
Chapter 10

Dealing With Juvenile Sexual Offenders

INTRODUCTION

10.1 Consistent with the terms of reference for this inquiry, the earlier chapters in this Report focus on recommendations to make the criminal justice system more responsive to the needs of complainants. In the Discussion Paper we indicated that we did not intend to examine research relating to, or programs for, sexual offenders.¹²⁰⁹ Although this Report does not deal with treatment of sexual offenders in detail, this Chapter discusses some ways in which young sexual offenders could be assisted to change their behaviour.

10.2 The Commission decided to examine this question for two main reasons. First, available information suggests there may be a significant number of young sexual offenders. Many of these offenders abuse younger children including siblings and other family members. Secondly, only a very small number of these offences are currently dealt with in the criminal justice process. We believe that policies which rehabilitate young offenders and support their families in responding to such behaviour will benefit the whole community including other children and young people who may be prospective victims of abuse.

10.3 If young offenders are not helped to change their behaviour they are likely to continue to offend.¹²¹⁰ Some offenders will continue to commit sexual offences as adults.¹²¹¹ Victims who are related to the offender often say they want the offender to be helped to change his behaviour so that other siblings or children are

1209 Discussion Paper para 1.13.

1210 Anna Grant, *The Historical Development of Treatment for Adolescent Sex Offenders* (2000) 2.

1211 Karen Flanagan and K Hayman-White, *Sexual Abuse Counselling and Prevention Program: A Five Year Review of Work with Victims and Adolescent Perpetrators of Sexual Abuse*, Children's Protection Society (1999).

not sexually assaulted. Taking action to reduce sexual assault by young people is consistent with these goals.

10.4 Research indicates that some young offenders have previously been the victims of sexual assault themselves. Even when this is not the case they need help to alter their behaviour. Processes designed to assist offenders must also recognise the psychological and physical effects of sexual assault, and must protect other children and young people from harm from potential re-offending while an offender is receiving treatment.

THE EXTENT OF THE PROBLEM

10.5 The Victoria Police Crime Statistics 2001/2002 record that sexual offences were reported against 436 alleged juvenile offenders in that year, amounting to 12.4% of a total of 3509 alleged offenders.¹²¹² In 2002 the Children's Court finalised 345 non-rape sexual offences and 14 rape offences.¹²¹³

10.6 An evaluation by the Children's Protection Society of clients (aged up to 17 years) referred to its young sex offender therapy program from December 1994 to June 1997 found that 71% were aged between 12-15 years; 94.3% knew their victims; almost half had sexually abused multiple victims; and almost 60% reported some form of penetrative assault.¹²¹⁴ A review of five years of its sexual abuse counselling and prevention program by the Children's Protection Society (CPS) found that of the 534 clients who attended the service one third had been sexually assaulted by a perpetrator aged 18 years or younger.¹²¹⁵

10.7 According to Department of Human Services data, adolescents account for approximately 20% of all recorded sexual offenders.¹²¹⁶ A recent English study of sexual assault of women aged over 16 found that 16% of rape and other assaults

1212 If multiple offences are reported the alleged offender will be recorded on multiple occasions.

1213 Department of Justice, Court Services, *Sexual Offences Finalised in the Children's Court of Victoria for the Period 1999/00–2001/02*.

1214 Children's Protection Society, *Adolescent Sex Offender Treatment Program, Evaluation/Client Profile Report, December 1994–June 1997* (1999) 2.

1215 See above n 1211.

1216 Department of Human Services, *Literature Review, Male Adolescent Sex Offending and Treatment* (1998) 2-4.

were committed by offenders under 19.¹²¹⁷ Among chronic adult sexual offenders, it is estimated that between 50% and 80% committed their first offence as adolescents.¹²¹⁸ International research indicates that between 20% and 40% of sexual abuse of children is perpetrated by people aged under 18.¹²¹⁹ As with other sexual assaults,¹²²⁰ sexual assault by young offenders is a significantly under-reported crime.

10.8 These statistics do not provide an accurate account of sexual offending behaviour by young people because they record only reported offences. The extent of child sexual assault has only recently been recognised. The high proportion of sexual assault perpetrated by young people has been even slower to reach public consciousness.¹²²¹ One of the barriers to ascertaining the extent of juvenile sex offending behaviour is that there is some confusion about what constitutes sexual assault by a child or young person. According to the Victorian Community Council Against Violence there is a 'lack of consistent understanding within the community of normal sexual behaviour for children and young people at various ages'.¹²²² The lack of a clear distinction between 'normal experimentation' and sexually abusive behaviour makes it difficult for parents, teachers, carers and others working with children to know when there is a problem and how to respond to it appropriately. We recommend below¹²²³ that the Department of Human Services should commission research into this issue to enable it to formulate clear guidelines regarding the identification of problematic sexual behaviours in children and young people.

10.9 Even when it is recognised that a young person has sexually assaulted someone¹²²⁴ a large proportion of sexual offences committed by young people are

1217 Home Office Research, Development and Statistics Directorate, *Rape and Sexual Assault of Women: The Extent and Nature of the Problem, Findings from the British Crime Survey Research Study 237* (2002).

1218 Glen Davis and Harold Leitenberg, 'Adolescent Sex Offenders' (1987) 101 (3) *Psychological Bulletin* 417.

1219 Michael L Rourke and Brad Donohue, 'Assessment and Treatment of Juvenile Sex Offenders: An Empirical Review' *Journal of Child Sexual Abuse* Vol 5 (1) (1996) 47.

1220 See above paras 1.5–14.

1221 Simon Hackett and Helen Masson, Mapping and Exploring Services to Young People Who Have Sexually Abused: Literature Review (2001), 11.

1222 Submission 22.

1223 Recommendation 198.

1224 Discussion Paper 21–5.

not reported. The usual reasons for not reporting¹²²⁵ including shame, fear of the repercussions and not understanding what has occurred, may be particularly acute when the victim and the offender are both young people. Adults may minimise the seriousness of the behaviour because they do not know how to deal with it. Sibling sexual abuse presents considerable difficulties for families who must deal with both the victim and the offender. Many parents and family members are reluctant to involve the police or welfare authorities.¹²²⁶ Some will attempt to deal with the problem within the family, which may prevent the offender receiving assistance to change their behaviour and may expose the victim to further abuse.

VICTIMS OF YOUNG OFFENDERS

10.10 Victims of young offenders tend to be several years younger than the abuser. Two thirds of the victims of the abusers in the CPS study were aged nine or younger. Among MAPPs clients¹²²⁷ almost half offended against children aged 10 years or less.¹²²⁸ Studies have found that approximately two-thirds of victims of young offenders are female.¹²²⁹

SIBLING OFFENDERS

10.11 A small but growing body of literature explores the incidence of sibling sexual assault.¹²³⁰ Professionals are becoming aware that some children and young people commit serious sexual offences against their siblings and step-siblings.

10.12 The Children's Protection Society has recently published research indicating a significant increase in the number of sibling sexual abuse cases referred to its sexual offender treatment program. They examined 40 case histories

1225 See Ibid and Interim Report paras 3.6–43.

1226 'Not "Just Play": The Response to Children and Young People who Sexually Abuse' (Unpublished Research Victorian Community Council Against Violence 2002).

1227 The Male Adolescent Program for Positive Sexuality (MAPPs) is a treatment program run by Juvenile Justice for convicted sex offenders between ten and 21. See n 1227 for details.

1228 MAPPs, Offending Profile Statistics for the Year Ended 30 June 2002 (2003).

1229 M E Fromuth, B R Burkhart and C W Jones, 'Hidden Child Molestation: A Investigation of Adolescent Perpetrators in a Nonclinical Sample' (1991) 6 (3) *Journal of Interpersonal Violence* 376–84.

1230 Sue Rayment-McHugh and Ian Nisbet, 'Sibling Incest Offenders as a Subset of Adolescent Sexual Offenders' (Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference convened by the Australian Institute of Criminology, 1–2 May 2003, Adelaide) 3.

and compared young people who had sexually assaulted siblings to non-sibling abusers.¹²³¹ On average, the sibling abusers who commenced at an earlier age¹²³² committed acts of abuse over longer periods of time¹²³³ and perpetrated more serious acts of assault.¹²³⁴ Nearly two-thirds of all sibling offence cases resulted in no police action compared with less than half of non-sibling offence cases. Approximately one third of the non-sibling offending cases proceeded to court¹²³⁵ compared to none of the sibling offending cases.¹²³⁶ There was a greater delay between onset of offending behaviour and referral for treatment for sibling offenders¹²³⁷ than for non-sibling offenders.¹²³⁸

10.13 According to US research, young people who sexually offend against their siblings were found to perpetrate more abusive acts over longer periods of time. There was more likelihood of vaginal and anal penetration and multiple victims when the victims were siblings. Despite the greater seriousness of this behaviour, only one third of sibling offenders in a US study received court-ordered treatment compared to three-quarters of other offenders.¹²³⁹

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- 1231 The average age of reported victims for both groups was around eight years. The gender of reported victims was 2:1 (female to male).
- 1232 The average age that sexually abusive behaviour commenced was 10.6 years for sibling offenders and 11.9 for non-sibling offenders.
- 1233 Sibling offenders were more likely than non-sibling offenders to have sexually abused their primary victims for a period of twelve or more months (6% and 47% respectively).
- 1234 Seventy per cent of the sibling abuse and 50% of non-sibling abuse involved penetration with the average age of victims approximately seven and a half years.
- 1235 N=7: six offenders received a sentence and one made an agreement to attend the Child Protection treatment program.
- 1236 A study by the Griffith Adolescent Forensic Assessment and Treatment Centre of 32 young male sexual offenders participating in a court mandated treatment program compared sibling offenders (n=13) with non-sibling offenders (n=19). They found that the sibling offenders had a significantly higher number of victims; were more likely to have other reported behavioural problems and were assessed as having a higher recidivism risk. Sue Rayment-McHugh and Ian Nisbet, 'Sibling Incest Offenders as a Subset of Adolescent Sexual Offenders' (Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference convened by the Australian Institute of Criminology, 1–2 May 2003, Adelaide), 7.
- 1237 3.1 years.
- 1238 1.5 years.
- 1239 Sue Righthand and Carlann Welch, *Juveniles Who Have Sexually Offended: A Review of the Literature* (2001) 1.

TREATMENT PROGRAMS FOR YOUNG SEXUAL OFFENDERS

10.14 Treatment can lower the rate of recidivism among young sexual offenders.¹²⁴⁰ There are a number of programs in Victoria specifically designed to treat young sexual abusers. Demand for these services is high and there are long waiting lists for some programs. There are limitations on access to programs in much of regional Victoria and there is little provision for specialised responses for young offenders with a cognitive impairment.

10.15 The Children's Protection Society is a non-government organisation that runs an adolescent sex offender treatment program combined with a program for victims of sexual assault and services to families. The program sees voluntary clients and those required to attend by the Children's Court. A precondition to attendance at the treatment program is that the behaviour is reported to the police. Usually the young person will also have to be removed from the home. Young people currently involved in proceedings before the Children's Court will not be seen by the CPS program.¹²⁴¹

10.16 The Australian Childhood Foundation is a charity that runs a program for children between four and 11 who exhibit sexualised behaviours. Children who display sexual behaviour that is unusual for their age, are compulsive and whose behaviour involves coercion, are eligible for the program and are usually referred either by Child Protection or, increasingly, by their parents.¹²⁴²

10.17 MAPPS (Male Adolescent Program for Positive Sexuality) is a program run by Juvenile Justice to provide assessment and treatment for young males who are convicted of sexual offences and receive an order, equivalent to probation or more onerous, from the Children's Court.¹²⁴³ The program works with young people aged between 10 and 21.

10.18 Other than the Australian Children's Foundation program for very young children, each of the dedicated programs¹²⁴⁴ requires at the least that the child or

1240 Anna Grant, *The Historical Development of Treatment for Adolescent Sex Offenders* (2000) 5.

1241 See the Children's Protection Society at <<http://www.cps.org.au/services/index.html>>.

1242 See the Australian Childhood Foundation at <<http://www.aaca.com.au/programs/counselling.asp>>.

1243 The Children's Court has the power to require a child to attend a treatment program pursuant to an undertaking (*Children and Young Persons Act* (1989) ss 137–143) or as a condition of bail (s 159), or as part of a Youth Supervision Order (s 164) or as part of a Youth Attendance Order (s 170).

1244 There are other sources of treatment for sexually abusive children and young people including certain of the State's Centres Against Sexual Assault, which will see some young offenders, usually if they are also victims and primarily those aged under 10.

young person's abusive behaviour has been reported to the police as a precondition of participation. This requirement stems from the therapeutic insistence that abusers accept responsibility for their actions.

10.19 As we have explained above, the proportion of sexually abusive behaviour by children and young people that is reported to police is small. This means that the requirement of a police report before specialised treatment is available severely limits the proportion of young people eligible for treatment. On the other hand, dropout rates from voluntary programs are high. Based on CPS statistics for December 1994 to September 1998, a quarter of the young people who initially agreed to attend the offender treatment program failed to do so and a further 12% withdrew before completion.

CHILD PROTECTION SYSTEM

10.20 Child Protection is a division within the Community Care Division of the Department of Human Services. The Child Protection Service (Child Protection) has an obligation¹²⁴⁵ to investigate any notification that a child may be in need of protection.¹²⁴⁶ The Service screens and investigates allegations of significant harm to children and young people whose parents or guardians are not considered to be 'acting protectively'.

10.21 Our research and discussions with Child Protection have indicated that the typical response to an allegation that a young person has committed a sexual assault focuses on the needs of the victim. Where the victim is outside the

Many families will access the services of private psychiatrists, psychologists or counsellors to deal with an sexually abusive child. Private practitioners practising in this area have varying levels of skill and experience and although in some cases the assistance received will be of a high quality, this will not always be the case.

The Child and Adolescent Mental Health Services (CAMHS) provides treatment services for children and young people who have or are at risk of, serious psychiatric disturbance. CAMHS sees many young people who have engaged in sexually abusive behaviour, either where they are referred to CAMHS specifically because of that behaviour or where they are referred for another reason and the sexual assault is later disclosed. The service is not a specialist provider and individual practitioners have varying skills in this area.

1245 *Children and Young Persons Act 1989* s 66.

1246 *Children and Young Persons Act 1989* s 63 defines a child in need of protection as one who, among other things, '(d) ...has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type; (e) ...has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.'

offender's family or home and where the victim's parents are considered to be acting protectively, Child Protection is likely to do little after the initial assessment. The fact that a young person displays sexually abusive behaviour does not of itself necessarily indicate that the abuser is at risk of harm according to Child Protection guidelines.

10.22 Where Child Protection does not consider there is a child in need of protection and where the police are not called or decline to become involved, there may be no response to the child's offending behaviour unless the child's family voluntarily seeks support.¹²⁴⁷ They may seek out a private practitioner for counselling for the juvenile or involve the child in a treatment program of some type. Access to treatment programs, as discussed above, will often be dependent on a police report being made and even if this criteria does not apply, or is satisfied, program availability is limited in numbers and in geographical coverage.

INADEQUACIES OF THE CURRENT SYSTEM

10.23 Currently neither the criminal justice system or the child protection system responds adequately to young people who sexually assault others.

LIMITATIONS IN THE CRIMINAL JUSTICE RESPONSE

10.24 Even if the young person's behaviour is reported to the police the criminal justice system may be unable to deal with it effectively. According to the Commission's research only one in seven reports involving offences against children result in any charge being laid.¹²⁴⁸ When the alleged perpetrator is under 10 years of age they cannot be prosecuted.¹²⁴⁹ A young person between the age of 10 and 14 is unlikely to be prosecuted.

10.25 In deciding whether to prosecute, first the police and then the Office of Public Prosecutions must determine whether there is evidence on which a prosecution could be based. The duty of the young person's lawyer is to assist

1247 According to our consultations with Child Protection, the Children's Court and MAPPs.

1248 Interim Report para 2.81.

1249 According to the common law, children under 10 years of age are presumed to be incapable of forming criminal intent. Children under 10 years are thus never charged with criminal offences. Children between 10 and 14 years cannot be convicted of a crime unless it can be proven that the child was capable of forming the relevant criminal intent. In practice, police and prosecutors view this presumption as a disincentive to pursue charges against children under 14 years.

their client to avoid conviction. Hence they will often advise the young person not to make any admissions.

10.26 A prosecution is unlikely unless the complainant would be a competent and credible witness. If the complainant is a child who is too young to testify effectively a prosecution is unlikely. When the offender and victim are siblings, the family and the victim child are likely to be reluctant for one sibling to testify against the other. The cumulative effect of these difficulties, as well as the difficulties of proof and the general community perception that sexual assault by children and young people is less serious than sexual assault by adults, results in a small number of prosecutions and a smaller number of convictions in cases of sexual assault by young people.

10.27 It will never be easy to prove sexual assault within the framework of the criminal justice system particularly when the offenders, and therefore in most cases the victims, are children or young people. While some alleged offenders will not have committed alleged offences, the low conviction rate for sexual assault cases means that some young people involved in sexual assault will escape legal responsibility.¹²⁵⁰

10.28 As we described above, many young sexual offenders may not participate in a sexual offenders treatment program unless they are convicted of an offence and ordered to do so by the Children's Court.¹²⁵¹ Research indicates that where young offenders undergo appropriate therapy, recidivism rates are reduced.¹²⁵² The Commission considers that the requirement to participate in a treatment program will often be the most effective way of changing the behaviour of a young person who has committed sexual assault.

1250 Of particular concern, are the high numbers of cases struck out in the Children's Court. In 2001/2, 34.78% of the non-rape sexual offences finalised by the Court (120 cases) were struck out. This means that the young people, against whom there was at least sufficient evidence to commence a proceeding, left the criminal justice process with no finding at all and no consequences for the behaviour of which they were accused. An inconclusive outcome such as this results in many young people escaping all responsibility and receiving no treatment.

1251 See above para 10.19.

1252 Eileen Vizard, Elizabeth Monck and Peter Misch, 'Child and Adolescent Sex Abuse Perpetrators: A Review of the Research Literature' in Ray Bull (ed) *Children and the Law: The Essential Readings* (2001).

LIMITATIONS IN THE CHILD PROTECTION RESPONSE

10.29 Where a child cannot be prosecuted for a sexual offence, the Child Protection system could provide an alternative way of requiring a young person to participate in a treatment program. Children who display sexually abusive behaviour often have life histories involving a range of other difficulties such as parental abuse or neglect, a history of other problem behaviour or a history of difficult peer relationships.¹²⁵³ Where these factors are present and an application is made for a child protection order, the orders¹²⁵⁴ made by the Children's Court include the power to require a person to give an undertaking.¹²⁵⁵

10.30 This power has been interpreted to include the power to make orders mandating attendance at therapeutic programs. As we have discussed,¹²⁵⁶ at present only young people subject to court orders are entitled to participate in some sexual offenders' treatment programs. Court orders requiring children displaying sexually offending behaviour to participate in a program would give them access to treatment which may otherwise be unavailable. However, where the child does not have other problems it is unlikely that a protection application will be made in relation to the offending child.¹²⁵⁷

10.31 At present it is not clear whether section 63 of the *Children and Young Persons' Act 1989* allows the Children's Court to make a child protection order in relation to a child whose 'need for protection' is based solely on the fact that they are sexually abusive. While some judicial members of the Children's Court take the view that section 63(e)¹²⁵⁸ already confers this power, this view is not uniformly held. This limitation could be overcome if section 63 were amended to provide that having committed sexually abusive behaviour may be treated as evidence that the child is in need of protection. Such an amendment would encourage Child Protection to apply to the Court for an order in appropriate cases.

1253 Children's Protection Society, *Sibling Sexual Abuse Prevention Project: A Research Project on the Nature and Characteristics of Sibling Sexual Abuse* (2003) 24–25.

1254 *Children and Young Persons Act 1989* s 84.

1255 *Children and Young Persons Act 1989* s 85.

1256 See above para 10.18.

1257 See above para 10.22.

1258 According to our consultations with the members of the *Court*.

10.32 Some other jurisdictions allow protection orders to be made for young people who engage in sexually abusive behaviour. In New South Wales, for example, the definition of a child at risk of harm is broader¹²⁵⁹ than the Victorian equivalent.¹²⁶⁰ A child between the age of 10 and 14 years who exhibits sexually abusive behaviour is explicitly considered by the legislation as the potential subject of care applications and orders.¹²⁶¹ In New Zealand a child or young person is considered to be in need of care and protection if, among other things, that child or young person is behaving in a way that is harmful to himself or others or (in the case of someone over 10 years but under 14) if the child has committed an offence.¹²⁶²

10.33 The Department of Human Services is currently involved in a review of the Child Protection area and the *Children and Young Persons' Act 1989*. It is therefore an appropriate time to consider whether the legislation should be modified in accordance with our recommendation. It would also be necessary for resources to be allocated to Child Protection to enable it to respond to any consequent increase in the demand for services.

RECOMMENDATION(S)

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

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

1259 *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 23.

1260 *Children and Young Persons Act 1989* s42.

1261 'The Children's Court may make a care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection [among other things]... in the case of a child who is under the age of 14 years, [if] the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service.' *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71.

1262 *Children, Young Persons, And Their Families Act 1989* (NZ), s 14.

IMPROVING THE PROCESS OF DEALING WITH YOUNG OFFENDERS

10.34 As we explain above, only very small numbers of cases of sexual assault by young people are currently being dealt with under either the criminal justice system or the child protection system. The changes we have proposed to the child protection system could result in more young sexual offenders receiving treatment and support. However without other changes the vast majority of young offenders will continue to avoid responsibility for their actions and will therefore be denied access to treatment that may assist in rehabilitation. The needs of victims (including child victims) who are abused by young offenders will also be unacknowledged.

10.35 In this section we refer to some alternative models for dealing with children and young people who are sexual offenders and for bringing them to acknowledge the harm done to their victims. The models discussed below usually involve diversion of young offenders from the criminal justice system. Some models also reflect the philosophy of restorative justice, a term which refers to the practice of involving those connected to a crime¹²⁶³ coming together with the aim of repairing it. One model of restorative justice widely practised in Australia and New Zealand provides for the offender and the victim, or a person representing the victim, to be brought together at a conference coordinated by a skilled facilitator. The purpose of the conference is to allow the offender to admit responsibility for their behaviour and agree to undertake agreed measures to repair the effects of the crime. These approaches may be combined with provision for the offender to participate in a treatment program.

10.36 We recommend the establishment of a Working Group to consider more effective ways of dealing with young sexual offenders. Because the *Children and Young Persons' Act* is currently being reviewed our discussion of this issue is only brief and is intended to suggest possible future directions rather than to put forward a detailed model for reform.

1263 Usually the perpetrator/s and the victim/s and/or their representatives. See Heather Strang and John Braithwaite (ed) *Restorative Justice and Civil Society* (2001) 1–13.

ALTERNATIVE MODELS

NEW ZEALAND

10.37 In New Zealand a child or young person who is alleged to have sexually offended may be dealt with at a family group conference. These conferences are facilitated by a separate unit based at Care and Protection (part of the Department of Youth, Justice and Family). A young person may be referred to a conference in one of three ways:

- They may come to the attention of the Youth, Justice and Family Department if the family contacts a therapeutic service directly and the service reports to the Department pursuant to its policy.¹²⁶⁴ In this situation they may be directly referred to a family group conference.
- A Care and Protection¹²⁶⁵ report may be made and the Care and Protection Unit may refer them to a family group conference.¹²⁶⁶
- The person may be reported to the police and be referred by the police to a family group conference.

10.38 The conference involves members of the alleged offender's family, members or representatives of the victim's family (usually), any professionals involved in the alleged offender's life such as a teacher, social worker or counsellor, a representative from a treatment program and a facilitator. The offender and/or the victim may be present.

10.39 If the victim is present, a range of supports are made available to ensure his/her wellbeing. If the police are the referring agency to the conference, a police member attends and the young person has an advocate present. The conference is governed by legal professional privilege so that what is said there may not be quoted elsewhere or used as evidence in court. The conference commences with an account of the incident¹²⁶⁷ and then the professionals leave the room and the

1264 There is no mandatory reporting in New Zealand. Thus, if an individual contacts a sex offender treatment program and discloses offences the service is not obliged to report it. However, the SAFE program's internal protocol requires it to report any matters that involve victims under 16 years to the Department of Youth, Justice and Family.

1265 A division of the Department of Youth, Justice and Family, the equivalent of Victoria's Child Protection agency.

1266 Pursuant to *Children, Young Persons, And Their Families Act 1989* (NZ), ss 18–35.

1267 If the police referred the child to conference, the conference begins with the formal reading of the charge and an entering of the plea but otherwise the chronology is the same.

families develop a plan with the assistance of the facilitator. Admission of responsibility by the offender is one of the factors which is taken into account in the development of the plan.

10.40 If the matter began with a police report, a plan will only be developed where the young person admits the offences. If he/she does not do so, the matter will be referred immediately to court. When the plan is agreed on it is presented to the professionals. If the families are in agreement regarding the plan, the role of the conferencing agency may then conclude and the plan will be implemented with supervision by the Care and Protection authority. If there is disagreement, the social worker from Care and Protection will have responsibility for developing a plan. If orders are required from the court, these will be part of the plan.

SOUTH AUSTRALIA

10.41 South Australia is the only Australian jurisdiction to use a diversionary process including family conferencing for young people accused of sexual offences. When a police officer charges a young person (aged over 10 and under 18) with a minor offence,¹²⁶⁸ the officer may deal with the matter by informal caution,¹²⁶⁹ formal caution,¹²⁷⁰ referral to family conference¹²⁷¹ or by laying a charge before the court.¹²⁷² The young person may have attended a treatment program for some time before they participate in the Conference.¹²⁷³ The conferencing scheme is run through Juvenile Justice and the Youth Court of South Australia and is coordinated by a member of the Family Conference Team and attended by the police, the young person and his/her support, the victim and his/her representative, and a member of the therapeutic program staff.

1268 A minor offence is any offence alleged to have been committed by a young person and which 'should, in the opinion of the police officer in charge of the investigation, be dealt with as a minor offence because of the limited extent of the harm caused... and the character and antecedents of the alleged offender; and the improbability of...re-offending; and where relevant—the attitude of the...parents...'. *Young Offenders Act 1993 (SA)* s 4.

1269 Section 6.

1270 Sections 7(a) and s 8.

1271 Sections 7(b) and s 9.

1272 Section 7(c).

1273 In the study by Kathleen Daly, Sarah Curtis-Fawley and Brigitte Bouhours, *Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995-2001* (2003), 20% of young people were in the Mary St treatment program in the pre-conference period, 17.

10.42 A recent evaluation of the family conferencing approach¹²⁷⁴ in South Australia found that approximately 31% of the sexual assault cases finalised within the 6½ years of the study were disposed of by conference.¹²⁷⁵ The types of cases proceeding to court originally included more serious charges. However by the time that the court and family conference cases were finalised, the cases were similar in seriousness.¹²⁷⁶ This reflects the fact that many criminal prosecutions for sexual offences are likely to result in the charges being dismissed or withdrawn. Cases that went to conference were resolved more quickly than those that went to court. While all the conference cases involved some form of allocation of responsibility to the accused,¹²⁷⁷ in around half of the sexual offences cases that went to court, the accused was not convicted.¹²⁷⁸

10.43 According to the authors:

the comparison suggests that conferences have the potential to offer victims a greater degree of justice than court. The Young Person's [YP] admission to the offence serves as an important public validation of the harm suffered by the victim, and the conference offers a forum for apology and reparation. For victims whose cases go to court, half will be disappointed (and perhaps angry and disillusioned) when charges are withdrawn or dismissed after lengthy proceedings. On all measure of what YPs have to do for victims (apology), for the community (community service) and for themselves (Mary Street counselling) it appears that conferences outperform court.¹²⁷⁹

10.44 Over half the young people who went to a conference undertook to participate in the Mary Street sex offenders treatment program, compared with 33% of the young people who went to court.¹²⁸⁰ If a young person does not

1274 387 cases comprising all cases involving juvenile offenders with at least one sexual offence charge at the start of the case and finalised in South Australia (by police caution, family conference or in the Youth Court) between 1 January 1995 and 30 June 2001 were studied. Ibid

1275 Compared to 10% finalised by formal caution and 59% finalised in court.

1276 This was the cases after plea negotiation and after processes resulted in attrition of some charges.

1277 At the least, participation in the conference requires an admission by the accused and requires him to sit at the table, listen to an account of the offending behaviour and assist to develop a response plan.

1278 The more serious the offence, the less likely it was to be proved.

1279 Kathleen Daly, Sarah Curtis-Fawley and Brigitte Bouhours, *Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995-2001* (2003).

1280 Approximately 33% of the offenders convicted in court were ordered to attend Mary Street counselling compared to 53% of the young people whose cases were admitted at conference.

comply with a requirement of a family conference the police have the power to lay a charge before the Court for the original offence referred to the conference.¹²⁸¹

CHILDREN'S COURT CONFERENCING IN VICTORIA

10.45 Although conferencing is available in the Children's Court, it is only available as a pre-sentence option, after the young person or child has been charged and the offence has been found to have been proved. It is not currently available to young people or children who have been convicted of sexual offences. In theory the program could be extended to cover young people who commit these offences. However its link with the pre-sentencing process may limit its usefulness in dealing with alleged sexual offenders because so few of them are charged and convicted.

10.46 The Juvenile Justice Group Conferencing project was first piloted in 1995. The program is operated in Melbourne by Jesuit Social Services, and other agencies¹²⁸² are currently contracted to run pilot conferencing programs in Gippsland and Hume. The conference is attended by the young person, their family representatives, a police officer and the young person's lawyer and is convened by a member of the service provider agency. The victim or their representative may also attend. The participants in the conference discuss the offending behaviour and develop a plan which includes agreements about ways of dealing with the offence such as apology and/or paying for damage as well as assistance for the offender such as counselling and education. The plan is then reported by the convenor to the court and the judicial member takes it into account in sentencing.

OPTIONS FOR CHANGE

10.47 An intervention program for young sexual offenders could:

- extend the existing diversion program in the Children's Court;
- provide multiple pathways into treatment; and
- include a conferencing component.

1281 *Young Offenders Act 1993* (SA) s 12 (8)(b).

1282 Anglicare in Gippsland and Brayton Youth and Family Services in Hume.

CHILDREN'S COURT PROGRAM

10.48 A diversionary program for sexual offences committed by young offenders could be established as an extension of the current diversionary program run by the Children's Court. The existing expertise and processes developed within the conferencing program could provide a framework for sexual offences conferences. The outcome plans developed within the family group conference could include arrangements for offenders to attend therapeutic programs.

10.49 The disadvantage of this approach is that it would only apply to children and young people who had been charged with, and convicted of, an offence. An extension of the existing program is unlikely to result in a significant number of young sexual offenders taking responsibility for their actions and receiving appropriate treatment.

MULTIPLE PATHWAYS INTO THE SYSTEM

10.50 The New Zealand model has the advantage of providing a number of pathways into treatment for young sexual offenders. The Commission believes that this is an important aspect of the system. These pathways could include orders made in either the criminal or protective divisions of the Children's Court and a voluntary program with provision for referral by a range of agencies.

10.51 We have recommended that section 63 of the *Children and Young Persons' Act 1989* should be amended to allow a protection application to be made for young people who engage in sexually abusive behaviour. This could be combined with the establishment of a specialist unit within the Department of Human Services to deal with young people against whom sexual offence allegations have been made. This unit could handle matters referred to it by the Child Protection Service, those referred by the police and those directly referred, for example, as the result of an approach by someone connected to the young person.

10.52 In New Zealand this model provides a way into family group conferencing. We are aware that any discussion of the application of family group conferencing to sexual assault cases is very controversial. Some academics and victims' groups consider that the only appropriate response to sexual assault is to prosecute the offender through the criminal justice system.¹²⁸³ They consider that

1283 See an overview of these concerns in Kathleen Daly, Sarah Curtis-Fawley, Bridgitte Bouhours et al, *South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing: Technical*

to advocate any alternative approach sends a message both to offenders and to victim/survivors that the crime of sexual assault is in some way less serious than other crimes.¹²⁸⁴ However Daly's evaluation of the South Australian conferencing process suggests that it has many positive features for victims and may be effective in holding accountable young people who would never have been prosecuted or convicted.¹²⁸⁵ In our view this model requires further investigation and assessment. We therefore recommend the establishment of a joint working party, including representatives of both the Children's Court and the Department of Human Services, to examine these issues.

! RECOMMENDATION(S)

197. The Department of Human Services should commission appropriate research to enable it to develop guidelines for the identification of problematic sexual behaviours in children and young people.
198. The Department of Human Services and the Children's Court should establish a working group, including representation from Victoria Police, to develop a wider range of options for responding to children and young people who have been involved in sexually abusive behaviour and to increase the numbers of young people held to account for this conduct.
199. Options to consider include:
- expansion of existing treatment programs; and
 - introduction of a conferencing process, along the lines of the model which applies in South Australia.

Report No 3: Archival Study of Sexual Offence Cases Disposed in Youth Court and by Conference and Formal Caution (2003) 5–7.

1284 Ibid 7.

1285 Kathleen Daly and Hennessey Hayes, *Restorative Justice and Conferencing in Australia* (2001). See also Kathleen Daly, Sarah Curtis-Fawley and Brigitte Bouhours, *Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995-2001* (2003); Kathleen Daly, Sarah Curtis-Fawley, Bridgitte Bouhours et al, *South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing: Technical Report No 3: Archival Study of Sexual Offence Cases Disposed in Youth Court and by Conference and Formal Caution* (2003); Kathleen Daly, 'Diversionary Conferences in Australia: A Reply to the Optimists and Skeptics' (Paper presented at the American Society of Criminology Annual Meeting, Chicago, 20-23 November 1996).

**RECOMMENDATION(S)**

200. In developing a wider range of responses to young people who have committed sexually abusive acts, the Working Group should consider:
- the respective roles which the Children’s Court and Department of Human Services should play in overseeing the process;
 - the criteria which should determine eligibility to participate in the program and the body which should be responsible for applying those criteria;
 - the body which should be responsible for overseeing compliance with the program;
 - mechanisms to ensure the appropriate representation of victims’ interests within the program; and
 - mechanisms for independent evaluation of the program.
201. Options for dealing with sexually abusive young people should provide for referral from a variety of sources including Victoria Police, the Child Protection Service and other agencies.

