

Justice responses to sexual violence

Submission to the Australian Law Reform Commission,
Australian Government

24 May 2024

Contents

Who we are	4
Introduction	5
The need for restorative justice options for victim survivors	5
Defendant participation in restorative justice processes	6
Trial processes	7
The right to trial by judge alone.....	7
Cross examination of complainants.....	8
Compensation for victim survivors	9
Conclusion	10

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Australian Law Reform Commission (ALRC) on justice responses to sexual violence.
2. Our submission responds to the research, reflections and questions presented by the ALRC in *Justice Responses to Sexual Violence: Issues Paper 49* ('Issues Paper'), which was released in April 2024.
3. The ALA's submission focuses on: the need for restorative justice options for victim survivors; trial processes; and compensation for victim survivors.

The need for restorative justice options for victim survivors

4. Restorative justice has been aptly described in the Issues Paper, as follows:²

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.

5. Natalie Hadar and Tali Gal from the University of Haifa have recently observed:³

In recent years, however, a growing number of scholars and practitioners have recognized the benefits of RJ [restorative justice] in cases of SV [sexual violence] for survivors, either as an alternative or as a complementary mechanism to the criminal process.

6. Further, Portuguese researchers Ana M. Nascimento, Joana Andrade and Andreia de Castro Rodrigues have examined 35 studies "focusing on the psychological impacts on victims resulting from restorative practices".⁴ After examining those studies, these researchers concluded:⁵

² Australian Law Reform Commission, *Justice Responses to Sexual Violence: Issues Paper 49* (April 2024) 25.

³ Natalie Hadar and Tali Gal, 'Survivors' Paths Toward Forgiveness in Restorative Justice Following Sexual Violence' (2023) 50(6) *Criminal Justice and Behavior*, 911, 912.

⁴ Ana M. Nascimento, Joana Andrade and Andreia de Castro Rodrigues, 'The Psychological Impact of Restorative Justice Practices on Victims of Crimes – a Systematic Review' (2023) 24(3) *Trauma, Violence, & Abuse* 1929, 1929.

⁵ *Ibid.*

The present research showed that restorative justice practices have a positive psychological impact on victims, who are frequently forgotten in conventional justice, and that some of these impacts persist over time.

7. The ALA supports restorative justice options being available for victim survivors, to assist with their healing and to reduce the likelihood of re-traumatising victim survivors (re-traumatisation which regularly happens during traditional, criminal prosecutorial processes). It is important to ensure that victim survivors have full agency in relation to restorative justice programs.
8. **The ALA recommends that the ALRC urges the Federal Government to:**
 - a. **adequately fund successful restorative justice programs;**
 - b. **ensure that restorative justice is enshrined in the relevant legislation, including creating a right for victim survivors to be informed about restorative justice options and to ensure victim survivors have legal support during these processes; and**
 - c. **encourage State and Territory Governments through the Standing Council of Attorneys-General to undertake the above courses of action.**

Defendant participation in restorative justice processes

9. As noted in the Issues Paper,⁶ defendant participation in restorative justice processes can contribute to a defendant's overall rehabilitation.
10. The ALA affirms that there is value in defendants participating in restorative justice processes, including with consideration of future public and community safety. Defendants should be encouraged to participate in restorative justice programs.
11. **As such, in instances where a restorative justice program are running parallel with a traditional criminal process, it should be taken into account during sentencing whether a defendant has successfully participated in restorative justice processes.**

⁶ Australian Law Reform Commission, *Justice Responses to Sexual Violence: Issues Paper 49* (April 2024) 25–26.

Trial processes

12. This section of the ALA's submission addresses trial processes, namely: the right to trial by judge alone, and cross examination of complainants.

The right to trial by judge alone

13. The ALA supports the right of trial by judge alone being readily available in all jurisdictions across Australia. As expressed by ALA members Greg Barns SC and Tom Percy KC:⁷

The flaws of the traditional jury system have become glaringly obvious in our digital age, with the exponential increase in the dissemination of information and the increasingly complex legal principles and factual scenarios in modern court cases. Demanding mandatory jury trials in the modern era is outdated and leaves many Australian jurisdictions with systems that unfairly prejudice accused persons.

14. Mr Barns SC and Mr Percy KC have identified the following reasons why the right of trial by judge alone should be an option as part of traditional criminal trial processes:⁸
 - a. It avoids the possibility of jurors being "affected, or potentially overwhelmed" by intense media scrutiny and/or adverse publicity;
 - b. There is a "real and likely possibility" that jury members have been exposed to "highly prejudicial information about the allegations before they are even empanelled as jurors";
 - c. It avoids the possibility of jurors accessing inadmissible or inappropriate materials during the trial;
 - d. There are strong concerns that jurors' prejudices play out in their decision-making during a trial, including and especially towards Aboriginal and Torres Strait Islander peoples, since "there is no way for courts to know how jurors deliberate or whether they act on their own biases and prejudices";
 - e. It avoids the chance that jury members may be "subject to subtle and even overt threats both inside and outside of the jury room";

⁷ Tom Percy and Greg Barns, 'Trial by judge alone' (2020) 161 *Precedent* 18.

⁸ *Ibid.*

- f. Trial by judge alone “results in a clear set of reasons as to why the acquittal or conviction eventuated”, which enhances transparency for all parties involved; and
 - g. Trial by judge alone offers “significantly greater flexibility in deciding when to sit, and if an adjournment for some protracted period is necessary the court is in a position to accommodate”; and
 - h. A trial without a jury “far less costly than a conventional jury trial”, as the court is not required to pay and reimburse jurors for their time and expenses during the trial.
15. The ALA notes that Victoria, the ACT and the Northern Territory do not have the option of trial by judge alone. **The ALA urges the ALRC to recommend that those three jurisdictions enact reforms to allow the option of trial by judge alone.**

Cross examination of complainants

16. The ALA supports measures already enacted across Australia to minimise re-traumatising victim survivors when they give evidence, as outlined in the Issues Paper.⁹
17. **The ALA acknowledges the difficult balance that must be achieved in trial processes – to reduce the changes of re-traumatising the victim survivor, and to provide the defendant with a fair trial.**
18. It is important to note there are already limitations on questioning of complainants contained in legislation and ethical rules.¹⁰ Ruled out are “improper” questions or questioning – that is, “a question or sequence of questions put to a witness” that is one of the following:¹¹
- “misleading or confusing”;
 - “unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive”;

⁹ Australian Law Reform Commission, *Justice Responses to Sexual Violence: Issues Paper 49* (April 2024) 9–12.

¹⁰ See, eg, *Evidence Act 2008* (Vic) pt 2.1 div 5; see also *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 62–63.

¹¹ *Evidence Act 2008* (Vic) s 41(3).

- “put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate”; or
- “has no basis other than a stereotype (for example a stereotype based on the witness’ sex, race, culture, ethnicity, age or mental, intellectual or physical disability)”.

Compensation for victim survivors

19. ALA members are very concerned about the barriers to victim survivors accessing compensation and also about the inadequacy of the compensation amounts available for victim survivors of sexual violence.
20. First, there remain barriers to victim survivors accessing compensation for the sexual violence and abuse they have experienced. One example is the ability for perpetrators to hide assets in their superannuation accounts, assets which then cannot be used to satisfy a compensation order. In those cases, the victim survivors are locked out of accessing the justice they deserve. The ALA made a submission on this matter to The Treasury in February 2022,¹² and we understand that the Federal Government is still considering possible reforms in this area.
21. Secondly, the ALA submits that the compensation amounts available to victim survivors are inadequate. For example, victim survivors eligible for payments under the National Redress Scheme can only access up to \$150,000. ALA members are concerned that this is inadequate given that in common law claims, compensation is often in the millions of dollars.
22. **The ALA recommends that the ALRC urges the Federal Government to rectify the issues victim survivors face in accessing to compensation and to improve what victim survivors are entitled to in terms of compensation. That should include:**
 - a. **all victim survivors of sexual violence and abuse being able to access perpetrators’ full superannuation amounts to satisfy compensation orders; and**
 - b. **raising the cap on compensation available to victim survivors through the National Redress Scheme to \$500,000.**

¹² Australian Lawyers Alliance, Submission to The Treasury, *Access to offenders’ superannuation for victims and survivors of child sexual abuse* (15 February 2023) <www.lawyersalliance.com.au/documents/item/2470>.

Conclusion

23. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Australian Law Reform Commission (ALRC) on justice responses to sexual violence.

24. The ALA is available to provide further assistance to the ALRC on the issues raised in this submission.

A handwritten signature in black ink, appearing to read 'Shaun Marcus', is positioned above the typed name.

Shaun Marcus

National President,

Australian Lawyers Alliance