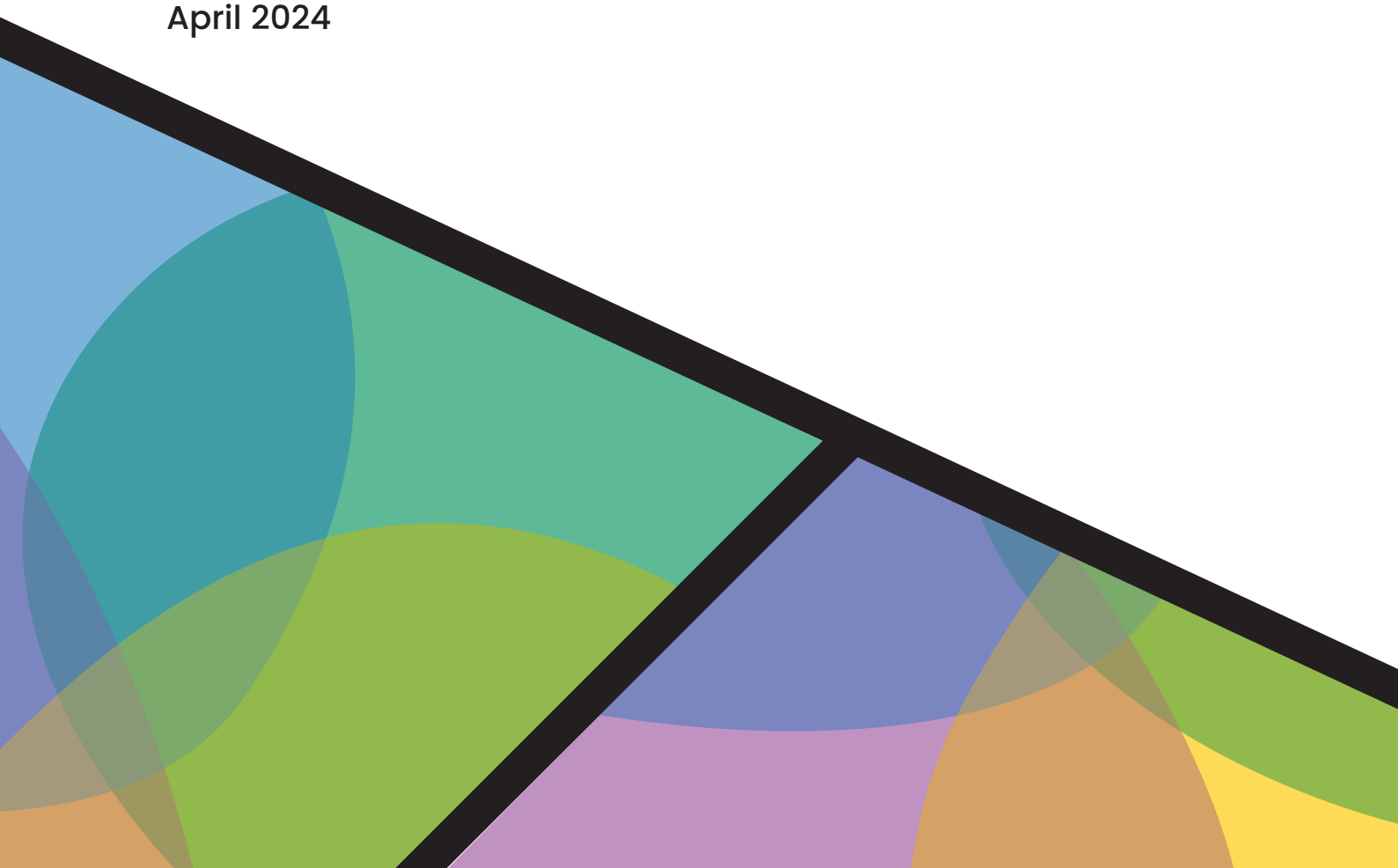
Australian Government
Australian Law Reform Commission

ISSUES PAPER

JUSTICE RESPONSES TO SEXUAL VIOLENCE

Issues Paper 49
April 2024



Note on content

This Issues Paper relates to sexual violence, which may be confronting or cause distress to some readers.

Please be aware that free and confidential support is available through:

- 1800 RESPECT, call 1800 737 732 or visit www.1800Respect.org.au
- Full Stop Australia, call 1800 385 578 or visit www.fullstop.org.au
- Lifeline, call 13 11 1 or visit www.lifeline.org.au
- 13YARN, call 13 92 76 or visit www.13yarn.org.au
- Kids Helpline, call 1800 55 1800 or visit www.kidshelpline.com.au
- Compass, call 1800 353 374 or visit www.compass.info
- Rainbow Sexual, Domestic and Family Violence Helpline, call 1800 497 212 or visit https://fullstop.org.au/get-help/our-services/rainbowviolenceandabusesupport

If you are, or someone else is, in immediate danger, call 000.

If you are deaf and/or find it hard hearing or speaking with people on the phone, the National Relay Service (NRS) can help. Contact via your preferred option or call 1800 555 660.

This Issues Paper reflects the law as at 1 April 2024.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

ALRC publications are available to view or download free of charge on the ALRC website: www.alrc.gov.au/publications. If you require assistance, please contact the ALRC.

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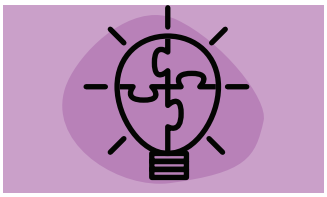
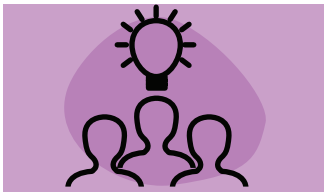


Who are we?

The ALRC is an independent statutory body.
We make recommendations to the Australian Government about how to reform the law.

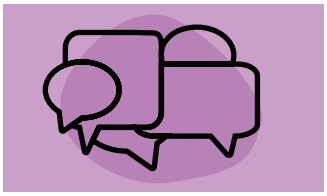
What is the Inquiry about?

We are inquiring into how the justice system responds to sexual violence. This means identifying problems in existing responses and developing recommendations for reform.



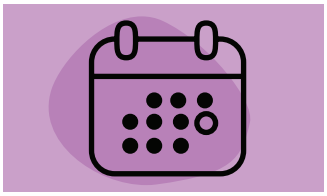
Why are we consulting?

We want to hear from a wide range of voices.
Your diverse perspectives and experiences will inform our recommendations to Government.



Who do we want to hear from?

Anyone is welcome to make a submission.
We are particularly interested in hearing from people who have encountered the justice system's response to sexual violence.



What is the deadline for making a submission?

Friday 24 May 2024

How do I make a submission?

- Using the online response form at: www.alrc.gov.au
- By email to: jrsv@alrc.gov.au
- By post to: PO Box 209, Flinders Lane VIC 8009

What happens next?

We will review and consider all submissions.
Wherever possible, we will seek further feedback from stakeholders before finalising our recommendations.

Introduction

1. The Australian Law Reform Commission ('ALRC') is inquiring into justice responses to sexual violence. The ALRC will consider how to harmonise laws about sexual violence across Australia and how to promote just outcomes for people who have experienced sexual violence. We will pay particular attention to people in groups that are disproportionately reflected in sexual violence statistics. Our recommendations will aim to ensure that people who have experienced sexual violence and their families are properly supported when they seek help, and that the justice response minimises the extent of any re-traumatisation.

2. Over several decades, there have been many recommendations and reforms made to improve justice responses to sexual violence. Examples of some recent reports, inquiries, and action plans are set out in paragraph three of the **Terms of Reference**.

3. In conducting this Inquiry, we will avoid duplicating existing work. The task of the ALRC is to synthesise and build on relevant reports, inquiries, and action plans, where appropriate. We will be identifying recent reforms that have been recommended and implemented, seeking information about whether the implemented reforms are working in practice, and considering whether further recommendations are needed to make the reforms more effective. We will also focus on identifying opportunities to explore new ground.

4. In undertaking the Inquiry, the Terms of Reference require the ALRC to consult with relevant stakeholders across Australia. These stakeholders include, but are not limited to:

- people who have experienced sexual violence;
- people and organisations representing population cohorts that are overrepresented in sexual violence statistics;
- state and territory government and law enforcement agencies;
- policy and research organisations;
- community service providers (especially specialist sexual assault service providers and legal assistance service providers); and
- the broader legal profession (including prosecutors and defence lawyers).

5. As well as hearing from individuals and organisations, the ALRC will be conducting research and consulting with the lived-experience Expert Advisory Group ('EAG') which has been established by the Attorney-General's Department (Cth). This group primarily comprises victim survivors of sexual violence and their advocates. We have already had the benefit of an initial consultation with the EAG. We will also consult with people currently working in different states and territories who know the strengths and weaknesses in the current criminal justice system and other systems established to support victim survivors.

6. The ALRC is interested in hearing about the diverse experiences and needs of victim survivors in relation to the questions in this Issues Paper. The Terms of Reference ask us to consider the impacts of laws and legal frameworks on groups that include: women; First Nations people; people from culturally and linguistically diverse ('CALD') backgrounds; people with disability; people who are lesbian, gay, bisexual, transgender, queer, intersex, asexual, brotherboy, sistergirl, or who have other genders and sexualities (LGBTQIA+); people who have been convicted of criminal offences and been incarcerated; people who are migrants or newly arrived refugees impacted by insecure visa status; people living with HIV; people employed in sex work; people in residential care settings; older people, especially those experiencing cognitive decline; and young people.

7. The questions in this Issues Paper are informed by:

- the ALRC's Terms of Reference;
- themes identified in prior reports, inquiries, and action plans; and
- our initial consultation with the EAG.

8. The questions focus on the information, support, and options available to victim survivors following their experience of sexual violence, whilst at the same time recognising that a person accused of an act of sexual violence cannot be convicted of an offence unless it is established beyond reasonable doubt. It has been suggested that the needs of victim survivors may include:

- the ability to report their experience in a safe space and obtain reliable information about available supports and options;
- having an informed choice as to whether or not to participate in the criminal justice system, including reporting to the police, giving evidence if charges are laid, having contact with the prosecution, and going to court; and
- the ability to make an informed decision regarding the options available instead of, or in addition to, the option of participating in the criminal justice system.

9. While some questions are directed specifically to victim survivors, the ALRC also welcomes responses to these questions from organisations and individuals who may have insights into the experiences of victim survivors in these areas.

10. This Issues Paper is intended to be accessible and has very few citations for this reason. Where this Paper refers to recommendations made in previous inquiries, the ALRC has focused on the reports listed in the Terms of Reference for this Inquiry. After considering submissions received in response to this Issues Paper, the ALRC will develop reform proposals for further feedback from stakeholders. This Issues Paper focuses primarily on procedural issues, but future reform proposals will also cover issues relating to substantive law, including laws about consent.

Making a submission

11. The purpose of this Issues Paper is to provide general guidance to individuals and organisations who want to tell us their views. The Paper sets out a series of questions to which individuals and organisations may want to respond. It is not necessary to deal with all these questions and it would be helpful for you or your organisation to tell us which issues you consider are most important. The ALRC will also accept submissions which address the Terms of Reference without responding to questions in this Paper.

12. The ALRC seeks submissions from a broad cross-section of the community, as well as those with a special interest in the Inquiry. These submissions are crucial in assisting the ALRC to develop its recommendations.

13. Uploading submissions through the ALRC website is preferred. Alternatively, submissions may be emailed in PDF format to jrsv@alrc.gov.au.

14. Stakeholders may make a public or confidential submission to the Inquiry. Public submissions may be published on the ALRC website. Submissions that are public are preferred. In the absence of any indication that a submission is intended to be confidential, the ALRC will treat the submission as public. If you are a victim survivor, please see the additional information about submissions from victim survivors below.

15. The ALRC will not publish submissions that breach applicable laws, promote a product or a service, contain offensive language, may be defamatory, express sentiments that are likely to

offend or vilify sections of the community, or that do not substantively comment on the issues relevant to the Inquiry.

16. In making a submission, it may help to focus on different aspects of the justice system's response to sexual violence. For example, **Figure 1** below illustrates how the criminal justice system typically responds to sexual violence, although not every case will follow this exact process. **Figure 2** (further below) illustrates other aspects of the justice system. Where possible, icons are used throughout this Paper to indicate how questions correspond to different aspects of the justice system.

Additional information about submissions from victim survivors

17. The ALRC seeks submissions from adult victim survivors.

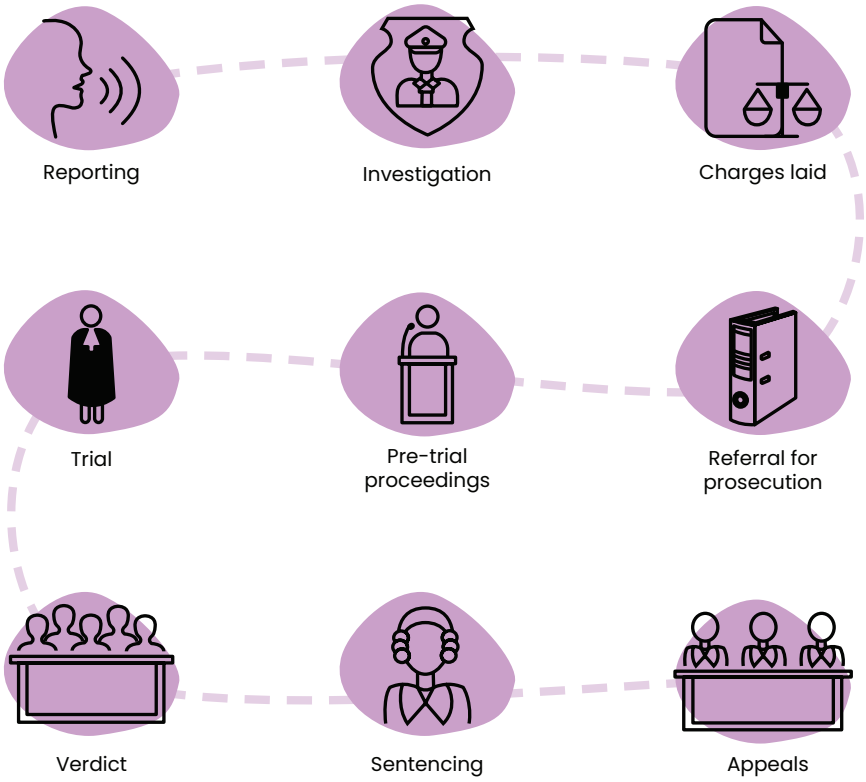
18. The ALRC is interested in your experience of the justice system and your views on how this could be improved. You do not need to tell us about your experience of sexual violence or name the people who were involved.

19. The ALRC will also respect your decision in relation to the confidentiality of the information you provide in your submission. However, there may be some situations where the ALRC is required by law to share the information.

20. In addition, there are laws in each state and territory about the circumstances in which the identity of victim survivors may, or must not, be published.

21. If you are interested in making a submission but need support to do so (for example, an interpreter or support person), please contact the ALRC. You can contact us by emailing jrsv@alrc.gov.au or calling us on +61 456 972 868. The ALRC may then organise for you to make a submission verbally to an ALRC staff member, with appropriate support.

Figure 1: The criminal justice system's response to sexual violence



The nature and extent of sexual violence

22. Prior reports and inquiries have examined the nature and extent of sexual violence in Australia and the response of the justice system. There is a lack of data about the performance of the criminal justice system across states and territories. Comparisons between the various studies must be undertaken cautiously, because they may deal only with sexual violence within some groups or may measure different matters (for example, some studies survey the extent of sexual violence, whilst others refer to offences reported to police or some other authority). Later in our work we will examine these statistics in greater detail. There are some generally accepted facts which may be distilled from prior reports and inquiries:

- A high proportion of women in Australia (around one in five) have experienced sexual violence since the age of 15.
- Although men in Australia also experience sexual violence, the proportion is lower (around one in 16 since the age of 15).
- Around one in five women and one in nine men have experienced physical or sexual violence *before* the age of 15. A high proportion of sexual offences against children or young people were perpetrated by a family member, a friend, in an institutional context, or by someone known to the victim survivor.
- In the family context, sexual violence often occurs alongside other forms of physical violence carried out by a partner, spouse, or parent.
- Women with a disability and Aboriginal or Torres Strait Islander women are more likely to have experienced sexual violence than other women.
- Trans and gender diverse people are also more likely to experience sexual violence than other people.
- The vast majority of adults in Australia who have experienced sexual violence were assaulted by a male.
- Only about 13% of sexual offences are reported to police. Victim survivors of an offence (particularly child victim survivors) often report it many years later.
- There is no accurate Australia-wide data on the proportion of sexual offences reported to police which result in charges being laid or in a criminal conviction. However, we know that of the small proportion of offences that are reported, a smaller proportion are prosecuted and some offences that are prosecuted do not result in a criminal conviction.

Reporting the experience of sexual violence safely

23. Many victim survivors of sexual violence do not report their experience to anyone, including the police. This may be because they are experiencing feelings of shame, embarrassment, guilt, blame, or fear of not being believed. They may: have a distrust of and lack of faith in the police or the justice system; receive poor responses from family, friends, carers, or services to an attempted disclosure; live in a regional, rural, or remote area, or have insufficient information about the justice process and associated support; or fear consequences in other aspects of their lives (such as loss of employment, impact on family, visa status, or cultural recriminations). Some victim survivors do not want to engage in the criminal justice process because they do not want the person responsible for sexual violence to go to jail, or because the process does not meet their needs. These factors suggest that many victim survivors do not engage with the justice system at all, and that measures should be implemented that improve access to justice for victim survivors.

24. In our initial consultation with the EAG, we heard of the need for the community to have safe and accessible opportunities for victim survivors to report their experience and obtain reliable information about available options and supports.

25. Relevant recommendations in prior reports and reforms in some states have included:

- increased use of websites and hotlines to provide information to victim survivors and advise them on how to obtain support;
- improved use of technology and new service delivery models to assist people in rural, regional, and remote areas;
- establishing safe places where people can seek help and information and be supported to report to the police if they choose to do so; and
- enabling victim survivors to report anonymously, so that the 'pattern of offending' by the person responsible for sexual violence becomes apparent over time.

Question 1 If you are a victim survivor, did you decide to tell someone about your experience?

If you did tell someone, did you contact:

- a particular support service;
- the police;
- a health professional, a teacher, an employer; or
- a family member, friend, or some other person?

Was there sufficient information available to you to help you decide who to tell and what to do? Where did you find that information? Was the response you received adequate?

What supports did you need at that time? Were the supports adequate? How could they be improved?

If you decided not to tell someone about your experience, you may wish to share with us the reason(s) why.

Question 2 What reforms or recommendations have been implemented in your state or territory? How are they working in practice? What is working well? What is not working well?

Question 3 How can accessing the justice system and reporting be made easier for victim survivors? What would make the process of seeking information and help, and reporting, better?

You might consider the kind of information given to victim survivors, the confidentiality of the process, and the requirements of particular groups in the community.

Question 4 Do you have other ideas for what needs to be done to ensure that victim survivors have a safe opportunity to tell someone about their experience and get appropriate support and information?

Criminal justice responses to sexual violence

26. Over the last 40 years, there have been many inquiries into, and reports about, criminal justice responses to allegations of sexual violence. In Australia, the many recommendations for reform have generally been made on a jurisdiction by jurisdiction basis, but often have common underlying themes.

27. Those themes include an acceptance that people who perpetrate sexual violence are guilty of serious criminal offences and that the right to a fair trial needs to be preserved. There is also no doubt that many victim survivors do not report their experience to the police at all, or if they do, it may not be until many years later. If a report to the police is made, a low proportion proceed through the criminal justice system and even fewer result in a guilty plea or conviction.

28. It is important to acknowledge the extensive work that has been done, and continues to be done, to change processes and procedures in the criminal justice system. We will identify and consider the changes in each 'jurisdiction' (by which we mean the criminal justice system in each state or territory), including its effectiveness (or otherwise) and whether it should be modified or harmonised. We will consider other recommendations for reform that have not been implemented. Additionally, there is always room for new ideas.

29. We have met with members of the EAG and understand the importance of hearing from victim survivors about their contact with the criminal justice system, their responses to changes, and their ideas for reform. Many members of the EAG, as well as other victim survivors, are experienced advocates and professionals working in this field.

30. For this part of the Issues Paper, we will adopt the term 'complainant' to refer to the person who has made a report to the police about their experience of sexual violence. It is the term used within the criminal justice system to recognise that the person has made a complaint of sexual violence, but the allegation has not yet been tried and proved. It is the term used during the process up until the point of any conviction (following a plea of guilty or trial) when the term changes to 'victim'. By adopting this terminology, we do not intend in any way to diminish the significance for the victim survivor of their experience of sexual violence.

31. At this stage of our consultation process, we have framed the issues in this paper in a general way to have a wide reach and to encourage people and organisations to respond as broadly or as specifically as they choose.

Police responses to reports of sexual violence

32. Members of the EAG identified the police as 'gatekeepers' to the justice system, which encapsulates the importance of the police response to reports of sexual violence.

33. In broad terms, recommendations made in prior reports and actions taken in some states and territories have included:

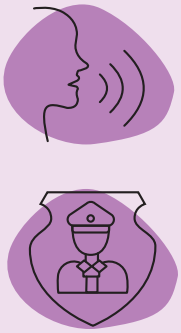
- training for police (including police prosecutors) about trauma and how to ensure culturally appropriate and trauma-informed responses;
- developing a program of victim-centred and trauma-informed approaches, policies, and procedures by consulting with people with lived experience, First Nations peoples, service system participants, and legal stakeholders;
- specialist divisions within the police force to respond to and investigate reports of sexual violence;

- training of specialist police to interview complainants; engaging with intermediaries for interviews with child complainants and adults with communication difficulties; and recording interviews with complainants;
- reviewing recruitment policies for police to create a more diverse police force so that, wherever possible, a complainant can speak to a police officer who will understand their background, and choose the gender of the interviewing officer;
- ensuring that complainants receive information about the prosecution process and understand the reasons why police may decide not to investigate or continue with a prosecution;
- reviewing translation and interpreting services used for First Nations people and CALD communities;
- undertaking regular audits of police practices to identify areas in need of improvement; and
- evaluating and including in annual reports information about outcomes and impacts for complainants following initiatives and actions.

Question 5 If you are a victim survivor, did you contact the police? If so, how? What was your experience of the police response?

Question 6 What reforms or recommendations have been implemented in your state or territory? How are they working in practice? What is working well? What is not working well?

Question 7 What are your ideas for improving police responses to reports of sexual violence? What can be done?



Prosecution responses

34. This section of the Issues Paper deals mainly with the role of the Office of the Director Public Prosecutions ('ODPP') which prosecutes sexual offences in the Supreme Court (Australian Capital Territory, Tasmania, Northern Territory) or in a County/District Court (Victoria, Queensland, South Australia, New South Wales, and Western Australia). The ALRC refers to these courts as the 'higher courts'. The ALRC would also like to hear about the role of police prosecutors who prosecute sexual offences in the Local or Magistrates' Courts. The ALRC refers to these courts as the 'lower courts'.

35. Once a report is made to police, police will conduct an investigation and decide what charges to lay in the lower court. The nature of the charges determines whether the police will prosecute, or the ODPP will prosecute. Broadly, if only less serious charges have been laid, the police will prosecute the matter in the lower court. If serious charges have been laid, the ODPP becomes involved, and the matter will proceed in the higher courts. The process then varies across the jurisdictions, and may include a committal process, at the end of which the accused is required to enter a plea. Ultimately, the ODPP determines which charges will proceed in the higher courts. Prosecutorial guidelines generally require the ODPP to be satisfied, based on the witness statements and or records of interview provided by police, that there is a reasonable prospect of conviction, and that the prosecution is in the public interest.

36. Once charges have been laid, the accused will plead not guilty or guilty. If the accused pleads not guilty, the matter will: (i) proceed to trial; or (ii) be discontinued by the ODPP at some stage prior to trial for other reasons. If the accused pleads guilty, that might be: (i) as charged; or

(ii) as a result of negotiations between the ODPP and the accused's lawyer about the charges, the factual basis of the charges, or both. At some stage in that process, the complainant may need to speak to a prosecutor about their experience of sexual violence.

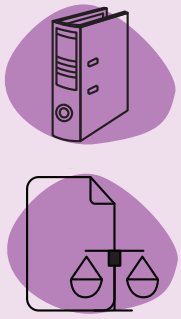
37. In broad terms, reforms at this stage of the justice response have sought to address issues of poor communication, insufficient support, and lack of consultation with complainants, and to minimise re-traumatisation in the re-telling of the experience. Recommendations and actions have included:

- trauma-informed training for prosecutors;
- specialist sexual offence prosecutors who receive regular trauma-informed training;
- developing and implementing a cultural capability plan that includes strategies to improve the capability of staff within the ODPP;
- establishing and funding a witness support service and a specialist child witness service to support witnesses throughout the prosecution process;
- maintaining regular communication with complainants, unless they have asked not to be kept informed;
- a memorandum of understanding between police and the ODPP relating to the investigation and prosecution of sexual violence cases;
- specific ODPP guidelines or (review of ODPP guidelines) to ensure that prosecution responses are guided by trauma-informed principles;
- requiring the ODPP to have written policies for decision-making and consultation, including: (i) a right for complainants to seek written reasons for key decisions; and (ii) a robust and effective formalised complaints mechanism to allow complainants to seek internal merits review of key decisions;
- providing for an independent review of sexual violence cases that are not progressed, or for cases to be considered by a victims' commissioner if requested; and
- regular auditing of prosecution decisions to identify patterns which affect the decision on whether or not to prosecute.

Question 8 If you are a victim survivor, did you have contact with the ODPP? What was your experience of the ODPP response? What support, if any, was provided to you?

Question 9 What reforms or recommendations have been implemented in your state or territory? How are they working in practice? What is working well? What is not working well?

Question 10 Do you have ideas for improving ODPP responses to the prosecution of sexual violence?



The trial process

38. As outlined above, all criminal charges are laid and commence in the lower courts. Charges that are 'less serious' stay in a lower court. The accused will go to trial before a Magistrate (if there is a not guilty plea) or the accused will be sentenced by a Magistrate (if there is a conviction following a trial or a guilty plea). Other charges that are 'more serious' go through a 'committal process' in a lower court. If the accused pleads not guilty, the matter will be committed for trial to

a higher court. If the accused pleads guilty (or is convicted at trial), they will be sentenced in a higher court.

39. Most sexual violence offence cases are finalised in the higher courts. Our focus is on the committal and subsequent trial and sentencing process in the higher courts. However, we do want to hear about experiences, issues, and ideas for reform in relation to trials and sentences which are dealt with by a Magistrate in lower courts.

40. In the higher courts, a criminal trial is either a trial by jury or a trial by judge alone. Some jurisdictions (Victoria, ACT, and NT) do not have the option of trial by judge alone.

41. At trial, the prosecution has the onus and burden of proof. That means the prosecution must present evidence which proves the charges to the standard of beyond reasonable doubt. The accused is entitled to a presumption of innocence and a right to silence. The accused may choose not to give evidence, without that choice adversely affecting the accused's presumption of innocence.

42. The prosecutor will call witnesses and tender exhibits. The prosecutor will ask questions of each witness, the answers to which which forms the witness' evidence in chief. The defence lawyer will then cross-examine the witness. The prosecutor may finally ask some further questions of the witness in re-examination.

43. A complainant of sexual violence is a witness for the prosecution in a sexual violence trial. The complainant does not decide on the charges or lay them in court. The complainant does not have their own legal representation.

44. For the prosecution, the complainant in a sexual violence trial is the most important witness. The complainant gives direct evidence about their experience. It is often the case that there are no other witnesses to the relevant events.

'Special measures': procedural changes

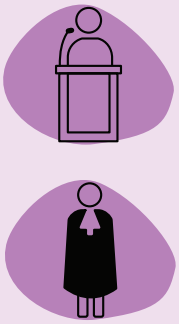
45. Following recommendations by past inquiries, legislative reforms provided for changes to be made in the way complainants could give their evidence, with a view to minimising re-traumatisation. Those procedural changes are often referred to as 'special measures'. Most of the following measures have been implemented nationally:

- a closed court during the complainant's evidence;
- the use of a one-way screen to shield the complainant from a view of the accused during the complainant's evidence, if the complainant chooses to give evidence in the courtroom;
- the use of closed-circuit television ('CCTV') to enable complainants to give their evidence outside the courtroom from a dedicated room within the court precinct;
- the use of facilities outside the court precinct from which complainants may give their evidence. Some jurisdictions have specially designed facilities for children and young people which may be visited by the child before giving their evidence;
- complainants may be accompanied during their evidence by a support person, have a canine companion present, or both; and
- changes to the design of courts to limit the complainant's interactions with the accused as far as possible.

Question 11 If you are a victim survivor, did you experience any of the measures described above? If so, what was your experience?

Question 12 Do you have views about the measures listed above? Have the measures reduced the trauma of giving evidence? Could they be improved? Have things changed? What is working well? What is not working well?

Are there other measures which have been implemented and are not listed above?



Question 13 Do you have other ideas for improving court processes for complainants when they are giving their evidence?

'Special measures': evidence in the form of audio-visual recordings

46. Past inquiries and reports have considered that pre-recording a complainant's evidence minimises trauma for complainants in the criminal justice process. The advantages have been considered to outweigh disadvantages. The intention has been to promote a trauma-informed approach, for example, by minimising the number of times complainants need to re-tell their experience, reducing the impact of delay upon complainants associated with lengthy trial lists, and enabling complainants to avoid further trauma arising from giving evidence in a courtroom.

47. There are now legislative provisions which enable the prosecution to present the evidence of a complainant at trial in the form of audio-visual recordings. The extent of those provisions and their implementation differs across jurisdictions. In some jurisdictions, the complainant is not required to attend in person at the trial.

48. Broadly speaking, if the complainant is a child, or an adult with communication difficulties (a 'vulnerable adult'), the evidence at trial may comprise: (i) an audio-visual recording of the complainant's interview(s) with police as part or all of the complainant's evidence in chief; and (ii) an audio-visual recording of the balance of the complainant's evidence (any additional evidence in chief, cross-examination and re-examination) at a pre-trial hearing in a courtroom, or in separate premises, such as a child witness service.

49. If the complainant is not a child or a vulnerable adult, police interviews are generally not recorded or used at trial as the examination in chief. Instead, the evidence at trial may consist of an audio-visual recording of the complainant's evidence at a pre-trial hearing in a courtroom.

50. If a complainant gives evidence at trial (rather than having the evidence pre-recorded), the evidence at trial may be recorded. If a conviction is successfully appealed and a re-trial ordered, the recording may be used as the complainant's evidence at any subsequent re-trial, though the complainant may also be recalled to give further evidence.

51. When the use of police recordings or court pre-recordings was considered by past inquiries as a possible reform, various associated matters were raised, including:

- the need for adequate technology to be available to police and courts to record the interviews/evidence, including in regional areas;
- standards and guidelines for police questioning of child or vulnerable adult complainants, including the training and use of specialist police officers to conduct the interviews;

- the involvement of intermediaries to assist police officers before and during interviews with child or vulnerable adult complainants;
- the need to provide a safe space for a child or vulnerable adult complainant to disclose the experience of sexual violence to police, including the time at which the recording of interviews should commence;
- whether police interviews of *all* adult complainants should be recorded and used as the examination in chief at trial;
- the ability of pre-recording evidence at a pre-trial court hearing to reduce delay to trial generally;
- the editing of recorded police interviews and court pre-recordings before they are used at trial; and
- the impact of recorded evidence upon a jury or judge, compared with the impact of evidence given in person.

Question 14 If you are a victim survivor, was your interview (or interviews if more than one) with the police recorded? Was your evidence recorded in court at a pre-trial hearing?

What was your experience of the recording process?

Did you see the recording(s) before they were presented by the prosecution at trial?

How did you feel about not giving evidence in person at the trial?

Question 15 Has the use of recorded evidence been implemented in your jurisdiction? If so, to what extent?

How is this working in practice? What is working well? What is not working well? What could be improved?

Do any of the matters discussed when the recommendations were made (some of which are outlined above) need further discussion in the context of the reforms having been implemented?

Are there any other issues? What do you see as the advantages and disadvantages of using recordings of the complainant's evidence at trial?

'Special measures': intermediaries and ground rules hearings

52. It has been well recognised that the traditionally complex questioning styles and practices of judges and lawyers need to be changed. This is a particular problem when the complainant being questioned is a child or vulnerable adult. In addition to training for judges and lawyers, past recommendations for reform have included the introduction of intermediaries in the trial process.

53. Some jurisdictions have now introduced an intermediary scheme. The models differ between those jurisdictions. Generally, intermediaries are engaged for child complainants, child witnesses, and vulnerable adult complainants. Some jurisdictions have not introduced such a scheme.

54. The role of the intermediary is to impartially facilitate communication between the complainant and counsel in court. Intermediaries are specialists, including psychologists, speech pathologists, and social workers, who receive training about their role.

55. The intermediary may interview the complainant (but not about the complainant's experience of sexual violence) and provide a report to the court or counsel about the complainant's communication needs. That report may be discussed at a 'ground rules' hearing. The intermediary will be present in court during the complainant's evidence and will intervene if a question needs to be rephrased to overcome any confusion it may cause the complainant.

56. Whether an intermediary has been engaged or not, many jurisdictions convene a 'ground rules' hearing prior to recording a complainant's evidence at a pre-trial hearing or prior to trial. These hearings are to discuss the 'ground rules' for taking the evidence of the complainant, including the need for breaks, special measures, and the topics or questions that may be asked in cross-examination. In some jurisdictions, these hearings are limited to sexual violence trials involving child or vulnerable adult complainants, but in others they are held for all sexual violence trials.

57. Issues that have arisen in relation to reform recommendations for intermediary schemes include:

- funding for the schemes;
- availability of suitable intermediaries, including culturally appropriate intermediaries and the ability to reach into regional areas;
- training, accreditation and registration of intermediaries; and
- extending the schemes to make intermediaries available more widely.

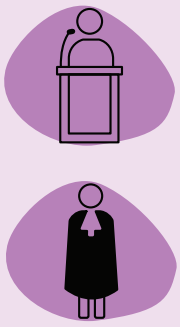
Question 16 If you are a victim survivor, was an intermediary involved to assist with communication? If so, we would like to hear your feedback.

If an intermediary was not involved, do you think an intermediary would have been helpful? If so, in what way?

Question 17 Has an intermediary scheme been implemented in your state or territory? How is it working in practice? What is working well? What is not working well? How could it be improved? Have any of the issues described above arisen?

If an intermediary scheme has not been implemented in your state or territory, do you know why? Do you think such a scheme would be helpful? If so, what do you think the scheme should involve?

Do you have any ideas generally about the use of intermediaries in the criminal justice system?



Assessment of the credibility and reliability of complainants

58. In a criminal trial, the jury or judge (where trial by judge alone) must assess the credibility and reliability of the evidence of witnesses. It follows that the jury or judge must assess the credibility and reliability of the complainant's evidence in a sexual violence trial, as well as the evidence of the accused (if the accused elects to give evidence).

59. Over recent decades, there has been a growing body of empirical research on the impact of trauma, including sexual violence trauma, on the memory and responsive behaviour of people who experience sexual violence. The research has been considered in more recent inquiries, including the Royal Commission into Institutional Responses to Child Sexual Abuse. It has been said in prior reports that the research has important implications for the criminal justice system, particularly for the assessment of the credibility and reliability of the evidence of a complainant of sexual violence.

60. It has been reported that the research challenges the foundation of what have been thought to be 'common sense' beliefs about the way memory works and the responsive behaviour of people who experience sexual violence. The research suggests that so called 'common sense' beliefs which inform the criminal justice process are based upon myths and misconceptions about the impact of trauma on memory and responsive behaviour.

61. For example, memory research suggests that it is a misconception to believe that a complainant of sexual violence should be able to remember the experience in a clear, detailed, linear, and uninterrupted sequence without inconsistency or omission. Rather, research suggests that the downloading and accessing of memory during and after a traumatic event does not work in that way. The research also suggests that it is to be expected that complainants may recall aspects of the offending gradually over a period of time; it is a misconception to expect that recall should happen all at once at a police station.

62. Similarly, responsive behaviour research suggests, for example, that the 'common sense' belief that a complainant of sexual violence will report their experience immediately is a myth. Many victim survivors do not report at all, or if they do report, it may be years until they are able to tell anyone.

63. Some years ago, all jurisdictions passed legislation to:

- abolish the common law requirement that, in broad terms, required judges to warn juries that it may be dangerous to convict on the complainant's evidence alone (the '*Longman* rule'[1]); and
- modify the common law relating to the admissibility of complaint evidence which assumed that complainants will complain about sexual violence 'at the first reasonable opportunity'.

64. More recent inquiries have recommended two main approaches for addressing myths and misconceptions in criminal trials. They are for the prosecution to call expert evidence about the research and for trial judges to give directions to the jury about the myths and misconceptions.

65. Legislation has been passed in most jurisdictions about the admissibility of some evidence and the requirement to give directions. Generally, there has been legislation that:

- enables the prosecution to lead expert evidence about memory and responsive behaviour research; and
- enables or requires trial judges to give juries directions about 'delayed' complaints, consent, and other myths and misconceptions.

66. To date, we understand that the ODPP in NSW calls expert evidence about memory and responsive behaviour research in sexual violence trials. Expert evidence has been called to a lesser extent in Victoria. It has not been called by prosecutors in other jurisdictions.

67. To date, in terms of jury directions, all jurisdictions have some legislation providing for jury directions to address myths and misconceptions. The Victorian Parliament has gone further than other parliaments in this regard by enacting the *Jury Directions Act 2015* (Vic). No other jurisdiction has adopted that more extensive approach.

68. In addition to recommendations about expert evidence and jury directions, other recommendations for reform have included:

- the use of an educative video to be played to jury panels prior to trial about memory and responsive behaviour research;

1 *Longman v The Queen* (1989) 168 CLR 70.

- mixed juries comprising lay people and experts on memory and responsive behaviour research;
- judge-alone trials; and
- education and training for appeal judges, trial judges, prosecutors, defence counsel, and police about the memory and responsive behaviour research.

Question 18 Are you aware of the research about memory and responsive behaviour in the context of sexual violence trauma? Do you have views about that research?

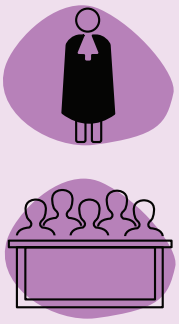
Do you have views about whether prosecutors should call expert evidence about that research (that is, about how people recall traumatic events and/or about how victim survivors of sexual violence typically respond)?

Is that expert evidence being called in your jurisdiction? If so, how is it working? If it is not being called, do you know why not?

Question 19 What is your view about the usefulness of jury directions in countering myths and misconceptions described by the research discussed above?

Do you have a view on whether the jury directions in your jurisdiction are sufficient? Could they be more extensive?

How are the directions in Victoria under the *Jury Directions Act 2015* (Vic) working in practice? Can they be improved?



Question 20 Do you have a view about the other recommendations that have been made (educative videos, mixed juries, judge-alone trials, and education and training)?

Do you have other ideas for reform based on research which suggests the evidence of complainants is assessed according to myths and misconceptions about memory and responsive behaviour?

Judge-alone trials

69. Most jurisdictions have provisions that allow, in certain circumstances, some criminal trials to proceed without a jury before a judge alone, upon application (by the accused or the prosecution), if the accused consents.

70. There are a wide range of views about whether, and in what circumstances, judge-alone criminal trials are appropriate.

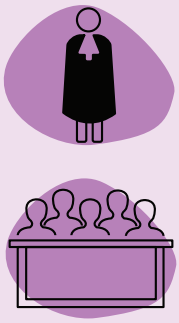
71. In relation to sexual offences, a range of reasons have been cited for the introduction or continued use of judge-alone trials, including:

- potential risks that, in certain trials, jurors may be influenced by media coverage, conduct their own research, or be intimidated; or that a jury be unable to reach a unanimous verdict;
- jurors may be affected by bias or misconceptions;
- greater flexibility, reduced cost, and reduced delay; and
- greater transparency, as judges are required to provide reasons.

72. Criticisms of judge-alone trials include:

- the important role of the jury system in ensuring community values are represented in the criminal justice system;
- potential risks (identified above) can be mitigated by adequate directions to the jury;
- the risk that judges may bring to bear their own beliefs and misconceptions, which will not be countered by the views of other members of a jury; and
- the requirement for judges to provide reasons is onerous — it could cause further delay or result in more appeals.

Question 21 What is your view about a trial by judge alone in relation to sexual offending?



Cross-examination and the law of evidence

73. Cross-examination is an important part of the assessment of the credibility and reliability of all witnesses.

74. It is consistently reported by complainants that cross-examination in sexual violence trials is particularly re-traumatising. The reported issues include the manner and duration of cross-examination, as well as the topics of cross-examination (for example, questions based upon myths and misconceptions regarding memory and responsive behaviour; about sexual reputation; and based upon personal information from counselling, therapeutic or other records).

75. Legislative reforms to cross-examination have varied across jurisdictions, but the reforms generally:

- enable prosecutors to object to questions and judges to disallow questions which:
  - are unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
  - are put to the witness in a manner or tone that is belittling, insulting, or otherwise inappropriate; or
  - have no basis other than a stereotype;
- restrict cross-examination of complainants on the topic of 'sexual reputation'; and
- prohibit an unrepresented accused from personally cross-examining the complainant.

76. In at least one jurisdiction (Victoria), legislation prohibits certain statements (including those made in cross-examination) relating to the reliability of particular classes of complainants, including children, and complainants in sexual offence cases. For example, statements that suggest that complainants who provide commercial sexual services are, as a class, less credible or require more careful scrutiny than other complainants.

Question 22 If you are a victim survivor, what was your experience of cross-examination? Did the prosecution object to questions asked by defence counsel? Did the judge intervene to stop defence counsel asking questions?

Question 23 Are the legislative provisions adequate to protect complainants during cross-examination? If not, how could they be improved? Should they be harmonised?

Question 24 Should cross-examination that reflects myths and misconceptions about sexual violence, such as the belief that a 'rape victim' would be expected to complain at the first reasonable opportunity be restricted on the ground that it is irrelevant or on any other ground?

Interpreters

77. Not all complainants of sexual violence have English as their first language, or speak English at all.

78. Past inquiries have recognised that interpreters must be available for complainants who require them in order to understand and reply to questions. Interpreters should be appropriately trained and accredited. They need to be culturally and linguistically appropriate and diverse.

79. Past recommendations for reform have included the need for state and territory governments to provide adequate interpreting services, including in regional areas and for complainants who are Aboriginal and Torres Strait Islander people.

Question 25 If you are a victim survivor, did you need an interpreter in the court room? Was one made available? We would like to hear your feedback.

Question 26 Have changes been made to interpreting services for complainants over the last five years? Does there continue to be a problem with availability, training and accreditation?

Are there problems in regional areas?

Are the available interpreters culturally and linguistically appropriate and diverse, particularly for complainants who are Aboriginal and Torres Strait Islander people?

Is the unavailability of interpreting causing difficulties and challenges for courts to ensure pre-trial recordings and trials commence as listed?

Personal information

80. Over the last decade or more, all jurisdictions have passed legislation which restricts or prohibits the disclosure of information about counselling or other therapeutic interventions which a complainant of sexual violence has sought prior to trial.

81. The legislative provisions differ across jurisdictions.

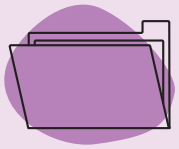
82. We consider it is necessary to review the legislative provisions and how they are working in practice.

83. The possibility of complainants being separately represented at the time when submissions are made in court about disclosure and use of this material has been raised in past inquiries, but not implemented.

Question 27 If you are a victim survivor, were the records of your counselling or other therapeutic interventions sought prior to or during trial?

Question 28 Are the legislative provisions adequate to protect the disclosure and use of a complainant's personal information obtained during counselling or other therapeutic intervention? How are they working in practice? Should they be harmonised?

Is there a need for complainants to be separately legally represented in court when submissions are made about the disclosure of the material and the application of the legislative provisions?



Types of evidence

84. In some jurisdictions, questions about the admissibility of the following types of evidence often arise:

- complaint evidence;
- distress evidence; and
- tendency and coincidence or discreditable conduct evidence.

85. At common law, the evidence of a complainant's 'recent complaint' was admissible as an exception to the hearsay rule if it was made at the first reasonable opportunity. Most jurisdictions have passed legislation in relation to the admissibility of that evidence, to address misconceptions about delay.

86. The legislation about the admissibility and use of complaint evidence varies significantly across jurisdictions. Some legislation enables the admission of the 'first complaint', whilst other legislation enables the admission of all complaints made up until the making of a police statement. Some legislation enables complaint evidence to be used for the truth of what was said, whilst other legislation enables the evidence to be used to only assess the credibility of the complainant's evidence.

87. The common law of distress developed out of the assumption that a victim of sexual violence would be visibly distressed, and the notion that the evidence of victims of sexual offences was less reliable, and therefore needed to be corroborated. Whilst the position differs between jurisdictions, broadly, evidence from a witness other than the complainant of distress at the time the complainant makes a complaint may be relevant as a piece of circumstantial evidence which supports a complainant's account of the alleged offending. It may also be used to assess a complainant's credibility. Issues that arise include the question of whether such evidence perpetuates myths about responsive behaviour to sexual violence because of an expectation that a victim would be visibly distressed.

88. Past inquiries have discussed the laws relating to tendency and coincidence or discreditable conduct evidence. The Royal Commission into Institutional Responses to Child Sexual Abuse published research on these topics and released a public consultation draft Bill, Evidence (Tendency and Coincidence) Model Provisions, on 25 November 2016. In NSW, NT and Tasmania, the model provisions have recently informed amending legislation.

Question 29 Have legislative reforms to the admissibility and use of complaint evidence been effective? Are there problems associated with that evidence? Is this an area in which the laws should be harmonised? If so, how should they be harmonised?

Should evidence of more than one complaint be admissible? Should complaint evidence be admissible as evidence of what is asserted by the complainant and/or to assess credibility?

Should complaint evidence be admissible at all? Does it perpetuate myths about responsive behaviour to sexual violence trauma (by expecting complainants of sexual violence to complain at some stage and placing weight on what was said)?

Question 30 Should there be legislative reform to the admissibility and use of distress evidence?

Is this an area which calls for legislative intervention and harmonisation? If so, how should they be harmonised? Should distress evidence be admissible at all?

Question 31 Are there further reforms to be considered to tendency and coincidence or discreditable conduct evidence in addition to the Evidence (Tendency and Coincidence) Model Provisions released by the Royal Commission into Institutional Responses to Child Sexual Abuse?

Question 32 Are there any other evidence issues relating to sexual violence trials that we should consider, including whether there should be harmonisation?

Specialisation and training of judges and counsel

89. The measures discussed above will not necessarily create a more trauma-informed criminal justice system for victim survivors of sexual violence unless the culture of that system also changes. Some countries have sought to deal with the need for cultural change by creating separate stand-alone courts which only deal with sexual offending. Other proposals or actions to bring about cultural change include the allocation of sexual offence proceedings to specialist sections or lists within an existing court. The judges who sit in such courts, sections, or lists would receive training about the particular problems experienced by complainants in sexual offence trials, learn how to respond to the psychological effects of trauma, and consider how trials could be managed to reduce trauma and increase complainants' trust in the criminal justice process. Judges would also receive training about child development and how children's responses can be affected by an experience of child abuse. Staff in such courts or lists would also receive some training about these issues.

90. In some countries, prosecutors and defence lawyers may be required, or strongly encouraged, to undertake some specialist training before they can appear in sexual offence cases. In Australia, judicial training in relation to the conduct of sexual offence proceedings is available, including through the Judicial College of Victoria and the National Judicial College of Australia. Training and accreditation of lawyers in various specialist fields is generally provided through professional bodies or associations of solicitors and of barristers.

Question 33 Do you have views about the creation of specialist courts, sections, or lists?

Do you support specialised training for judges who conduct sexual offence cases? What issues should that training address?

Do you support some form of special accreditation for lawyers who appear in sexual offence cases? Would this reduce the number of lawyers available to appear in such cases and contribute to delays in hearing such cases?

Delay

91. Delays in the criminal justice system impact complainants for all types of offences.

92. The impact of delays in the court system upon complainants of sexual violence has been documented in the reports of past inquiries. For example, there is no doubt that delay can have a negative impact on a complainant's capacity to recover from trauma, and that delay may lead to the discontinuance of a proceeding because the complainant is no longer willing or able to participate. The quality of the evidence that a complainant can give may also be affected by delay. Delay also impacts upon the families of complainants. The impact of delay is amplified for younger complainants.

93. It has been suggested that there are many sources of delay, including:

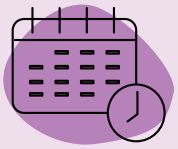
- delay in police investigations, assessing charges, and laying charges;
- the committal process;
- the time between committal and first appearance in a higher court;
- delay in the time between committal and trial as a result of matters such as the ODPP proofing witnesses, unexplained absences of the accused from court hearings, changes in legal representation, funding issues for the accused, disclosure by the police and ODPP, late issuing of subpoenas for information, unavailability of interpreters, limited court resources for CCTV remote rooms, late briefing of counsel by ODPP or defence solicitors, inexperienced solicitors and counsel, a culture of counsel leaving plea negotiations or trial preparation to the last minute, technology breaking down, interlocutory appeals fragmenting the trial process, and backlogged trial lists; and
- matters not reaching trial because of a lack of courtrooms, CCTV remote rooms, judges, prosecutors, and defence counsel.

94. Past recommendations for reducing delays include specialist investigative police officers, specialist prosecutors, specialist training for defence counsel, written guidelines for police/ODPP/courts including time frames, specialist courts, specialist divisions/lists within courts, heavy case management by trial courts including the use of orders imposing strict time limits, processes to encourage guilty pleas, additional appointments of judges, and more courtrooms and witness facilities for children and vulnerable adults.

Question 34 If you are a victim survivor, what were the delays you experienced? What was the impact of those delays upon you and/or your family and friends?

Question 35 What are the causes of delay in your state or territory? Do you wish to comment on the past recommendations (as outlined above) and whether they have been or should be implemented in your state or territory?

What are your ideas for reducing delays? Can there be a national approach to reducing some aspects of the delay?



Guilty pleas

95. An accused person charged with sexual violence offences may plead guilty as charged. The accused person may also plead guilty after negotiations with the ODPP about different offences, the factual basis for sentencing, or both.

96. If an accused person pleads guilty, that can minimise the trauma associated with the trial process, especially if the guilty plea occurs at an early stage. Prior inquiries have heard from victim survivors about the lack of communication from and consultation with the ODPP when there are negotiations with defence counsel about guilty pleas. Recommendations have been made to improve those lines of communication and to engage with victim survivors at that stage.

97. Recent legislative changes to sentencing laws across jurisdictions may also impact upon the preparedness of an accused person to plead guilty as charged, or to negotiate a guilty plea. Those changes include increased maximum penalties, reduced availability of sentence reductions for guilty pleas, mandatory sentencing provisions, reduced number of sentencing options, and the broadened reach of sex offender registration legislation.

98. Some jurisdictions have special directions hearings which may encourage guilty pleas, and other jurisdictions have sentencing indication hearings.

Question 36 If you are a victim survivor, did the offender plead guilty? Did the offender plead guilty as charged, or was there negotiation with the ODPP? We would like to hear about your experience of that process.

Question 37 Have any recent changes in sentencing laws had an impact upon the preparedness of accused persons to plead guilty to sexual violence offences?

Question 38 Are sentencing indication hearings (or their equivalent) effective in terms of resulting in guilty pleas? Can the process be improved? Are there other ways in which guilty pleas may be encouraged?

Sentencing

99. Legislative provisions which govern the sentencing of sexual violence offenders differ significantly across jurisdictions. Those differences include maximum penalties for offences, available reductions for guilty pleas, the considerations that must be taken into account when determining a sentence, mandatory sentencing provisions, and the availability of different types of penalties (such as suspended sentences and home detention).

100. It is a fraught exercise to compare sentences for sexual violence offences across jurisdictions because of those significant differences.

101. Recommendations for a degree of harmonisation have included legislation to exclude good character as a mitigating factor, to require sentencing courts to indicate sentences that would have been imposed for each offence (when sentencing for multiple charged episodes of offending, where there are multiple victims, or both), and to provide that sentencing standards at the time of sentence apply rather than standards at the time of the offending. Some of these recommendations have been implemented in some jurisdictions.

102. The situation is different for sentences for Commonwealth sexual violence offences. The sentences for those offences are comparable across jurisdictions because the offences are all charged under the same Commonwealth legislation and sentencing is largely governed by the same legislation, the *Crimes Act 1914* (Cth).

103. A complaint common to all jurisdictions in the sentencing process is that victim survivors report feeling re-traumatised by and excluded from the sentencing process.

104. Each jurisdiction enables victim survivors to have some input into the sentencing process, including via the use of victim impacts statements ('VIS'). The practice and details of the process by which victim survivors provide these statements differ across jurisdictions.

105. Past inquiries have considered the role of VIS in sentencing, including:

- support and information for victim survivors around the content that may be included (and what may be objected to or excluded from consideration);
- whether there should be more options for presenting VIS, including the use of remote facilities;
- whether victim survivors can or should be cross-examined on the contents; and
- the impact of VIS on sentencing judges.

106. Other matters raised during past inquiries have included:

- whether victim survivors should have independent legal representation during sentencing submissions; and
- post-conviction considerations (for example, sex offender registration, parole, and rehabilitation and re-integration programs).

Question 39 Are there aspects of sentencing practices and outcomes which may be harmonised across jurisdictions?

Question 40 If you are a victim survivor, what was your experience of the sentencing process? What aspect(s) of the sentencing process were important to you?

Did you make a Victim Impact Statement? If so, how did you find that process? What could be improved?

Question 41 Have there been recent changes to the role of victims of sexual violence in the sentencing process in your jurisdiction? Are Victim Impact Statements given appropriate consideration by the sentencing judge?

Are there further improvements to be made? Should victims have independent legal representation during sentencing submissions?

Question 42 Do you have ideas for improving the sentencing process in matters involving sexual violence offences?

Appellate proceedings

107. If a person is convicted of sexual violence offences, they may appeal that conviction, the sentence, or both. If a person is sentenced for committing sexual violence offences, they or the Director of Public Prosecutions may appeal the sentence.

108. Each jurisdiction has its own appellate process. The appeal court in each jurisdiction is an intermediate appellate court which interprets and applies legislative provisions in that jurisdiction. There is little opportunity for harmonisation of the decisions of intermediate appellate courts across jurisdictions because often the appeal courts consider different legislative provisions, and the decision of an appeal court in one jurisdiction is not binding upon an appeal court in another jurisdiction. The opportunity for harmonisation via an appeal to the High Court of Australia is limited.

109. The appeals process in each jurisdiction aims to prevent miscarriages of justice and correct excessive (or inadequate) sentences.

110. The appeals process may be traumatic for victim survivors for many reasons. Previously identified issues include:

- Delay — Appeals prolong the criminal justice process for victim survivors, particularly where there is a delay in commencing the appeal, or a long period until the appellate judgment is delivered.
- Exclusion — The appeals process may sometimes be perceived as offender-focused. The basis of the appeal may be highly technical, with limited consideration of the victim survivor or the impact of the offending on them. Victim survivors may also have a limited role in proceedings, noting appellate courts tend to focus on issues of legal principle.
- Outcomes — If an appeal is allowed, a re-trial may be ordered with further delay and uncertainty, including the prospect of having to give evidence again.

111. Past inquiries have considered ways to improve the appeals process and reduce the re-traumatisation of victim survivors, whilst maintaining procedural fairness for accused persons, through:

- introducing legislation to expand the prosecution's right to bring an interlocutory appeal on pre-trial rulings (if the decision or ruling eliminates or substantially weakens the prosecution's case) and on 'no case' rulings;
- the pre-recording of evidence or recording of evidence at trial to avoid the need for a complainant to give evidence at any re-trial;
- ensuring that victim survivors are consulted by the ODPP about the continuation of proceedings where a re-trial has been ordered;
- education and training for appellate judges about trauma-informed practices, including the impact of delay upon victim survivors; and
- tasking an independent agency to collate data on appeal outcomes, to identify areas for reform, and to assess whether reforms have achieved their aims.

Question 43 If you are a victim survivor, what was your experience of the appeal process?

In responding, you may wish to consider the following:

What information or support did you receive about the appeals process and its possible outcomes? If you received some information or support, how useful did you find it?

What information or support did you receive about the decision made on the appeal? If you received some information or support, how useful did you find it?

What impact did the appeals process have on you?

If the appeal resulted in a re-trial, were you consulted about whether the prosecution should proceed with a re-trial?

Question 44 What are your ideas for improving the appeals process in matters involving sexual violence offences?

Civil proceedings and other justice responses

112. This part of the Issues Paper discusses justice responses to sexual violence other than criminal justice. **Figure 2** below illustrates some aspects of the justice system that are discussed in this part.

Figure 2: Civil and other justice responses

113. Some people who experience sexual violence do not want to give evidence at a criminal trial or otherwise engage with the criminal justice system. This may be for a range of reasons including difficulties in describing their experience, their perceptions of the criminal justice system, or wanting the person responsible for the violence to be held accountable in some other way.

114. There are a number of legal processes, beyond criminal prosecution, that may provide victim survivors access to justice outcomes that better reflect the victim survivor's particular need for relief or redress.

115. For example, some victim survivors may wish to participate in a restorative justice process, in which the person responsible for sexual violence acknowledges the harm they have caused and provides some recompense. Restorative justice processes can take many forms, including:

- an exchange of correspondence between the person harmed and the person responsible;
- engagement between the person harmed and a representative of an institution, if the violence occurred in an institutional context, such as a business, church, or school; or
- a conference involving the person harmed, the person responsible, and often others such as counsellors, professional support people, a trained facilitator, and possibly family or community members.[2]

2 Victorian Law Reform Commission, *Improving Justice System Responses to Sexual Violence* (September, 2021), 187.

116. Some people may want to consider taking civil proceedings against the person responsible for sexual violence, or against other persons (such as an employer) who may be legally responsible for the conduct of that person. A wide range of civil relief is available for victim survivors in civil proceedings (or could be made available through legislative change). Relief may include declarations of wrongdoing, damages, the imposition of civil penalties, and intervention orders. In comparison to criminal proceedings, civil proceedings can provide a victim survivor more agency or control over their proceeding, and the lower standard of proof applicable to civil proceedings may enhance the prospect of the victim survivor feeling that they have been believed and vindicated.

117. For example, under the common law it may be possible to sue the person responsible for 'battery', or to sue a related institution for 'negligence'. In addition, it may be possible to take legal action under legislation such as the 'sexual harassment' provisions in the *Sex Discrimination Act 1984* (Cth), which make it unlawful for a person to make an unwelcome sexual advance.

118. Some people may want to claim under a criminal injury or other compensation scheme. States and territories have established schemes that may provide compensation to cover a range of losses including medical and psychological expenses, loss of income, and pain and suffering, for victims of crime including sex offences.

119. Some people may want to apply for protection from the person responsible for sexual violence in the form of an Intervention Order.[3] Others may want to have sexual violence issues dealt with in the context of family law proceedings after separation from their partner. When sexual violence occurs between work colleagues or in a workplace, some people may want to protect themselves against any negative employment consequences for reporting the violence. If a service provider does not assist a person appropriately, that person may want to make a formal complaint by reference to a Victims' Charter.

120. The ALRC is seeking your views on which of these (or other) legal processes might be most helpful for people who have experienced sexual violence, and which might be most in need of reform.

Restorative justice

121. Restorative justice is a victim-centred, party-led process that focuses on the examination of harm caused by the offence and options for repairing that harm. Providing restorative justice as an alternative, or as a transformative approach, to criminal prosecution can recognise the broader range of justice needs of victim survivors and provide an enriched sense of justice and healing for the victim survivor, the person responsible, and their community.

122. In broad terms, recommendations and actions to address restorative justice have included:

- expanding restorative justice programs (for example, by funding restorative justice for sexual offences and making it available at any stage of criminal proceedings);
- embedding restorative justice in legislation;
- establishing strong governance for restorative justice (for example, oversight of training and accreditation, monitoring restorative justice outcomes, managing complaints, and collecting data about restorative justice programs);
- increasing access to restorative justice programs (for example, by expanding eligibility for victim survivors; creating a right for victim survivors to be told about the option of restorative justice; and providing victim survivors with legal support to inform their decision about participating in restorative justice);

3 Intervention orders are known by different names in different jurisdictions, including variations such as 'Apprehended Violence Order', 'Restraining Order', 'Family Violence Order', and 'Personal Protection Order'.

- improving restorative justice through co-design processes that engage with people with lived experience in the design of restorative justice programs or legislative frameworks, as well as supporting Aboriginal and Torres Strait Islander communities to develop restorative justice programs for Aboriginal and Torres Strait Islander people; and
- considering how restorative justice interacts with other processes, such as the effect of participating in restorative justice on the decision to prosecute, and connecting offenders in restorative justice processes with therapeutic treatment and support.

Question 45 If you are a victim survivor, how do you feel about restorative justice? Is it an important option to have? If so, what do you think should be the approach to restorative justice in responding to sexual violence?

Question 46 What reforms have been implemented in your state or territory? How are they working in practice? How could they be improved? Have things changed? What is working well? What is not working well?

Question 47 What are your ideas for implementing restorative justice as a way of responding to sexual violence?

Civil litigation

123. Previous reports on sexual violence have commented less on civil processes than on criminal processes. Some reports have acknowledged the potential advantages of civil legal processes, and have supported further investigation into their availability and utilisation. On the other hand, it has been noted that civil litigation can be expensive, lengthy, and re-traumatising. Recommendations regarding civil litigation have focused on making the process more accessible and effective, including:

- government funding for some applicants in civil proceedings;
- supporting applicants to apply for Intervention Orders; and
- government enforcement of orders to pay damages.

124. Other relevant aspects of civil litigation that the ALRC could address include:

- trauma-informed court processes, support for victim survivors, and the availability of training and other measures to address the myths and misconceptions about sexual violence;
- excluding the admissibility of prejudicial evidence of little or no probative value;
- extending the available remedies; and
- the intersection of sexual violence issues with family violence matters, family law matters, and child protection matters.

Question 48 Which of the measures listed above are likely to most improve civil justice responses to sexual violence?

Question 49 Apart from those listed above, are there other recent reforms and developments which the ALRC should consider? Are there further reforms that should be considered?

Workplace laws

125. There have been significant reports focusing on sexual harassment in the context of work. Previous recommendations and actions have included:

- establishing safe disclosure mechanisms;
- introducing a positive duty for all employers to take reasonable measures to eliminate sexual harassment;
- amending the *Australian Human Rights Commission Act 1986* (Cth) and *Fair Work Act 2009* (Cth) to facilitate civil proceedings, for example by permitting representative groups to bring proceedings, inserting protections regarding costs orders, and including the perpetration of sexual harassment as valid grounds for dismissal;
- harmonising anti-discrimination laws;
- protections for witnesses, including non-publication orders and supports in the courtroom;
- ensuring awards of damages reflect contemporary understandings of the harms arising from sexual harassment; and
- developing best practice principles for non-disclosure agreements.

Question 50 If you are a victim survivor who experienced sexual violence in connection with a workplace, which factors led you to take legal action, or not take legal action, regarding the violence?

Question 51 What provisions or processes would best facilitate the use of civil proceedings in this context?

Compensation schemes

126. Compensation schemes play a part in acknowledging and addressing the financial hardship sexual violence can cause. Other reviews have considered that ensuring compensation schemes are accessible, equitable, and trauma-informed is necessary to provide adequate compensation to victim survivors of sexual violence.

127. There are several aspects of compensation schemes that are relevant to this Inquiry. These include:

- awareness of compensation schemes and adequacy of education to promote awareness;
- accessibility of compensation schemes and potential barriers to accessibility, such as eligibility requirements which may include a conviction being secured and time limits for applications;
- adequacy of compensation for victim survivors;
- timeliness of compensation being awarded;
- providing training and education to workers' compensation bodies on the nature, drivers, and impacts of sexual harassment; and
- providing government funded legal advice and representation to victim survivors to ensure they can understand and exercise their options for compensation in an informed way.

Question 52 If you are a victim survivor, did you apply for compensation? If not, why not? If so, how did you find the experience of applying for compensation?

Question 53 What changes to compensation schemes would best promote just outcomes for victim survivors of sexual violence?

Victims' charters

128. Every Australian jurisdiction has adopted a 'charter', 'declaration' or set of 'guidelines' in relation to victims of crime.

129. Broadly, the charters govern the treatment of victims of crime by public agencies and officials, and in some cases, by non-government agencies and contractors funded by the state to provide services to victims. In the case of prosecuting and investigatory agencies, the charters may also impose specific obligations. The charters also set out the rights or entitlements of victims of crime to participate in certain processes and have input into certain decisions which affect them.

130. Purposes advanced for the existence of the charters include recognition of victims' roles within the criminal justice system and the need to prevent further harm to victims of crime through that process.

131. Jurisdictions vary as to whether the charters are incorporated into (or even required by) legislation and in terms of the obligations they impose, the rights they confer, and the degree of enforceability.

132. Recommendations have included:

- expanding existing charter rights and introducing new charter rights;
- considering whether charter rights should be incorporated into Human Rights Acts; and
- increasing transparency around complaints, both in terms of the number of complaints and how they have been addressed.

Question 54 If you are a victim survivor, how do you feel about Victims' Charters? Are they important to you? If so, what do you think should be included in the Charter?

Question 55 Have reforms been implemented in your State or Territory? If so, how are they working in practice? How could they be improved? Have things changed? What is working well? What is not working well?

Question 56 What are your ideas for ensuring victim survivors' rights are identified and respected by the criminal justice system? What can be done?