

Chapter 3

Increasing the Responsiveness of the Criminal Justice System

INTRODUCTION

3.1 Chapter 1 of this Report describes the unique characteristics of sexual offences, which create particular challenges for the criminal justice system. It suggests that changes which maintain fairness to the accused, but make the system more responsive to the needs of complainants, could encourage more people to report sexual assault and to give evidence at committal and trial.

3.2 Chapter 4 of our Interim Report described complainants' perceptions of the criminal justice process.¹⁶¹ The qualitative data which the Commission obtained from submissions and consultations was supplemented by other research on the experiences of complainants in sexual offence cases which has been conducted in many jurisdictions.¹⁶² Issues identified by complainants and the organisations which assist them include:

- perceptions that the criminal justice system does not treat complainants fairly and sensitively;
- 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;

161 Interim Report 147–59.

162 See for example: Department for Women, New South Wales, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996); Melanie Heenan and Helen McKelvie, *Crimes (Rape) Act 1991, An Evaluation Report* (1997); Pia van de Zandt, 'Heroines of Fortitude' in Patricia Eastal (ed) *Balancing the Scales: Rape, Reform and Australian Culture* (1998); Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002).

- the lack of appropriate, accessible information about what is happening at the various stages of the criminal justice process;
- the long and frustrating delays that occur throughout the process;
- difficulty caused by not understanding the complex language used throughout the criminal justice process, particularly in court; and
- the traumatic effect of intimidating or confusing cross-examination.

3.3 Our consultations also produced many reports of perceived barriers to participation in the criminal justice process which confront complainants who have a cognitive impairment, complainants from Indigenous communities and NESB and refugee communities and children, including children from these groups.

3.4 The Interim Report¹⁶³ said that changes to substantive offences and to the law of evidence needed to be accompanied by cultural changes within the criminal justice system to improve the system's response to complainants in sexual offence cases.

3.5 Chapter 2 of this Report makes recommendations for improving police responses to reports of sexual assault. In this Chapter we make recommendations which are intended to improve other aspects of the criminal justice process. Recommendations include:

- 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 other particularly vulnerable witnesses 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.

3.6 In Chapter 5 of this Report¹⁶⁴ we recommend there should be a presumption in favour of recording all evidence of children and people with cognitive impairment prior to trial. In this Chapter we discuss when pre-recording

163 Interim Report paras 4.32–45.

164 See Recommendations 123–131.

should occur and how committal and trial procedures could be modified to provide for this process of pre-recording.

PROFESSIONAL DEVELOPMENT FOR LAWYERS AND JUDICIAL OFFICERS

3.7 Recommendations which are designed to make the criminal justice process more responsive to the needs of complainants will only be effective if their purpose is understood and accepted by prosecutors, defence lawyers and judges and if those involved in the administration of criminal justice support them. Prosecutors and judges should receive information about the research findings which underpin the proposed reforms, have the opportunity to discuss and enhance existing processes, and identify issues which may arise in applying new provisions.

TRAINING FOR LAWYERS

3.8 In the Interim Report¹⁶⁵ we recommended a program of specialist education for prosecutors who appear in sexual offences cases. Training of this type acknowledges the key role which prosecutors play in liaising with complainants during the criminal justice process and in pursuing laws and procedures intended to ensure fair treatment of complainants.

3.9 The recommendation for prosecutor education received significant support in submissions. Many of those who responded said that appropriate education for key participants was essential to developing the criminal justice system to make it more responsive to the needs of complainants. Loddon Campaspe CASA, for example, said in its submission: 'Regular and continuing education of prosecutors, defence counsel and judicial education are crucial to changing the culture of the courts'.¹⁶⁶ The Equal Opportunity Commission of Victoria strongly supported the recommendation and suggested that the training 'should ideally cover some of the specific issues, myths and stereotypes that affect particular groups of complainants during the legal process, such as Indigenous complainants and complainants with a cognitive impairment'.¹⁶⁷ The Criminal Bar Association agreed with the recommendation and noted that the OPP already has 'a proactive approach to educating prosecutors'.¹⁶⁸ The Department of Human

165 Interim Report paras 4.36–40 and Recommendation 20.

166 Submission 19.

167 Submission 38.

168 Submission 42.

Services strongly supported the recommendation and suggested that the program 'should...demonstrate how support of the complainant may lead to provision of better quality evidence'.¹⁶⁹ The Federation of Community Legal Centres suggested that the training should be a compulsory and ongoing part of professional development.¹⁷⁰

3.10 Since the Interim Report was published a continuing professional development scheme (CPD) has been introduced for solicitors in Victoria, and a continuing legal education (CLE) scheme for barristers.¹⁷¹ Practitioners are required to accumulate units, which can be earned by participating in approved seminars, workshops and conferences.¹⁷²

3.11 As seminars and workshops may be offered by a range of approved bodies, it is not possible for the Commission to recommend the particular body which would be responsible for offering seminars on the legal issues relating to sexual offences. However, we recommend that bodies which offer seminars and lectures for continuing professional development purposes should include material on sexual offence laws and practice which would assist lawyers practising in criminal law or in areas such as family law and child protection, where allegations of sexual assault may be relevant. The participation of defence lawyers in such seminars could improve the quality of representation for accused people, and improve the quality of cross-examination of complainants in sexual offence cases.

3.12 As we described in the Interim Report, a specialist training program on sexual offences has been implemented by the Office of Public Prosecutions (OPP). The program is attended by solicitors from the OPP who deal with sexual offence cases, and Crown prosecutors. Barristers in the private profession who are regularly briefed in sexual offence cases may also attend.

3.13 The initial program appears to have been successful. We support the further development and continuation of this program and recommend that when

169 Submission 44.

170 Submission 47.

171 For solicitors, Continuing Professional Development Rules 2004 were made by the Victorian Lawyers RPA Ltd (now Law Institute of Victoria Limited) under Legal Practice Act 1996, s 72. For barristers, the Victorian Bar Council introduced Compulsory Continuing Legal Education Rules 2004, also pursuant to s 72.

172 A number of other activities also qualify for the award of CPD and CLE points; see Rule 1.1–11 in the Continuing Professional Development Rules and Rules 3–9 in the Compulsory Continuing Legal Education Rules 2004.

briefing members of the private profession the OPP should only brief barristers who have participated in the program. We recommend that the OPP collaborate with appropriate agencies such as the Equal Opportunity Commission and CASAs to prepare and present courses which will enable barristers to understand the special difficulties and barriers faced by some complainants.

! RECOMMENDATION(S)

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;

!	RECOMMENDATION(S)
	<ul style="list-style-type: none"> • 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. <p>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.</p> <p>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:</p> <ul style="list-style-type: none"> • 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.

JUDICIAL EDUCATION

3.14 In the Interim Report we described the program then being considered by the Judicial College of Victoria to facilitate discussion among members of the judiciary about substantive legal issues and process issues which commonly arise in sexual offences cases. Recommendation 21 proposed that the Judicial College implement a program for judicial officers

to facilitate discussion of issues which commonly arise in sexual offences committals and trials, particularly issues relating to the exercise of judicial discretions, interventions during cross-examination and directions or warnings to juries.¹⁷³

Recommendation 22 described the information we considered should be included in the program, including information about the effect of sexual offences, the problems that complainants experience in giving evidence and the social context in which offences occur.¹⁷⁴

3.15 These recommendations received strong support in submissions, including those from certain CASAs, Violence Against Women Integrated Services, Victorian Community Council Against Violence, Youth Affairs Council of Victoria, the Salvation Army, the VOICES group of victim/survivors and the Department of Human Services.¹⁷⁵ In discussions with the Commission, Chief Judge Rozenes also expressed strong support for judicial education.¹⁷⁶

3.16 The Disability Discrimination Legal Service supported the recommendations and made an additional recommendation that the College offer a compulsory program for judges and magistrates 'to promote understanding of the needs and specific issues impacting on victim/survivors of sexual assault with a cognitive impairment who appear before the court and the means available to them to facilitate meaningful participation of victim/survivors in the court process'.¹⁷⁷

3.17 The Federation of Community Legal Centres supported the recommendation but considered that 'it does not go anywhere near far enough'.¹⁷⁸ Their view was that judicial training should be compulsory and should 'include the socio-cultural context of sexual assault and the impact on the victim/survivor'.

3.18 The Criminal Bar Association supported Recommendation 21 and suggested that it 'is also worthwhile balancing [the content proposed for the

173 Interim Report, Recommendation 21, 165.

174 Ibid, Recommendation 22.

175 Submissions 19, 24, 22, 12, 33, 30 and 44.

176 However, in Submission 39 Judge Neesham, with the support of Judges Nixon, Kelly and Hart suggested that judicial education on the matters referred to in recommendation 22 was unnecessary and that the recommendation gives insufficient weight to the fact that trials are by jury not judge alone.

177 Submission 40.

178 Submission 47.

sessions in Recommendation 22] with like training from the perspective of an accused...[including] the factors that have contributed to wrongful convictions in sexual cases'.¹⁷⁹

3.19 The Judicial College has now begun its education program. It conducted a seminar for County Court judges in November 2003 to discuss the issues that arise in child sexual assault cases and a seminar in April 2004 to discuss jury warnings in sexual offence cases.

3.20 We recommend that the College continue to offer regular seminars addressing issues relevant to sexual offences cases. Such seminars should not be confined to legal issues. The College should arrange programs which include presenters with expertise on the social context and the impact of sexual assault and how this may affect the complainants in giving their evidence.

3.21 The Australian Institute of Judicial Administration is undertaking some preliminary work for research on jury directions in sexual offences and homicide cases. When this research is completed findings on the effectiveness of jury directions could usefully be included in the information provided to judges in the Judicial College program.

3.22 Despite State differences in the substantive law of sexual offences, judges in all Australian jurisdictions face similar issues when they preside over sexual offence trials. We consider it would be helpful for the National Judicial College, as part of its provision of ongoing professional development for members of the judiciary, to offer seminars on issues relevant to sexual offences cases.

! RECOMMENDATION(S)

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.

! RECOMMENDATION(S)

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.

CHANGING THE COMMITTAL PROCESS

3.23 When an adult is charged with an indictable sexual offence which cannot be heard summarily, a committal will be held in the Magistrates' Court.¹⁸⁰ Committal hearings¹⁸¹ are a preliminary examination of the evidence by a magistrate to determine whether or not there is evidence of sufficient weight to support a conviction.¹⁸² If the magistrate finds that this is the case, the defendant is committed to trial in the County Court. At committal stage, the defendant may apply to have witnesses produced for cross-examination.

DISCLOSURE

3.24 One of the purposes of the committal process is to ensure adequate and timely disclosure of the prosecution case against the accused. In Western Australia

180 *Magistrates' Court Act 1989* s 56. Section 56(2) provides that a committal proceeding must be conducted in accordance with Schedule 5 of the Act.

181 The committal hearing will be preceded by a committal mention. If the accused pleads guilty during the committal process or nominates to go directly to the County Court, no committal hearing will be held.

182 *Magistrates' Court Act 1989* Schedule 5 Cl 23(2).

where committals have been abolished alternative processes have been put in place to ensure disclosure is carried out.¹⁸³

3.25 Under the current process in Victoria the prosecution usually prepares a brief of evidence¹⁸⁴ which is served on the defendant.¹⁸⁵ The brief of evidence must include a list of witnesses who have made statements, copies of witness statements, a copy of every statement made by the complainant to any member of the police force, a transcript of any audio or video recording that the informant intends to rely upon, and a description of tests and forensic procedures that have not yet been completed but which the informant intends to rely upon.¹⁸⁶

3.26 The hand-up brief process is intended to ensure that an accused receives details of the case against him at an early stage of proceedings.¹⁸⁷ It is also intended to reduce costs by ‘preventing blanket requests for the attendance of witnesses with no proper thought being given to which witnesses are really required until the day of the court hearing’.¹⁸⁸

3.27 A witness whose statement is included in the hand-up brief does not have to attend the committal to give oral evidence-in-chief.¹⁸⁹ However the court can give leave for the witness to give oral evidence-in-chief to supplement their written statement where this is ‘in the interests of justice’.¹⁹⁰ A witness who has not made a

183 In Western Australia the *Justices Act 1902* provides a regime for disclosure supervised by the Magistrates court in much the same way as the Victorian provisions—see *Justices Act 1902* (WA) Part V Division 2.

184 The prosecution prepare a brief of evidence to be served on the defendant. The defendant can elect to go directly to trial by way of relying on the ‘hand-up brief’ procedure. The magistrate must still be satisfied that the material contained in the brief of evidence which has been ‘handed up’ by the prosecution contains evidence of sufficient weight such that a jury properly instructed could convict the defendant of the offences with which he has been charged. The defendant, after being served with the brief of evidence prepared by the prosecution may request certain or all witnesses to attend for cross-examination at a committal hearing.

185 *Magistrates’ Court Act 1989* s 56(2) and Schedule 5 cl 6. Where the accused is pleading guilty a plea brief can be served on the accused.

186 *Magistrates’ Court Act 1989* Schedule 5 cl 6 see esp 6 (h) and (i) relating to sexual offence committals. Provision is made for a description only of the forensic evidence due to the time limits imposed for committal mentions. The forensic analysis would usually not be complete when the brief is prepared.

187 This is discussed in: Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 887 (Phil Gude, Minister for Education on behalf of the Attorney-General Jan Wade).

188 *Ibid* 886.

189 *Magistrates’ Court Act 1989* Schedule 5 cl 13(6).

190 Schedule 5 cl 15(2) and (3).

written statement may give oral evidence-in-chief with the leave of the court if it is in the interests of justice.¹⁹¹

CROSS-EXAMINATION AT COMMITTAL

3.28 Historically there were virtually no restrictions on cross-examination of witnesses at committal in Victoria. The defence were required to notify the prosecution and the court as to which witnesses they wished to cross-examine, and those witnesses were then required to attend for cross-examination. The only restriction was that the court had a general power to set aside the application if it was frivolous, vexatious or would be oppressive in all the circumstances to require a witness to attend at the committal proceeding.¹⁹²

CHANGES TO CROSS-EXAMINATION RULES IN 1999

3.29 Substantial changes were made to the committals process on 1 July 1999.¹⁹³ Restrictions were imposed to limit the availability of witnesses for cross-examination at committal. The defence is required to give notice of an intention to seek leave to cross-examine a witness no later than 14 days before the committal mention date.¹⁹⁴

3.30 Requiring leave to cross-examine means that the defence have to think in advance about which witnesses are required at committal and why. The application for leave is heard at the committal mention, and the magistrate makes a ruling as to which witnesses the defence will be allowed to cross-examine at the committal hearing.

3.31 The new process was intended to place increased pressure on the parties to come together and commence negotiations at an earlier stage than had been occurring.¹⁹⁵ It also made the process less onerous for witnesses. Between 1 July 1999 and 30 June 2001 the court could only give leave for a witness to be cross-examined at committal if the court was satisfied that the scope and purpose of the questioning had substantial relevance to the facts in issue, and if the witness was

191 Schedule 5 cl 15(2)(b) and (3).

192 *Magistrates' Court Act 1989* Schedule 5 cl 3(7) prior to amendment in 1999.

193 *Magistrates' Court (Amendment) Act 1999*.

194 Schedule 5 clause 12(1). At the committal mention the accused will indicate whether they intend to proceed to a contested committal hearing, plead guilty or reserve their plea.

195 Above n 187, 888.

under 18, that the interests of justice could not be adequately served except by granting leave.¹⁹⁶ The court was also required to take account of a number of factors in deciding whether to permit cross-examination, including the age of the witness and whether the defendant had made admissions.¹⁹⁷

3.32 These provisions gave child witnesses in sexual offences some protection against being cross-examined twice, first at committal and then at trial. They 'frequently led to outright refusals by magistrates to grant leave to cross-examine witnesses under 18'.¹⁹⁸

LIBERALISATION OF CROSS-EXAMINATION RULES IN 2001

3.33 The rules controlling cross-examination of witnesses at committal were liberalised in June 2001. As a result of these changes, the defence application for leave to cross-examine no longer has to indicate the scope and purpose of the proposed questioning and how it has substantial relevance to the facts in issue. Under the new rules, it is now only necessary to indicate 'an issue to which the questioning relates, a reason as to why the evidence of the witness is relevant to that issue and why cross-examination on that issue is justified'.¹⁹⁹ Strict time limits still apply for each stage of the committal process,²⁰⁰ but there is no time limit between committal mention and committal hearing.

3.34 The provisions protecting children were also changed. In the case of a child under 18 it is no longer necessary to pass a threshold test in order to cross-examine at committal. Previously the defence had to establish that the interests of

196 *Magistrates' Court Act 1989* Schedule 5 Clause 13 (as at 1 July 1999).

197 *Magistrates' Court (Committal) Rules 1999* Order 9.02.

198 Mark Regan, 'Committal Proceedings: Further Changes July 2001' (Paper presented at the Leo Cussen Institute Seminar: Criminal Law 2001: Committal Proceedings 30 July 2001, Melbourne), 56.

199 Schedule 5 cl 13(5).

200 Filing Hearings are to be held within 7 days of arrest, or within 4 weeks after issue of a summons. At Filing Hearing, a Committal Mention date is to be fixed at 12 weeks later. This time limit cannot be extended for sexual offence cases: Schedule 5 cl 4(2). The prosecution brief must be served on defence 6 weeks prior to the Committal Mention date. A Form 8A Application to cross-examine witnesses must be filed by the defence no later than 14 days prior to committal mention: Schedule 5 cl12(1). In 2001 the provision allowing the court to allow a late application for leave to cross-examine was expanded to allow a late application to cross-examination if it is in the interests of justice: Schedule 5 Clause 12(5). The previous provision required the applicant to show 'exceptional circumstances'. The Prosecution must file a Form 9A Notice within 7 days of Committal Mention, indicating consent or opposition to the Form 8A Application.

justice could not be adequately served unless cross-examination of the child was allowed.

3.35 Although there is no longer a threshold test, the new provisions set out a range of factors which must be taken into account in determining whether the questioning of a witness under 18 is justified. The court must take account of the need to minimise the trauma that might be suffered by the witness, any characteristics of the witness including any mental, physical or intellectual disability, and a range of other factors including the importance of the witness to the prosecution case and the existence or lack of corroborating evidence.²⁰¹ During cross-examination the court can disallow questions if the defendant has not identified an issue to which the question relates and has not provided a reason why the evidence is relevant, if the question is not justified or if it is unduly repetitive.²⁰²

3.36 The new test for leave to cross-examine makes it more likely that complainants will be cross-examined at committal and then again at trial. In addition, if leave is granted, cross-examination is not confined to the issues nominated in the application.²⁰³ It is therefore likely that witnesses will be cross-examined about a broader range of issues and more extensively at committal than was previously the case. This cross-examination is then likely to be repeated at trial.

ARGUMENTS FOR RETENTION OF COMMITTALS IN SEXUAL OFFENCE CASES

3.37 A major purpose of committals is to ensure that the community is not put to the expense of setting up a judge and jury trial where the prosecution evidence does not warrant it. If it becomes clear at the committal that the evidence is not of sufficient weight to support a conviction, the magistrate will not commit the defendant for trial.

3.38 Those who support retention of committals argue that they 'filter' out cases in which the evidence is not strong, so that the accused is unlikely to be convicted. As well as saving public money, this means that complainants do not

201 *Magistrates' Court Act 1989* Schedule 5 cl 13 (5B). See also cl 17 which contains special rules for sexual offences. In particular the informant must be represented by a legal practitioner and a limit is placed on the people who can be present while the witness is giving their evidence.

202 Schedule 5 cl 16.

203 Schedule 5 cl 13(5C). Previously it was: Schedule 5 cl 16 as at 1 July 1999.

have to endure both the committal and trial process when there is no prospect of conviction of the defendant. Committals also give the prosecution the opportunity to assess the strength of the case against the defendant. Even if the defendant is committed for trial, the DPP may decide not to proceed with the prosecution if it is apparent it will not be successful. These measures may help to prevent unnecessary cross-examination of complainants.²⁰⁴

3.39 The committal process may also encourage some offenders to plead guilty to all or some of the offences with which they have been charged. A defendant may decide to plead guilty if some charges are dropped or may plead guilty in the hope that this will result in them receiving a ‘discount’ on their sentence.²⁰⁵ The discount is designed to encourage a guilty plea at an early stage to minimise distress to the victim and save the community the cost of the trial.

3.40 Those who support committals also suggest that giving evidence at committal may assist complainants to prepare for trial. Very few complainants will have previously given evidence in court. Giving evidence at committal could assist them to obtain an understanding of what trial may be like, and to feel more prepared for it. In effect, the committal could act as a ‘practice run’ for trial.

ARGUMENTS AGAINST COMMITTALS IN SEXUAL OFFENCE CASES

3.41 During our consultations the following concerns were expressed about the effect of committals in sexual offence cases.

- Complainants found it very difficult to be cross-examined at both committal and trial. This was particularly traumatic for children.
- Some parents were unwilling to allow children to give evidence at trial because they had found cross-examination at committal so daunting. Some adults also said that after committal they were no longer prepared to give evidence at trial.

204 Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2000, 1210 (Rob Hulls, Attorney-General).

205 *Sentencing Act 1991* s 5(2)(e) requires the court to consider the fact that the accused pleaded guilty to the offence and the stage in proceedings that the plea, or an indication of the intention to plead, was entered when deciding on an appropriate sentence. Section 5(2C) requires the court to have regard to the defendant's conduct in relation to the trial as an indication of remorse. An early plea of guilty can indicate remorse where the circumstances support it.

- The evidentiary principles which apply to sexual offence cases (for example restrictions on admission of prior sexual history evidence) may not always be enforced stringently at the committal stage.
- Defence counsel may question the witness 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 lengthens the criminal justice process because of the delays involved, including delays between charge and completion of the committal process and between committal and trial.

HOW COMMITTALS WORK IN PRACTICE

FILTERING WEAK CASES

3.42 Although committals are said to filter out weak cases, the Commission's research shows that around 87% of sexual offence cases are committed for trial.²⁰⁶ Some defendants decide to plead guilty after committal hearings, when they have been able to assess the strength of the evidence against them.²⁰⁷

ARE COMPLAINANTS CROSS-EXAMINED TWICE?

3.43 The Commission undertook an empirical project to determine whether complainants are routinely cross-examined at committal. The project looked at all sexual offence matters which had a committal hearing at Melbourne Magistrates' Court over a four month period from September 2003 to December 2003. Forty matters were examined.²⁰⁸ In 39 of the 40 cases a request was made by the defence to cross-examine the complainant. All but one of those requests was granted.

206 In the Commission's rape tracking study, 87% of those originally charged with rape were committed for trial on at least one rape or non-rape offence: see Discussion Paper para 4.59. In the study of penetrative offences, 86.4% of those charged with penetrative offences other than rape were committed for trial: see Interim Report para 2.81.

207 However, there may be other ways to encourage early guilty pleas. The Victorian Government is currently considering the introduction of a 'sentence indication procedure' whereby the court will provide the accused with an indication of the sentence he would receive if he pleaded guilty: Attorney-Generals Justice Statement: New Directions for the Victorian Justice System 2004–2014, Department of Justice, Victoria, para 3.2.4.

208 There were originally 43, however three matters were eventually excluded. In one matter the prosecution withdrew the charges before the committal hearing. The other two had committal

3.44 In 14 of the 40 cases the complainants were under 18 years of age at the time of the committal hearing. As noted above, in those cases the magistrate is required to consider additional factors when determining whether to grant the application. Despite those additional considerations, applications to cross-examine were successful in 100% of the matters involving child complainants. An order was made for the complainant to give evidence remotely via CCTV in only five of the 40 matters.²⁰⁹ Four of those five matters involved child complainants.

3.45 The only case where the court refused to allow cross-examination involved an adult complainant, use of a weapon, documented physical injury and full admissions by the defendant. However, those factors were not unique: other cases in the data set involved documented injury and admissions. It is therefore difficult to determine why that matter was refused when all others were granted. Even in cases where the complainant was a child and the defendant had made full or partial admissions, both of which are matters the court is required to consider in deciding whether to allow cross-examination, the applications were still successful and no order was made for the complainant to give evidence via CCTV.²¹⁰

3.46 The current legislation has made it easier to cross-examine complainants, particularly children. It would appear that even where issues are fairly well defined—where there is supportive evidence and the defendant has made admissions—in the overwhelming majority of cases, cross-examination will still be permitted at committal. This means that most complainants are cross-examined twice.

DELAYS

3.47 Throughout our consultations we were told that many sexual offence cases are subject to significant delays and that complex cases involving child complainants are frequently adjourned repeatedly. Long delays before trial can cause extreme stress for complainants and their families who anticipate the process with anxiety and are unable to move forward in their lives until the proceedings

hearings outside the data collection period—one was adjourned, and the other one had already had committal hearing and the hearing within our collection period was a further hearing to add a witness.

209 In the other 35 cases, it is not known whether the prosecution made applications for the use of alternative arrangements which were refused or whether no applications were made.

210 There were 3 such cases in the study. We do not know whether applications were made for the use of CCTV in any of these cases.

are complete. For children, the lapse of time often makes a great difference to their ability to recall events and significantly detracts from the quality of their evidence.

3.48 Currently the legislation requires that in some sexual offence cases (for example cases involving sexual offences against children)²¹¹ a committal mention must be held within three months of the commencement of proceedings.²¹² A trial must occur within three months of the committal.²¹³ No time applies to the period between committal mention and committal hearing.

3.49 In order to understand the effect of committals on delays and also to gauge the effectiveness of the legislative time limits, the Commission tracked 27 cases²¹⁴ involving sexual penetration charges of children under 18 years. The Commission examined the elapsed times between charge date and committal hearing, committal hearing and trial, and the total time elapsed between charge date and trial.

3.50 Although each case in the data set went to trial, not all had a full committal hearing. Seven matters were committed to trial from a committal mention, that is, the defendant was committed based on the 'hand-up brief' procedure rather than after a hearing where the witnesses were cross-examined.²¹⁵ For these cases the shortest time lapse between charge date and committal was 22 days and the longest was 100 days, with an average lapse of 59 days or just under three months. These matters took longer to get from the committal stage to trial than those that had a full committal hearing. The time from charge date to trial was, however, somewhat shorter for these matters (due to a much shorter time lapse between charge and committal).

211 Some offences against adults are also included, for example incest and sexual offences against people with cognitive impairment by persons who provide medical or therapeutic services to them.

212 Above n 200.

213 *Crimes Act 1958 s 359A(1)*.

214 See Table 1 below. Originally, a data set of 33 cases involving penetrative offences against children was identified from an existing data set compiled by the VLRC from the Office of Public Prosecutions PRISM database for analysis during the second phase of the reference. These cases represented all penetrative offences against children under 18 years which went to trial between July 1997 and June 1999. Due to unavailability of data, only 27 of the 33 cases were eventually included in the final data set.

215 The reasons for this are unknown. The cases examined went to trial between July 1997 and June 1999 when there were few restrictions on cross-examination at committal. It is therefore unlikely that the defence were denied the opportunity to cross-examine witnesses at committal hearing by the court. It is possible that legal aid funding was denied for committal hearing in those cases, or that a strategic decision was taken by the defence to proceed directly to trial.

3.51 In the 20 cases where a committal hearing was conducted, the delays between charge date and committal were longer than for the 'on the papers' matters. The time lapse between charge date and committal ranged from 31 days to 333 days, with an average time lapse of 136 days or 4.5 months. However, these matters had a shorter delay between committal and trial, with an average time lapse of 186 days (just over six months) for the 'hand-up brief' matters compared with an average lapse of 244 days (eight months) for matters where a full committal hearing was held.

3.52 For all 27 matters, the delay between committal and trial was far greater than between charge and committal, averaging 200 days (about 6.5 months) as compared with 116 days (almost four months).

3.53 Overall, the matters which proceeded most quickly from charge date to trial were those where committals were held 'on the papers': an average of 304 days (10 months) compared with an average of 322 days (about 10½ months) for matters where committal hearings were held.

Table 1. Delays: Initiation²¹⁶ to committal to trial for offences involving sexual penetration of a child under 18

Phase	Types of time lapses (in days)	Whole sample (number of cases=27)	Matters where committal hearing held (number of cases=20)	Matters where committal 'on the papers' (number of cases=7)
Initiation to committal	Range ²¹⁷	22 to 333	31 to 333	22 to 100
	Average ²¹⁸	116	136	59
	Median ²¹⁹	112	126	59
Committal to trial	Range	52 to 488	84 to 482	52 to 488
	Average	200	186	244
	Median	142	124	214
Initiation to trial	Range	140 to 641	140 to 641	152 to 517
	Average	317	322	304
	Median	286	286	279

3.54 Despite the long delays between committal and trial, the legislatively prescribed periods were not necessarily breached because the legislative prescription for the commencement of the trial is satisfied by the conduct of a directions hearing, whether or not the actual trial commences or is adjourned. In this way there is technical compliance with the legislation, although repeated adjournments are often granted. It has been suggested that delays are often considerable in regional areas. In the Commission's police focus groups one SOCAU member raised the issue of delays on circuit, stating:

216 Initiation here means the date of charge.

217 Smallest time lapse in days to longest time lapse in days.

218 The average is calculated by adding all values in the sample then dividing by the number in the sample.

219 The median is the midpoint of the sample, or the 'middle value'.

We explain this to people at the start: ‘It’s going to be a long process, it’s not like Law and Order.’ Some just don’t want to wait.

3.55 There seem to be several reasons for the delays.

- No time limit applies to the period between committal mention and committal hearing. In addition, more than one committal mention may be held before a committal hearing.²²⁰
- The time limit applicable to the commencement of the trial is satisfied by the conduct of a directions hearing. At the directions hearing a date for trial may be set, or the matter may be adjourned to a further directions hearing. The directions hearing allows for technical compliance with the legislation but repeated adjournments are often granted.
- Most time limits can be extended as the court can grant adjournments.²²¹ These adjournments can lead to lengthy delay in proceedings, as noted above, between charge and committal. The Commission did not undertake research to ascertain why adjournments are requested and granted and whether the prosecution are either agreeing to or not opposing adjournments.

3.56 These delays create significant problems, particularly where child complainants are involved. Modification of the committal process, as recommended below, could contribute to the reduction of delays in sexual offence cases.

OPTIONS FOR REFORM OF COMMITTALS

3.57 The Commission believes that changes to the committal process are necessary to reduce delays and protect children and other vulnerable witnesses, for example people with a cognitive impairment²²² from being cross-examined twice.

220 For example, an adjournment to further committal mention may occur if the prosecution brief is not yet complete, or the accused has not yet been able to organise legal representation.

221 For example under *Magistrates’ Court Act 1989* Schedule 5 clause 4(4)(c) the defendant can request that the committal mention hearing be held after the relevant period.

222 It is not suggested that people with an intellectual disability are child-like, but that individuals within the two groups may have similar needs and experiences when in contact with the justice system: NSW Attorney-General’s Department Criminal Law Review Division, *People with an Intellectual Disability—Giving Evidence in Court*, June 2000. See www.lawlink.nsw.gov.au/clrd1.nsf/pages/dis_report_3.

We considered three main ways in which the committal process could be made more responsive to the needs of complainants:

- abolishing committal hearings in all sexual offence cases;
- restricting the right to cross-examine children and witnesses with cognitive impairments at committal; and
- abolishing the right to cross-examine children and witnesses with cognitive impairments at committal.

OPTION 1: ABOLISHING COMMITTAL HEARINGS IN SEXUAL OFFENCE CASES

3.58 Western Australia has abolished committal hearings for all offences.²²³ This approach could be applied to sexual offence cases in Victoria.

3.59 Under this option there would be no provision for examination of witnesses prior to the trial. The defendant would not be able to give or tender any evidence before trial, or able to formally submit that there was insufficient evidence for the matter to go to trial. It would therefore be necessary for the prosecution to carefully examine matters at that stage in order to decide whether the evidence is sufficient for the matter to go to trial.²²⁴

3.60 It would be necessary to retain a pre-trial disclosure process which could occur either in the Magistrates' Court or in the County Court. If the trial disclosure process occurred in the Magistrates' Court, the current 'hand-up' procedure could be used to transmit the matter from the Magistrates' Court to the County Court.

3.61 Clearly the WA legislature has decided that the interests of justice can be adequately served by not having committals at all. This option would reduce system costs associated with committal and could lessen delays in sexual offence matters..

3.62 In light of our research and empirical studies relating to committal, the Commission supports a wider review of committals to examine whether they should be retained. However, broad recommendations about committals are beyond the scope of this reference. The Commission notes that the Attorney-

223 *Justices Act 1902* (WA) s 2.

224 In Western Australia this function is fulfilled by the Petty Sessions unit in the Office of Public Prosecutions.

General has highlighted committals as one area that will be looked at as part of the recently released Justice Statement.²²⁵

3.63 The Commission has decided against recommending abolition of committals in sexual offence cases for several reasons. First, although there may be advantages in abolishing committal hearings generally, there would be difficulties in abolishing them for sexual offences alone. Such an approach would create anomalies in cases where a person was charged with both sexual and other criminal offences. It would also put the accused in sexual offences cases at a special disadvantage as compared with accused charged with other offences.

3.64 Secondly, if committals were abolished it would be desirable to have some other mechanism for filtering out unsustainable cases before they go to trial. This issue should be considered in the context of a broader review of committals. It is arguable that abolition of committals might also reduce the number of early guilty pleas. Further empirical work would be necessary to determine whether this is the case.

3.65 Thirdly, we believe that the concerns of complainants about delays and cross-examination at committal can be met in less radical ways than by abolishing committals in all sexual offence cases.

OPTION 2: RESTRICTING THE RIGHT TO CROSS-EXAMINE CHILDREN AND WITNESSES WITH A COGNITIVE IMPAIRMENT

3.66 The second option is to retain the current committal process but legislate to restrict cross-examination at committal of certain witnesses in sexual offence cases. Under this option a new legislative threshold test could be imposed, requiring application for leave to cross-examine children or witnesses with a cognitive impairment. This approach has been adopted in South Australia, Tasmania, Queensland and New South Wales.²²⁶ This is a less radical step than abolishing committals altogether for sexual offence cases.

3.67 However, in Victoria the threshold test has been changed several times in recent years in order to overcome perceived problems with its operation. Between 1 July 1999 and 30 June 2001 the test for allowing cross-examination of witnesses was:

225 See above n 207.

226 *Summary Procedure Act 1921* (SA) s 106; *Justices Act 1959* (Tas) s 3 and s 57A; *Evidence Act 1977* (Qld) s 21AG; *Criminal Procedure Act 1986* (NSW) ss 93–4.

- cross-examination should have substantial relevance to the facts in issue; and
- if the witness was under the age of 18 years, cross-examination would not be permitted unless the interests of justice could not be adequately served except by granting leave.²²⁷

3.68 On its face this test provided broad protection for child witnesses, applying to child witnesses generally rather than only complainants in sexual offence cases. In practice, however, the test may not have been applied consistently.²²⁸

3.69 It is difficult to formulate a test that gives the court sufficient guidance as to when cross-examination should be allowed. At a roundtable held by the Commission to discuss this issue²²⁹ it was suggested that rules to limit cross-examination require considerable resources to be expended by the court and the defence without producing much difference in outcome. It was also noted that in sexual offence cases the complainant is often the only witness against the accused, so that leave to cross-examine will invariably be given no matter what test is applicable.

3.70 After careful consideration of this option, including a detailed examination of new Queensland provisions which attempt to limit the circumstances in which cross-examination may occur,²³⁰ the Commission has decided against this approach. The Commission does not believe that children and people with cognitive impairment should be cross-examined twice. Because rules limiting but

227 *Magistrates' Court Act 1989* Schedule 5 Cl 13 (4)(b) as at 1 July 1999.

228 In the Second Reading Speech of the *Magistrates' Court (Committal Proceedings) Bill*, however, the Attorney-General stated that the test resulted in applications to cross-examine young witnesses being refused, and lead to more young witnesses being cross-examined at trial. The basis for this view is not known: Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2000, 1210 (Rob Hulls, Attorney-General).

229 Roundtable 4 March 2004.

230 *Evidence (Protection of Children) Amendment Act 2003* (Qld) introduced new provisions restricting the right to cross-examine children. For example, s 21AG (3) provides that a child should not give evidence at committal unless certain criteria met and the interests of justice can't be adequately satisfied by leaving cross-examination of the child until trial. There are also provisions relating to how the evidence will be taken if permission is given to cross-examine the child. In that case there is a presumption in favour of a special hearing to pre-record the entirety of the child's evidence: s 21AG(7) and Subdivision 3. The special hearing provisions are applicable to both committal and trial, and summary hearings: s 21AI.

not preventing cross-examination at committal provide only limited protection to vulnerable witnesses, the Commission supports the third option discussed below.

OPTION 3: ABOLISHING THE RIGHT TO CROSS-EXAMINE CHILDREN AND WITNESSES WITH A COGNITIVE IMPAIRMENT AT COMMITTAL

3.71 The third option considered is to retain the current committal process, but legislate to prohibit cross-examination at committal of certain witnesses in sexual offence cases. We considered whether this should apply to child victims only, child witnesses generally, all victims of sexual offences, witnesses with particular vulnerability, or a combination of these. We have decided to recommend this option for children and witnesses with cognitive impairment only.²³¹

3.72 In coming to this recommendation the Commission has considered all the matters discussed above, particularly the need to ensure that resources are best utilised and that accused charged with sexual offences against children are not disadvantaged. We have also considered research which shows that cross-examination is particularly traumatic for children and that children and people with cognitive impairment are at a special disadvantage as witnesses.²³² Cross-examination of these witnesses at committal also invariably contributes to delays by the addition of another step in the process to trial. For children, the lapse of time often makes a great difference to their ability to recall events and significantly detracts from the quality of their evidence. People with cognitive impairment, particularly impairments that affect memory, are also disadvantaged by delay.

3.73 Our research of cross-examination of complainants at committal found that the current system is not effective in protecting children. Although the court must take into account certain considerations before allowing the cross-examination, these appear to be easily overcome when the child is a complainant in a sexual offence case. In the period of our study of committals, every child complainant was cross-examined.²³³

3.74 In some cases, cross-examination at committal will lead to the accused deciding to plead guilty before trial. However, in many cases the complainant will

231 When combined with recommendations below, relating to pre-recording of testimony and a specialist handling of these matters in the Magistrates' and County Courts, we believe the court experience will be significantly improved for these vulnerable witnesses without compromising the rights of the accused.

232 See paras 5.131–44, 6.37.

233 See para 3.44.

be cross-examined again at trial. In addition, it was noted at the Roundtable²³⁴ that cross-examination at trial generally repeats what occurred at committal. That is, there is a laborious process of re-examining on all the issues, rather than the committal being used to cut down the issues that go to trial. We believe this repeated cross-examination is likely to perpetuate the trauma and frustration of these child witnesses and disadvantage them in the presentation of their evidence.

3.75 The recommendation below is intended to provide protection to child witnesses and witnesses with a cognitive impairment and, when combined with pre-recording of testimony of these witnesses, will ensure fairness to the accused while enhancing their capacity to give their evidence to the court.

! RECOMMENDATION(S)

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.

COMBINING COMMITTAL CHANGES WITH PROVISION FOR PRE-RECORDING

3.76 In the Interim Report we recommended the introduction of a provision allowing the prosecution to apply for a child's evidence-in-chief and cross-examination to be video recorded in the presence of a judge and shown at trial. This procedure has been used in Western Australia for 12 years²³⁵ and has recently been introduced in Queensland.²³⁶

3.77 After further research we have decided to recommend that where a person is charged with an indictable sexual offence against a child or someone who has a cognitive impairment, there should be a presumption in favour of the complainant's evidence-in-chief and cross-examination being pre-recorded prior to trial in the presence of a judge. This should occur except where the court is satisfied that the complainant wishes to give evidence at the trial, or where the

234 See above n 229.

235 *Evidence Act 1906* (WA) s 106I(1)(b), inserted by *Acts Amendment (Evidence of Children and Others) Act 1992* (WA).

236 *Evidence Act 1977* (Qld) Part2, Division 4A, Subdivision 3.

interests of justice can only be served by the complainant giving evidence at trial.²³⁷ Pre-recorded evidence would be played to the jury at trial. If there was a retrial following a successful appeal, the tape could be re-played so that the complainant did not have to give evidence again.

3.78 Our reasons for making this recommendation, and the details of the recommendation, are discussed in Chapter 5. In this section we consider how existing processes should be modified to provide for pre-recording.

3.79 The new process must enable pre-recording of the complainant's evidence as soon as possible after the service of the brief of evidence upon the defendant. This will ensure that evidence is captured while the complainant's recollections are fresh and enable the complainant to put the events behind them as soon as possible. However, in order to ensure fairness to the accused, it is also necessary for defence counsel to have sufficient knowledge of the case against the accused to enable them to cross-examine the complainant at the time when pre-recording occurs. The accused must have information about the allegations to be able to make a decision as to whether to plead guilty prior to the trial.

SAFEGUARDING THE ACCUSED'S RIGHT TO TEST THE EVIDENCE

3.80 The Commission has considered how to reconcile the aim of ensuring that the complainant can give evidence and be cross-examined as quickly as possible, with the need to ensure that cross-examination does not occur until defence is fully aware of the details of the prosecution case.

3.81 Conducting the pre-recording at the same time as the committal would enable complainants to give evidence at an earlier stage than if pre-recording were postponed until after committal. However we are concerned that under this approach the accused would not have heard evidence at committal which might provide a basis for cross-examination of the complainant. This issue was discussed at the Roundtable which the Commission held to consider changes to the committal process and the introduction of specialist lists.²³⁸ We propose that pre-recording should occur after the accused has been committed for trial and a presentment has been filed in the County Court. Provision of the presentment and depositions to the accused before pre-recording occurs will ensure that the

237 In this case the complainants evidence would normally be given via CCTV. In Chapter 4, we recommend that all complainants in sexual offence cases should normally give evidence by CCTV; see Recommendations 59–61.

238 Above n 229.

accused person is fully informed of the case against him and defence counsel can properly prepare for, and conduct, the examination of the witness.

3.82 If evidence is given at trial which could not have been anticipated by the defence at the time of the pre-recording, so that the child could not have been cross-examined on it, we recommend in Chapter 5 that legislative provision should be made for the child to be recalled so that they can be cross-examined on this new evidence.²³⁹ Provision of this kind is already made in Western Australia and Queensland,²⁴⁰ although the Commission has been told that it has rarely been necessary to recall a child in Western Australia.

CASE CONFERENCES

3.83 It is proposed that the preliminary hearing in which pre-recording occurs should take place as soon as possible after a case conference occurs in the County Court. A case conference is an informal procedure held in the County Court after the matter has been committed for trial. The parties appear before a judge to discuss the issues involved in the trial on a 'without prejudice' basis. To ensure fairness to the accused, the judge who presides over the case conference is not to hear any subsequent plea or preside over the trial.²⁴¹ The purpose of the case conference is to create an opportunity for negotiation on plea and, if that is not successful, to identify the issues that will be contested at trial. The judge has an active role in adjudicating and assisting the prosecution and defence to try to resolve issues. Case conferences are held in the County Court in most criminal cases but are not presently used in sexual offence cases.

3.84 The Commission recommends that the County Court introduce case conferences for sexual offence cases. This process should initially be piloted in cases where the complainant is a child or a person with a cognitive impairment. In such cases, the matter should be listed for a case conference in the County Court 21 days after committal.²⁴² Negotiations at the case conference may result in some accused deciding to plead guilty. However, if that does not occur, we recommend

239 Recommendation 129.

240 *Evidence Act 1977* (Qld) s 21AN; *Evidence Act 1906* (WA) s 106T.

241 County Court Criminal Jurisdiction, Case List Management System, *Crimes (Criminal Trials) Act 1999*, Practice Note No. 1 of 1999, para 6.6.8.

242 We discuss new procedures in the Office of Public Prosecutions and Victoria Legal Aid below which will support this process.

that the judge presiding over the conference set dates for pre-recording, directions hearing and trial.

3.85 The trial date should be set within three months of the date of committal and this deadline should be applied strictly. Dates for pre-recording and directions hearing should be set within the three month period. We recommend that the date for pre-recording be set 21 days after the case conference. The depositions and presentment should be filed and served at least seven working days prior to the pre-recording. The time limits are short, though manageable, if the same solicitor and counsel remain involved on both the defence and prosecution sides. The short time frames may also make it easier for the same counsel to remain with the matter.

3.86 The directions hearing should be conducted shortly after the pre-recording, so that if the accused person has decided to plead guilty after the complainant has provided their evidence, the trial date can be vacated and a date set for plea. We also recommend that there be provision for counsel for the defence and prosecution to seek a further case conference after the pre-recording, if they believe the matter could be successfully resolved to plea through a further case conference.

3.87 We have referred above to the requirements that in cases involving sexual offences against children²⁴³ a committal mention must be held within three months of the commencement of proceedings²⁴⁴ and a trial must occur within three months of the committal of the matter to the County Court.²⁴⁵ No time limit applies to the period between committal mention and committal hearing.

3.88 Significant delays often occur between committal mention and committal. If this period is too long it will undermine one of the purposes of pre-recording, which is to ensure that children and people with a cognitive impairment can give their evidence as soon as possible after an alleged offender is charged. In the course of our consultations we heard a number of suggestions about how delays in the processing of sexual offence cases (and particularly those involving children) could be reduced.

3.89 It has been suggested that processing times in the OPP could be reduced in child sexual offence cases if the same solicitor and counsel had the carriage of

243 Some offences against adults are also included, for example incest.

244 See above n 200.

245 *Crimes Act 1958* s 359A(1).

the matter throughout. If the recommended 21-day time limit is introduced for the period between committal and case conference this will become even more important. If counsel has been briefed for committal, it is desirable that the same counsel should handle the case conference, pre-recording and trial. Changes to the way in which the OPP handles sexual offence cases may require additional resources.²⁴⁶

3.90 It is equally desirable that the same defence counsel remain briefed throughout a matter. Continuity of counsel for the defence could also assist in reducing delays and ensure that time limits can be met. The current system of funding through Victoria Legal Aid requires applications to be made separately for each stage of a matter as it progresses. This may cause delay after committal while a further grant of legal aid is requested. It has been suggested that changes to Legal Aid guidelines, to allow a legal aid grant for committal to include a grant for the case conference, would make it more likely that the same counsel would continue to act for the accused. The Commission understands that VLA is currently considering a simplified grants process for criminal trials which may help to address these issues.²⁴⁷

3.91 In order to reduce delay to trial, we suggest that if a matter does not resolve at case conference and proceeds to pre-recording, it may be desirable for Legal Aid guidelines to provide for a grant of Aid that covers both pre-recording and trial, with the proviso that a 'plea fee' (rather than a 'trial fee') would be paid if the accused pleaded guilty after the special hearing. The Commission has not assessed the practicability of these proposals but believes they should be seriously considered.

3.92 Further work, outside the scope of this reference, is required to identify the sources and reasons for delays. The Commission suggests that a working party be established to find the best way to address delays in processing sexual offence cases, particularly delays in cases involving children. The working party should include representatives from all the key stakeholders including the Courts, the Bar,

246 Currently the OPP try to ensure that the same solicitor handles a matter from committal mention until completion. However, with current staffing levels in the sexual offences unit it is not always possible for that to occur. This may be improved by our recommendations about new time limits.

247 Personal communication by e-mail from Tony Parsons, Managing Director, Victoria Legal Aid, 11 May 2004.

the Office of Public Prosecutions, Victoria Legal Aid, the Law Institute, Victoria Police and the Victorian Government Reporting Service.²⁴⁸

3.93 The recommendations made in the next section of this Chapter for the introduction of specialised sexual offences lists in the Magistrates' Court, and for assignment of a judicial officer to list and actively manage all cases involving allegations of child sexual assault or sexual offences against people with a cognitive impairment in the County Court, should also contribute to the reduction of delay in such cases.

!	RECOMMENDATION(S)
43.	The <i>Evidence Act 1958</i> 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. <i>Note that further recommendations relating to pre-recording are contained in Chapter 5.</i>
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.

248 The Victorian Government Reporting Service produces transcripts of court proceedings, which the OPP require for depositions.

RECOMMENDATION(S)

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.

SPECIALISED HANDLING OF SEXUAL OFFENCES CASES**ISSUES RAISED IN THE INTERIM REPORT**

3.94 In the Interim Report²⁴⁹ we mentioned that some jurisdictions were moving towards a more specialised approach in handling sexual offences cases which include features such as specialised prosecution teams, judicially managed lists, special Legal Aid grants, witness support staff and specialised court staff. We asked whether a specialised approach could assist in overcoming the difficulties that the criminal justice system has in dealing with sexual offence cases. We also discussed a number of possible advantages of some form of specialisation, including:

- enabling recognition of the unique features of sexual offences cases and the difficulties faced by complainants in such cases;

249 Interim Report paras 4.46–60.

- providing an opportunity to develop case management procedures that are more sensitive to the needs of complainants;
- making it easier to provide physical facilities (for example separate waiting rooms) and technology (for example closed circuit television) to ensure that complainants feel safe;
- making it easier to identify barriers to participation in the criminal justice system by children, people with a cognitive impairment and people from Indigenous and non-English-speaking backgrounds, and to develop systems for meeting their needs;
- reducing delays;
- providing an opportunity to develop support services for complainants alongside the criminal justice process;
- facilitating exchange of information and resources between agencies that support court users;²⁵⁰ and
- symbolising the fact that sexual offences are taken seriously by the criminal law.

3.95 We also suggested that specialisation could contribute to the development of expertise in the substantive law and procedures relevant to sexual offences cases which require detailed knowledge about:

- the rules of evidence which apply in sexual offence cases, for example the provisions restricting cross-examination on prior sexual history and the admission of confidential counselling information;
- provisions allowing use of alternative methods of giving evidence;
- dealing with child witnesses, for example determining whether the child is competent to give evidence and ensuring the children are not subjected to inappropriate or confusing cross-examination; and
- the distinctive jury directions that must be given in sexual offence trials.²⁵¹

250 A key attribute of each of the projects discussed above is good communication and cooperation between agencies, whether as a distinct feature of the project or where it is an incidental consequence of the project as in New South Wales.

A review of good-practice models to facilitate access to justice by those experiencing family violence found that a coordinated community response to family violence is a key aspect of a number of successful projects. Office of the Status of Women, *Research into Good-Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* Final Report (2002).

SUBMISSIONS

3.96 The Interim Report referred to two main forms of specialisation. One model would involve establishing a new stand-alone court with jurisdiction to hear summary sexual offence cases, indictable offences triable summarily which are currently often heard in the Magistrates Court, and indictable offences. A more modest reform would involve the establishment of a specialist sexual offences list in both the Magistrates' Court and the County Court. It was contemplated that judicial officers, who had expressed an interest in this area of law and had received some training on the issues which arise in trying sexual offence cases, might be assigned to these lists for a defined period.²⁵² Most submissions that expressed a view on this matter did not express a preference between these two approaches.

3.97 Twenty-four of the 55 submissions received responded to the question regarding specialisation. The majority of the responses were positive about the prospect of some form of specialisation.²⁵³ The major benefits referred to in the submissions were the opportunity for legal personnel involved to become more aware of, and responsive to, complainants' needs and the likelihood of more efficient case management enabling cases to be processed more quickly.

3.98 Support for the specialisation proposal came from several CASAs.²⁵⁴ Loddon Campaspe CASA took the view that 'a "specialist approach" where well trained and experienced legal personnel deal with sexual assault matters in court may ensure greater consistency of response'.²⁵⁵ SECASA favoured the establishment of a specialist jurisdiction and considered that it 'may be easier for a specialist court to bring about the changes needed to make the court system more accessible for victims'.²⁵⁶ The Gatehouse Centre at the Royal Children's Hospital commented that they 'strongly believe that specialisation within the Criminal Justice system would enhance all areas including awareness, procedures, support and case management'.²⁵⁷

251 See discussion in Chapter 7.

252 Interim Report para 4.53.

253 Seventeen submissions made positive comments.

254 Submissions 19, 21, 26, 28 and 29.

255 Submission 19.

256 Submission 26.

257 Submission 28.

3.99 Support for the proposal also came from the Violence Against Women Integrated Services,²⁵⁸ Uniting Care Victoria and Tasmania, a member of the public and the Youth Affairs Council of Victoria: ‘We see that such a jurisdiction would mean that those who work within it could develop an in-depth understanding of the complexities and sensitive nature of sexual assault cases...[and]...would also streamline the process and in this way improve the experience of complainants’.²⁵⁹ The Salvation Army²⁶⁰ and the Australian Childhood Foundation²⁶¹ both favoured the proposal and considered that specialisation would afford significant benefits to child complainants.

3.100 Qualified support came from the VOICES victims/survivors’ support group which emphasised that the specialist jurisdiction must ‘be charged with the authority to hear any case involving a number of offences where one or more of those offences is a sexual offence’.²⁶² South Western CASA supported the concept but ‘has reservations about how it would operate in regional areas’.²⁶³ The Domestic Violence and Incest Resource Centre supported the proposal but cautioned that [specialisation] ‘should not occur without comprehensive integration with specialisation approaches being developed in the area of family violence’.²⁶⁴

3.101 The supervising magistrate of the criminal division of the Magistrates’ Court also favours some form of specialisation. As well as delivering benefits including efficiency and cultural change, she takes the view that ‘acknowledgement of the need for specialisation would itself be of assistance in changing community (importantly potential complainants) perceptions of the justice system’.²⁶⁵

3.102 Opposition to specialisation (or at least specialisation involving assignment of cases to self-selected judges) was expressed in a submission from Judge Neesham of the County Court, with which Judges Nixon, Kelly, and Hart

258 Submission 24.

259 Submission 12.

260 Submission 33.

261 Submission 41.

262 Submission 30.

263 Submission 29.

264 Submission 20.

265 Submission 8.

concurrent.²⁶⁶ The submission said that the ‘principles of trial applicable in ...a rape trial are no different from the principles applicable upon the trial of any other indictable offence’ and that any County Court judge ‘should be perfectly competent to conduct such a trial’. The submission queried the willingness of judges to sit full time on ‘emotionally draining’ sexual offence trials and also ‘the utility of a specialist court that seeks a verdict from a non-specialist jury’. The Law Reform Committee of the County Court also opposed specialisation in its submission and observed that ‘specialization invariably leads to excessive familiarity and development of intractability and inflexibility of approach’.²⁶⁷

3.103 The Criminal Bar Association submission also considered that specialisation was not justified and said that ‘the current rotational system [for assigning judges to cases] works effectively’.²⁶⁸ The Victorian Bar did not support the establishment of a specialist sexual offences jurisdiction on the grounds that it would ‘unnecessarily segregate and stigmatise’ these cases and also that the emotionally draining nature of sexual assault cases would make them unsuitable for Judges to hear for lengthy periods.²⁶⁹

EXAMPLES OF A SPECIALIST APPROACH

3.104 During the last year, the Commission has obtained information about various forms of specialisation within a number of jurisdictions inside and outside Australia. We discuss some examples of specialisation below.

VICTORIA

3.105 Within the Victorian court system there are already a number of different types of specialisation. In the Supreme Court, apart from the Court of Appeal, judges are assigned to one or other of the three divisions of the Court: the Commercial & Equity Division, the Common Law Division and the Criminal Division. This arrangement is designed to promote specialisation, although any judge can hear any case in any Division. The fact nevertheless remains that (for example) homicide trials are assigned wherever possible to judges with an interest and expertise in this area.

266 Submission 39.

267 Submission 52.

268 Submission 42.

269 Submission 48.

3.106 Historically, there was some specialisation in case management processes in the County Court. The Court had a number of judge-managed lists which grouped together particular types of cases with the aim of ensuring more efficient case management. Specialist divisions exist for Workcover, building cases, defamation cases and damages (medical).²⁷⁰ Although the County Court appears to be moving away from this approach,²⁷¹ a number of these judge-managed lists remain.²⁷² The judge who manages the particular list assigns the cases to other judges, although these judges are not necessarily selected because they have specialist expertise in the particular legal area.

3.107 The Magistrates' Court currently operates a number of specialist jurisdictions, including a Drug Court based on a therapeutic approach²⁷³ in the Melbourne suburb of Dandenong and Koori divisions of the Court²⁷⁴ in Shepparton, Broadmeadows and Warrnambool.

3.108 In order to reduce delays in committals in child sexual offence cases, the Magistrates' Court piloted a specialist committal list for such matters in January 2004. Magistrate Lisa Hannan ran the list and she and another magistrate presided over committals in the Melbourne Magistrates' Court. Magistrate Hannan reports that this approach increased the number of cases settling by way of a guilty plea after committal and reduced delays in matters where the accused

270 The 2002 Annual Report of the County Court notes, at page 19, that 'Building disputes are notoriously difficult to resolve. Contributing factors may include a multiplicity of parties and issues and the technical nature of the matters in dispute. To overcome these problems a Building cases list was established in this court in 1983.'

271 A third of cases are now assigned to 'cylinders' which are headed by a judge who takes responsibility for overseeing case management and who assigns the cases. The approach is intended to produce more active judicial management of cases. The assignment does not reflect the subject matter of the case.

272 See County Court *Annual Report 2002*.

273 Various jurisdictions within Australia and internationally have established drug courts to sentence and supervise the treatment of offenders with drug problems who have committed offences while under the influence of drugs or to support a drug habit. The Victorian Court focuses on attempting to rehabilitate and reintegrate drug offenders. <<http://www.magistratescourt.vic.gov.au>>.

274 The Koori Court was established by the *Magistrates' Court (Koori Court) Act 2002*. It is a division of the Magistrates' Court that sentences offenders who have pleaded guilty. It provides a relatively informal atmosphere and enables greater participation of members of the Koori community in court processes. The court aims to tailor sentencing orders to the cultural needs of Koori offenders. <<http://www.magistratescourt.vic.gov.au>>.

pleaded not guilty. She noted that this approach had a positive effect on the conduct of matters in terms of disclosure and the conduct of cross-examination.²⁷⁵

3.109 Specialisation may also take the form of establishing a stand-alone court to deal with particular categories of cases. For example the Children's Court, which has both a Family (Child Protection) and a Criminal Division, occupies a separate purpose-built building, in which specialist magistrates and a judge sit for an assigned period, experienced lawyers practise and an infrastructure of appropriate support services is made available.

Proposal for a Specialised Family Violence Division in the Magistrates' Court

3.110 The Magistrates' Court of Victoria has already adopted protocols and other measures to regulate the handling of family violence matters. These processes attempt to systematise the handling of family violence and stalking matters so that consistency between courts is improved and matters are processed in a way that best accommodates the needs of aggrieved family members, including their need for expeditious resolution of the matter, privacy and security and access to support services.²⁷⁶

3.111 The Court is now moving towards a greater degree of specialisation in the area of family violence. A Family Violence Court Reference Group was established in June 2002 to develop a more comprehensive framework for a specialist approach to family violence.

3.112 Possible features of the proposed Family Violence Division of the Magistrates' Court include the power to exercise a number of relevant jurisdictions concurrently, more effective listing practices, improved safety and security measures, and special measures to be responsive to diversity. The recommendations we make below for a specialist sexual offences jurisdiction are consistent with those contemplated for the Family Violence jurisdiction.

NEW SOUTH WALES

3.113 New South Wales is currently about half way through a 28 month trial of specialist approach to handling child sexual assault cases in four courts. Three

275 Personal communication with Magistrate Lisa Hannan 3 May 2004.

276 Interim Report para 4.57 and see updated Magistrate's Court of Victoria, *Family Violence and Stalking Protocols* (Revised November 2003).

courts in Sydney's west: Parramatta, Campbelltown and Penrith, as well as the court in the regional town of Dubbo, have been equipped to participate in the trial. Each of these courts houses both a Local Court (the equivalent of Victoria's Magistrates' Court jurisdiction) and a District Court (the equivalent of Victoria's County Court jurisdiction). This enables all child sexual offences cases, whether summary or indictable, to be heard in the pilot specialist court.

3.114 The recommendation for a pilot was made in the NSW Legislative Council Standing Committee on Law and Justice Report on Child Sexual Assault Prosecutions.²⁷⁷ The Report recommended a pilot specialist court featuring courts equipped with high standard electronic facilities for the use of special measures such as CCTV and staff trained to use the facilities, pre-trial hearings to determine a child's readiness to proceed, and appropriate child friendly facilities and judicial officers, prosecutors and court staff selected on the basis of interest and specialised training in child development.

3.115 The pilot project incorporates most of these features. A suite of rooms in an office building five minutes walk away from the Parramatta Court has been equipped with two CCTV rooms in which children's evidence is given and projected into the courtrooms in either Parramatta, Penrith or Campbelltown. This facility has a large sitting area, a private interview room and a room with children's videos which is furnished in a child-friendly way with bright colours, toys and so on. The facility is secure and unmarked. Children required to give evidence are able to do so without entering the court building at all. The Witness Assistance Service workers, prosecutors and anyone else who needs to be in contact with the child will attend the remote facility or contact the child by telephone. If exhibits are required, documents can be faxed to the facility.

3.116 The technology is of a very high standard and enables even a very quietly spoken child to be heard easily in court. There are two screens in each CCTV room and one of these has a split screen feature enabling the child to see both the judge and the defence or prosecution barrister at the same time. Excellent technical support is on hand and local court staff have also received equipment training.²⁷⁸

3.117 Although there is no formal process of pre-trial hearings to determine the child's ability to testify, it is the practice of the chief listing judge to enquire about

277 Standing Committee on Law and Justice, *Inquiry Into Child Sexual Assault Matters* (2002).

278 According to our researcher's observations during a visit to the facility on 24 November 2003.

these issues at an early stage of pre-trial processes. The project team from the NSW Attorney-General's department has prepared a draft Practice Note²⁷⁹ to formalise the pre-trial hearing process.²⁸⁰

3.118 Prosecutors and judges are not specially selected to participate in this jurisdiction but are randomly assigned to these cases. However, a significant effort has been made by the project team, working with other agencies including the Judicial College, to put together information packages for all magistrates and judges outlining the special needs of child witnesses in sexual assault cases and explaining the purposes of the pilot.²⁸¹

3.119 While the proposed evaluation of the court is not available, early feedback from personnel involved in the project, as well as those working at agencies in close contact with complainants in these cases, indicates that the specialist approach improves child witnesses' experiences in two main ways. First, it is far easier for children to testify from the remote facility and secondly, the more 'hands on' case management approach taken by the judiciary, together with the greater focus on the needs of the child witnesses, means that cases are being heard more quickly and scheduling is more effective. Changes to scheduling have meant that children are now asked to come in when they are actually to testify, rather than routinely asked to come into court on the Monday of the week the case is listed 'just in case' they are required.

3.120 An additional benefit noted by a member of the project team was the increased opportunity for greater inter-agency collaboration, although increased communication and cooperation may stem more from the pilot nature of the project and the consequent need for ongoing assessment and monitoring, than from the specialist nature of the court.

3.121 Various people who commented on the pilot project noted that specialisation of judicial members and prosecutors would be highly desirable and that the decision not to implement this aspect of the Standing Committee's recommendation is regrettable. Although numerous training and education opportunities have been made available to all judicial members, whether to take

279 At the time of writing, the Note was being considered by the jurisdictional heads.

280 According to information provided by the NSW Attorney-General's department in November/December 2003.

281 Ibid.

up these opportunities is entirely the decision of individual members and there is no ongoing evaluation process to monitor the utility of the training provided.

SPECIALISATION OVERSEAS

South Africa

3.122 In South Africa, the first sexual offences court was established at Wynberg Magistrates Court in 1993, in response to advocacy on the part of women's organisations about the need for improving the treatment of rape victims within the criminal justice system.²⁸² The Wynberg Court deals only with sexual offences against women and children. Its aims are to decrease the secondary trauma to victims of sexual abuse, to increase the reporting of sex crimes by providing a specialised service to victims of sex crimes, and to increase the conviction rate and sentencing of perpetrators.²⁸³ The Court is adversarial in nature, is staffed with specialist prosecutors, has facilities for witness preparation, works closely with other agencies to provide integrated service delivery, is equipped with a CCTV room and employs a social worker who provides support services to children. Since the establishment of the specialist court in Wynberg, a number of additional specialist courts have been opened in the Western Cape. Conviction rates in the specialist courts are higher than in ordinary regional courts in the Western Cape²⁸⁴ and, on the whole, the evaluations of the court have found the specialist approach assists in the reduction of secondary trauma for witnesses testifying at the sexual offences courts.²⁸⁵

Manitoba

3.123 In the Canadian province of Manitoba, a specialist family violence court was established in 1990. This court deals with all child abuse, wife abuse and elder

282 Lulama Dikweni Mastoera Sadan, Shaamela Cassiem, *Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and Related Services* (2001) 5.

283 Ibid.

284 Ibid 36.

285 Ibid 43.

Because the courts are not sufficiently resourced, training for specialist staff is often inadequate and staff turnover is high. An evaluation of the courts found that these factors reduce the courts' capacity to achieve the aim of reducing secondary trauma. Ibid 53–6.

See also National Child Sexual Assault Reform Committee, *Discussion Paper: Alternative Models for Prosecuting Child Sex Offences in Australia (Draft)* (2003).

abuse cases where there has been an ongoing intimate relationship involving elements of trust, dependency or kinship between the parties. All cases involving child victims of physical and sexual abuse are handled by the court, as are cases involving adult survivors of child sexual assault, on the basis that all assaults against children involve breaches of trust.²⁸⁶

3.124 The goals of the court when established were expeditious court processing, rigorous prosecution and more appropriate sentencing. The court has been successful in achieving a three month average processing time and in imposing more appropriate sentences for family violence cases.²⁸⁷ However, case attrition rates prior to sentencing are still high.²⁸⁸ The establishment of the specialised jurisdiction involved the development of particular goals, protocols and procedures and the recruitment of specially trained prosecutors²⁸⁹ and judges. According to an evaluation of the court's operations,²⁹⁰ these specialist practitioners significantly reduced 'problems of biased attitudes or lack of awareness'²⁹¹ and improved consistency in decision-making.²⁹² The court has two victim support programs—the Women's Advocacy Program and the Child Abuse Victim Witness Program—which provide support and advocacy for women and children who have been victims of violence by their partners, parents or caregivers. An important aspect of the Services' advocacy role is to address women's

286 E. Jam [*sic*] Ursel, 'The Winnipeg Family Violence Court' 14 (12) *EuroWRC* 3 <www.eurowrc.org>.

287 Prior to specialisation, the most frequent sentences for family violence offences were conditional discharge, suspended sentence and probation. In the first two years of the Family Violence Court's function, the most frequent disposition was probation followed by suspended sentence and incarceration. *Ibid* 6.

288 *Ibid* 1.

289 The court is currently staffed by 13 specialist prosecutors. In the opinion of Dr Jane Ursel, who has compiled data and evaluated the court's performance since its inception, the involvement of specialist prosecutors is the single greatest factor responsible for the court's success. (communicated by Dr Ursel to VLRC researcher on 26 November 2003).

290 These observations are based on Dr Jane Ursel's evaluation of the 4080 cases processed by the court during its first two years of operation. E. Jam [*sic*] Ursel, 'The Winnipeg Family Violence Court' 14 (12) *EuroWRC* 3.

291 *Ibid*.

292 *Ibid* 2.

reluctance to continue through the criminal justice system²⁹³ and to advocate for the complainants with the prosecutors.²⁹⁴

OUR RECOMMENDATIONS

3.125 The Commission believes that there are strong arguments in favour of adopting a more specialised approach to sexual offence cases. Experience in Manitoba shows that assigning judicial officers with an interest in family violence to a specialist list within the court, together with the establishment of a specialist prosecutors unit, has helped to change the criminal justice culture in a way which makes court staff, judges and lawyers more aware of the needs of complainants.²⁹⁵

3.126 We believe that the assignment of self-selected judges and magistrates to specialist sexual offences lists for a period would have a similar effect, particularly if steps were made to build up the existing sexual offences unit in the Office of Public Prosecutions. Once judicial members, prosecutors, defence counsel, court staff Practice Committee, Ministry of Justice) and other agencies have the opportunity to devote appropriate time and attention to the complex issues involved in prosecutions of sexual offences, their sensitivities to the needs of both the accused and complainants is likely to be heightened.

3.127 Specialisation would contribute to the establishment of judicial expertise in dealing with the issues which commonly arise in sexual offence cases. While concerns are sometimes expressed²⁹⁶ that treating sexual offences cases differently from other criminal cases could result in these cases being regarded as less important than other offences, this does not appear to have occurred in jurisdictions that have established specialist courts. We believe it is possible to combine a specialist approach to sexual offences that is sensitive to the needs of complainants, while at the same time ensuring that accused persons are treated fairly and that allegations against them are tested within a rigorous adversarial process.

293 The Services' counsellors meet with women after the police have charged the alleged offender but before the case is passed on to the Prosecution.

294 According to information given to VLRC researcher by Dr Jane Ursel, on 26 November 2003.

295 Ibid.

296 Submission 48. Although Submission 8 makes the point that specialisation would signal that these cases are taken seriously.

3.128 Establishment of sexual offence lists in the Magistrates' Court and County Court would encourage the adoption of case management processes that minimise delays and produce greater confidence in the legal system amongst the agencies which support complainants.²⁹⁷ The purpose of these changes would be to encourage more people to report offences and to give evidence at committal and trial. These changes would also contribute to complainants feeling that the criminal justice process operates fairly, even if it does not always produce the outcome they might have wanted.²⁹⁸

WHAT FORM OF SPECIALISATION?

3.129 The Commission has considered the form of specialisation that it might be practical to introduce at this stage. As discussed above, the Magistrates' Court has already successfully piloted a specialist child sexual offences list at the Melbourne Magistrates' Court. We recommend that the Court establish a specialist list for sexual offences against children and people with a cognitive impairment in Melbourne and major regional cities. Magistrates should be allocated to the list for a defined period and members of the Court should be rotated through the list. All magistrates hearing cases in this list would be expected to participate in relevant judicial education programs on hearing child sexual offence cases.

3.130 For resource reasons our recommendation is limited to cases involving children and complainants with a cognitive impairment.²⁹⁹ However, if this approach proves successful we would expect the Magistrates' Court to consider whether it could be extended to all sexual offence cases.

3.131 There have been a number of discussions with the Chief Judge of the County Court and other County Court judges about the introduction of a model

297 Office of the Status of Women, *Research into Good-Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* Final Report (2002).

298 Tyler discusses the importance of participants' perceptions of fairness in their contact with legal processes. He submits that legal outcomes such as conviction and sentence have less influence on people's reactions to their contact with the system than the behaviour of legal authorities during personal encounters. Tom Tyler, *Trust and Law-Abidingness: A Proactive Model of Social Regulation* (2001).

299 Although child complainants and complainants with a cognitive impairment will no longer be cross-examined at committal under our recommendations, other witnesses may still be called. The specialist list may assist in reducing any delay in committal hearings in those matters so that the case can proceed to pre-recording in the County Court as quickly as possible.

under which judges who express an interest might be assigned to a specialist sexual offences list within the Court for a period of, for example, three months.

3.132 At present there appears to be little support for this model within the Court. The major concerns expressed by those who oppose specialisation focus on the reluctance of judges to hear one type of matter exclusively over long periods. It has been argued that all County Court judges should be regarded as having sufficient expertise to hear the full range of cases that form the Court's business. The Chief Judge encourages all members of the court to participate in judicial education. It is argued that the provision of appropriate specialist information for all judges will ensure that each judge of the Court is well placed to hear sexual offence cases.

3.133 In light of the concerns expressed by the County Court it would be premature for the Commission to recommend the assignment of sexual offence cases to designated judges. Instead, we recommend that the Court establishes a pilot scheme under which a designated judge is appointed to manage a list of cases involving allegations of child sexual assault.

3.134 The appointment of a designated judge would assist the County Court to recognise and manage the range of issues that arise in child sexual offence cases and allow the new processes recommended in this Report to be overseen and refined if necessary.

3.135 A designated judge would be able to liaise with other relevant institutions, including the Magistrate's Court, and develop a clear understanding of where the problems are so that they could be dealt with effectively. He or she could contribute to the design of ongoing judicial education covering identified problems, and oversee the collection and maintenance of data to assess the effectiveness of this approach. The designated judge might also take responsibility for preparing a comprehensive and up-to-date set of materials on the issues likely to be encountered in such cases, and to assist judges who feel less experienced or confident about these issues. The designated judge could assign cases to judges for cases conferences, directions hearings and trials.

3.136 The appointment of a designated judge with these responsibilities would signal the County Court's willingness to address the concerns of complainants and increase community confidence in the way the criminal justice system deals with alleged offences against children and people with a cognitive impairment.

3.137 We propose that the Court should arrange for evaluation of the pilot scheme by an independent researcher at the end of the 12 month period.

RECOMMENDATION(S)

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.

