

Victorian  
Law Reform  
Commission

**Sexual Offences**  
Final Report

**Victorian Law Reform Commission**

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## Preface

This Final Report is the culmination of the Victorian Law Reform Commission's reference on sexual offences.

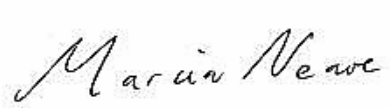
The Report contains 202 recommendations on all aspects of the criminal justice process. The recommendations in the Report are based on research on how current laws and procedures are working and on extensive consultation with complainants, organisations which provide counselling and support to victims of sexual offences, police, prosecution and defence lawyers, judges, magistrates and many others. Our recommendations are intended to make the criminal justice system more responsive to complainants in sexual offences cases, whilst at the same time ensuring a fair trial for those accused of these offences.

The Report is the product of the work of many people. In the Discussion Paper and Interim Report published previously I recognised the significant contributions of Research and Policy Officers. Dr Sara Charlesworth, Stephen Farrow, Ailsa Goodwin and Trish Luker contributed to the Discussion Paper and Sangeetha Chandrashekar, Nicky Friedman and Dr Melanie Heenan worked on the Interim Report. Nicky Friedman, Angela Langan, Hilary Little and I had responsibility for researching and writing this Final Report. Nicky Friedman contributed significantly to research and writing of Chapters 3, 5 and 10, Angela Langan to Chapters 3, 4, 6 and 9 and Hilary Little was responsible for empirical research and drafted Chapters 2, 7 and 8. I am grateful for the hard work and commitment of the whole research team. Members of the Sexual Offences Division, Justice David Harper and Judge Jennifer Coate and Professor Felicity Hampel SC worked tirelessly on the reference.

The Chief Executive Officer, Padma Raman, oversaw reference planning and coordinated many of the consultations. Simone Marrocco assisted with the organisation of the consultations. Several people made very significant contributions to formatting and production, including Kathy Karlevski, the Operations Manager, Lorraine Pitman, my Personal Assistant and Julie Bransden, the Commission's Librarian. The Report was edited by Valina and Tony Rainer.

Many other people provided information and contributed to the Commission's policy work, including the members of the Advisory Committee for the reference (named below), and the lawyers, judges and other experts who participated in consultations on particular legal issues.

I am grateful to the Executive Committee of the County Court and the County Court judges who agreed to have their jury directions analysed and to magistrates and judges who commented on proposed procedural changes. The Commission could not function effectively without the voluntary contributions of those who serve on our Advisory Committees and provide expert advice, who are listed in our Acknowledgements below. I am deeply grateful for their advice and assistance. The recommendations in this Report are of course the responsibility of the whole Commission.

A handwritten signature in cursive script that reads "Marcia Neave". The signature is written in black ink on a light-colored background.

Professor Marcia Neave  
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## Terms of Reference

On 27 April 2001, the Attorney-General, the Honourable Rob Hulls MP, gave the Victorian Law Reform Commission a reference:

1. To review current legislative provisions relating to sexual offences to determine whether legislative, administrative or procedural changes are necessary to ensure the criminal justice system is responsive to the needs of complainants in sexual offence cases, having regard to the findings of the:
  - Victorian Parliamentary Drugs and Crime Prevention Committee's 1995 report on *Combating Child Sexual Assault* and 1996 report on *Combating Sexual Assault Against Adult Men and Women*;
  - Rape Law Reform Evaluation Project's 1996 report into the *Crimes (Rape) Act 1991*; and
  - Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General's 1999 report on *Sexual Offences Against the Person*.
  
2. To develop and/or coordinate the delivery of educational programs which may be necessary to ensure the effectiveness of existing and proposed legislative, administrative and procedural reforms.

## Abbreviations

<b>A Crim R</b>	Australian Criminal Reports
<b>ABCA</b>	Alberta Court of Appeal (Canada)
<b>ABS</b>	Australian Bureau of Statistics
<b>AC</b>	Appeal Cases (United Kingdom)
<b>ACT</b>	Australian Capital Territory
<b>AJ</b>	Alberta Judgments (Canada)
<b>ALJR</b>	Australian Law Journal Reports
<b>ALO</b>	Aboriginal Liaison Officer
<b>ALR</b>	Australian Law Reports
<b>ALRC</b>	Australian Law Reform Commission
<b>ANZJ Crim</b>	Australian and New Zealand Journal of Criminal Law
<b>BC</b>	Butterworths Cases
<b>BCCA</b>	British Columbia Court of Appeal (Canada)
<b>CASA</b>	Centre Against Sexual Assault
<b>CCTV</b>	closed circuit television
<b>CCU</b>	Crisis Care Unit
<b>CIU</b>	Criminal Investigations Unit
<b>CJ</b>	Chief Justice
<b>CJ at CL</b>	Chief Justice at Common Law
<b>cl</b>	clause
<b>CLR</b>	Commonwealth Law Reports
<b>CR</b>	Criminal Reports (Canada)

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<b>Cr App R</b>	Criminal Appeal Reports
<b>Cth</b>	Commonwealth
<b>CWP</b>	Child Witness Project
<b>CWS</b>	Child Witness Service
<b>DDLS</b>	Disability Discrimination Legal Service
<b>DHS</b>	Department of Human Services
<b>DNA</b>	Deoxyribonucleic acid
<b>DPP</b>	Director of Public Prosecutions
<b>ER</b>	English Reports
<b>et al</b>	and others
<b>EuroWRC</b>	The White Ribbon Campaign in Europe
<b>FMO</b>	Forensic Medical Officer
<b>e.g.</b>	for example
<b>HL</b>	House of Lords
<b>HREOC</b>	Human Rights and Equal Opportunity Commission
<b>ibid</b>	in the same place (as the previous footnote)
<b>i.e.</b>	that is
<b>ITP</b>	Independent Third Person
<b>IWDVS</b>	Immigrant Women's Domestic Violence Resource Centre
<b>J</b>	Justice (JJ plural)
<b>JA</b>	Appeal Justice
<b>LEAP</b>	Law Enforcement Assistance Program
<b>MAPPS</b>	Male Adolescent Program for Positive Sexuality
<b>Mass Ann</b>	Annotated Laws of Massachusetts
<b>MCC</b>	Model Criminal Code
<b>MCCOC</b>	Model Criminal Code Officers Committee

n	footnote
NAPCAN	National Association for the Prevention of Child Abuse and Neglect
NESB	non-English speaking background
NFPA	no further police action
NOD	no offence detected
NSW	New South Wales
NSWCA	New South Wales Court of Appeal
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
OJ	Ontario Judgments (Canada)
OPA	Office of the Public Advocate
OPP	Office of Public Prosecutions
para	paragraph
PEIJ	Prince Edward Island Judgments (Canada)
PRISM	Prosecution Recording and Information Systems Management
Qd R	Queensland Reports
Qld	Queensland
R	The Queen (as in <i>R v Case Name</i> ) or The Reports (UK) 1893–1895
RLC	Regional Liaison Committee
RLREP	Rape Law Reform Evaluation Project
RSC	Revised Statutes of Canada
S Ct	Supreme Court (United States)
s	section (ss pl)
SA	South Australia

SAIS	Sexual Assault Investigation Section
SASR	South Australian State Reports
sch	schedule
SCR	Supreme Court Reports (Canada)
SECASA	South East Centre Against Sexual Assault
SIU	Sexual Investigation Unit
SOCA(U)	Sex Offences and Child Abuse (Unit)
SPSS	Statistical Package for Social Sciences
Tas	Tasmania
UBC L Rev	University of British Columbia Law Review
UK	United Kingdom
v	versus (said as 'and')
VATE	video and audio taped evidence
VCCAV	Victorian Community Council Against Violence
VIFM	Victorian Institute of Forensic Medicine
VMC	Victorian Multicultural Commission
vol	volume
VR	Victorian Reports
VSC	Supreme Court of Victoria
WA	Western Australia
WAS	Witness Assistance Service
WLR	Weekly Law
WLR	Weekly Law Reports
YJ	Yukon Judgments (Canada)

## \* TERMINOLOGY

**We list below some of the key terms used in this Final Report, and explain the significance of the terminology.**

*Victim/survivor and complainant:* Where this Final Report makes reference to people against whom sexual offences are alleged to have taken place, we use the term 'victim/survivor'. However, once matters enter into the criminal justice system we use the term 'complainant'. This recognises the fact that the criminal justice system assumes that an accused person is innocent of a crime unless guilt is established beyond reasonable doubt.

*Accused/defendant:* We use the term 'defendant' when describing the position of a person charged with criminal offences up to and including committal proceedings and 'accused' following committal and during trial until conviction.

*He/she:* We use the pronoun 'he' to refer to a person accused of sexual offences, 'she' to refer to adult victims/survivors and generally 'they' to refer to child victims/survivors. This reflects the fact that the majority of those accused of sexual offences are men and the majority of adults who report such crimes are women.

*Cognitive impairment/impaired mental functioning:* We use the term 'impaired mental functioning' when referring to the current legislation, as that is the terminology contained in the legislation. We recommend a change to the legislation so that the term 'cognitive impairment' is used instead, as this is regarded as a more accurate description by disability groups and is widely used and accepted. We use the term 'cognitive impairment' throughout the Report whenever we are not referring to the current legislation.

*Non-English speaking background (NESB):* We use the term 'non-English speaking background (NESB)' to refer to immigrant and refugee communities in Victoria. The Commission recognises that government agencies are increasingly using 'culturally and linguistically diverse (CALD)' to refer to immigrant and refugee communities. However, we have chosen to use NESB to maintain consistency with the previous Sexual Offences reports and because participants in some consultations expressed a preference for this term.

## Executive Summary

### THE BACKGROUND TO THIS INQUIRY

In 2001 the Attorney-General, the Honourable Rob Hulls, asked the Victorian Law Reform Commission to consider whether the criminal justice system is sufficiently responsive to the needs of complainants in sexual offence cases and to make recommendations for any necessary changes. This Final Report is the culmination of three years work, which has included both research on the way current laws and procedures work in practice and extensive consultations.

Throughout the course of our inquiry we have spoken with victims of sexual assault who have decided not to report offences to the police and with complainants who have participated in the legal process. We have also consulted non-government organisations which support sexual assault victims, members of Victoria Police, defence and prosecution lawyers, magistrates and judges and many other experts. We have made particular efforts to understand the difficulties experienced by people who face significant barriers in participating in the criminal justice process, including children, Indigenous people, people with cognitive impairments and people from non-English speaking backgrounds.

The Commission published an Interim Report in 2003 which made 107 preliminary recommendations covering the entire criminal justice process, from disclosure and reporting, through to prosecution, committal and trial. Fifty-five submissions were received in response to these preliminary recommendations. The Final Report takes account of 55 submissions made in response to the Interim Report as well as further consultations conducted by the Commission to test the workability of our preliminary recommendations.

The 202 recommendations in this Report respond to the widely held perception that the criminal justice system does not always deal fairly with complainants in sexual offence cases. People who allege that they have been sexually assaulted are the least likely of all crime victims to report the offence to the police. Only about one in six reports to police of rape and less than one in seven reports of incest or sexual penetration of a child result in prosecution. Conviction rates for rape are substantially lower than for other offences and have fallen since the late 1980s.

Concerns about the fairness of the criminal justice process contribute to substantial under-reporting of sexual offences and may discourage people from giving evidence against alleged offenders at committal and trial.

Prosecution for a sexual offence has very serious consequences for the accused, including life-long stigma and the possibility of a lengthy prison sentence if convicted. It is vital to safeguard the presumption of innocence and ensure that the criminal justice system treats people accused of offences fairly. However the Commission does not accept the argument that this is the sole purpose of the criminal justice system. The community has an interest in encouraging people to report sexual crimes and in apprehending and dealing with those who commit them.

The recommendations in this Report are intended to achieve the twin goals of providing decent treatment for complainants, who perform a public service when they report offences and give evidence in court, and ensuring a fair trial for people accused of sexual offences. During our consultations some lawyers expressed concerns that our recommendations would increase the chance that people would be wrongly convicted of offences. We disagree with this view. Most of the changes proposed are already in place in other parts of Australia and there is no evidence that they have caused injustice to those charged with offences.

## **CHAPTER 2—IMPROVING POLICE RESPONSES**

Because police are the ‘gate-keepers’ to the criminal justice system, the way they respond to people who report sexual assault is vitally important. Throughout this inquiry the Victorian Law Reform Commission has worked closely with senior members of Victoria Police, who have shown a strong commitment to improving police responses. Police processes are governed by the Victoria Police Code of Practice for the Investigation of Sexual Assault Cases, which is currently being reviewed. Victoria Police is a joint convenor, with the Office of Women’s Policy, of the Statewide Steering Committee to Reduce Sexual Assault.

As part of its work, the Commission convened focus groups with several Centres Against Sexual Assault (CASAs) and with Victoria Police members to discuss attitudes to complainants and identify problems in current policing processes which create a need for reform.

Our focus group research showed that there was still room to improve police attitudes and understanding about sexual assault. In focus groups we were told that some police are influenced by common myths surrounding sexual assault and the behaviour of victims, although other police participants showed an awareness

of the difficulties faced by complainants and the particular barriers to reporting sexual assault that exist for people with a cognitive impairment and people from NESB and Indigenous communities. Both CASA focus groups and police members of Sexual Offence and Child Abuse Units (SOCAUs) were critical of the attitudes and approach of some Criminal Investigation Unit (CIU) detectives in communicating with complainants.

CASA focus groups reported a lack of consistency in police decisions about whether or not to authorise prosecutions of sexual offences. Similar issues were also identified in police focus groups.

Major recommendations for the Victoria Police cover:

- enhancing training for general duties police, members of Sexual Offences and Child Abuse Units and Criminal Investigation Units to ensure a more sensitive and supportive response to people who report they have been sexually assaulted;
- working with NESB and Indigenous communities to develop training packages that are responsive to the needs of complainants from these communities;
- ensuring that police comply with Code of Practice requirements which seek to provide continuity of care to people who report sexual assault and make sure they have access to counselling services;
- providing information about police processes to complainants in a range of languages;
- undertaking research to gain a better understanding of the reasons why there has been an apparent increase in the numbers of people who make complaints and then withdraw them;
- giving written reasons to complainants when a decision is made not to continue with an investigation or not to lay charges;
- reviewing the process of authorising cases for prosecution to ensure decisions are consistent and transparent;
- regularly evaluating decision-making about prosecutions;
- attaching one or more detectives to existing SOCA Units to work exclusively on investigating sexual offences reported to SOCA and preparing briefs of evidence. These Units (known as Sexual Assault Investigation Sections) will shortly be piloted by Victoria Police; and
- improving police data collection on sexual assault.

The Commission was told that in country areas it was often impossible to satisfy the Code of Practice requirement that people reporting a sexual assault are medically examined within two hours. Delay in medical examination can be distressing for victims and also hinder police investigations. We recommend that the government should consider allocating additional funding to the Victorian Institute of Forensic Medicine to ensure that appropriate numbers of forensic medical officers can be recruited and trained, particularly in regional areas reporting chronic shortages.

### **CHAPTER 3—INCREASING THE RESPONSIVENESS OF THE CRIMINAL JUSTICE SYSTEM**

The changes to procedure and evidence laws which are recommended in this Report are unlikely to be effective unless they are also accompanied by changes to the culture of the criminal justice system. This Chapter makes recommendations to support systemic changes to the prosecution, committal and trial processes, including:

- building on existing programs for prosecutor training and judicial education to enhance prosecutors' and judges' expertise in dealing with sexual offence cases;
- changing the committal process to reduce delays and to ensure that children and people with a cognitive impairment do not have to face cross-examination at both committal and trial; and
- moving towards a more specialised approach for managing sexual offence cases involving children or people with a cognitive impairment, to facilitate a faster and more sensitive response to the needs of these complainants.

We explain these recommendations below.

#### **TRAINING FOR JUDGES AND LAWYERS**

The Interim Report's preliminary recommendations on prosecutor training and judicial education received significant support in submissions. Following publication of the Interim Report the Judicial College of Victoria held seminars for judges on issues arising in child sexual assault cases and jury warnings in sexual offence cases. The Office of Public Prosecutions (OPP) provides training for prosecutors handling sexual offence cases. The Commission recommends ongoing training on sexual assault for judges, defence lawyers and prosecutors. We also

recommend that barristers from the private profession should only be briefed by the OPP to prosecute sexual offence cases if they have participated in training.

### **CHANGES TO THE COMMITTAL PROCESS**

A committal hearing is a preliminary examination of the evidence by a magistrate to determine whether the evidence is of sufficient weight to support a conviction. If the magistrate finds this is the case, the defendant is committed to trial in the County Court.

During our consultations many concerns were expressed about the effect of committals on complainants in sexual offence cases. Complainants are often cross-examined at both committal and trial. Children and people with a cognitive impairment found this particularly difficult. We were also told that defence counsel often question complainants more rigorously at committal where no jury is present, than at the trial. At trial the complainant may be cross-examined more sensitively by the defence, so that the accused does not lose the jury's sympathy. The committal process also lengthens the period during which complainants must be involved in the criminal justice process, which creates particular difficulties for children, who cannot put events behind them until the criminal justice process is completed.

The Commission believes that changes to the committal process are necessary to reduce delays and protect children and people with a cognitive impairment from being cross-examined twice. The Report examines a number of ways of dealing with this issue and recommends prohibiting cross-examination of children and people with cognitive impairment at committal hearings for sexual offences. These changes are combined with provision for pre-recording of the evidence of children and people with a cognitive impairment, which is discussed below.

### **SPECIALISED HANDLING OF SEXUAL OFFENCE CASES**

In the Interim Report we asked whether a specialised approach could improve how the criminal justice system deals with sexual offence cases. We suggested that specialisation would acknowledge the complexities of sexual offence cases. It could create an environment in which lawyers, judges and court staff could gain a better understanding of and be more responsive to complainants' needs, including the need for case management processes which would deal with these offences quickly. Overseas experience has shown that specialisation may bring about cultural changes in the way the criminal justice system responds to complainants.

Two main forms of specialisation were discussed: a new stand-alone court with jurisdiction to hear both summary and indictable offences, and the establishment of specialist lists in both the Magistrates' Court and the County Court. The first model is currently being piloted in New South Wales, where initial evaluations are favourable. Under the latter model, judicial officers within the Magistrates' Court and the County Court who expressed an interest would be assigned to a specialist sexual offences list for a defined period.

The majority of submissions supported specialisation, but did not express a clear view about the type of specialist approach which would be most appropriate. The Magistrates' Court favours the creation of a specialist sexual offences list and piloted a specialist list for committals in child sexual offence cases in January 2004. In the County Court at present there seems to be little support for a model of specialisation under which judges who express an interest are assigned to a specialist sexual offences list for a period (say three months). The Court's view is that all County Court judges have the expertise to deal with these cases and that most judges would be reluctant to hear one type of matter exclusively for a defined time.

Based on our consultations with the courts, we recommend the establishment of a specialist list in the Magistrates' Court for summary offences and committals in sexual offence matters involving child complainants and complainants with a cognitive impairment. For the County Court, we recommend the assignment of a designated judge to list and manage all sexual assault cases involving child complainants and complainants with a cognitive impairment. Given concerns about specialisation expressed by the County Court we do not recommend that only designated judges should hear sexual offence cases.

## **CHAPTER 4—MAKING IT EASIER FOR COMPLAINANTS TO GIVE EVIDENCE**

The Commission has identified a number of features of sexual offence cases which make committals and trials particularly distressing for many complainants, including:

- the sense of marginalisation and powerlessness experienced by many complainants, because their status in the criminal proceeding is only that of witnesses, and because they have little control over the process;
- the long and frustrating delays that frequently occur; and

- the traumatic effect of unnecessarily intimidating or confusing cross-examination.

Cross-examination of witnesses is an essential feature of an adversarial criminal justice system. However complainants often find it very confronting to see their alleged attacker and the resulting trauma may muddle or distort their testimony. The focus on the complainant's behaviour and credibility during cross-examination can also cause significant distress.

Although legislation requires the permission of the judge before a complainant can be cross-examined about their prior sexual activities, we found that such cross-examination often occurs. Sometimes this is done without any application for permission to cross-examine the complainant on this issue, despite the current legislative requirement that such permission is obtained.

Legislation also places restrictions on admission of evidence about what a complainant told a counsellor. However these restrictions do not prevent a defence lawyer from subpoenaing a person to produce counselling notes, so that the defence knows what is in them, even if they are not used as evidence in the case. Complainants may be reluctant to seek counselling after they have been sexually assaulted because they fear that the counsellor will be required to give evidence or produce notes of what the complainant said in counselling sessions.

## RECOMMENDATIONS TO PROTECT COMPLAINANTS DURING CROSS-EXAMINATION

The Report makes a number of recommendations for changes to law and procedure to make it easier for complainants to give evidence and to prevent inappropriate admission of evidence of prior sexual activity, or confidential counselling material. These include:

- providing for mandatory use of closed circuit television, so that complainants in sexual offence cases do not have to give evidence in the presence of the jury and the accused in the court room, except where the trial judge is satisfied they want to give evidence in this way;
- strengthening existing provisions which require a judge to give permission before evidence can be admitted of a complainant's prior sexual activities. We recommend that the legislation should be amended to make it clear that these restrictions apply to both consensual and non-consensual activity (for example sexual abuse of the complainant when she was a child). Evidence of other sexual activities should only be admitted if it is relevant to a fact in issue in the committal or trial and if it is in the interests of

justice. In deciding whether this is the case the court must consider a number of matters, including the distress, humiliation and embarrassment that the complainant may suffer as the result of the admission of the evidence and the accused's right to defend himself against the charge;

- placing restrictions on subpoenaing counsellors to produce counselling notes and imposing more stringent conditions on the admission in evidence of confidential counselling information;
- ensuring that adequate support is provided for adult complainants in sexual offence cases.

We also recommend that the accused should be prohibited from personally cross-examining complainants and other vulnerable witnesses. This recommendation is discussed in more detail below. Many of the recommendations listed above are already in force or have been proposed in other States.

### **PROHIBITING CROSS-EXAMINATION BY UNREPRESENTED ACCUSED**

Under the current law, people may represent themselves at trial and may therefore cross-examine the complainant personally. Although this does not happen often, it has the potential to cause complainants great distress. Restrictions against this happening already exist in most Australian jurisdictions, as well as in England, Scotland and New Zealand. In the Interim Report we recommended the accused be prohibited from personally cross-examining the complainant and other 'protected witnesses', including children and people with cognitive impairment. Instead, the accused would be invited to obtain legal representation. We proposed that if they refused, the court should direct Victoria Legal Aid to appoint a lawyer for the cross-examination. We suggested the lawyer should act as a friend of the court, rather than the accused's representative.

Lawyers' groups and some judges were strongly opposed to the recommendation, arguing that the accused has a fundamental right to conduct his own defence. Questions were also raised about practical problems that may arise if the lawyer was acting as a friend of the court. However, the majority of submissions supported our recommendations. The Commission believes the accused's right to a fair trial can be protected without allowing him to personally cross-examine the complainant.

The Commission recommends the court-appointed lawyer should act as the legal representative of the accused when they cross-examine the complainant. Lawyers will act on the instructions of the accused and owe the same duties as if the accused had engaged them. If the accused declines to instruct the court-appointed

lawyer, the lawyer will have an obligation to act in the best interests of the client in cross-examining the complainant. In this situation, any inadequacy in the cross-examination will not be unfair to the accused, as it will be caused by the accused's failure to give instructions.

## MODIFICATIONS TO THE HEARSAY RULE

Chapter 4 also recommends changes to the hearsay rule. This rule generally prevents a jury from hearing evidence from the complainant about what he or she said out of court about an offence. It also prevents other people giving evidence about what the complainant told them. An exception to the hearsay rule allows the jury to hear evidence that the complainant told someone about a sexual assault if this occurred immediately after the assault occurred (the recent complaint principle). However the jury can only treat this evidence as supporting the complainant's credibility, and not as evidence of the truth of what the complainant said.

The hearsay rule sometimes excludes evidence likely to be reliable and helpful to the jury. The recent complaint exception which allows hearsay evidence to be admitted for limited purposes is based on the incorrect assumption that people who have been sexually assaulted typically report this immediately. If a person tells someone about a sexual offence some time after it allegedly occurred this evidence will not usually be admissible.

The Australian Law Reform Commission published a report on evidence in 1987 that recommended retaining the hearsay rule but legislating to permit the admission of some first-hand hearsay in criminal proceedings. The Commonwealth, NSW, Tasmania and the ACT have enacted the Uniform Evidence Act based on those recommendations. Other States have enacted child-specific hearsay exceptions. Victoria is the only State that has neither. We considered a range of ways in which the hearsay rule could be modified in sexual offence cases, and have proposed reforms based on the Uniform Evidence Act.

The major recommendations are:

- hearsay evidence that can be admitted under the current rules will be able to be used as evidence of the truth of the statement made;
- where the person who made the statement is available to give evidence, hearsay evidence of the statement will be able to be given by the person who made it, or by someone who heard them making the statement. For this to apply the facts must have been fresh in the memory of the person when they made the statement;

- where the person making the statement is not available to give evidence, the evidence will be admissible if the statement was made at or shortly after the alleged facts occurred or made in circumstances which make it highly probable it is reliable.

Safeguards for the accused have been included in our recommendations:

- The court can exclude hearsay evidence if it would be unfair to the accused to admit it.
- The jury must be told that hearsay evidence may not be as reliable as direct evidence.

## **CHAPTER 5—IMPROVING THE SYSTEM FOR CHILD COMPLAINANTS**

Child complainants in sexual offence cases face significant difficulties in reporting offences and giving evidence.

- At the time the acts occurred they may not have understood that the behaviour was an offence and may have been pressured by the accused to keep it secret.
- Because abuse of children may have occurred over a long period, complainants may find it difficult to recall details of particular incidents of abuse; this problem is exacerbated if the complainant has to give evidence about events which occurred some time ago.
- They will often have been assaulted by family members and may be reluctant to take action that will result in the break up of their family or prosecution of the alleged offender.
- They may not understand why they have to tell their story many different times to different people and are likely to find the language used in court confusing.
- They may find cross-examination particularly stressful.
- Delays in court processes may make it difficult for them to recall details of events.
- Lengthy court processes may inhibit recovery from traumatic events by preventing the child from putting the experience behind them.

These problems are compounded for children with cognitive impairment and NESB and Indigenous children. They contribute to low reporting rates for child sexual abuse and few prosecutions for such offences. People accused of sexual offences against children are entitled to the presumption of innocence, and must

receive a fair trial. However, it is also important to ensure child complainants are treated fairly and are able to give their evidence without feeling they are being victimised. It is also in the public interest that people guilty of offences are convicted and prevented from assaulting other children.

The recommendations made by the Commission to improve the situation for child complainants include:

- establishing an independent specialist child witness support service along the lines of the service which operates successfully in Western Australia. If this is not possible, we recommend that the Office of Public Prosecutions receives dedicated funding for the existing Witness Assistance Service to enable it to service the particular needs of child witnesses;
- changing the rules determining competence to give evidence, to make it easier for children to give sworn and unsworn evidence;
- allowing evidence-in-chief and cross-examination of child witnesses and witnesses with a cognitive impairment to be pre-recorded in the presence of the trial judge, the accused and prosecution and defence counsel;
- allowing admission of the hearsay evidence of a child if the child is under 16, the child is available to give evidence and the court is of the view that the evidence has sufficient probative value to justify it being admitted; and
- imposing a duty on the trial judge to prevent children being subjected to misleading, confusing intimidating or harassing cross-examination.

The details of these recommendations are set out below.

## CHANGES TO COMPETENCE REQUIREMENTS

Sexual offences against children usually occur in secret, making the child's evidence crucial in proving that an offence has been committed. Under Victorian law children aged 14 or over are assumed to be competent to give sworn evidence. Children aged under 14 are questioned and assessed by the judge or magistrate as to their understanding of the oath. If they are assessed as incompetent, they may give unsworn evidence but this is regarded by the law as having less weight. The Commission believes current tests for admission of children's evidence may prevent some people accused of sexual offences from being prosecuted.

We recommend legislative changes to:

- create a presumption that all witnesses, regardless of age, are competent to give sworn evidence (a similar provision is contained in the Uniform Evidence Act);

- change the competency test to allow child witnesses who can understand questions and answer them, and who understand the obligation to tell the truth, to give evidence on oath;
- change the competency test to allow a child to give unsworn evidence if they can understand questions put to them and give comprehensible answers to those questions; and
- allow the court to seek expert evidence as to the child's competence to give evidence.

### PRE-RECORDING OF CHILDREN'S EVIDENCE

Current Victorian legislation allows police to video-record or audio-record interviews with children and for the tape of the evidence (VATE) to be admitted as the child's evidence-in-chief at trial. Despite these provisions VATEs are seldom used in evidence. We make recommendations to improve the VATE process.

The prosecutor can apply to the court for the child to give their evidence by CCTV. Applications for use of CCTV are usually granted by the court. However prosecutors sometimes do not apply for the child to testify via CCTV because they believe the child is capable of giving evidence in court and that the jury may be more likely to convict if this occurs. Under our earlier recommendation (see Chapter 4) all complainants in sexual offence cases will have the right to give evidence using CCTV.

Although the above changes will help child complainants, the Commission believes more needs to be done. Under the current system there may be a considerable delay between the time the child reports the offence and when he or she gives evidence. This delay could be reduced by pre-recording both the child's evidence-in-chief and their cross-examination. This process has been operating successfully in Western Australia for almost a decade and has recently been introduced in Queensland.

We recommend pre-recording the child's evidence-in-chief and cross-examination at a preliminary hearing in the presence of the prosecution, defence counsel and the judge as soon as possible after committal. The child would give their evidence by CCTV. The recording would then be played at the trial. If there was a successful appeal and a re-trial, the tape could be played again, rather than the child having to be recalled to give evidence. We also recommend a similar process be available for witnesses with cognitive impairment.

This process will reduce delays for children in giving evidence, and allow them to give evidence at a time when they are more likely to recall the events on which the charge is based. It will help children to recover from traumatic events more quickly and allow them to move on with their lives.

### **ALLOWING ADMISSION OF CHILDREN'S HEARSAY EVIDENCE**

Children who have been abused rarely report it immediately. The hearsay rule prevents the prosecution from calling evidence from someone other than the child, such as their mother or teacher, to give evidence that the child reported abuse to them, even though this will often be the best evidence of an alleged assault. The rule against hearsay also prevents the child from giving evidence of what they told someone else about the assault.

There are currently two situations in which the court will allow evidence to be given about the child's prior consistent statements: to rebut allegations the child is dishonest or mistaken, and as evidence of 'recent complaint'. The Commission believes further amendment to the hearsay rule is required. A delay before trial is particularly disadvantageous for children, as their memory of the event will fade. Children also find it difficult to continually repeat their story. As a result their evidence may not seem believable by the time they give it at trial. We recommend that hearsay statements of children under 16 should be admissible to prove the facts in issue if the child is available to give evidence and if the court believes the evidence is of sufficient probative value to justify its admission. This recommendation applies in addition to recommendations about hearsay in Chapter 4.

### **PROTECTING CHILDREN FROM INAPPROPRIATE CROSS-EXAMINATION**

Cross-examination involving the use of complex language, and leading and repetitive questioning, is particularly difficult for children. Complex concepts, questions using double negatives, or a confusing sequence of questions are inappropriate for children. Judicial officers have the power to control the trial process to ensure questions asked of witnesses are fair, comprehensible and appropriate. Victorian legislation also requires the court to disallow indecent or scandalous questions and those intended to insult or annoy. These powers seem to be used sparingly by judges.

The Commission believes the current law is not adequate to protect children. Our recommendation is similar to the approach recommended by the Queensland Law

Reform Commission. Our recommendations seek to improve children's cross-examination by:

- imposing a duty on the court to ensure questions asked of children aged under 18 are not misleading, confusing or phrased inappropriately;
- requiring the court to take the witnesses' age, education and any disabilities into account when deciding whether to disallow a question;
- supporting the preparation of a guide to assist judges in dealing with child witnesses (the Australian Institute of Judicial Administration (AIJA) is currently considering this project);
- educating defence lawyers, prosecutors and the judiciary about effective and fair ways of questioning child witnesses.

## **CHAPTER 6—IMPROVING THE SYSTEM FOR COMPLAINANTS WHO HAVE A COGNITIVE IMPAIRMENT**

People who have a cognitive impairment have an increased vulnerability to sexual assault and abuse because of their daily dependence on others for assistance. They also face additional barriers when accessing the criminal justice system. They may not understand that what has happened to them is a crime, may face misconceptions about their credibility and memory when reporting an offence, and may find the process of questioning difficult, both at the reporting stage and in court.

Chapter 2 of this Report makes recommendations for improving police responses. These recommendations will assist complainants with a cognitive impairment. Further recommendations in this Chapter directed at improving police responses include:

- developing guidelines for the identification of cognitive impairment in consultation with key agencies, and ensuring all officers are familiar with the guidelines;
- requiring investigating officers to use the VATE process to take a complainant's statement if they are unsure whether a person has a cognitive impairment; and
- providing training to police on appropriate techniques for communicating with people with a cognitive impairment.

It is also recommended that the Office of the Public Advocate (OPA) should liaise with CASA to develop training for Independent Third Persons (ITPs) who support people with a cognitive impairment during police interviews.

Chapters 3 and 5 contain recommendations to improve the court process for complainants with a cognitive impairment in relation to committals, pre-recording, use of VATE and CCTV, and specialist lists in the Magistrates' and County Courts. We also believe it is necessary to impose a duty on the court to ensure appropriate questioning of people with cognitive impairment, and recommend the *Evidence Act 1958* be amended to impose such a duty. We recommend training for defence lawyers, prosecutors and judicial officers about the disadvantages experienced by people with cognitive impairment and effective communication techniques.

It is clear that people with a cognitive impairment face significant difficulties in the criminal justice process, whether they are complainants, witnesses or accused. Some of the issues raised in consultations were beyond the scope of this inquiry. The Commission suggests that the Attorney-General consider asking the Commission to review how people with cognitive impairment are treated in the criminal justice system as complainants, accused and witnesses. In the meantime, we also recommend training for CASA in identifying disability and working with people with cognitive impairment.

#### **CHANGING SEXUAL OFFENCES WHICH PROTECT PEOPLE WITH A COGNITIVE IMPAIRMENT FROM SEXUAL EXPLOITATION**

Section 50 of the *Crimes Act 1958* defines the term 'impaired mental functioning' for the purposes of sections 51 and 52, which prohibit certain people from being involved in sexual activities with people with a cognitive impairment. Some submissions raised concerns about this term, suggesting use of the word 'mental' stigmatises people with disabilities. We recommend this term be changed to 'cognitive impairment'.

A number of submissions also wanted the definition to be changed to refer to a person's capacity to make informed judgments about sexual activities. At present the definition refers to particular mental conditions as examples of 'impaired mental functioning', though the definition is not restricted to these conditions. The Commission has decided against recommending a definition based on capacity. As sections 51 and 52 create serious offences, it is important their application is clear. A redefinition could make these offences more difficult to prosecute as it would require a range of experts to be called to testify about

whether the complainant had the capacity to choose to engage in sexual activity with people in positions of power over him or her. The number of prosecutions under these sections of the Act is very small compared to the estimated rates of sexual abuse. We therefore do not support adopting a definition that would make it harder to prosecute those who sexually exploit people with a cognitive impairment.

We recommend section 51 be amended to make it an offence, for a person who provides medical or therapeutic services *relating to the cognitive impairment* to participate in sexual activity with the complainant. The intention is to make it unnecessary for the prosecution to prove the accused had knowledge of the impairment, where the services relate to that impairment. The defence of honest and reasonable belief the person did not have a cognitive impairment will apply to cover the rare situation where a provider of services was unaware of the impairment. We also propose a new offence to cover the situation where the services do not relate to the cognitive impairment. In that case, the service provider would only be guilty of the offence if they were aware of the impairment.

Section 52 currently prohibits sexual acts between people with cognitive impairment and workers in residential facilities. We recommend section 52 be extended to cover any person working at a facility or in a program which provides services to people with cognitive impairment. As is the case under the current law, it is not proposed that the defence of consent should apply to these offences, since they are designed to protect people with impaired mental functioning against exploitation. We also recommend that section 35 of the *Crimes Act 1958* should be amended to ensure that same-sex partners of people with cognitive impairment cannot be prosecuted for these offences.

## **CHAPTER 7—JUDGES' DIRECTIONS TO JURIES**

This Chapter evaluates and recommends changes to the laws that determine how judges direct juries in sexual offence cases.

In a sexual offence trial, the judge is responsible for summarising the evidence and directing the jury about the law, and the jury is responsible for deciding the guilt or innocence of the accused. Historically, jury warnings in sexual offence cases existed solely to protect accused persons against unfair convictions. In more recent times however, legislation has been enacted to counter myths about sexual assault and to ensure that complainants, as well as accused, are treated fairly. This chapter evaluates the effectiveness of the legislative changes intended to produce this 'balance of fairness'.

The Commission undertook a qualitative empirical study in which it examined 24 judges' charges in sexual offence trials that took place between 2000 and 2002 in the County Court of Victoria. The aims of the study were to determine:

- how trial judges are applying the legislative provisions of the *Crimes Act 1958* which govern jury directions about consent, belief in consent and delay in reporting;
- how judges approach the common law rules relating to delay in the reporting of sexual offences (*Longman* and *Crofts* warnings); and
- the clarity and length of judges' charges.

As a result of our findings, further research and consultations, the Commission makes a number of recommendations about jury directions in sexual offence trials, including:

- amending the mandatory consent direction contained in section 37 of the *Crimes Act 1958* to say that the fact that a person did not say or do anything to indicate free agreement to a sexual act is evidence that the act took place without that person's free agreement;
- amending section 61 of the *Crimes Act 1958* to prevent a judge from warning the jury that it is dangerous or unsafe to convict an accused unless the judge is satisfied that the accused has in fact suffered some specific forensic disadvantage as a result of the complainant's delay in reporting, or that the accused has in fact been prejudiced as a result of other circumstances in the case. Section 61 should be further amended to include a provision preventing a judge from stating or suggesting in any way to the jury that the credibility of a complainant is affected by a delay in reporting, unless the judge is satisfied that there is sufficient evidence to justify such a warning; and
- amending the *Evidence Act 1958* to clarify that in sexual offence cases, expert evidence about sexual assault is admissible.

## CONSENT DIRECTIONS

Section 36 of the *Crimes Act 1958* defines consent as 'free agreement'. If consent is in issue in a sexual offence trial, section 37 requires a judge to direct the jury that the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show the person did not freely agree. The Commission recommends that the word 'normally' be removed from section 37 to make it clear that the failure of the complainant to say or do anything is

sufficient of itself to show lack of consent. This will reinforce the communicative model of consent.

### **DELAY DIRECTIONS (SECTION 61, LONGMAN AND CROFTS WARNINGS)**

Section 61(1)(a) of the *Crimes Act 1958* provides that the judge must not warn or suggest to the jury that the law regard complainants in sexual offence cases as an unreliable class of witness. If delay in reporting the offence is raised as an issue in the trial, the judge must tell the jury that there may be good reasons for such delay. These amendments were designed to reflect the reality that many sexual offence victims delay reporting the offence. However, the High Court has said that the existence of such provisions does not prevent trial judge from commenting that a delay in reporting a sexual assault could affect the credibility of the complainant (a *Crofts* warning) and does not remove the need to warn juries in certain circumstances about the dangers of convicting of accused persons on the uncorroborated testimony of the complainant (a *Longman* warning).

The Commission is concerned that the effectiveness of section 61 is being undermined by these common law warnings, which often appear alongside them. This is likely to confuse juries, as the two sets of directions appear to contradict each other. Further, we remain of the view that phrase ‘dangerous or unsafe to convict’ may be interpreted by juries as an invitation to acquit. We recommend that the *Longman* and *Crofts*-style warnings be restricted to situations where the judge is satisfied that there is sufficient evidence that the accused has in fact suffered some specific disadvantage as a result of a delay in reporting or for other reasons.

### **JURY ATTITUDES**

Juries can be influenced by their own experience and attitudes, and may rely on common myths about sexual assault during their decision-making. One way to ensure that jury decision-making is based on accurate information would be to allow experts to give general evidence about sexual assault, for example, on the reasons for delay in reporting an assault. We recommend an amendment to the *Evidence Act 1958* to clarify that expert evidence about sexual assault is admissible in sexual offence cases.

## **CHAPTER 8—THE MENTAL ELEMENT OF RAPE**

In Victoria, the prosecution must prove the accused intentionally sexually penetrated the complainant without her consent, while aware that she was not or

might not have been consenting. All elements of the offence of rape, including the state of mind of the accused (or the ‘mental element’ of the offence), must be established by the prosecution beyond reasonable doubt. Current Victorian law provides for a subjective approach to the mental element. The prosecution must prove that the accused did not honestly believe that the complainant consented. In deciding whether this is the case the jury can, however, take into account whether the accused’s belief in consent was reasonable in the circumstances.

The Commission believes that the subjective approach to the mental element of rape should be modified for several reasons including the following:

- it does not adequately protect the autonomy of people to refuse to participate in sexual activity. Instead of requiring the initiator of sex to find out if the other person consents, it places the onus on the person approached to resist; and
- the current law may allow an accused person to avoid culpability if he has not turned his mind to the issue of consent.

The current law undermines the ‘communicative model’ of consent and does nothing to discourage the assumption of consent in ambiguous situations. A person who honestly believes that another person’s silence or acquiescence means consent may be acquitted of rape;

Several other jurisdictions have recognised the disadvantages of a subjective mental element and introduced objective or partially objective tests. For example, Western Australia, Queensland and Tasmania apply an objective test, as do New Zealand and England. Canada has a partially objective test.

## OUR RECOMMENDED MODEL

The majority of submissions were in favour of an objective or partially objective test for the mental element of rape, although some lawyers’ groups opposed any change to the current law.

The Commission recommends a variation on the current Canadian model, which has both objective and subjective elements. Under this model:

- The accused can raise a defence of honest belief in consent.
- Before the defence can be put to the jury, the trial judge must be satisfied that there is sufficient evidence of an honest belief in consent, which goes beyond the accused’s mere assertion (the ‘air of reality’ test).

- Once the trial judge is satisfied that this test is satisfied, the defence of honest belief in consent can be put to the jury. The judge will direct the jury that the defence must fail if they determine that:
  - the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting (any evidence of self-induced intoxication is not to be taken into account in determining this); or
  - the accused did not turn his mind to the issue of whether the complainant was consenting; or
  - any one of the fact situations set out in section 36 of the *Crimes Act 1958* were present at the time and the accused knew of these facts (section 36 provides a non-exhaustive list of factors in which a complainant is not to be regarded as consenting, for example where the complainant is asleep or unconscious, or under the apprehension of force or harm).

The Commission believes that this model has several advantages, including:

- the model avoids the ‘reasonable or ordinary person’ test, which has caused problems in other areas of the criminal law, for example provocation;
- it is a partially subjective, partially objective model;
- it simplifies the jury’s decision-making process by ensuring that the jury need only consider the accused’s honest belief in consent when there is evidence that this is in issue in the case;
- it prevents an accused who has not even considered whether the other person is consenting, or who has failed to take reasonable steps to ascertain whether that person is consenting, from benefiting from such inaction. The onus is shifted to the initiator to determine that there is consent; and
- it supports the communicative model of consent.

## **CHAPTER 9—OTHER LEGISLATIVE CHANGES**

Chapter 6 makes recommendations for changes to offences against people with cognitive impairment. Chapter 8 proposes changes to the offence of rape. This Chapter recommends changes to offences covering:

- incest;
- compelling people to participate in sexual activities; and

- some sexual offences against children and young people.

## **INCEST**

The Commission believes the offence of incest needs to be changed to emphasise that the primary purpose of the offence is to protect people against sexual exploitation by family members who have power over them. We recommend that the offence be re-named ‘intra-familial sexual penetration’. The term incest stigmatises both parties to the transaction and may suggest a victim is a willing participant in the activity. Apart from the name change, we recommend creating three separate offences of intra-familial penetration, and an offence of persistent abuse of a sibling.

## **COMPELLING PEOPLE TO PARTICIPATE IN SEXUAL ACTIVITIES**

We recommend changes to offences which punish people who compel others to participate in sexual activities. The recommendations will make these offence apply regardless of the gender of the victim, and of whether the penetration is penile, digital, oral or by an object. We also recommend it be an offence to compel someone to self-penetrate, or penetrate or be penetrated by an animal. Our recommendations were supported in submissions.

## **RECOMMENDATIONS RELATING TO OFFENCES AGAINST CHILDREN AND YOUNG PEOPLE**

Our recommendations for changes to sexual offences against young people include:

- in the offence which prohibits people in a relationship of care supervision and authority over young people, from participating in sexual activities with them, providing examples of the types of relationships which are covered;
- prohibiting non-penetrative sexual activity between young people aged 16 and 17 and people who have a relationship of care, supervision and authority over them;
- repealing section 60 of the *Crimes Act 1958*, which covers soliciting acts of sexual penetration, and replacing it with a new section which covers soliciting and procuring of young people to take part in sexual penetration and indecent acts. This will cover people who use the Internet, for

example, to establish contact with and ‘groom’ young people for sexual acts;

- amending the offence of unlawful sexual penetration of a child to make it clear the onus is on the accused to establish the defence of reasonable belief as to age or marriage on the balance of probabilities
- re-naming the offence of maintaining a sexual relationship with a child as an offence of ‘persistent sexual abuse of a child’.

## **CHAPTER 10—DEALING WITH JUVENILE SEXUAL OFFENDERS**

Although the main focus of this inquiry is on improving the system for complainants, we also decided to examine the issue of juvenile sexual offenders. Research suggests many sexual offenders begin offending when they are young. Some abuse younger children, including siblings. Only a very small number of these offences are currently dealt with by the criminal justice system. Among chronic adult sexual offenders it is estimated that between 50% and 80% committed their first offences as adolescents.

Although the Child Protection division of the Department of Human Services may become involved when a young person has committed a sexual assault, their primary responsibility is to protect the victim. The abuser may not come within the provisions of the *Children and Young Persons’ Act 1989* which allows care applications to be made for children ‘at risk of harm’.

The Commission believes neither Child Protection nor the criminal justice system currently responds adequately to young people who sexually assault others. Many young people are not charged because they are too young to be held criminally responsible, or because the victim is too young to give credible evidence. In addition, where the victim and offender are siblings, the family and the victim may be reluctant for the victim to testify against his or her sibling.

We recommend the *Children and Young Persons’ Act 1989* be amended so the court can make an order to protect a child who is a sexual offender. The requirement to participate in a treatment program will often be the most effective way to deal with the young offender’s behaviour.

We also briefly examine other responses to the needs of young sexual offenders, including various forms of diversion and family conferencing. In Victoria, Children’s Court conferencing can only occur as part of the sentencing process, after the young person has been convicted. It is not currently used for sexual offences.

The Commission tentatively proposes a system under which the child could obtain treatment in a variety of ways, including under orders made in the criminal and protective divisions of the Children's Court and referral by a range of agencies. Such treatment might be combined with processes such as family conferencing, which could be a means of making young people who would otherwise never have been prosecuted or convicted more accountable to those they have assaulted. We recommend the establishment of a joint working party, including representatives from DHS and the Children's Court, to consider a broader range of responses to the problem of juvenile sexual offending.



# Recommendations

## Chapter 1

### Introduction

1. The Department of Justice Diversity Unit should convene a steering committee with representation from criminal justice stakeholders, government agencies and Aboriginal services and community groups to oversee the development and implementation of the following:
  - ‘Responding to Sexual Assault’ training for Aboriginal community members and workers;
  - a Community Family Violence/Sexual Assault Resource Guide; and
  - a Statewide sexual assault awareness and safety campaign for Indigenous people.
2. The Department of Justice and the Victorian Multicultural Commission should convene a steering committee including representatives from the Department of Human Services, Victoria Police, the Centre Against Sexual Assault (CASA) and relevant NESB community organisations to plan and implement a series of community education campaigns focusing on strategies to reduce sexual assault in NESB communities.
3. These campaigns should be developed in consultation with appropriate women’s organisations from the various communities targeted and should be consistent with the principles for NESB community education developed at the Victorian Law Reform Commission’s forum.
4. The Department of Justice should convene a working party comprising representatives of Victoria Police, the Office of Public Prosecutions, the courts and other relevant stake-holders, to establish an integrated process for the collection of reliable statistics relating to sexual offences.
5. If possible the database should permit tracking of offences from the time of report until the matter is concluded.

6. The data base should also include information on:
  - incidence of offences in Victoria;
  - the characteristics of victims and offenders, including racial and ethnic background, any disability and age;
  - police reports and prosecution rates for such offences; and
  - prosecution outcomes and the factors which may affect them.
7. The Department of Justice Diversity Unit and the Victorian Multicultural Commission should continue to collaborate to develop a program for uniform data collection by the various government and non-government agencies and services that work with victim/survivors and perpetrators of sexual assault. The program should include the development of appropriate standards, systems and the provision of training to personnel to ensure that accurate data regarding the Indigenesness and Aboriginality, ethnicity and other relevant characteristics of service users is recorded and forwarded to a centralised agency for collation

## **Chapter 2**

### **Improving Police Responses**

8. Victoria Police should consider funding a research project to obtain further information about why complaints are withdrawn and the factors that influence police decisions to take no further action on a complaint. Information derived from this research should be taken into account in police training, and considered in the review of the Code of Practice for the Investigation of Sexual Assault (Code of Practice) and the review of the brief authorisation process proposed in Recommendation 19 below. See also Recommendation 32 below.
9. Victoria Police and CASAs should ensure that NESB complainants receive written information in relevant community languages as soon as practicable after a report of sexual assault has been made, about culturally specific support services available to them.
10. Victoria Police should ensure that Indigenous complainants receive written information about Indigenous support services available to them as soon as practicable after a report of sexual assault has been made.

11. Victoria Police should enhance training and develop refresher courses for all general duties police on how to respond appropriately to victims of sexual offences.
12. Training on sexual assault for members of Sexual Offences and Child Abuse (SOCA) Units and Criminal Investigation Units (CIU) should address the social context of sexual offences, including:
  - the characteristics of most offences, offenders and victims;
  - the short-term and long-term impact of sexual assault on victim/survivors; and
  - the barriers that victims often face in reporting offences.
13. Training for CIU members on responding to sexual assault victims should include information on the reasons why victims may feel unable to continue with a police report, or request that the investigation be discontinued. This material could usefully be included in a training session developed by CASAs in collaboration with the SOCAU Coordination Office.
14. Police training should take account of the diversity of victims' needs and the particular barriers to reporting which are faced by some groups in the community. Training initiatives should discuss best practice models for responding to sexual assault of
  - Indigenous people;
  - people from non-English speaking backgrounds;
  - people with cognitive impairments; and
  - children.
15. In developing sexual assault training packages for police, Victoria Police should:
  - work collaboratively with CASAs to develop training packages that ensure police members understand the role of CASAs and can benefit from their experience of working directly with complainants;
  - engage consultants or representatives from non-English speaking background community organisations who are recognised by communities as having expertise or training experience in culturally appropriate sexual assault service responses; and

- engage consultants or representatives from Indigenous community organisations who are recognised by Indigenous communities as having expertise or training experience in culturally appropriate sexual assault service responses.
16. Information on police processes should be made available to victims at police stations. Materials should outline the basic steps involved in reporting sexual assault to the police, the contact details of local CASA and SOCA Units, the principles of the Code of Practice, and the options victims have in making a statement. These materials should be provided in a range of languages.
  17. Liaison Committees (see Recommendations 27, 28, 29 below) should assist in the development of these materials and ensure the materials are kept updated and a ready supply available at police stations at all times.
  18. The Code of Practice should be amended to state that, as a matter of course, written reasons must be provided to the victim where a decision is made not to continue with an investigation or not to lay charges.
  19. Victoria Police should review their brief authorisation process with the aim of developing a model that is consistent, transparent and accountable. In particular, the impact of court costs on the decision-making process should be examined and appropriate strategies devised to resolve any issues which are identified.
  20. Victoria Police should consider delegating power to the Officers-in-Charge of SOCA Units to authorise sexual assault briefs.
  21. A monitoring process should be established to allow evaluation of the authorisation process on a regular basis, so that necessary amendments can be made.
  22. All officers who are able to authorise briefs in sexual assault matters should be required to attend a sexual assault brief manager's course.
  23. Where the Criminal Investigation Unit have principal carriage of the investigation the officer-in-charge of the relevant SOCA Unit, or the individual SOCA Unit members, should be consulted prior to any decision being made against authorising the brief for prosecution.
  24. Police should be made aware that the *Code of Practice* applies regardless of whether medical attention or a forensic medical examination is required.
  25. The meaning of the requirement that people reporting a recent sexual assault should be taken to the nearest CASA or hospital Crisis Care Unit should

reflect the principles upon which the Police *Code of Practice* was first based. The Code should be interpreted to ensure that victims receive continuity of care and to optimise their future access to counselling services.

26. The government should consider allocating additional funding to the Victorian Institute of Forensic Medicine (VIFM) to ensure that appropriate numbers of Forensic Medical Officers (FMOs) and sexual assault doctors can be recruited and trained, particularly in regional areas reporting chronic shortages.
27. The Sexual Assault Liaison Committee should consider the most appropriate means of ensuring that forensic medical officers are familiar with accurate interpretation of the Code of Practice guidelines. This could be achieved through the inclusion of material in training manuals and sessions, redistributing copies of the Code, and issuing 'refresher' documents that clearly state the position on relevant issues.
28. Where Regional Liaison Committees have been established, a CIU member from the appropriate division should be nominated to regularly attend the meetings. FMOs should be invited to attend the meeting when needed.
29. Where no Regional Liaison Committee currently exists, a CIU member should be nominated to contact the local CASA and FMOs on a quarterly basis to discuss any problems or issues that have emerged. These contacts should be formalised to the extent that there is agreement by the parties in how to respond to the issues raised, and to report back to the CASA, VIFM and Victoria Police on what action was taken.
30. The Commission recommends that Victoria Police establish Sexual Assault Investigation Sections in all metropolitan divisions where the caseload reaches a pre-determined threshold. The processes of selection for CIU members, tenure, and lines of accountability should be clearly established by Police Command.
31. Victoria Police should review the current Operating Procedures relating to sexual assault with a view to:
  - determining appropriate time frames for the investigation of sexual offences;
  - ensuring increased supervision regarding investigation time frames and appropriate victim contact/follow-up.

32. Victoria Police should consider devising a comprehensive performance standards process (perhaps to be included in the Operating Procedures) whereby there is ongoing monitoring of the police response to sexual assault, including the monitoring of:
  - the delays between initial report and initiation of the prosecution process;
  - the number and type of cases authorised and why;
  - the number and type of cases not authorised and why; and
  - the number and type of cases that do not reach the brief authorisation stage.
33. Victoria Police should establish appropriate IT systems to enable the effective monitoring and evaluation of sexual assault reporting patterns and of police procedures relating to authorisation of briefs for prosecution of sexual assault matters. Such systems should be compatible with broader Department of Justice systems.
34. Any new IT system should be evaluated for efficacy approximately two years after implementation.

### **Chapter 3**

#### **Increasing the Responsiveness of the Criminal Justice System**

35. Bodies which offer seminars and lectures for continuing professional development purposes should include material on sexual offence laws and practice which will assist lawyers practising in criminal law or in areas such as family law and child protection where allegations of sexual assault may be relevant.
36. As well as promoting understanding of the laws and procedures relevant to sexual assault, such programs should include information about the social context in which sexual offences typically occur, and the emotional, psychological, and social impact of sexual assault.
37. The Office of Public Prosecutions (OPP) should continue to offer a regular training program for solicitors and prosecutors involved in committals and trials in sexual offence cases. As well as dealing with legal issues the objectives of the program should include:

- 
- increasing prosecutors' understanding of the emotional, psychological and social impact of sexual assault on complainants in sexual offence cases, and how this may affect complainants in giving their evidence;
  - providing information on the social context in which sexual offences typically occur;
  - ensuring that prosecutors are aware of the advantages of meeting with complainants before the hearing and advising them about what will happen when they give their evidence;
  - familiarising prosecutors with the use of all alternative arrangements available to assist witnesses in giving evidence, and of the advantages to complainants in giving their evidence in this way;
  - liaising with witness support services to ensure that complainants receive support and information which prepares them for what will happen in court; and
  - encouraging prosecutors to take appropriate steps to protect complainants from offensive, unfair or irrelevant cross-examination.
38. Prosecutors from the private Bar should only be briefed to appear in sexual offence cases if they have participated in the OPP training program on sexual assault or in an equivalent continuing professional development program.
39. The OPP should ensure that prosecutors receive training on how to deal with the problems experienced by people who are likely to have experienced discrimination because of their disability, Indigenous status or language or ethnicity. This could be done by engaging consultants with relevant expertise or by building links with relevant organisations who could participate in designing and providing components in the training program. Such organisations might include:
- CASAs;
  - non-English speaking background community organisations which have expertise in providing culturally appropriate sexual assault service responses;
  - Indigenous community organisations which are recognised by Indigenous communities as having expertise or training in culturally appropriate sexual assault service responses; and

- disability organisations with expertise or training in providing appropriate sexual assault service responses for people with a disability.
40. The Judicial College of Victoria should continue to offer regular programs for judges and magistrates which facilitate discussion of issues which commonly arise in sexual offences committals and trials, particularly issues relating to the exercise of judicial discretions dealing with child witnesses and witnesses with a cognitive impairment, intervention during cross-examination and directions or warnings to juries.
  41. The program should include presentations by recognised experts on the social context in which sexual offences occur, including the outcomes of empirical research on the incidence and circumstances in which sexual assaults occur:
    - the emotional, psychological and social impact of sexual assault on victim/survivors, including how the assault may be experienced by people who have already experienced discrimination because of their Indigenous status, language and ethnicity or disability, and how this may affect complainants in giving their evidence;
    - the effect of these offences on victims and the particular problems that complainants may experience in giving evidence; and
    - the background to, and application of, any recent legislative changes, and legislative changes arising from the report on this reference.
  42. Schedule 5 of the *Magistrates Court Act 1989* should be amended to prohibit cross-examination of children or people with cognitive impairment at committal hearing.
  43. The *Evidence Act 1958* should be amended to create a presumption in favour of the pre-recording of the evidence-in-chief and cross-examination of child complainants and complainants with cognitive impairment in sexual offence cases.
  44. The recorded evidence should be admissible as if the evidence were given orally in accordance with the usual rules of evidence, in the same way as evidence is given orally in a hearing. *Note that further recommendations relating to pre-recording are contained in Chapter 5.*
  45. Where the complainant in a sexual offence matter is a child or a person with a cognitive impairment, a case conference should be conducted in the County Court within 21 days after the accused has been committed for trial.

46. At the conclusion of the case conference, if the matter is to continue to trial, dates should be set for pre-recording the complainant's evidence, for a directions hearing and for trial. Pre-recording should occur within 21 days of the case conference, and the trial within three months of the date of committal. A directions hearing should be held shortly before trial.
47. Where a person is committed for trial for a sexual offence against a child or a person with a cognitive impairment, the OPP should file and serve depositions and the presentment at least seven days prior to pre-recording.
48. A Working Party comprising representatives from the Magistrates' Court, the County Court, the OPP, Victoria Legal Aid, the Law Institute, Victoria Police and the Victorian Government Reporting Service should be established to identify the reasons for delays in processing sexual offence cases (including delays between committal mention and committal hearing) and to make recommendations for reducing such delays as far as possible. Some of this issues which should be considered are: continuity of solicitor and counsel within the OPP, continuity of defence counsel, streamlining of grants of Legal Aid, and the resources required to reduce delays in the provision of transcripts.
49. Priority should be given to the introduction of processes to reduce delays in cases involving child complainants and people with a cognitive impairment
50. In the County Court a designated judge should be assigned to list and manage all sexual assault cases involving child complainants and complainants with a cognitive impairment.
51. Delays and different treatment occurs because such matters as section 37A applications are not always handled at the same stage of the process. The court should identify all matters that are to be considered at directions hearings in all sexual offences cases.
52. The County Court should be resourced to evaluate the effect of this process on delays and plea rates.
53. The Magistrates' Court should establish a separate list (or lists) for summary offences and committals in sexual offence cases involving child complainants and complainants with a cognitive impairment in the Melbourne metropolitan area and major regional centres.

54. Initially, such cases should be allocated to magistrates who have expressed an interest in dealing with sexual offence cases. They should be assigned to this list for a defined period.
55. All magistrates hearing cases in the sexual offences list should participate in a judicial education program on issues that arise in hearing child sexual offence cases and cases involving a complainant with a cognitive impairment. Such education should be conducted on an ongoing basis.
56. The Magistrates' Court should evaluate the effect of these processes on timelines and plea rates.
57. Subject to the availability of resources and the outcome of the above evaluation, the Magistrates' Court should consider establishing a list to deal with all sexual offences cases.
58. The Department of Justice should consider the need for additional resources in the Magistrates' Court in order to implement the above recommendations.

## **Chapter 4**

### **Making it Easier for Complainants to Give Evidence**

59. Section 37C of the *Evidence Act 1958* should be amended to give all adult complainants in sexual offence trials the right to give evidence by closed-circuit television (CCTV).
60. The prosecution should be able to apply for an order that the complainant give evidence in the court room. Before the court makes such an order the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to give evidence by CCTV and that the complainant is able and wishes to give evidence in the court room.
61. Every effort should be made to install appropriate CCTV facilities in all courts in which sexual offence proceedings are held. Where facilities are unavailable, cases should be relocated where practical.
62. Where the complainant gives evidence by CCTV the court may make any order it considers appropriate to allow the complainant to take part in a view or identify a person or thing.
63. The Magistrates' Court and the County Court should develop a protocol dealing with matters relating to the operation of the CCTV link, including

who in the courtroom is to be able to, or not to be able to, be heard or seen by the complainant.

64. Where CCTV cannot be used, or an order is made that the complainant should give evidence in court, a screen is to be used to remove the defendant from the complainant's direct line of vision, except where the magistrate or judge has satisfied him/herself that the complainant does not wish a screen to be used for this purpose.
65. If it is not practically possible to implement Recommendations 59–63 for all complainants in sexual offence cases immediately, priority should be given to ensuring that CCTV is available for use by all child witnesses in sexual offence cases and for witnesses with a cognitive impairment.
66. Complainants in sexual offence cases should be entitled to have a person of their choice beside them for the purpose of providing emotional support while they are giving evidence, (whether or not they give evidence by CCTV) except where the presiding judge or magistrate is satisfied that the complainant does not wish to have a support person present.
67. Where the presiding judge or magistrate is of the opinion that it is not in the interests of justice for a particular person to provide support to the complainant, that person shall not be entitled to act as a support person, but this does not prejudice the right of the complainant to have another person beside them for the purpose of providing emotional support while they are giving evidence.
68. Section 37A of the *Evidence Act 1958* should be amended to make it clear that it applies to both consensual and non-consensual sexual activities.
69. Section 37A of the *Evidence Act 1958* should be amended to provide that the court shall not grant leave for the complainant to be cross-examined about sexual experience or activity (whether consensual or non-consensual) or lack of sexual experience or activity unless it is satisfied that:
  - the evidence is of substantial relevance to a fact in issue; and
  - admission of the evidence is in the interests of justice having regard to the matters in Recommendations 70 and 71 below.
70. In deciding whether the admission of the evidence is in the interests of justice the judge must consider:

- whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may suffer as the result of the admission of the evidence;
  - the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;
  - the need to respect the complainant's personal dignity and privacy; and
  - the right of the accused to make a full answer and defence to the charge.
71. In assessing the distress, humiliation, or embarrassment that the complainant may suffer as a result of leave being granted the court must consider the age of that person and the number and nature of questions that will be put to that person.
72. Evidence of prior sexual experience or activity should not be regarded as having substantial relevance to a fact in issue merely because of the fact that the complainant freely agreed to participate in another sexual act with the accused or with another person.
73. Evidence of the complainant's sexual activity or experience is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity or experience that is the subject matter of the charge.
74. The OPP should continue to notify defence counsel of the need to make a written application for leave to cross-examine the complainant at least 14 days before the date listed for committal or trial, unless exceptional circumstances justify admission of the evidence without prior written application.
75. The OPP should establish a system for monitoring the operation of section 37A of the *Evidence Act 1958* which enables an assessment of the percentage of sexual offence cases in which applications are made for the admission of prior sexual history evidence, the grounds on which such applications are based and the success rate of applications.
76. A counselling communication must not be disclosed in committal proceedings. Accordingly, at committal
- whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may suffer as the result of the admission of the evidence;

- the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;
  - the need to respect the complainant's personal dignity and privacy; and
  - the right of the accused to make a full answer and defence to the charge.
77. A counselling communication must not be disclosed in any trial or plea proceedings except with the leave of the court. Accordingly
- a person cannot be required (whether by subpoena or otherwise) to produce a document which records a counselling communication; and
  - evidence of a counselling communication cannot be admitted in any trial or plea proceedings except with the leave of the court.
78. A person who objects to production of a document which records a counselling communication in relation to a trial or plea proceedings cannot be required to produce the document unless
- the document is first produced for preliminary examination by the court for the purposes of ruling on the objection;
  - and the court is satisfied that:
    - the contents of the document have substantial probative value;
    - other evidence of the contents of the document or the confidence is not available; and
    - the public interest in preserving the confidentiality of the communication and protecting the confider from harm is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).
79. The preliminary examination is to be conducted in the absence of the parties and their legal representatives, except to the extent that the court determines otherwise.
80. Evidence taken at a preliminary examination is not to be disclosed to the parties or their legal representatives, except to the extent that the court determines otherwise.
81. After undertaking the preliminary examination the court is to determine whether the confidential counselling communication should be disclosed.

82. A counselling communication cannot be adduced in evidence at a trial or in plea proceedings unless the court, after inspecting the document, is satisfied that
- the contents of the document have substantial probative value;
  - other evidence of the contents of the document or the confidence is not available; and
  - the public interest in preserving the confidentiality of the communication and protecting the confider from harm, is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).
83. In deciding whether the public interest test is satisfied, the court must consider
- the extent to which disclosure of the information is necessary to allow the accused to make a full defence;
  - the need to encourage victims of sexual offences to seek therapy and the extent to which such disclosure discourages victims from seeking counselling or diminishes its effectiveness;
  - whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;
  - whether the victim or alleged victim objects to disclosure of the communication;
  - the attitude of the person to whom the communication relates; and
  - the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.
84. The legislation should continue to apply to counselling communications whenever they are made.
85. Existing requirements which govern applications for leave and notification of the informant and the counsellor should continue to apply.
86. If there is a general review of the law of evidence in Victoria, the review should consider whether restrictions should be placed on the admission of confidential communications made in the context of professional relationships, similar to the restrictions in ss 126A–126F of the *Evidence Act 1995* (NSW).

87. The *Evidence Act 1958* should be amended to allow the admission of first-hand hearsay evidence in sexual offences cases in circumstances where this evidence is admissible under sections 65 and 66 of the Uniform Evidence Act.
88. A person should be regarded as unavailable to give evidence for the purposes of the provision allowing admission of hearsay evidence if they are dead or mentally or physically incapable of giving evidence.
89. The court should not be able to admit hearsay evidence to prove an asserted fact if, when the representation was made, the person was not competent to give evidence about an asserted fact because he or she was incapable of giving a rational reply to a question about a fact. This should not apply to a statement made by a person about his or her health, sensations, intention, knowledge or state of mind.
90. Where evidence is sought to be adduced of a hearsay statement made by a person who is unavailable to give evidence, the person who seeks to adduce the evidence must give reasonable notice in writing to the other party of the intention to adduce that evidence. The notice must state the provision on which the party seeks to rely in arguing that the hearsay rule does not apply.
91. Where evidence of a previous representation is admitted for a purpose other than to prove the fact asserted, it should also be admissible as evidence of the truth of that fact. (This provision is based on section 60 of the Uniform Evidence Act).
92. The court may refuse to admit hearsay evidence if the court is satisfied that it would be unfair to the defendant to admit the evidence.
93. In a jury trial the judge must warn the jury that hearsay evidence may not be as reliable as direct evidence.
94. In any criminal proceeding for a sexual offence, the accused may not cross-examine the complainant or a protected witness personally. (Note: Protected Witness is defined in Recommendation 101.)
95. The court must advise the accused that legal representation is required in sexual offence cases if the complainant or a protected witness is to be cross-examined and that he or she may not cross-examine the complainant or protected witness personally. The accused must be invited to arrange legal representation and given an opportunity to do so.

96. If the accused refuses legal representation, the court must direct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination of the complainant or protected witness.
97. A court-appointed lawyer has the same obligations as a lawyer engaged by the accused when he or she cross-examines on behalf of the accused. If the accused refuses to instruct the court appointed lawyer the lawyer is obliged to act in the best interests of the accused when cross-examining on behalf of the accused, subject to the obligations that lawyers normally owe as officers of the court.
98. When the court advises the accused that legal representation is required in sexual offence cases and that he or she cannot cross-examine the complainant or a protected witness personally, the court must warn the accused about the implications of the rule in *Browne v Dunn*.
99. If the accused declines to accept the legal assistance provided for this purpose, or to provide such instructions as are necessary to enable the person appointed to question the complainant or protected witness adequately or at all, he is to be taken as having foregone his right to cross-examine the complainant or protected witness.
100. The court must inform the jury that the accused is not permitted to cross-examine the complainant or a protected witness personally. If a complainant or protected witness is cross-examined by a person appointed for that purpose, the court must warn the jury that:
  - the procedure is a routine practice of the court;
  - no adverse inference is to be drawn against the accused as a result of the use of the arrangement; and
  - the evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.
101. A ‘protected witness’ means any child under 18, a person who is a complainant in respect of other sexual offence charges brought against the accused, and a person with impaired mental functioning, or a person who is declared by the court to be a protected witness under Recommendation 102.
102. An application may be made to the court for a parent or sibling of the accused or complainant, or any family member of the accused or complainant, to be declared a protected witness if the court considers that

the person would suffer unnecessary distress, humiliation, or intimidation if cross-examined by the accused personally.

103. The current section 372 and section 398A of the *Crimes Act 1958* should not be amended.
104. A dedicated funding stream should be committed to the OPP based Witness Assistance Service to enable it to provide adequate support to all adult prosecution witnesses in sexual offences cases, both in Melbourne and in rural and regional areas.

The funding should be sufficient to enable the service to:

- meet the needs of witnesses from non-English speaking background communities;
- meet the needs of Indigenous witnesses;
- meet the needs of witnesses with differing physical and intellectual requirements;
- respond to all appropriate requests for assistance in a timely manner;
- assess the needs of witnesses for support through the criminal justice process and develop a clear plan as to how this should be done;
- either directly provide or negotiate the provision, nature and level of assistance required to ensure that the witnesses' participation in the criminal justice system is as positive as possible and that the integrity of the judicial process is upheld; and
- ensure witnesses are made aware of, and where necessary assisted to access, any assistance required for longer term support arising from either the experience of surviving an offence or any negative effects from giving evidence at court.

## **Chapter 5**

### **Improving the System for Child Complainants**

105. The Department of Justice should establish an independent specialist witness support service for child witnesses.
106. The service should provide support to child witnesses, their parents, guardians or carers in sexual offences cases, both within Melbourne and in rural and regional areas.

107. The purpose of this support should be to facilitate child witnesses' more effective and credible participation in the criminal justice process, while protecting their wellbeing.
108. The support should be appropriate for Indigenous children, children from non-English speaking backgrounds and children with differing physical and intellectual requirements.
109. Specialist child witness support should be provided by professional staff with expertise in relation to the developmental needs and capacities of children and an understanding of the requirements of the criminal justice system in relation to the prosecution of sexual offences.
110. Where circumstances require it, there should be appropriate collaboration between the service and other agencies providing services to the child witness.
111. Support for child witnesses should include:
  - assessing the requirements of the individual child witness and coordinating the appropriate program for the child and for parents, guardians or carers;
  - keeping the child and their parents, guardians or carers informed of the progress of the case and liaising and advocating with prosecutors, solicitors and police on behalf of the child;
  - explaining the court process and preparing the child, parents, guardian or carer for the experience of giving evidence;
  - accompanying the child to court or arranging for a court companion of the child's choice;
  - providing appropriate psychological and welfare support to children, including their parents, guardians or carers; and
  - making necessary referrals for children and families, guardians or carers to therapeutic counselling, medical care and other services necessary.
112. Child friendly facilities should be provided for children within court complexes, including in interview areas and waiting rooms.
113. Police should continue to make video and audiotaped evidence (VATE) of statements given by children and people with a cognitive impairment.

114. Victoria Police should establish an independent evaluation of VATE statements in sexual offence cases and of the use of VATE statements in evidence.
115. The evaluation should include
  - arranging for a review panel, including a magistrate, a member of Victoria Police, a judge, an experienced defence barrister, an experienced prosecutor and a child psychologist with expertise in methods for questioning children, to view a sample of VATEs (including tapes played at trials and tapes not played) to assess their admissibility, forensic quality and the appropriateness of the interview techniques used;
  - researching Australian and international best practice with respect to the preparation of video recordings of evidence and making recommendations about changes to police training which may be necessary to improve the quality and admissibility of VATE interviews; and
  - making recommendations for prosecutor training which might encourage greater reliance on VATE tapes.
116. A joint Working Party of Victoria Police and the OPP should be established to oversee implementation of any recommendations made as a result of the evaluation.
117. The Working Party should include a person with expertise in dealing with child victims of sexual assault, and a representative of the Department of Human Services (DHS).
118. Section 37 of the *Evidence Act 1958* should be amended to give child complainants in sexual offences cases the right to give evidence by CCTV.
119. The prosecution should be able to apply for an order that the alternative arrangement not be used. Before the court makes such an order the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to give evidence by CCTV and that the complainant is able and wishes to give evidence in the court room.
120. Recommendations 62–67 should also apply in relation to child complainants.
121. Child complainants in sexual offence cases should be entitled to have a person beside them for the purpose of providing emotional support while they are giving evidence (whether or not they give evidence by CCTV)

except where the presiding judge or magistrate has satisfied him/herself that the complainant does not wish to have a support person present.

122. All child complainants' evidence given by CCTV should be simultaneously audio and video recorded so that in the event of a retrial or other situation arising that requires the court to rehear all or part of the child complainant's evidence, the tape can be played instead of the child being called to testify again.
123. The *Evidence Act 1958* should be amended to create a presumption in favour of videorecording of children's evidence-in-chief and cross-examination. Pre-recording should occur at a hearing presided over by a judge at which the accused and counsel for the prosecution and defence are present.
124. The prosecution should be able to apply for an order that a child complainant should give evidence at the trial rather than pre-record his or her evidence. Before the court makes such an order, the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to have evidence pre-recorded at a separate hearing and that the complainant is able and wishes to give evidence at the time of the trial by CCTV or in the court room.
125. The child's recorded evidence should be admissible as if the evidence were given orally in accordance with the usual rules of evidence in the same way as evidence given orally in a hearing.
126. Unless the court orders otherwise, the child's recorded evidence should be admissible in a retrial of the same offence, or for a trial of an offence arising out of the same circumstances.
127. At the hearing the defendant must not be in the same room as the child, but must be capable of seeing and hearing the child when the child gives evidence.
128. The child must give their evidence by closed circuit television from a place outside the courtroom.
129. If the child's evidence has been pre-recorded the child may not be subsequently cross-examined or re-examined on any matter unless either:
  - a party seeks to recall the child as a result of that party having become aware of a matter of which that party could not have been aware with reasonable diligence at the time of the pre-recording, or

- it is in the interests of justice for the court to permit the child to be re-examined or cross-examined; or
  - if the child were giving evidence in court in the normal way the child could be recalled to give further evidence and it would be in the interest of justice to make the order.
130. If the child's evidence is insufficient to support all of the counts on the presentment the accused should be presented on the original counts, the entire pre-recording played to the jury, and the prosecution should then formally withdraw the counts that were not supported by the child's evidence.
131. A similar pre-recording process should also be available for witnesses with cognitive impairment.
132. Section 23 of the *Evidence Act 1958* should be amended to provide that all witnesses, regardless of age, should be presumed competent to give sworn evidence.
133. The test for competence to give evidence on oath should be that witnesses understand that they are obliged to give truthful evidence.
134. People who are not competent to give sworn evidence should be able to give unsworn evidence if they can understand questions put to them as witnesses and give intelligible answers to them.
135. People who are not capable of giving comprehensible answers to a question about a fact should not be competent to give evidence about that fact, but may be competent to testify about other facts.
136. Before children give unsworn evidence the judge should tell them that it is important to tell the truth and not to tell lies.
137. At the same time that the judge instructs a child that the child must tell the truth, the judge should also tell the child:
- that the child may not know or not be able to remember some things that the child is questioned about, and that the child should tell the court if this is the case;
  - that the child will be asked questions that may make suggestions that are true or untrue;

- that the child should agree with true statements, but should not feel under pressure to agree if the statement is incorrect, according to the child's understanding of what happened.
138. In cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert on the child's competence to give sworn or unsworn evidence.
139. Evidence of a hearsay statement made by a child which is relevant to the facts in issue shall be admissible to prove the facts in issue in any criminal case involving child sexual assault allegations where:
- the child is under the age of 16 and
  - the child is available to give evidence and
  - the court, after considering the nature and contents of the statement and the circumstances in which it was made, is of the view that the evidence is of sufficient probative value to justify its admission.
140. The court must warn the jury that the hearsay nature of the evidence may make it unreliable.
141. Provisions allowing admission of the hearsay evidence of children to prove facts in issue should not detract from or modify common law rules allowing admission of evidence of statements made to third persons for a purpose other than as proof of the facts in issue.
142. The provisions that allow admission of hearsay evidence of children are not intended to derogate from the broader provisions relating to the admission of hearsay evidence specified in Recommendations 87–93.
143. That the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible, that in the case of questions asked of children under 18 years of age:
- neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
  - the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.
144. In deciding whether to disallow a question, the court is to take into account any relevant condition or characteristic of the witness, including age, culture,

personality, education and level of understanding and any mental, intellectual or physical disability of the witness.

145. The County Court should participate in the Australian Institute of Judicial Administration (AIJA) project for the preparation of a judicial bench book to assist judges in dealing with child witnesses. The Bench book should include material about children's development and guidelines for effective communication with children of different ages and backgrounds.
146. Programs for continuing professional development of lawyers and prosecutor training [See Recommendations 35–38] should draw lawyers attention to the legislative changes recommended above and include material that addresses the developmental patterns of children and the appropriate ways to question child witnesses.
147. Prosecutor training should draw prosecutors' attention to the legislative changes recommended above and to the desirability of objecting to questioning that contravenes these legislative restrictions.
148. The program of judicial education referred to in Recommendations 40–41 should deal with the issues that arise during trials involving child witnesses and include information from specialists in child development about best practice questioning of child witnesses.
149. The Department of Justice should fund an independent evaluation of the effect of this package of reforms on child complainants.

## **Chapter 6**

### **Improving the System for Complainants Who Have a Cognitive Impairment**

150. Victoria Police should develop guidelines for the identification of cognitive impairment in consultation with the Office of Public Advocate and the Equal Opportunity Commission. Guidelines prepared by Corrections Victoria might provide a useful model for this process.
151. Training for general duties police, SOCA members and CIU members should ensure that police are familiar with and can apply the guidelines for the identification of cognitive impairment.
152. If investigating officers are unsure as to whether a person has cognitive impairment, they should use the VATE process to take that person's statement.

153. Training of general duties police and SOCA Unit and CIU members should include appropriate communication techniques with people with a cognitive impairment.
154. OPA should liaise with CASA House to develop training for Independent Third Persons (ITPs) in supporting people with a cognitive impairment who report sexual assault.
155. OPA should consider seeking resources to enable it to establish a central roster system for allocating Independent Third Persons.
156. CASA training should include a component on identifying disability and working with people with cognitive impairment.
157. The Attorney-General should consider establishing a review which identifies the issues confronted by people with cognitive impairment in the criminal justice system as complainants, accused and witnesses and makes recommendations for legal and procedural changes.
158. That the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible in the case of questions asked of people with a cognitive impairment that:
  - neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
  - the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.
159. Training programs for prosecutors and defence lawyers should include a component on the disadvantages experienced by people with cognitive impairment, and effective communication with people with a cognitive impairment.
160. Judicial education programs on sexual offences should include material that familiarises judges with communication and other difficulties people with a cognitive impairment may face.
161. Sections 50, 51 and 52 of the *Crimes Act 1958* should be amended to use the term ‘cognitive impairment’ rather than ‘mental impairment’.
162. Section 23 of the *Evidence Act 1958* should be amended to use the term ‘cognitive impairment’ rather than ‘impaired mental functioning’.

163. The definition of ‘impaired’ in section 50 of the *Crimes Act 1958* should not be changed.
164. Section 51 of the *Crimes Act 1958* should be amended so that:
- it is an offence for a person who provides medical or therapeutic services to a person with cognitive impairment to engage in a sexual act with that person;
  - where the medical or therapeutic services are related to the cognitive impairment, it is unnecessary for the prosecution to prove that the accused was aware of the person’s cognitive impairment. However, the accused can raise the defence that they had an honest and reasonable belief that a person did not have a cognitive impairment; and
  - where the medical or therapeutic services are not related to the cognitive impairment, the service provider is not guilty of the offence unless he or she was aware that the person had a cognitive impairment.
165. Section 52 of the *Crimes Act 1958* should be amended as follows: A person working or volunteering at a facility or in a program which provides services to people with cognitive impairment, who takes part in a sexual act with a person whom he or she knows has cognitive impairment, should be guilty of an indictable offence.
166. Sections 51 and 52 of the *Crimes Act 1958* should not include a defence of consent.
167. Section 35 of the *Crimes Act 1958* should be amended to include ‘spouse or domestic partner’ and should be broadly defined to include same sex couples and couples in a genuine relationship who are not cohabiting.
168. The Working Party that is convened by the Department of Justice to establish an integrated process for the collection of reliable statistics on sexual offences [see Recommendation 4] should consider how to ensure that information is collected relating to complainants and offenders with cognitive impairment.

## **Chapter 7**

### **Judges’ Directions To Juries**

169. The mandatory jury direction on consent contained in section 37 of the *Crimes Act 1958* should be changed as follows:

The fact that a person did not say or do anything to indicate free agreement to the particular sexual act at the time that the act occurred is evidence that the act took place without that person's free agreement.'

170. Section 61 of the Crimes Act 1958 should be amended as follows (**proposed amendments in bold text**, existing provisions in normal text):

(1) On a trial of a person for an offence under Crimes Act 1958 Part 1, Division (8A), (8B), (8C), (8D) or (8E)...

(a) The judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual offence cases as an unreliable class of witness; and

(b) (i) if evidence is given or a question is asked of a witness or a statement is made in the course of an address on evidence which tends to suggest that there was delay in making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.

**(ii) The judge must not state, or suggest in any way to the jury that the credibility of a complainant is affected by a delay in reporting a sexual assault unless satisfied that there exists sufficient evidence in the particular case to justify such a warning.**

(c) The judge must not warn, or suggest in any way to the jury that it is dangerous or unsafe to convict the accused, unless satisfied that:

(i) there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a substantial delay in reporting; or

(ii) there is evidence that the accused has in fact been prejudiced as a result of other circumstances in the particular case.

(d) If the judge is satisfied in accordance with sub-section (c) that a jury warning is required, the judge may warn the jury in terms she or he thinks appropriate having regard to the circumstances of the particular case.

(e) In giving a jury warning pursuant to sub-section (d), it is not necessary for the judge to use the words 'dangerous or unsafe to convict'.

(2) **Subject to s 61(1)(b)(ii), (c), (d) and (e)**, nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.

(3) Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which sub-section (1) applies if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

171. Judicial education on sexual assault should include:

- information about the social and cultural context of sexual assault (see Recommendation 7) and the factors that result in delays in reporting assault;
- training on the content and comprehensibility of jury directions and the appropriate balance between comments on the facts and discussion of the law; and
- information about the usefulness of providing written and visual aids to assist jury decision-making.

172. Judges should consider providing juries with written and visual aids to assist their deliberation.

173. The *Evidence Act 1958* should be amended to clarify that in sexual offence cases expert evidence about sexual assault is admissible. This evidence may include evidence on:

- the nature and dynamics of sexual assault;
- social, psychological and cultural factors that may affect the behaviour of people who have been sexually assaulted and may result in them delaying in reporting an assault.

## **Chapter 8**

### **The Mental Element of Rape**

174. The *Crimes Act 1958* should be amended to include the following formulation of the mental element of rape:

- A person commits rape if he intentionally sexually penetrates another person without that person's consent.

- It is a defence to a charge of rape that the accused held an honest belief that the complainant was consenting to the sexual penetration.
- The accused must produce some evidence that he had an honest belief that the complainant consented before this matter can be left to the jury. The mere assertion by an accused that he believed the complainant was consenting shall not constitute sufficient evidence of an honest belief as to consent.
- Where an accused alleges that he believed that the complainant consented to the sexual penetration, a judge must be satisfied that there is sufficient evidence of the existence of such a belief before the defence of honest but mistaken belief in consent can be considered by the jury.
- The defence of honest belief in consent is not available where:
  - the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting;
  - the accused did not turn his or her mind to the possibility that the complainant was not consenting; or
  - one or more of the circumstances listed in section 36(a)–(g) existed and the accused was aware of the existence of such circumstances.
- In considering the question of whether the accused took reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting, the jury shall not have regard to any evidence of the accused’s self-induced intoxication.
- If relevant to the facts in issue in a proceeding, the judge must direct the jury that—in considering the accused’s alleged belief that the complainant was consenting to the sexual act it must take into account whether that belief was reasonable in all the relevant circumstances. [current section 37(1)(c) *Crimes Act 1958*].

## Chapter 9

### Other Legislative Changes

175. An offence of intra-familial sexual penetration should be created, in place of the existing offence of incest:

- A person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her child or other lineal descendant or his or her step-child.
  - A person must not take part in an act of sexual penetration with a person under the age of 18 whom he or she knows to be the child or other lineal descendant or the step-child of his or her de facto spouse.
  - A person must not sexually penetrate a person under the age of 18 whom he or she knows to be his or her sibling.
176. Consent should not be a defence to the above intra-familial sexual penetration offences.
177. A person who takes part in a prohibited act of intra-familial sexual penetration under the coercion of the other person who took part in that act is not guilty of an offence.
178. In all proceedings for offences of intra-familial sexual penetration it shall be presumed in the absence of evidence to the contrary:
- that the accused knew that he or she was related to the other person in the way alleged; and
  - that people who are reputed to be related to each other in a particular way are in fact related in that way.
179. A new offence should be created to make it an offence where:
- (1) the accused took part in an act of sexual penetration of his or her sibling when the sibling was 18 years or older; and
  - (2) prior to the sibling attaining the age of 18 years, the accused took part in one or more acts that would constitute an offence under *Crimes Act 1958* section 38 (rape), section 44 (sexual penetration of a person under the age of 18 years by a sibling); section 45 (sexual penetration of a child under 16); section 47 (indecent act with a child under 16); section 48 (sexual penetration of a person aged 16 or 17 under the care, supervision and authority of the accused); section 49 (indecent act with a person aged 16 or 17 under the care, supervision and authority of the accused); or the ‘compelling sexual penetration offence (see para 9.13 below).
180. It is not necessary to prove an act referred to in sub-section (2) with the same degree of specificity as to date, time, place, circumstances or occasion as

would be required if the accused were charged with an offence constituted by that act instead of an offence against sub-section (1).

181. A prosecution for this offence must not be commenced without the consent of the Director of Public Prosecutions.
182. Section 38(3) of the *Crimes Act 1958* should be amended to include, within the crime of rape, the situation where:
  - a person (the offender) compels another person (the victim) to sexually penetrate the offender or a third person, irrespective of whether the person who is penetrated consents to the act; or
  - a person (the offender) prevents a person who has sexually penetrated the offender or a third person from ceasing to sexually penetrate the other person, irrespective of whether the person who is penetrated consents to the act.
183. Section 38(4) of the *Crimes Act 1958* should be amended by removing the word 'male'.
184. The *Crimes Act 1958* should be amended to create a new offence of compelling sexual penetration, with the same penalty that applies to rape. The offence would apply where a person (the offender) compels another person (the victim) to sexually penetrate the victim or to sexually penetrate or be penetrated by an animal.
185. Sections 48 and 49 of the *Crimes Act 1958* should include a non-exhaustive list of the relationships covered by the section including the relationships of:
  - teacher and student;
  - foster parent, legal guardian, and the child for whom they are caring;
  - in the case of section 49 (which penalises non-penetrative sexual acts) parents, including step-parents and adoptive parents and their children;
  - religious instructors;
  - employers;
  - youth workers;
  - sports coaches;
  - counsellors;
  - health professionals and young people who are patients; and

- police and prison officers and young people in custody.
186. The age of consent for sexual activity with a person over whom someone is in a position of care, supervision and authority should be 18 years, regardless of whether the sexual acts involve sexual penetration.
187. The defence of reasonable belief that the young person was aged 18 years or more should continue to apply.
188. Section 60 of the *Crimes Act 1958* 'Soliciting Acts of Sexual Penetration or Indecent Acts' should be repealed.
189. Section 58 of the *Crimes Act 1958* should be amended to make it an offence for:
- a person aged 18 years or over to solicit or procure a child under the age of 16 to take part in an act of sexual penetration or an indecent act outside marriage with him or her or another person;
  - a person over 18 years to solicit or procure another person to take part in an act of sexual penetration or an indecent act outside marriage with a child under the age of 16;
  - a person over 18 years to solicit or procure a 16- or 17-year-old child to whom he or she is not married and who is under his or her care, supervision or authority to take part in an act of sexual penetration or an indecent act with him or her or another person.
190. The section should also provide that:
- a person in Victoria who solicits or procures a child outside Victoria to take part in sexual penetration or an indecent act which, if committed in Victoria, would be an offence is guilty of this offence;
  - a person outside Victoria who solicits or procures a child outside Victoria to take part in an act of sexual penetration or indecent act in Victoria is guilty of this offence.
191. Section 45 of the *Crimes Act 1958* should be amended to make it clear that where the accused is charged with unlawful sexual penetration of a person aged between 10 and 16, and the complainant consented, the onus is on the accused to establish the defence of reasonable belief as to age or marriage on the balance of probabilities.

192. Section 47A of the *Crimes Act 1958* should be amended to replace the words ‘maintain a sexual relationship with a child’, wherever they appear, with the words ‘persistent sexual abuse of a child’.

193. The *Crimes Act 1958* should include a statement of the objectives of Part 1 subdivisions 8A to 8G in the following terms:

The aim of subdivisions 8A to 8G are to:

- (i) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
- (ii) protect children, young people and people with cognitive impairment from sexual exploitation;

194. The Act should also contain an interpretative clause in the following terms:

In interpreting subdivision 8A to 8G the court is required to consider the unique character of sexual assault and the way in which sexual assault affects the lives of victims. In particular, the court must have regard to the high incidence of sexual violence within society and the fact that:

- sexual offences are significantly under-reported;
- women, children and young people, and people with disabilities are overwhelmingly the victims of sexual assault;
- offenders are commonly known to victims; and
- sexual offences occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

195. A similar interpretative clause should be included in the *Evidence Act 1958* to apply to provisions relevant to sexual offence trials, including Part 2 Division IIA, Sections 37A to 37C and sections 39 to 41.

## **Chapter 10**

### **Dealing With Juvenile Sexual Offenders**

196. Section 63 of the *Children and Young Persons Act 1989* should be amended as follows:

- Insert subparagraph (g) after (f) ‘the child is displaying sexually abusive behaviour and an order of the Children’s Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service’.

197. The Department of Human Services should commission appropriate research to enable it to develop guidelines for the identification of problematic sexual behaviours in children and young people.
198. The Department of Human Services and the Children's Court should establish a working group, including representation from Victoria Police, to develop a wider range of options for responding to children and young people who have been involved in sexually abusive behaviour and to increase the numbers of young people held to account for this conduct.
199. Options to consider include:
  - expansion of existing treatment programs; and
  - introduction of a conferencing process, along the lines of the model which applies in South Australia.
200. In developing a wider range of responses to young people who have committed sexually abusive acts, the Working Group should consider:
  - the respective roles which the Children's Court and Department of Human Services should play in overseeing the process;
  - the criteria which should determine eligibility to participate in the program and the body which should be responsible for applying those criteria;
  - the body which should be responsible for overseeing compliance with the program;
  - mechanisms to ensure the appropriate representation of victims' interests within the program; and
  - mechanisms for independent evaluation of the program.
201. Options for dealing with sexually abusive young people should provide for referral from a variety of sources including Victoria Police, the Child Protection Service and other agencies.

