



Victorian  
Law Reform  
Commission

**Sexual Offences**  
Implementation Report

**Victorian Law Reform Commission**

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## Introduction

In August 2004, the Victorian Law Reform Commission launched the *Sexual Offences Law and Procedure: Final Report*, making 201 recommendations for changes to the law and legal procedure to make the criminal justice system more responsive to the needs of complainants in sexual offences cases.

The commission's recommendations focus on:

- improving the police response (Chapter 2)
- increasing the response of the criminal justice system (Chapter 3)
- making it easier for complainants to give evidence (Chapter 4)
- improving the system for children (Chapter 5) and people who have a cognitive impairment (Chapter 6)
- changes to directions given to juries by judges (Chapter 7)
- changes to the legal requirement for proof of the state of mind of the accused in rape cases (Chapter 8)
- how to deal with juvenile sexual offenders (Chapter 9).

## Summary



The Victorian Government has been quick to implement many of the legislative reforms. This program has been divided into three stages. The first lot of amendments put into effect the recommendations about children and people with a cognitive impairment, the second stage focuses on adult complainants and the third makes changes to the 'mental element' in rape cases.

Other initiatives are being implemented under the Department of Justice's sexual assault reform package, including:

- establishment of multidisciplinary centres by Victoria Police
- introduction of sexual assault forensic nurses
- introduction of specialist sex offences lists in the Magistrates' and County Courts
- introduction of specialist prosecutors
- establishment of a child witness service
- establishment of a treatment program for 15–18 year olds
- introduction of a Victims' Charter.

The Department of Human Services is responsible for:

- improved counselling and crisis care services for victims of sexual assault
- treatment programs for children aged under 10 who exhibit sexualised behaviours.

## Legislative Reforms

### Crimes (Sexual Offences) Act 2005

On 16 November 2005, the Crimes (Sexual Offences) Bill was introduced into Parliament. In his Second Reading Speech, the Attorney-General, Rob Hulls, said:

This Bill implements the majority of the legislative recommendations put forward by the commission and represents one component of a broader policy initiative to make the criminal justice system respond to sexual assault in a fairer way and in a way that does not re-traumatise victims.

The Bill received endorsement in parliament from all parties, with representatives from the ALP, Liberal and National parties expressing support for all measures. During the 7 February 2006 parliamentary debate, Mr Andrew McIntosh, MLA, said the legislation represented an 'an appropriate balancing of the rights of the accused against the rights of witnesses in the circumstances', and that the opposition welcomed the amendments.

The *Crimes (Sexual Offences) Act 2005* amends the *Crimes Act 1958*, the *Magistrates' Court Act 1989*, the *Crimes (Criminal Trials) Act 1999* and the *Evidence Act 1958*. It implements the commission's legislative recommendations about children and people with a cognitive impairment, including provisions intended to protect them from sexual assault, to improve their experience as complainants, and to amend the rules of evidence to strike a better balance between the rights of complainants and accused people in criminal prosecutions for sexual offences. The amendments to the Evidence Act and the Magistrates' Court Act came into force on 9 March 2006, and those to the Crimes Act and the Crimes (Criminal Trials) Act on 1 December 2006.

### Guiding Principles

The commission recommended that principles be incorporated into the Crimes Act to guide interpretation of the law on sexual offences (Rec 194). Section 37B specifies that courts should have regard to the following principles when dealing with sexual assault offences, recognising that:

- there is a high incidence of sexual violence within society
- sexual offences are significantly under-reported
- a significant number of sexual offences are committed against women, children and other vulnerable people, including people with a cognitive impairment
- sexual offenders are commonly known to their victims
- sexual offences occur in circumstances where there is unlikely to be any physical signs of the offence.

### New Offences

The commission recommended changes to some sexual offences:

- create a new offence of compelling sexual penetration (s 38A)
- expand the offence of rape to include the situation where a person compels another person to penetrate the offender, irrespective of consent (s 38(3))
- create a new offence of intra-familial sexual penetration to replace the existing offence of incest and ensure that a person who is compelled to take part in this offence is not guilty of the offence (s 44(6))

- make clear that in the offence of sexual penetration of a child aged under 16 and over 10, the prosecution bears the onus of proving lack of consent
- change the offence of sexual relationship with a child under 16 to persistent sexual abuse of a child under 16, and identify a non-exhaustive list of the sorts of relationships which are covered, including teachers, foster parents, guardians, ministers, employers, youth workers, sports coaches, counsellors, health professionals and police (s 48(2))
- incorporate a new definition of 'cognitive impairment' to replace 'impaired mental functioning', including impairment because of mental illness, intellectual disability, dementia or brain injury (s 50(1))
- create a broader offence of sexual acts between providers of medical or therapeutic services and people with a cognitive impairment, irrespective of whether the services are related to the impairment
- create a broader offence of sexual conduct by workers at facilities delivering educational and development needs to people with a cognitive impairment (s 52)
- expand the offence of procuring a child aged under 16 to take part in an act of sexual penetration or an indecent act, or under 18 years if in a relationship of care, supervision or authority (s 58), and ensure this offence includes procuring via the internet and telecommunications.

## Making it Easier for Complainants to Give Evidence

### Child Complainants, Complainants with Cognitive Impairment

The commission recommended a new definition of cognitive impairment be incorporated into legislation to cover people with mental illness, intellectual disability, dementia or brain injury.

The commission also recommended that all witnesses, regardless of age, should be presumed to be competent to give sworn evidence. The test for competence on oath should be that witnesses understand they are to give truthful evidence. If this cannot be established, the commission recommended that witnesses should be allowed to give unsworn evidence, as long as they understand the questions and can give intelligible answers. The commission pointed out that if witnesses are not competent to give a comprehensible answer to one question, they may be able to testify about another fact (Recs 132–35).

Section 23 of the Evidence Act has been amended to implement these recommendations. The court must explain to children or people with a cognitive impairment who are considered competent to give evidence, the importance of telling the truth, that they may not be able to answer a question, and that they should feel free to disagree with statements put during cross-examination.

The commission recommended that all complainants in sexual offence trials have the right to give evidence away from the courtroom via closed-circuit television (CCTV), or within the courtroom using screens to remove the accused from their direct line of vision (Recs 59–63). If it was not possible to implement such procedures for all complainants, priority should be given to children and people with a cognitive impairment (Rec 65).

A new division 3AA Examination and Cross-Examination of Certain Witnesses has been inserted into the Evidence Act. This creates a presumption that all children and people with a cognitive impairment who are complainants in sexual offences cases give evidence via CCTV. These arrangements must be used, unless complainants are aware of their right but wish to give direct testimony.

The commission's recommendation that children and complainants with a cognitive impairment be entitled to have a support person beside them when giving evidence (whether or not they use CCTV) has also been implemented.

There is a prohibition against improper questioning of children and complainants who have a cognitive impairment during cross-examination, including questions which are confusing or misleading, inappropriately phrased, annoying, harassing, intimidating, offensive, oppressive or unduly repetitive (Rec 143).

### **Hearsay Statements**

The commission recommended that hearsay statements made by children which are relevant to the facts in sexual offences cases be admissible as evidence. Under section 41D of the Evidence Act, the hearsay evidence of children aged under 17 is now admissible to support their credibility as complainants in sexual offences cases, if they are available to give evidence and the evidence is considered to be sufficiently relevant to the facts in the case.

### **Counselling Communications**

The commission recommended that confidential communications between counsellors and their clients should not be admissible as evidence in sexual offences cases and a person should not be required to produce such documents, except with the leave of the court (Recs 76–81). Section 32C(1) of the Evidence Act has now been amended to specify that when considering whether to grant leave, the court must take into account issues such as whether the document is substantially relevant, whether other evidence is available, and the public interest in preserving confidentiality (Rec 78).

### **Prior Sexual History**

The commission recommended that cross-examination of the complainant about prior sexual experience or activity (whether consensual or non-consensual), or lack of sexual experience or activity, should be prohibited, unless the court determines that this evidence is of substantial relevance (Recs 69–73).

Under section 37A(1) of the Evidence Act, when making a decision about the relevance of evidence of prior sexual history, the court must take into account a number of issues:

- whether the relevance of the evidence outweighs the distress, humiliation and embarrassment the complainant may experience
- the risk that such evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury
- the need to respect the complainant's personal dignity and privacy
- the right of the accused to answer a charge.

### **Cross-examination by the Accused**

The commission recommended the accused not be allowed to cross-examine the complainant or other specific witnesses personally. Defendants should be advised that they must have legal representation, and if they refuse Victoria Legal Aid should provide legal assistance (Recs 94–102).

The new section 37CA of the Evidence Act now creates the category of 'protected witness', which includes the complainant, a family member (including a spouse or ex-spouse, partner or ex-partner, parents, step-parents, children, guardian or a member of the household) or anyone else declared by the court. The accused is prohibited from cross-examining a protected witness. If the accused does not have a lawyer, and refuses to get one, the court must order Victoria Legal Aid to provide representation.

## Jury Warning on Consent

The commission recommended that the mandatory direction by the judge to the jury on consent should be amended to state:

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

This recommendation has been incorporated into section 37(1)(a) of the Crimes Act.

## Crimes (Sexual Offences) (Further Amendment) Act 2006

The second stage of legislative reforms are being introduced under the *Crimes (Sexual Offences) (Further Amendment) Act 2006*. The Act amends the Crimes Act, the Evidence Act and the Magistrates' Court Act. The amendments to the Evidence Act come into operation immediately and all remaining provisions by 1 December 2006.

### Making it Easier for Complainants to Give Evidence

The commission recommended that all complainants in sexual offences trials should have the right to give evidence via CCTV and that every effort should be made to install CCTV facilities in courts (Recs 59–63). Where CCTV facilities are not used, screens should be installed to remove the defendant from the complainant's direct line of vision (Recs 64–5).

These recommendations are being implemented under section 37CAA of the Evidence Act. There is now a presumption that all complainants in sexual offences trials will give evidence via CCTV, unless the court is satisfied that they are aware of their right and are able and wish to give evidence in the courtroom. There is a reverse onus on the prosecution to apply for evidence to be given in the courtroom. Complainants will have the right to have someone beside them when they give evidence, whether they are inside or outside the courtroom.

### Jury Warnings on Delay in Reporting

The commission recommended that judges' warnings to juries concerning delay in reporting sexual offences (known as the Longman warning) should be clarified. Under amendments to section 61(1)(b) of the Crimes Act, if evidence is provided which suggests there was a delay in reporting, a judge must tell a jury that there may be good reasons why a victim may delay reporting sexual assault and must not suggest that the credibility of the complainant is in any way affected by the delay, unless the judge is satisfied there is sufficient evidence to support such a warning. The judge must not warn or suggest to a jury that it would be dangerous or unsafe to find the accused guilty because of the delay.

## Non-legislative Reforms

### Police Response to Complainants

The commission recommended improvements in police responses to complainants in sexual offence cases, including the provision of specialist information for people from culturally and linguistically diverse and Indigenous communities (Recs 9–10), and the enhancement and development of training for members of sexual offences and child abuse units and criminal investigation units on sexual assault. This training should be conducted in collaboration with centres against sexual assault and consultants from non-English speaking backgrounds and Indigenous community organisations (Recs 11–15).

Victoria Police has been funded to establish one-stop multidisciplinary sexual assault centres at Frankston and Mildura Magistrates' Courts, incorporating justice and human service facilities for victims. Specialist police investigation units, forensic, crisis and victim support services are located together, to minimise the impact on complainants of giving evidence. In addition, a multidisciplinary team incorporating forensic, counselling and community workers, including specialist services for people from culturally and linguistically diverse and Indigenous communities, and independent third parties for people with cognitive impairment will be established by early 2007.

### Case Management

The commission recommended the Magistrates' Court establish a separate list for sexual offences cases which involve child complainants and complainants with a cognitive impairment. It said that, subject to evaluation of these processes, the court should consider establishing a separate list for all sexual offence cases (Recs 53–57). On 7 April 2006, the Magistrates' Court began a pilot sexual offences management list at the Melbourne Magistrates Court, where all matters involving one or more sexual offences are listed. The Sexual Offences List has subsequently been established permanently (Magistrates' Court Act s 4R).

The commission also recommended a designated judge be assigned in the County Court to list and manage all sexual assault cases involving child complainants, with an evaluation of the effect of this case management system on delays and plea rates (Recs 50–52). A specialist sexual offences list began on 1 October 2005, coordinated by Judge Meryl Sexton. It is intended to make the trial process more efficient and responsive to the needs of all participants, with a particular focus on the needs of complainants, especially vulnerable witnesses. The case management system focuses on pre-trial processes, particularly delays and interruptions to the trial.

### Forensic Services

The commission recommended that additional training be provided to recruit forensic officers and sexual assault doctors, especially for regional locations (Rec 26). The Victorian Institute of Forensic Medicine is establishing a clinical nursing framework to recruit nurses in rural and metropolitan areas to provide specialist education, clinical training, professional development and support. A one-year Graduate Certificate in Nursing (Forensic) is now being offered by the institute and Monash University, which all forensic nurses will be required to complete.

### Child Witness Service

The commission recommended the establishment of an independent specialist witness service to support child witnesses and their carers in metropolitan, rural and regional areas (Recs 105–12). In September 2006, the Victorian Government

announced it had established the first Child Witness Service, based in metropolitan Melbourne.

The child witness program is being coordinated by the Courts and Programs Development Unit in the Department of Justice. The government has allocated \$3.2 million over four years to support children and their carers and liaise with police, prosecutors and court staff during trials in the Magistrates' and County Courts. The service will also provide education and information before and after trials.

### **Counselling and Crisis Care for Sexual Assault Victims**

The Department of Human Services is also improving counselling services to assist victims of sexual assault and expanded crisis care responses for children and adults, particularly in rural areas which are not well serviced.

### **Court Facilities**

From May 2006, as part of an integrated courts management system to upgrade technology in courts, upgraded video conferencing equipment is being installed in County Courts across Victoria to facilitate complainant evidence in sexual offences cases.

### **Programs for Young People**

The commission recommended the Department of Human Services and the Children's Court work towards developing a wider range of options for responding to children and young people who have displayed sexually abusive behaviour, including the possibility of expanded treatment programs and conferencing processes (Recs 198–201).

The newly established Courts and Programs Development Unit, within the Department of Justice, has responsibility for implementing a prevention and early intervention program for 15–18 year olds, including research and evaluation.

The Department of Human Services is also developing programs for children aged under 10 who exhibit sexualised behaviours, focusing on early identification and treatment.

### **Training of Prosecutors**

The commission recommended the Office of Public Prosecutions (OPP) continue to offer training to increase prosecutors' understanding of the issues for complainants in sexual offences cases, particularly when giving evidence, and ways to assist and support complainants as witnesses. Training should include contributions from centres against sexual assault, and non-English speaking background and Indigenous community organisations with expertise in providing culturally-appropriate responses. The commission recommended that prosecutors from the bar should only be briefed to appear in sexual offences cases if they have participated in OPP training (Recs 37–39).

The OPP has a sexual offences section which it will develop to manage a single program of specialist prosecutors for sexual offences cases in the Melbourne County Court.

### **Judicial Training**

The commission recommended the Judicial College of Victoria continue to offer regular programs for judges and magistrates designed to facilitate discussion of issues which commonly arise in sexual offences cases, particularly judicial discretion in dealing with child witnesses and witnesses with a cognitive impairment, intervention during cross-examination, and jury warnings (Rec 40).

The Judicial College will be coordinating a project to develop a sexual assault manual and education framework to assist judicial officers, court staff, prosecution and defence counsel and solicitors.

### **Victims' Charter**

While it was not one of the commission's specific recommendations, the Victims' Charter closely reflects the sentiment of the sexual offences report. The charter, established under the *Victims' Charter Act 2006*, provides a framework for the delivery of services by agencies, including police, courts and other government services, to improve the experience of victims of the criminal justice process. The charter affirms the need for victims to have access to information and support and to minimise the experience of trauma in the criminal justice process. Police, the OPP and courts will receive training in the principles of the charter.

### **Governance**

The newly established Courts and Programs Development Unit is responsible for monitoring and coordinating implementation of sexual assault initiatives and for measuring success of the reforms. The unit will be responsible for the development of ongoing research projects.