

Issues Paper B

Sexual Offences: Key Issues in the Criminal Justice System



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Introduction

- 1 This paper is for:
 - people who work in, or have experience of, the criminal justice system in relation to sexual harm
 - counsellors, intermediaries, and others who support or work with those who have experienced sexual harm
 - researchers and others interested in the subject.
- 2 We also encourage people who have experienced sexual harm, and those who have supported them, to answer any questions in this paper that interest them.
- 3 There have been many reforms to improve the response of the criminal justice system to sexual harm. These have tried to address key issues such as:
 - improving the understanding of sexual harm and attitudes to people who have been harmed
 - reducing delay
 - improving support for people who have experienced sexual harm.
- 4 In this paper, the Victorian Law Reform Commission asks how well the criminal justice system is responding to sexual harm, and what else should be done about these key issues. We also ask for your views on specialist courts and alternatives to jury trials.

Issues Paper B is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

Attitudes and understanding

- 5 In 2004, in an inquiry into sexual offences, we made recommendations to improve attitudes to people who have experienced sexual harm and the understanding of sexual harm in the criminal justice system.¹ Recommendations included:
- further education and training
 - specialised roles for police and the prosecution
 - allowing expert evidence in trials about the context and patterns of sexual harm
 - jury directions to counter misconceptions about sexual offences.
- 6 The recommendations, and other important work on sexual offences, led to reforms that aimed to ensure people in the system dealt with sexual harm in the right way. For example, training and guidance was developed for police, to counter misconceptions about sexual harm.²
- 7 There have been signs of positive change since the reforms. A 2011 evaluation found a change in culture of those within the criminal justice system. The experience of victim survivors in the criminal justice system had also improved.³
- 8 But more may still need to be done. For example, some research suggests that expert evidence could be used more often in sexual offence trials in Australia.⁴
- 9 We want to hear if there is still a need to improve the attitudes and understanding of those within the criminal justice system and, if so, how.
- 10 Other possible reforms might include:
- requiring judges who sit on sexual offence cases to have training, as happens in the United Kingdom⁵ (this could also apply to lawyers)
 - providing more information to jurors (for example, video briefings for jurors on the context and patterns of sexual harm)
 - making training more available, more comprehensive or more regular.
- 11 We discuss next other possible reforms, including introducing a specialist sexual offences court and alternatives to jury trials.
- 12 Jury directions are discussed in Issues Paper E.

Question

- 1 Is there a need to improve attitudes towards victim survivors or the understanding of sexual harm within the criminal justice system? If so, how?

You might think about:

- how to improve the attitudes and knowledge of jurors
- how to improve the attitudes and knowledge of police, lawyers and judges, including in appeal courts.

A specialist sexual offences court

- 13 In Victoria, most courts have specialist lists to deal with sexual offences. Another possible reform would be to create a specialist court that deals only with sexual offences and has its own rules and procedures.⁶
- 14 New Zealand recently piloted a specialist sexual offences court.⁷ Such a court has also been established in South Africa.

New Zealand specialist sexual offences pilot

The key features of this pilot were:

- judges and prosecution and defence lawyers were trained about sexual harm and the experience of complainants in court
- court processes were based on best practice guidelines for sexual offence cases
- case managers proactively dealt with potential issues of delay.⁸

An evaluation in 2019 found that there was widespread support for a national rollout of the pilot. It found that cases progressed more quickly, with fewer adjournments and a decrease of 134 days in the average time that cases took.

It also found that the quality of case review hearings and trials had improved, with judges intervening more often to prevent unacceptable questioning of witnesses. Better case management also led to more and earlier guilty pleas. The evaluation noted that the quality and role of the case managers was critical to the success of the pilot.

However, there were concerns about workload pressures for judges and counsel because of the preparation needed for case review hearings. The evaluation also identified 'burn out' among staff as a risk.⁹

- 15 Specialist courts are related to 'problem-solving courts', which aim to address the underlying problems of people who commit offences.

New York Sex Offense Court

The New York Sex Offense Court is a problem-solving court. The key features of the court are:

- a dedicated judge to handle each case
- judicial monitoring of people convicted of sexual offences
- collaboration with probation and parole agencies
- training of judges and non-legal staff
- sex offender treatment programs
- access to services for people who have experienced sexual harm.¹⁰

The benefits of this court are said to be less trauma for people who have experienced sexual harm (because of better case management) and positive effects on people who have been convicted of a sexual offence.¹¹

We are not aware of any evaluations of this court.

- 16 A specialist court could be staffed by trained judges, lawyers and others providing support. This could improve decision making through specialisation, and be more efficient.¹²
- 17 However, there are challenges with specialist courts. It may be hard to keep or attract judges to such a court because of its subject matter, and it may reduce the flexibility of courts to manage their cases.¹³

Questions

- 2 Do you support introducing a specialist court for sexual offences? Why or why not?
- 3 If you support introducing a specialist court for sexual offences, what features should it have?

You might think about:

- the value of a specialist court compared to specialist lists
- the features of a specialist court
- how to address the challenges of attracting and keeping judges.

Alternatives to jury trials

- 18 Research on jury trials for sexual offences raises two areas of concern. Jurors bring their own attitudes and understanding about sexual harm into the courtroom. This may include common misconceptions about sexual harm.¹⁴ Some studies suggest that jurors are more influenced by their own attitudes about rape than by the evidence presented at trial.¹⁵
- 19 Another concern is that the presence of a jury may be harmful for complainants.¹⁶ It can be difficult to give evidence in front of a group of people, especially in small communities where the complainant and jurors might cross paths.¹⁷ The need to persuade a jury may also lead to more intense questioning of the complainant than is needed to test the evidence.¹⁸
- 20 Two alternatives to jury trials have been suggested: professional jurors (see box) or trial by judge alone.

Professional jurors

The New Zealand Law Commission (NZLC) considered a model of semi-professional or professional jurors for sexual offences. In this model, a panel of a judge and jurors would decide the case. The jurors would have an understanding of sexual harm, either because of their work experience or because they had been trained to sit on sexual offence trials.

The model the NZLC considered was based on models in Austria, Germany and Denmark where judges sat with lay jurors on criminal cases.

The jurors would sit together with the judge on the bench. They would also receive a copy of the case dossier before trial. They would deliberate together. The NZLC noted that the jurors' role could be to advise the judge, or they could have independent voting power, as was the case in Germany.

The NZLC concluded there was value in giving the decision-making function in sexual offence trials to a body other than a jury. They recommended that the issue be considered as part of the evaluation of the specialist sexual offence court (discussed above).¹⁹

- 21 The NZLC also considered judge-alone trials as an alternative. Recently in Victoria, judge-alone trials were introduced for a six-month period due to coronavirus (COVID-19) restrictions.²⁰ However, this option has not been used often.²¹
- 22 Judge-alone trials could avoid the concern that jurors bring misconceptions about sexual harm, and could reduce the risk of appeals based on errors in jury directions. They might also be more efficient.²² Publishing reasons for decisions would make the process transparent. This could strengthen the confidence of the community and professionals in the outcomes of the trial.²³ The process may also be fairer to the accused, by reducing the influence of stereotypes.²⁴
- 23 On the other hand, juries are an important feature of the criminal justice system. They represent the community and their values. They are a check on potential abuses of power. Removing juries could undermine trust in the criminal justice system,²⁵ and the right to a fair trial.²⁶ There is also research that indicates that jurors take their task seriously and any misconceptions they bring are moderated by the jury process.²⁷
- 24 We want to hear your ideas about the strengths and weaknesses of jury trials for sexual offences, and if you support other decision-making models.

Question

- 4 Do you support changing the role or nature of the jury in trials for sexual offences? Why or why not?

You might think about:

- ways of educating juries in sexual offence cases
- the strengths and weaknesses of the model considered in New Zealand
- why judge-alone trials have not been used often.

Delay

- 25 In our Sexual Offences inquiry in 2004, a key issue was the effect of delay on complainants. Delay makes it difficult for complainants to move on with their lives and is likely to affect the quality of their evidence.
- 26 Some delay cannot be avoided. However, the Commission found there were delays that could be avoided, especially in the time taken to get the results of DNA tests and during the committal process.²⁸
- 27 There are some challenges in getting a full picture of how quickly cases progress through the justice system, due to data limitations (see Issues Paper A).²⁹ Sexual offences, however, typically take much longer than other cases to be resolved.³⁰
- 28 Reforms have tried to address delay for sexual offences, including by:
- providing shorter time frames for committal proceedings³¹
 - improving case management and establishing specialist lists³²
 - setting time limits for starting trials.³³
- 29 We have also recently made recommendations to reduce pre-trial delay during the committals process.³⁴ These recommendations have not yet been implemented.
- 30 We want to hear if there are still delays that can be avoided or reduced, and if so how.

Question

- 5 How well are reforms working to avoid delays in the criminal justice process, and what other reforms could address delay?

You might think about:

- where you still see delays
- if certain cases, such as those with child complainants, should be given higher priority
- the timeframes you think are achievable or appropriate.

Support for people who have experienced sexual harm

31 In Victoria there are support programs for victims of crime (see Table 1). Some of these give priority to people who have experienced sexual harm. There are special rules for complainants, such as for giving evidence. These are discussed in Issues Paper E.

Table 1: Supports for victims of crime and people who have experienced sexual harm

| Program | Target group | About the service |
|---|--|--|
| Intermediaries | Children (under the age of 18) or any person with a cognitive impairment. | An intermediary is an officer of the court who helps the court to communicate in the best way with the complainant. ³⁵ This pilot scheme was funded until June 2020. ³⁶ |
| Child Witness Service | Children (under the age of 18) | This service prepares complainants and witnesses for their role, including by familiarising them with the court process and staff, supporting them and their family, and referring them to community agencies. |
| Victims Support Agency, Department of Justice and Community Safety | Eligible victims | The agency runs the Victims of Crime Helpline and funds the Victims Assistance Program across the state to support victims, including through counselling and referrals to other services. |
| Victims and Witness Assistance Service, Office of Public Prosecutions | Adult victims, with priority to victims in sexual offence and family violence matters, and others who need more support. | This service supports victims through the process of giving evidence, including by giving them information about how courts work and providing practical support. |
| Court Network | Victims, accused persons, witnesses and their families and friends | Trained volunteers provide information, support and referral within courts across Melbourne and regional Victoria. |
| Translation and interpretation services | All victims | Victorian courts provide translation and professional interpreter services on request. |

32 We recently recommended extending the intermediaries scheme to all witnesses with communication difficulties.³⁷ In another recent inquiry, we recommended a pilot legal service for victims of violent serious crimes.³⁸ The service would advise victims on their rights during a legal process, such as how to respond to applications for confidential medical or counselling records.³⁹ These recommendations have not yet been implemented.

33 Another model would be a program that advocates for people who have experienced sexual harm and helps them navigate their way through the legal process. The United Kingdom has a program of this kind (see box).

- 34 We want to hear how well existing programs support people who have experienced sexual harm, and how this support can be improved. We are interested in hearing how well support services respond to the diverse needs of people who have experienced sexual harm, including those who face greater barriers in accessing justice.
- 35 We also want your views on any challenges these programs are currently facing. For example, in the intermediary pilot scheme, intermediary notes have become the subject of litigation.

Independent Sexual Violence Advisors in the United Kingdom

A person who has experienced sexual harm can get support from an advisor before reporting the harm to the police, and this support extends after the court process. The advisor's role is broad, and includes advocating, educating, liaising and supporting people who have experienced sexual harm.⁴⁰ For example, advisors can liaise with police, and deal with housing issues.

Advisors empower a person to make informed decisions about what to do. They address issues that could cause people who have experienced sexual harm to disengage from support services during the criminal justice process. They also support people in communicating with their families and mending relationships.⁴¹

Question

- 6 How well are support programs for people who have experienced sexual harm working? How can they be improved?

You might think about:

- the intermediary pilot scheme
- witness support services
- the availability of inclusive support, such as translation and interpreter services
- new initiatives, such as an independent sexual harm advisor.

Other issues

- 36 We want to hear if there are other key issues that affect the criminal justice process as a whole, and what should be done to address them. Issues specific to stages of the criminal justice process are discussed in Issues Papers C–E.

Question

- 7 What other issues affect the criminal justice process as a whole, and what should be done to address them?

Endnotes

- 1 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
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- 3 Success Works, Department of Justice (Vic), *Sexual Assault Reform Strategy* (Final Evaluation Report, 2011) iii <<https://trove.nla.gov.au/version/169811763>>.
- 4 Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) *University of New South Wales Law Journal* 707, 732.
- 5 JUSTICE (UK), *Prosecuting Sexual Offences* (Report, 2019) 60–1 <<https://justice.org.uk/wp-content/uploads/2019/06/Prosecuting-Sexual-Offences-Report.pdf>>.
- 6 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) 91 <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.
- 7 Office of the Chief District Court Judge, 'District Courts to Pilot Sexual Violence Court', *The District Court of New Zealand* (Web Page, 20 October 2016) <<https://www.districtcourts.govt.nz/assets/Uploads/827ea2faec/Statement-from-the-Chief-District-Court-Judge-Pilot-SV-Court-.pdf>>.
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- 9 Ibid.
- 10 Patrick Parkinson, 'Specialist Prosecution Units and Courts: A Review of the Literature' (Research Paper No 16/26, Law School, The University of Sydney, 2016) 17–18 <<https://papers.ssrn.com/abstract=2756305>>.
- 11 Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 76 <<https://cij.org.au/research-projects/sexual-offences/>>.
- 12 See generally Patrick Parkinson, 'Specialist Prosecution Units and Courts: A Review of the Literature' (Research Paper No 16/26, Law School, The University of Sydney, 2016) <<https://papers.ssrn.com/abstract=2756305>>; Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) 91 <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.
- 13 Patrick Parkinson, 'Specialist Prosecution Units and Courts: A Review of the Literature' (Research Paper No 16/26, Law School, The University of Sydney, 2016) <<https://papers.ssrn.com/abstract=2756305>>.
- 14 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) 110 <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.
- 15 Natalie Taylor, Australian Institute of Criminology (Cth), *Juror Attitudes and Biases in Sexual Assault Cases* (Trends & Issues in Crime and Criminal Justice Report No 344, 15 August 2007) 1 <<https://aic.gov.au/publications/tandi/tandi344>>.
- 16 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) 113 [6.22] <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.
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- 19 Ibid 116 [6.48].
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- 22 Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 143, 149.
- 23 Ibid.
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- 28 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) 135 [2.89] <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
- 29 For a discussion generally on tracking delays in criminal matters in Victoria, see Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) ch 3 <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
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- 31 *Criminal Procedure Act 2009* (Vic) s 126.
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- 33 *Criminal Procedure Act 2009* (Vic) s 212. Note that time limits for starting trials were in place before the *Criminal Procedure Act 2009* (Vic).
- 34 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 35 *Criminal Procedure Act 2009* (Vic) s 389f.
- 36 Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, 14 June 2019 (Ben Carroll, Minister for Victim Support) <https://www.parliament.vic.gov.au/images/stories/committees/paec/2019-20_Budget_Estimates/Transcripts_and_tabled_docs/2019-20_BEH_Victim_Support_Verified_Transcript.pdf>.
- 37 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) Recommendation 47, 133–135 [11.105]–[11.114] <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
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- 39 Ibid 122.
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