however, the methodology applied in this article could be utilised to develop conceptual frameworks for application to other contexts, including the minimisation of vicarious trauma suffered by court personnel.

Second, the assumptions must be clarified and simplified. Assumptions one and two are necessary because without basic knowledge of what trauma is and how to recognise its signs and symptoms, it is difficult for criminal trial personnel to be *informed* by trauma and, therefore, to apply trauma-informed practice principles (assumption three), including by utilising the trauma-informed practices and other measures available to them. Despite this, assumptions one and two could be simplified to make it clearer what is actually being assumed. In addition, as noted in Part II, assumption four — resist re-traumatisation — is best characterised as the ultimate aim of trauma-informed practice. As such, it should not be included as an assumption of the trauma-informed trial. The ultimate aim of the trauma-informed trial was described above as being to minimise re-traumatisation.

Operationalising and clarifying the assumptions in accordance with the above creates the following set:

- 1) It is assumed that criminal trial personnel understand trauma and how it might affect court participants;
- 2) It is assumed that criminal trial personnel recognise the signs of trauma in court participants; and
- 3) It is assumed that criminal trial personnel respond by applying principles of the trauma-informed trial.

While these assumptions are a considerable improvement, they may still be difficult to apply and assess in practice. For this reason, the assumptions should be turned into a set of questions that can be asked of a particular cohort of criminal trial personnel. These questions are:

¹⁴⁴ Katz and Haldar (n 9) 359.

¹⁴⁵ See Part I above.

- Do criminal trial personnel understand trauma and how it might affect court participants?
- Can criminal trial personnel recognise the signs of trauma in court participants?
- Have criminal trial personnel applied principles of the trauma-informed trial?

By operationalising the assumptions in this way, they become easier to test and measure. Despite this, the third question — ‘application of principles of the trauma-informed trial’ — may still be challenging to apply and assess in the context of the criminal trial, given the vague and ambiguous nature of SAMHSA’s principles (especially as they apply to the criminal trial).

2 Principles

As with the assumptions, there are three key ways that SAMHSA’s principles must be refined to make them a more effective tool for application in the criminal trial — they must be operationalised to the criminal trial context, they must be clarified, and they must be modified to make them easier to apply and assess in practice. By way of reminder, SAMHSA’s six principles are: safety; trustworthiness and transparency; peer support; collaboration and mutuality; empowerment, voice and choice; and cultural, historical and gender issues.¹⁴⁶

SAMHSA explained that the principle of safety means physical, psychological and interpersonal safety.¹⁴⁷ This provides a clearer account of what safety means and, as such, should be used to interpret and apply the principle of safety within the trauma-informed trial framework. Taking this approach — and operationalising the principle to reflect the criminal trial context (as I did with the assumptions above) — the principle of safety should be reframed as ‘physical, psychological and interpersonal safety of court participants’. While less vague than SAMHSA’s original principle, principles in themselves can still be difficult to assess and apply. As such, the principle should be converted into a question that can be asked about any practice or other measure used in the criminal trial (for simplicity, ‘measure’ is used in the question to encompass any practice, procedure, policy or other thing used or done in the context of the criminal trial). Specifically, ‘Does the measure promote physical, psychological and/or interpersonal safety of court participants?’ A question such as this orients the person applying the framework to the issue they must consider and makes it far clearer what the principle aims to do in practice. Existing trial measures in Australia that might promote the safety of court participants include, for example, victim-witnesses being able to give evidence via audiovisual link from a

¹⁴⁶ SAMHSA’s *Concept* (n 1) 10–11.

¹⁴⁷ *Ibid* 11.

location outside the courtroom or from behind a screen, partition or one-way glass (so they do not have to see the defendant when giving evidence).¹⁴⁸

SAMHSA explained that the principle of trustworthiness and transparency refers to whether operations and decisions are conducted transparently, with the goal of building trust with clients.¹⁴⁹ In the context of the criminal trial, this principle should be operationalised in a way that interrogates whether trust is built between court participants and court personnel, and whether the trial process is transparent for court participants. Specifically, the principle should be reframed as ‘trustworthy court personnel and transparent trial processes’. Again, this principle could be made more effective to apply and assess by turning it into two questions: first, ‘does the measure build trust between court participants and court personnel?’ and, second, ‘does the measure make trial processes more transparent?’ Examples of measures that might build trust between court participants and court personnel, and make the trial process more transparent, include the provision of information to witnesses about the trial process and the building of rapport between prosecutors and victim-witnesses.

In the context of SAMHSA’s framework, the principle of peer support focuses on supportive relationships with other trauma survivors.¹⁵⁰ As the criminal trial is not specifically concerned with support from peers in this sense (ie other trauma survivors), the principle should be interpreted and applied to mean the presence of supportive relationships for court participants throughout the trial process (such as support services for victims, the presence of an emotional support person in court while a witness gives evidence¹⁵¹ or support from family in court for defendants). Drawing on this explanation, the principle of peer support should be interpreted as ‘supportive relationships for court participants’. To make the principle easier to apply and assess, the principle should also be reframed as a question: ‘does the measure promote supportive relationships for court participants?’

The principle of collaboration and mutuality is defined by SAMHSA to include partnering and promoting collaborative relationships.¹⁵² Without this explanation, however, it is not so clear what ‘mutuality’ refers to. While collaboration and mutuality have similar meanings, mutuality is directed more so at reciprocal relationships while collaborations refer to working together.¹⁵³ As such, the principle would be better enunciated as ‘collaborative, reciprocal relationships between court participants and court personnel’. This principle should be transformed into a question to assist with its application and assessment in practice: ‘does the measure promote collaborative, reciprocal

¹⁴⁸ See above n 113.

¹⁴⁹ SAMHSA’s *Concept* (n 1) 11.

¹⁵⁰ *Ibid.*

¹⁵¹ See above n 113.

¹⁵² SAMHSA’s *Concept* (n 1) 11.

¹⁵³ *Cambridge Dictionary* (online at 14 June 2023) ‘mutuality’ (def 1); *Cambridge Dictionary* (online at 14 June 2023) ‘collaboration’ (def 1).

relationships between court participants and court personnel?’ While similar to the principle of ‘supportive relationships for court participants’, this principle focuses specifically on the relationship between court participants and court personnel. In contrast, the principle of supportive relationships extends beyond this to other relationships that court participants might have (such as with out-of-court victim support workers). Additionally, this latter principle is concerned specifically with supporting court participants rather than collaborations or reciprocity, which are different characteristics of relationships. An example of a measure that might promote collaborative, reciprocal relationships between court participants and court personnel includes a prosecutor and victim-witness working together to determine which alternative arrangements for giving evidence (if any) would suit the victim-witness best.¹⁵⁴

SAMHSA explained that the principle of empowerment, voice and choice refers to the empowerment of individuals, whether they are given a voice, and whether they are given the opportunity to make their own decisions.¹⁵⁵ It has been argued that people are empowered by giving them a voice that is heard and the choice to decide.¹⁵⁶ Because of this, the principle is best operationalised as ‘empowerment of court participants, including through choice and a voice that is heard’. This principle acknowledges that a person might be empowered in ways other than just giving them voice and choice,¹⁵⁷ but highlights that choice and voice are key ways to empower a person, as reflected in the literature on recovery from trauma.¹⁵⁸ As with the other principles, this principle would more effectively be applied and assessed in practice if it was transformed into a question: ‘does the measure empower court participants, including by giving them choice and a voice that is heard?’ Measures that might empower court participants and give them choice and a voice include, for example, allowing witnesses to choose which alternative arrangements for giving evidence (if any) they ultimately want to use or modifying the rules of evidence to enable witnesses to give evidence in their own words, rather than answering a series of questions that are often intended to only elicit a yes or no answer.

According to SAMHSA, the final principle — ‘cultural, historical and gender responsiveness’ — requires the organisation to move past cultural stereotypes and biases, offer access to gender responsive services, recognise and address historical trauma, and incorporate policies and processes that are responsive to the racial, ethnic, cultural and gender needs of clients.¹⁵⁹ This explanation appears

¹⁵⁴ For legislative provisions on the alternative arrangements available in Australian jurisdictions, see above n 113.

¹⁵⁵ SAMHSA’s *Concept* (n 1) 11.

¹⁵⁶ See, eg, Kristin L Anderson, ‘Victims’ Voices and Victims’ Choices in Three IPV Courts’ (2015) 21(1) *Violence Against Women* 105.

¹⁵⁷ See, eg, SAMHSA’s explanation of the principle of empowerment, voice and choice: SAMHSA’s *Concept* (n 1) 11.

¹⁵⁸ See, eg, Herman (n 3) 133–6; van der Kolk (n 43) 169, 212–14, ch 14.

¹⁵⁹ SAMHSA’s *Concept* (n 1) 11.

to focus on two things: that organisations be responsive to individuals' needs and unequal starting points (whether that be because of cultural, racial, ethnic, historical or gender factors), and that they move past stereotypes and biases.

While the whole point of trauma-informed practice is to be responsive to individuals' needs, this principle focusses on the context — needs that arise because of factors outside trauma specifically (even though these factors may have contributed to the trauma). It also emphasises that, as part of being responsive to individual needs, people should eschew any reliance on stereotypes and biases. In the context of the criminal justice system, relevant to the issue of stereotypes and biases are myths and misconceptions — research shows that myths and misconceptions about the victim, defendant and/or crime persist in evidentiary rules, judicial directions and bench book guidance, and are held by many jurors.¹⁶⁰ Operationalisation of the principle to the criminal trial should therefore reflect these things.

As such, the principle should be restated as 'responsiveness to cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants, eschewing reliance on stereotypes, biases, myths and misconceptions'. To make the principle easier to apply and assess, it should be turned into two questions. Specifically, 'is the measure responsive to the cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants?' and 'does the measure eschew reliance on stereotypes, biases, myths and misconceptions?' Examples of measures that might reflect this principle include allowing Aboriginal and Torres Strait Islander defendants to attend a Murri Court in Queensland¹⁶¹ or permitting expert evidence to be given about the behaviour of domestic, family and sexual violence complainants (including the impact of trauma on such complainants).¹⁶²

The operationalised principles presented above specifically reflect the criminal trial context yet are still sufficiently flexible to allow them to be applied across and throughout the criminal trial process. They are also less ambiguous than SAMHSA's principles and it is clearer what they aim to achieve. In this way, the principles will be easier to apply and assess in practice. Whether or not a certain measure does (or will) in fact promote a particular principle can only be determined with research into that specific measure. There are many ways that such research could be undertaken, but this could involve, for example, asking court participants for their thoughts on particular measures or by comparing outcomes when a particular measure is used (as opposed to not used).

¹⁶⁰ See, eg, Cossins (n 3) 487, 555–60, chs 6, 10–11; Katirai (n 3) 86; Epstein and Goodman (n 3) 425–32; Herman (n 3) 160.

¹⁶¹ 'Murri Court', *Queensland Courts* (Web Page, 22 April 2022) <<https://www.courts.qld.gov.au/courts/murri-court>>.

¹⁶² In Australia, see, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74A; *Evidence Act 1977* (Qld) pt 6A, div 1A; *Evidence Act 1929* (SA) pt 3, div 4; *Criminal Procedure Act 2009* (Vic) s 388; *Evidence Act 1906* (WA) ss 36BE, 39–39B.

3 Universal Precautions or a Focus on the Individual

Like other authors, SAMHSA argued that its principles of trauma-informed practice must be applied taking a universal precautions approach.¹⁶³ The universal precautions approach was discussed in Part II but, briefly, it assumes a history of trauma in all people and, as such, suggests that it is best practice to treat all clients as trauma-survivors.¹⁶⁴

Some stakeholders have argued that a universal precautions approach should be taken in the legal system because legal system personnel are not trained to recognise trauma and its effects.¹⁶⁵ However, the universal precautions approach has been criticised by some feminist scholars who argue that it has the potential to ignore the diversity in women's experiences, identity and coping, and erase their unique agency — they argue that the focus should be on the uniqueness of the individual (ie an individually responsive approach should be taken).¹⁶⁶ Moreover, some feminist scholars have highlighted that not all people will have persisting trauma problems (and therefore not all will need trauma-informed practices).¹⁶⁷

There are reasons why both approaches — universal precautions and individually responsive — may be appropriate in the context of a trauma-informed trial. For example, a universal precautions approach may save time and resources, and might be easier for court personnel to apply and for the trial to accommodate (given measures that are available would be the same across all trauma-informed trials). This is especially so if court personnel do not have adequate knowledge of how to recognise when court participants might be suffering from trauma (and therefore might need additional assistance navigating the trial process). On the other hand, an individually responsive approach may ensure the approach taken in the case as well as how court participants are treated are tailored specifically to participants' needs, which could improve their experience of the trial and benefit the prosecution/defence. It could also be more feasible in practice, given not all courts may have the resources to engage in trauma-informed practices in every case (such as spare court rooms, relevant technology, support people or extra time). Additionally, the individually responsive approach is more consistent with the principles of 'empowerment of court participants, including through choice' and 'responsiveness to the cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants', which focus on an individual's needs and desires.

¹⁶³ SAMHSA's *Concept* (n 1) 10.

¹⁶⁴ *Ibid.*

¹⁶⁵ See, eg, Kezelman and Stavropoulos, 'Trauma and the Law' (n 5) 3–4, 7.

¹⁶⁶ Emma Tseris, 'Social Work and Women's Mental Health: Does Trauma Theory Provide a Useful Framework?' (2019) 49(3) *British Journal of Social Work* 686, 690 ('Social Work and Women's Mental Health'); Birnbaum (n 93) 478.

¹⁶⁷ Tseris, 'Social Work and Women's Mental Health' (n 166) 687; Emma Tseris, 'A Feminist Critique of Trauma Therapy' in Bruce MZ Cohen (ed), *Routledge International Handbook of Critical Mental Health* (Routledge, 2017) 255; Berliner and Kolko (n 93) 171.

Because both approaches have merit in the trial context, rather than mandating application of the universal precautions approach, the trauma-informed trial framework should begin with the universal approach but provide scope for taking an individually responsive approach. This could be achieved by refining the third assumption of the trauma-informed trial as follows: 'it is assumed that criminal trial personnel apply principles of the trauma-informed trial, *taking a universal precautions approach unless otherwise appropriate*'. Framing the assumption in this way highlights that trauma-informed practices should be applied universally within the trial (to victims, defendants, witnesses and other court participants, as relevant) but if this is not appropriate, then an individually responsive approach should be taken. This could operate as an 'opt-out' system for court participants, providing scope for them to decline trauma-informed practices, consistent with the principles of the trauma-informed trial.

In the context of the criminal trial, this approach might be more suitable given court personnel may not possess the knowledge necessary to be able to recognise when someone might be suffering from trauma or, indeed, to be able to disentangle the potentially many causes of disadvantage that court participants might have.¹⁶⁸ In this way, the default position would be for court personnel to universally apply the trauma-informed measures available (assuming there could be a diversity of issues at play, including trauma), unless other information indicates otherwise (such as a victim-witness informing the prosecutor of their wishes or medical evidence indicating an individually responsive trauma-informed practice should be used instead). A similar approach could be taken by lawmakers, policymakers, law reformers, academics and others when considering how potential reforms could operate.

C Trauma-Informed Practice Beyond the Trial

While this article has presented a conceptual framework for the trauma-informed trial, the methodology utilised in this article could be applied to develop similar conceptual frameworks for application to other legal system contexts and, in this way, provide clarity as to how trauma-informed practice should be applied in those contexts. This is something that some staff members (including myself) did at the Australian Law Reform Commission ('ALRC') to inform development of staff practices for engaging with consultees and other members of the public as part of the *Justice Responses to Sexual Violence Inquiry*.

The Terms of Reference for that Inquiry asked the ALRC to take a 'trauma-informed ... approach'.¹⁶⁹ To inform development of inquiry-specific trauma-

¹⁶⁸ See, eg, Megan C Kurlychek and Brian D Johnson, 'Cumulative Disadvantage in the American Criminal Justice System' (2019) 2(1) *Annual Review of Criminology* 291.

¹⁶⁹ 'Terms of Reference', *Australian Law Reform Commission* (Web Page, 23 January 2024) <<https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference/>>.

informed practices, we utilised the approach taken in this article to operationalise SAMHSA's trauma-informed practice framework to the law reform inquiry process. These operationalised principles were then converted into questions that we asked of various practices. These questions were:

- 1) Does the measure promote the physical, psychological and relational safety of consultees and other engaged members of the public?
- 2) Does the measure foster trust between consultees/other engaged members of the public and ALRC staff? Does the measure make the ALRC inquiry process more transparent?
- 3) Does the measure create room for peer support for consultees and other engaged members of the public?
- 4) Does the measure promote collaborative, reciprocal relationships between consultees/other engaged members of the public and ALRC staff?
- 5) Does the measure empower consultees and other engaged members of the public, give them a voice that is heard, and give them choice?
- 6) Is the measure responsive to the individual needs and inequalities of consultees and other engaged members of the public? Does the measure eschew reliance on stereotypes, biases, myths and misconceptions?

We took a similar approach to inform development of trauma-informed practices to minimise the risk of vicarious trauma suffered by ALRC staff during the course of the inquiry.

The staff who were involved in this process, including myself, found the methodology utilised to be useful for providing clarity as to how trauma-informed practice should be applied in the law reform inquiry process. Some of my colleagues commented that the questions in particular were immensely helpful, as they oriented us to the particular issue that needed to be considered and provided guidance as to how the relevant principle should be applied and assessed in practice.

IV CONCLUSION

This article presented a conceptual framework for the trauma-informed trial. It is intended (and hoped) that others will use this framework to develop trauma-informed practices that can be applied in specific trial contexts, or to address particular problems that arise in criminal trials (such as the experience of domestic, family and sexual violence victim-witnesses). The aim of the trauma-informed trial is to *minimise* re-traumatisation, an aim that this article argued is compatible with the adversarial trial and defendant's fair trial rights.

By way of summary, the trauma-informed trial conceptual framework consists of three assumptions — specifically, that criminal trial personnel:

- 1) Understand trauma and how it might affect court participants;
- 2) Recognise the signs of trauma in court participants; and
- 3) Apply principles of the trauma-informed trial, taking a universal precautions approach unless otherwise appropriate.

To make the assumptions easier to apply and assess in practice, the assumptions were converted into a set of questions to be asked of a particular cohort of criminal trial personnel, as follows:

- Do criminal trial personnel understand trauma and how it might affect court participants?
- Can criminal trial personnel recognise the signs of trauma in court participants?
- Have criminal trial personnel applied principles of the trauma-informed trial, taking a universal precautions approach unless otherwise appropriate?

When applied to a trial setting, the six trauma-informed practice principles result in the following principles and associated questions:

1. *Physical, psychological and interpersonal safety of court participants*
 - Does the measure promote physical, psychological and interpersonal safety of court participants?
2. *Trustworthy court personnel and transparent trial processes*
 - Does the measure build trust between court participants and court personnel?
 - Does the measure make trial processes more transparent?
3. *Supportive relationships for court participants*
 - Does the measure promote supportive relationships for court participants?
4. *Collaborative, reciprocal relationships between court participants and court personnel*
 - Does the measure promote collaborative, reciprocal relationships between court participants and court personnel?
5. *Empowerment of court participants, including through choice and a voice that is heard*

- Does the measure empower court participants, including by giving them choice and a voice that is heard?
6. *Responsiveness to cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants, eschewing reliance on stereotypes, biases, myths and misconceptions*
- Is the measure responsive to the cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants?
 - Does the measure eschew reliance on stereotypes, biases, myths and misconceptions?

It is intended that the set of questions above be asked about a particular trial measure as a means of assessing the extent to which that measure promotes trauma-informed practice principles (and, in this way, whether the measure might minimise re-traumatisation).

The trauma-informed trial framework summarised above is designed to address some of the limitations and critiques of existing trauma-informed practice frameworks, including that a framework for application in the context of the criminal trial is yet to be settled. Trauma-informed practice is increasingly being applied by law reform and government bodies examining issues in the context of criminal law, so creating a conceptual framework specific to the criminal trial will be of immense practical benefit. Given the research shows that many defendants and victims of crime have suffered traumatic experiences, this conceptual framework will be an invaluable tool for those seeking to minimise the re-traumatising nature of the criminal trial.