

Chapter 6

Improving the System for Complainants Who Have a Cognitive Impairment

INTRODUCTION

6.1 This Chapter makes recommendations to improve the criminal justice response for people with a cognitive impairment who are sexually assaulted, including people who have an intellectual disability, a mental illness, dementia or an acquired brain injury. Currently the offences dealing with sexual exploitation of people with a cognitive impairment refer to people with ‘impaired mental functioning’.⁷⁴⁹

6.2 Some submissions raised concerns about the use of the term ‘impaired mental functioning’. It has been suggested that the use of the term ‘mental’ stigmatises people with disabilities.⁷⁵⁰ In this Chapter we use the expression ‘cognitive impairment’ instead, since this expression is regarded as a more accurate description by disability groups and is widely used and accepted. We have used that term throughout this Chapter, except where we refer to the existing legislation.

6.3 People who have a cognitive impairment are more vulnerable to sexual assault and abuse because they depend on others for assistance with daily life. Most sexual assault occurs in the victim’s place of residence.⁷⁵¹ Often the abuser is someone known to the victim, for example a staff member or other resident. Women are more at risk than men.⁷⁵² Women who live in institutions or group

749 *Crimes Act 1958* ss 50, 51, 52.

750 Disability Discrimination Legal Service (DDLS) Submission 40.

751 Moira Carmody, 'Invisible Victims: Sexual Assault of People with an Intellectual Disability' (1991) 17 (2) *Australia and New Zealand Journal of Developmental Disabilities* 229–236.

752 Vicky Turk and Hilary Brown, 'The Sexual Abuse of Adults with Learning Disabilities: Results of a Two Year Incidence Survey' (1993) 6 (3) *Mental handicap Research* 212.

homes are up to three times more vulnerable to assault, and ten times more likely to be sexually assaulted than women without disabilities.⁷⁵³

6.4 In earlier Chapters⁷⁵⁴ we referred to the barriers that people with a cognitive impairment experience in reporting sexual assault to the police and in participating in the criminal justice process. These barriers were identified in a report by Disability Discrimination Legal Service (DDLS)⁷⁵⁵ and at a Commission roundtable which focused on issues relevant to people with cognitive impairment.⁷⁵⁶

6.5 Problems faced by people with a cognitive impairment include the following:

- they may not tell anyone about sexual abuse because they may not understand that what has happened to them is a crime;⁷⁵⁷
- they may face misconceptions about their credibility and their memory, as a result of which their complaints about sexual assault may not be taken seriously by the police;⁷⁵⁸
- they may have difficulty in explaining what happened to them when they are interviewed by the police;⁷⁵⁹

753 Lesley Chenoweth, 'Invisible Acts: Violence Against Women with Disabilities' (1993) 2 *Australian Disability Review* 22.

754 Chapters 2 and 3. See also Interim Report paras 3.29–43.

755 Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice* Final Report of Stage One of the Sexual Offences Project (2003).

756 Roundtable 19 September 2002.

757 Moria Carmody and Joan Bratel, 'Vulnerability and Denial: Sexual Assault of People with Disabilities' in Jan Breckenridge and Moria Carmody (ed) *Crimes of Violence: Australian Responses to Rape and Child Sexual Abuse* (1992); Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice* Final Report of Stage One of the Sexual Offences Project (2003). In addition, it might be difficult for family or support people to know when intervene or to offer help. A 1996 study conducted by the National Council of Intellectual Disability found that family members and staff working with intellectually disabled people in residential services felt that they lacked the skills and training required to recognise and report abuse: Robert Conway, Louise Bergin and Kathryn Thornton, *Abuse and Adults with Intellectual Disability Living in Residential Services: A Report to the Office of Disability* (1996). This is an important issue which we believe should be included in a wider review of cognitive impairment and the criminal justice system.

758 Interim Report paras 3.29–43.

- complex courtroom language makes it difficult for them to respond to questioning or to understand legal processes; and
- they are likely to find cross-examination particularly daunting and difficult.⁷⁶⁰

6.6 The effect of these barriers is that the criminal justice system does not adequately protect people with a cognitive impairment against sexual abuse. Despite their over-representation as victims of sexual assault, there are very few prosecutions under the Victorian offences designed to protect people with cognitive impairment from sexual exploitation by people with power over them.⁷⁶¹

6.7 In this Chapter we refer to recommendations made earlier in this Report, which are intended to assist people with a cognitive impairment to participate in the criminal justice process, and deal with some additional matters. We also propose some further changes. Recommendations in this Chapter cover:

- refining the Independent Third Person (ITP) Program;
- including information on cognitive impairment in police training and judicial education programs about sexual assault;
- amending sections 50–2 of the *Crimes Act 1958* to improve the current offences designed to protect people with cognitive impairment; and
- setting up a system for collecting statistics on sexual offences and cognitive impairment, in order to increase understanding of the extent of this problem.

6.8 We also recommend that the Attorney-General should consider giving the Commission a reference to consider a broader review of the treatment of people with cognitive impairment in the criminal justice system as complainants, accused and witnesses. There are many issues which we have not covered in this Report, as it would not be appropriate to make recommendations which relate solely to victims of sexual assault with a cognitive impairment without considering the position of victims of other offences and also accused with cognitive impairments.

759 Kelly Johnson, Ruth Andrew and Vivienne Topp, *Silent Victims, A Study of People with Intellectual Disabilities as Victims of Crime* (1988) 48.

760 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* Report No 80 (1996) 261.

761 The provisions are found in *Crimes Act 1958* ss 51, 52. It was confirmed by Gary Ching, Manager of the Sexual Offences unit at OPP that prosecutions for these offences occur infrequently (email of 27 January 2004).

POLICE RESPONSE

6.9 In Chapter 3 we made recommendations for improving police responses to people who report sexual assault. These recommendations will go some way towards assisting people with a cognitive impairment.

6.10 The Police Code of Practice for the Investigation of Sexual Assault Cases requires interviews with people who are intellectually disabled or mentally impaired to be conducted with the assistance of an Independent Third Person.⁷⁶² The role of the Independent Third Person is discussed in more detail below. The Review of the Code is examining the changes needed to improve police response to people with a cognitive impairment.⁷⁶³ The Commission supports this review.

ASSISTING POLICE TO IDENTIFY THAT A PERSON HAS A COGNITIVE IMPAIRMENT

6.11 Like many other service providers in the community, police may have difficulties in identifying that a person has a cognitive impairment and in determining the nature of the person's impairment. We recommend that guidelines to assist police to identify cognitive impairment be developed by Victoria Police. The Office of the Public Advocate and the Equal Opportunity Commission should be consulted on these guidelines. Corrections Victoria is currently developing screening tools for prison officers to identify people who have acquired brain injury, and already have screening for mental illness.⁷⁶⁴ Their knowledge and expertise in this area may be of assistance to Victoria Police.

6.12 Police guidelines could include a statement of the main types of cognitive impairment, possible indicators of each type of impairment, and key features of a person's social information that may be suggestive, for example their social security entitlement and whether the person has a caseworker. Police should have training on those guidelines to ensure that they are well accepted and understood.

6.13 In Chapter 5 we discuss the current procedure of video recording and audio recording of statements of people with cognitive impairment (VATE statements) who report sexual assault. We recommend that police continue to use VATEs, but also recommend that the VATE process needs to be evaluated. Given

762 Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (1999), guideline 57.

763 See para 2.13.

764 Information supplied by Peter Person, Policy Officer Corrections Victoria in conversation on 5 April 2004. Inquiries are also made by Corrections as to whether the person is registered with DHS as having an intellectual disability.

the difficulties that police may have in identifying cognitive impairment, we recommend below that if the police are unsure as to whether a person has a cognitive impairment, the person's statement should be taken using VATE.

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

INTERVIEWING COMPLAINANTS WITH A COGNITIVE IMPAIRMENT

Interviewing Techniques

6.14 Complainants with a cognitive impairment may face significant difficulties in making their statements. Police need to allow sufficient time when taking statements from people with a cognitive impairment and give them time to have a break when necessary. Police also need to develop interviewing and communication skills which meet the needs of people with a cognitive impairment.

6.15 The DDLS Project found that there is an assumption amongst police that victims with a cognitive impairment will not present as credible witnesses. These perceptions can lead to reluctance to take a complaint of sexual assault from a person with a cognitive impairment seriously or to take a statement or investigate the matter.⁷⁶⁵

765 Above n 755, 54–6.

6.16 The Commission's focus groups with the police also indicated that victims with a cognitive impairment, particularly mental disorders, are not considered to be credible witnesses and that briefs for prosecution of those accused of sexually assaulting a person with an intellectual disability were rarely authorised.⁷⁶⁶ Earlier research in NSW also found that police lacked knowledge about cognitive impairment, used inappropriate communication techniques and required training to improve their responses.⁷⁶⁷

6.17 These issues cause attrition of cases and only a small number of victims with cognitive impairment who report sexual assault progress to the trial stage.⁷⁶⁸ The Commission believes that training is needed to improve police knowledge of cognitive impairment and to improve police techniques in communicating with people who have such an impairment. Victoria Police is currently considering changes to police training along these lines. Recommendation 14 in Chapter 2 of this Report⁷⁶⁹ says that police training should include best practice models for responding to people with a cognitive impairment who report that they have been sexually assaulted.

! RECOMMENDATION(S)
153. Training of general duties police and SOCA Unit and CIU members should include appropriate communication techniques with people with a cognitive impairment.

SUPPORT DURING THE POLICE INTERVIEW PROCESS

6.18 People who have a cognitive impairment require support when they are being interviewed by the police. Independent Third Persons (ITPs) are volunteers who provide support for people with cognitive impairment during police

766 Above paras 2.42–3. See also Roundtable with disability service providers 19 September 2002 and Meeting with DDLS 18 December 2003.

767 New South Wales Law Reform Commission, 'Research Report 3 (1993) —People with an Intellectual Disability and the Criminal Justice System: Consultations' <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/RR3CHP2>> ; Mark Brennan and Roslin Brennan, *Cleartalk: Police Responding to Intellectual Disability* (1994).

768 The offences are under *Crimes Act 1958* s 51 and 52. See discussion at 6.40–55.

769 See above para 2.56.

interviews.⁷⁷⁰ The person who requires support may be a person who reports an offence or a person who is suspected of committing it.

6.19 The selection criteria for ITPs requires that they have a practical understanding of people who have a disability and their communication issues.⁷⁷¹ The role of the ITP is to facilitate communication with the person being interviewed and to prevent them being questioned inappropriately. Inappropriate questions are questions that cannot be clearly understood by the interviewee—the ITP has no power to object to questioning on any other basis.

6.20 The ITP program is run by the Office of the Public Advocate (OPA). In the Interim Report we recommended that the OPA develop an accredited training program for ITPs to ensure consistent standards of practice when working with victims of sexual assault.⁷⁷²

6.21 The Commission received 11 submissions on that recommendation.⁷⁷³ Seven submissions supported this recommendation:⁷⁷⁴ one was concerned that an accused person with cognitive impairment should also be given support by OPA⁷⁷⁵ and two thought the recommendation did not adequately address the issues around ITPs.⁷⁷⁶

6.22 OPA advised that it has developed training for ITPs in supporting victims/survivors of crimes generally. About 15% of interviews attended by ITPs are for people who report a crime. Almost 75% of these are for alleged victims of sexual assault.⁷⁷⁷ Clearly it is therefore important for ITPs to receive specific information about supporting people who report sexual assault. OPA has agreed

770 Victoria Police Operating Procedures, para 4.6.3.2 requires an ITP or family member to be present when an offender is interviewed, and Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (1999), Above n 762, guideline 57 requires an ITP to be present when taking statements from the victim.

771 See <<http://www.publicadvocate.vic.gov.au>> and follow links to Programs and Independent Third Persons Program.

772 Interim Report Recommendation 2.

773 Submissions 7, 19, 26, 30, 31, 38, 40, 42, 44, 47, 48.

774 Submissions 19, 26, 30, 42, 44, 47, 48.

775 Submission 7.

776 Submissions 38 and 40.

777 Information provided by Lisa Morrison, Coordinator ITP program in conversation of 9 January 2004. In the 2001–2 year there were 930 attendances by ITPs. 749 were for alleged offenders, and 151 for victims. Of the 151 victims, 112 were victims of sexual assault. Figures relate to attendances at interview, not clients. There may be more than one attendance at interview per person assisted.

that within the current training it would be sensible to include training on sexual assault.⁷⁷⁸

6.23 The Equal Opportunity Commission Victoria (EOCV) submission on this issue⁷⁷⁹ agreed that it is important for ITPs to be trained in sexual assault issues. It also suggested that a person be available to support the victim from the first interview with police to at least the stage at which a decision is made about prosecution. That person should have a high level of expertise in working with victims of sexual assault as well as expertise in working with people with cognitive impairment. The theme of consistent support and advocacy is taken up in the DDLS submission, discussed below.

6.24 In the Interim Report⁷⁸⁰ we discussed the improvements made to the ITP program following a review in 1995⁷⁸¹ including: a funded coordinator's position, a review of recruitment and selection criteria and a review of training. As a result of the training review, for the past two years ITPs have been required to undertake a compulsory two-day induction training course and to complete a one day update session at least once every two years. OPA continues to work on its training program to ensure that it is more focused on skills development.⁷⁸² In light of OPA's comments, we no longer recommend accredited training, but support the current compulsory training program.

6.25 The Commission notes that it may be helpful for OPA to liaise with Centre Against Sexual Assault (CASA) House in developing a training component on supporting people with a cognitive impairment who report sexual assault. CASA workers might also benefit from training which assists them in communicating with people with cognitive impairments.

6.26 Both the roundtable which the Commission held to discuss problems experienced by people with a cognitive impairment and the DDLS submission raised concerns about the availability and role of ITPs and the adequacy of the

778 Submission 31.

779 Submission 38.

780 Interim Report para 3.35.

781 Department of Health and Community Services, *The Independent Third Person Program: Evaluation* (1995).

782 Conversation with Lisa Morrison, Coordinator of Independent Third Person Program on 9 January 2004.

ITP in providing support for people with a cognitive impairment who report a sexual assault to the police.

6.27 The DDLS submission argued that police were sometimes selective in choosing an ITP to attend interviews. Concerns were expressed about impartiality and effectiveness of ITPs. It is particularly important for people with a cognitive impairment who are accused of sexual offences to have an effective ITP present at the interview.

6.28 The DDLS suggested that the decision as to which ITP is used should be independent from police and controlled by the ITP program centrally via a roster system. This could be done by way of a central phone number that diverts to whoever is rostered on at that time. OPA report that they have used a roster system in the past and this did not work as they do not have the resources to operate a centrally controlled system that would operate 24 hours a day. Such a system would therefore require an additional allocation of resources to the program.

!	RECOMMENDATION(S)
154.	OPA should liaise with CASA House to develop training for Independent Third Persons (ITPs) in supporting people with a cognitive impairment who report sexual assault.
155.	OPA should consider seeking resources to enable it to establish a central roster system for allocating Independent Third Persons.

ADVOCACY FOR PEOPLE WITH A COGNITIVE IMPAIRMENT

6.29 The DDLS submission pointed out that the role of ITPs is to provide support rather than advocacy for the interviewee. People with cognitive impairment, who report they have been sexually assaulted, will not necessarily have access to someone who can act as their intermediary and advocate in dealing with the police, in explaining the legal process to them and in assisting them to make decisions about whether to continue with a complaint.

6.30 DDLS believes that there is a need for someone to provide advocacy for people with cognitive impairment to ensure they understand the language being used, and that they are fully informed about their options and role in the legal process. In order to properly fulfil an advocacy role, the same person would have

to be available to the person with cognitive impairment throughout the whole criminal justice process, from reporting until any court hearing is complete. DDLS do not suggest ITPs should take on an advocacy role given their voluntary nature, but believe that it is necessary for advocacy to be provided by a funded body.⁷⁸³

6.31 In the absence of an advocacy service for people with cognitive impairment, DDLS suggested that in addition to an ITP, complainants should have access to a support person during their dealings with police.⁷⁸⁴ This could be their Disability Support Worker or a CASA worker. This should be taken into account in the current review of the police Code of Practice. In consultations for their project, DDLS found that CASAs identified a need for further training to assist them to work with people with disabilities. Such training should provide an understanding of disability and how it may affect a person's capacity to identify and disclose sexual assault.⁷⁸⁵ We recommend that a component on identifying disability and working with people with cognitive impairment become a core element of CASA training.

6.32 It is clear that the criminal justice system offers people with a cognitive impairment very limited protection against sexual assault. Realistically the criminal law may never be able to deal adequately with sexual assaults committed in secret on people with limited or non-existent communications skills.

6.33 However, with adequate assistance many people with a cognitive impairment can tell the police what has happened to them and can give evidence in court. The Commission believes there is a need to consider better ways of supporting people with a cognitive impairment who are victims of crime to participate in police interviews and in the whole criminal justice process. There is also a need to assist people with a cognitive impairment who are charged with sexual offences, who may face significant disadvantages in instructing their lawyer or in participating in the court process. Such problems arise in all areas of the criminal law and are not limited to sexual offences.

783 Meeting with Jonathon Goodfellow and Margaret Camilleri 18 November 2003. There was discussion about this role being fulfilled by either Disability Support workers or CASA workers, however DDLS believed the former would require further training about legal rights and the legal process, and the latter would require further training to assist in working with people with disabilities. Specific funding for such a role would also be required.

784 Above n 755, 48.

785 Ibid 51–2. It is noted in the report at p 34 that since 1997 CASAs have developed a kit and some practice guidelines for supporting victims with an intellectual disability.

6.34 The Commission believes provision of support for people who have a cognitive impairment who are involved in the criminal justice system requires broader and more systematic analysis than the scope of this reference allows. We recommend that the Attorney-General consider a review of the treatment of people with cognitive impairment in the criminal justice system as complainants, accused, and witnesses. The review should undertake research to identify the needs of people with cognitive impairment when reporting sexual assault and the most effective way of supporting them to do so.⁷⁸⁶ It should consider ways of reducing the risk of assault by people with cognitive impairment who are in care or attending programs. It should also look at education for people with cognitive impairment about human relations, sexual safety and protective behaviours and about the law and their legal rights. The VLRC would be a suitable body to undertake this project.

! RECOMMENDATION(S)

156. CASA training should include a component on identifying disability and working with people with cognitive impairment.
157. The Attorney-General should consider establishing a review which identifies the issues confronted by people with cognitive impairment in the criminal justice system as complainants, accused and witnesses and makes recommendations for legal and procedural changes.

COURT PROCESSES

6.35 In previous Chapters we have made a number of recommendations which will assist people with a cognitive impairment in giving evidence. These include:

- abolishing the right to cross-examine complainants with a cognitive impairment at committal;⁷⁸⁷
- establishing a specialist list in the Magistrates' Court to handle summary offences against people who have a cognitive impairment and committals in cases involving indictable sexual offences against these people;⁷⁸⁸

786 Above n 755, Recommendation 8.

787 See Recommendation 42.

- assigning a designated judge in the County Court to list and manage all sexual offence cases involving offences against complainants with a cognitive impairment;⁷⁸⁹
- increasing the use of VATE tapes so that fewer complainants with a cognitive impairment have to give oral evidence-in-chief;⁷⁹⁰
- allowing all complainants (including complainants with a cognitive impairment) to give evidence by closed circuit television;⁷⁹¹
- introducing a process for pre-recording evidence-in-chief and cross-examination of people who have a cognitive impairment;⁷⁹² and
- preventing the accused in a sexual offence case from cross-examining the complainant.

6.36 As noted in the Interim Report⁷⁹³ the language of the courtroom poses particular obstacles for complainants with some types of cognitive impairment. For example, people with intellectual disabilities may have particular difficulty with leading or lengthy questions, questions spoken rapidly or containing many concepts or double negatives.⁷⁹⁴ They may also find it more difficult to follow events such as processes that occur before and during trial.

6.37 Complainants with an intellectual disability or a mental illness may find cross-examination daunting and very difficult. In DDLs consultations it was noted that a person with an intellectual disability will often give the answer that they think will please the questioner or cause the questions to stop. In many cases this will be a 'yes' or 'no' answer.⁷⁹⁵ In Chapter 5 we recommended that the *Evidence Act 1958* should be amended to impose a duty on the court to ensure appropriate questioning of children and young people. The Commission considers that a similar duty should apply in the case of people with a cognitive impairment.

788 See Recommendation 53.

789 See Recommendation 50.

790 See Recommendation 113.

791 See Recommendation 59.

792 See Recommendation 43.

793 Interim Report para 4.26.

794 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* Report No 80 (1996) 258.

795 Above n 755, 58 and Submission 44.

! RECOMMENDATION(S)

158. That the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible in the case of questions asked of people with a cognitive impairment that:

- neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
- the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.

6.38 The DDLS submission noted that the criminal justice system can only operate fairly if judges and magistrates have an understanding of and sensitivity to the needs of people with a cognitive impairment.⁷⁹⁶ This will assist them to assess whether the person with the disability fully comprehends the questions being put to him or her and whether they should intervene. It will also assist them to identify when the person may need a break from questioning.

6.39 In Chapter 3 we made recommendations for prosecutor training, training of defence lawyers and judicial education programs on issues that commonly arise in sexual offence cases. Such education should include information on the problems that complainants with a cognitive impairment face in participating in the criminal justice process and on how those problems might be overcome. Training materials should be prepared with input from the Office of the Public Advocate.

! RECOMMENDATION(S)

159. Training programs for prosecutors and defence lawyers should include a component on the disadvantages experienced by people with cognitive impairment, and effective communication with people with a cognitive impairment.

796 Above n 755, 54.

**RECOMMENDATION(S)**

160. Judicial education programs on sexual offences should include material that familiarises judges with communication and other difficulties people with a cognitive impairment may face.

SEXUAL OFFENCES AGAINST PEOPLE WITH COGNITIVE IMPAIRMENT

6.40 Chapter 7 of the Discussion Paper identified some deficiencies in sections 50, 51 and 52 of the *Crimes Act 1958*, which create a number of sexual offences against people with ‘impaired mental functioning’. In Chapter 8 of the Interim Report we proposed some changes to these provisions.

6.41 In the section below we describe responses to our proposals and make final recommendations for changes to these sections.

SECTION 50

6.42 Section 50 currently defines the concept of ‘impaired mental functioning’. For the reasons discussed in 6.2 we recommend that this expression should be changed to ‘cognitive impairment’. Section 50 says that ‘impaired’ includes a person whose mental functioning is impaired because of mental illness, intellectual disability, dementia or brain injury. This is a non-exhaustive list, so that mental impairment due to other factors could also be included. In the Interim Report we discussed whether the definition of ‘impaired mental functioning’ in section 50 should be expanded to explicitly include people with severe personality disorders. The Interim Report suggested that this was unnecessary. The majority of submissions agreed that the current definition was sufficient to cover people with severe personality disorders. We do not recommend this change to the definition.

6.43 A number of submissions⁷⁹⁷ argued that instead of referring to particular disorders the definition should simply refer to the person’s capacity to make informed judgments about sexual activities. We do not recommend adopting a ‘capacity’ definition for these sections.

6.44 These sections specify an appropriate standard of behaviour for those providing services to people with a cognitive impairment. Section 51 covers

797 Submissions 31, 38, 40 and 44. Also at meeting with Jonathon Goodfellow and Margaret Camilleri from Disability Discrimination Legal Service on 18 November 2003.

people providing ‘medical and therapeutic services’ to the person and section 52 covers sexual activities between people with a cognitive impairment and workers in residential facilities. Because the sections create serious offences that carry long terms of imprisonment it is important that their application is clear.

6.45 Although research suggests that much sexual abuse occurs in these settings, there are very few prosecutions under these sections. The Office of Public Prosecution’s records show only 17 prosecutions under section 51 or section 52 since 1996.⁷⁹⁸

6.46 A definition which was solely based on capacity would make these matters more difficult and lengthy to prosecute. Under the current definition a psychologist or psychiatrist may be required to testify as to whether the person has, for example, a mental illness. A capacity-based definition could result in a wide range of experts being called to testify whether the complainant has the capacity to make a choice as to whether to participate in sexual acts with people in positions of power over her. If experts presented conflicting opinions on whether or not the person had capacity to make an informed choice to participate in sexual acts, it is unlikely that the jury would convict an accused who claims that he believed the complainant had made such a choice. We do not support adopting a definition that would make it harder to prosecute those who sexually exploit people with a cognitive impairment.

SECTION 51

6.47 Section 51 makes it an offence for a provider of medical or therapeutic services related to a person’s impairment to sexually penetrate or commit an indecent act with the person to whom the services are being provided. We discussed changes to section 51 in the Interim Report.⁷⁹⁹ We recommended that section 51 be amended to allow the prosecution of a person who provides medical or therapeutic services *relating to the cognitive impairment* without requiring the prosecution to prove that the accused had knowledge of the impairment. The defence of honest and reasonable belief that the person did not have a cognitive impairment could be raised by an accused providing services related to the impairment who was unaware of the cognitive impairment. This is more likely to arise in the context of therapeutic than medical services.

798 Information provided by Jari Jancar, IT Manager, Office of Public Prosecutions, from search of their PRISM database on 13 February 2004.

799 Interim Report paras 8.36–45.

6.48 Our proposal was generally supported by submissions,⁸⁰⁰ though some submissions were concerned about the availability of the defence of honest and reasonable belief.⁸⁰¹ The Commission thinks it is important to make provision for this defence to cover the rare situation where a person providing services relating to the impairment does not know of it. For example, a physical therapist may conduct an exercise class with a group of people with various disabilities, but may be unaware of the nature of their various disabilities. In this situation the therapist might engage in a sexual act with a person with a cognitive impairment without being aware that the person had a cognitive impairment.

6.49 In these circumstances we think it is appropriate for the accused to be able to raise the defence of honest and reasonable belief. We confirm the recommendation in the Interim Report.

6.50 We also proposed a new offence to cover the situation where the services do not relate to the cognitive impairment. This would cover, for example, the situation where a dentist who is treating a woman who has an intellectual disability engages in a sexual act with her, or a chiropractor sexually penetrates a woman who has a mental illness whom he is treating for a back problem. Because not all therapeutic service providers will be in a position to be aware of the cognitive impairment we proposed that these service providers should only be guilty of the offence if they were aware of the impairment.

6.51 Submissions received to the Interim Report were supportive of the new offence, and we confirm our interim recommendations.

SECTION 52

6.52 Section 52 currently prohibits sexual acts between people with cognitive impairment and workers in residential facilities. A ‘residential facility’ is defined as an approved mental health service under section 3 of the *Mental Health Act 1986* or premises operated by any person or body for the purposes of providing residential services to intellectually disabled people. Changes to section 52 were also discussed in the Interim Report.⁸⁰² Government policies of de-institutionalisation mean that a higher proportion of people with a cognitive

800 Submissions 19, 26, 38, 44, 48 and 49 were supportive, apart from wanting the capacity definition to be included.

801 Submissions 31 and 40.

802 Interim Report paras 8.46–55.

impairment now live with family or relatives and attend day care or other programs.⁸⁰³

6.53 Our interim recommendation was to extend section 52 to cover any person working at a facility or in a program that provides services to people with cognitive impairment, rather than just workers in residential facilities. The offence would only apply if the worker knows the person has a cognitive impairment. In our view the high incidence of sexual assault of people with cognitive impairments, and the low levels of reporting, suggest that the law must do more to protect them.

6.54 Submissions to the Interim Report were overwhelmingly in support of this extension of section 52. One submission⁸⁰⁴ said that the section should cover volunteers as well as workers. We agree with that submission, as volunteers are in the same position as paid workers in relation to the person to whom services are provided and should have the same responsibility to them. Another submission suggested extending the section to cover employers of people with cognitive impairment.⁸⁰⁵ The Commission has decided against that extension.

6.55 The legislation must balance two competing goals. On the one hand it should not prevent people with a cognitive impairment from having non-exploitative sexual relationships. On the other hand sexual abuse of people with a cognitive impairment by carers or people involved in program provision is unfortunately relatively common. Confining the operation of section 52 to carers and service providers achieves an appropriate balance between these goals and sets out clear standards of behaviour for those who work in programs for people with a cognitive impairment.

CONSENT

6.56 The issue of consent in relation to these offences was discussed in the Interim Report. Most submissions were supportive of our recommendation that consent not apply to these offences.⁸⁰⁶

6.57 The Equal Opportunity Commission Victoria⁸⁰⁷ submitted that if section 50 was not changed to include a capacity definition then a limited defence of

803 Submissions 38 and 44.

804 Submission 26.

805 Submission 38.

806 Submissions 19, 26, 31, 40, 44, 49.

consent should apply, with the onus being placed on the accused to demonstrate that consent was not obtained through the abuse of trust or professional authority. The Criminal Bar and Victorian Bar⁸⁰⁸ thought that the defence of consent should apply to these offences.

6.58 The historical reason for introducing these offences was that the law of rape did not adequately protect people with a cognitive impairment from sexual abuse. We consider that the defence of consent would be inconsistent with the policy goal of protecting people with cognitive impairment from exploitation through these offences. Allowing a defence of consent in these circumstances would invariably raise the issue of capacity, which would lead to the difficulties in prosecution discussed above. We confirm our recommendation that the defence of consent should not apply to these offences.

PARTNERS OF PEOPLE WITH A COGNITIVE IMPAIRMENT

6.59 The Equal Opportunity Commission Victoria (EOCV) also raised the issue of sexual discrimination in this part of the *Crimes Act 1958*. Sections 51 and 52 do not apply in the situation where the person is the spouse or de facto spouse of the person with cognitive impairment.

6.60 Section 35 contains definitions relating to subdivisions 8A to 8G which contain sections 50 to 52. ‘De facto spouse’ is defined as ‘a person who is living with a person of the opposite sex as if they were married although they are not’. This could leave same sex couples open to prosecution. We agree with the EOCV’s suggestion that section 35 be amended to include ‘spouse or domestic partner’ and that this be broadly defined to include same sex couples and couples who are not cohabiting (for example because one of the people is living in a nursing home). Those in genuine relationships should not be placed at risk of prosecution.

EDUCATION OF PEOPLE WITH COGNITIVE IMPAIRMENT

6.61 We have earlier discussed the need for education of those involved in the criminal justice system about issues relating to cognitive impairment.⁸⁰⁹ It is also very important that people with cognitive impairment and their carers are educated about their rights and obligations in the criminal justice system, and

807 Submission 38.

808 Submissions 42 and 48.

809 Recommendation 14 relates to police and Recommendations 40 and 41 relate to judicial education.

have access to information in a suitable format. Knowledge about sexuality, relationships and sexual rights and safety is also important, and may assist people with cognitive impairment to develop appropriate sexual and self-protective behaviours.⁸¹⁰ This may reduce their risk of assault by people known to them. It is unlikely that legislative change alone will improve the rate of prosecutions under sections 51 and 52. It is necessary for victims to first have a greater understanding of their rights and of what constitutes a criminal offence in order for reporting of these offences to increase.

! RECOMMENDATION(S)

161. Sections 50, 51 and 52 of the *Crimes Act 1958* should be amended to use the term 'cognitive impairment' rather than 'mental impairment'.
162. Section 23 of the *Evidence Act 1958* should be amended to use the term 'cognitive impairment' rather than 'impaired mental functioning'.
163. The definition of 'impaired' in section 50 of the *Crimes Act 1958* should not be changed.
164. Section 51 of the *Crimes Act 1958* should be amended so that:
 - it is an offence for a person who provides medical or therapeutic services to a person with cognitive impairment to engage in a sexual act with that person;
 - where the medical or therapeutic services are related to the cognitive impairment, it is unnecessary for the prosecution to prove that the accused was aware of the person's cognitive impairment. However, the accused can raise the defence that they had an honest and reasonable belief that a person did not have a cognitive impairment; and
 - where the medical or therapeutic services are not related to the cognitive impairment, the service provider is not guilty of the offence unless he or she was aware that the person had a cognitive impairment.

810 Above n 755, 45–8.

! RECOMMENDATION(S)

165. Section 52 of the *Crimes Act 1958* should be amended as follows: A person working or volunteering at a facility or in a program which provides services to people with cognitive impairment, who takes part in a sexual act with a person whom he or she knows has cognitive impairment, should be guilty of an indictable offence.
166. Sections 51 and 52 of the *Crimes Act 1958* should not include a defence of consent.
167. Section 35 of the *Crimes Act 1958* should be amended to include 'spouse or domestic partner' and should be broadly defined to include same sex couples and couples in a genuine relationship who are not cohabiting.

INFORMATION ON REPORTING PATTERNS

6.62 In Victoria there is very little data collected on victims with a cognitive impairment who report sexual assault. Victoria Police do not systematically record the existence of intellectual disability or mental illness for their annual statistics on reported crimes, nor do the courts. The lack of data and the failure to accurately record information both on the incidence and characteristics of sexual assault of people with cognitive impairment impedes legal and policy development in this area.

6.63 In Chapter 1 we recommended that an integrated process be established for the collection of reliable statistics relating to sexual offences. To improve policy development in this area we believe that cognitive impairment needs a particular focus.

! RECOMMENDATION(S)

168. The Working Party that is convened by the Department of Justice to establish an integrated process for the collection of reliable statistics on sexual offences [see Recommendation 4] should consider how to ensure that information is collected relating to complainants and offenders with cognitive impairment.