

Issues Paper E

Sexual Offences: The Trial Process



Victorian
Law Reform
Commission

**Victorian Law
Reform Commission**
GPO Box 4637
Melbourne
Victoria 3001
Australia
DX 144, Melbourne

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone
+61 3 8608 7800
Freecall
1300 666 555
(within Victoria)
Fax
+61 3 8608 7888

Email
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

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Sexual Offences: The Trial Process

- 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.¹
- 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 The criminal trial plays a key role in responding to sexual harm. It is a public forum to test evidence and can hold someone to account and denounce their actions.
- 4 However, it can be a traumatic experience for complainants. The trial process can also reflect common misconceptions about sexual harm. These concerns have been the focus of many reforms of the trial process.
- 5 In this paper we ask about how effective these reforms have been, and if there are ways to improve the trial process further. This paper focuses on:
 - charging decisions
 - ground rules hearings
 - special procedures and alternative arrangements for giving evidence
 - aspects of laws relating to the trial process, such as jury directions and the protection of complainant records
 - appeals
 - the Children’s Court.
- 6 The paper does not discuss every aspect of the criminal trial. For example, it does not discuss summary trials, jury empanelment, plea procedures, evidence of previous convictions, victim impact statements or sentencing. However, you can address any of these in your answer to the final question.

Issues Paper E 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.

A note about committals

- 7 The Victorian Law Reform Commission recently completed an inquiry into committal proceedings.² The Commission recommended measures to reduce delay due to committal proceedings. These include abolishing the test for committal and improving charging and disclosure by requiring the Office of Public Prosecutions to be involved earlier in indictable matters.
- 8 Another concern was that cross-examination at committals traumatised complainants. Complainants who are children or have a cognitive impairment cannot be cross-examined during committals for sexual offence cases. While the Commission did not recommend extending this to adults in proceedings for sexual offences, it recommended other measures to reduce trauma, such as requiring magistrates to consider the need to minimise trauma when deciding whether to grant leave to cross-examine.³ These reforms have not yet been implemented.

Charging and prosecution decisions

- 9 In past inquiries, the Commission heard concerns from victims about decisions to drop charges and end cases.⁴ In its 2020 report, *Committals*, the Commission recommended reforms to charging decisions.⁵
- 10 The Commission made related recommendations in its 2016 report, *The Role of Victims of Crime in the Criminal Trial Process*. While it supported a scheme for review similar to that used in the United Kingdom, it did not consider that it was practical for Victoria to adopt this reform alone.⁶ Instead, it recommended giving victims the right to apply for an internal review of the decision.⁷
- 11 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that each Australian Director of Public Prosecutions adopt a ‘formalised internal complaints mechanism’ for victims who want a review of key decisions, such as decisions to end a prosecution or not prosecute at all.⁸
- 12 Under the policy of the Director of Public Prosecutions for Victoria (DPP), charges must have a reasonable prospect of conviction.⁹ Before making a decision to discontinue a case, prosecutors must ask victims for their views. Different senior prosecutors and the DPP then review decisions to discontinue. Victims must be asked if they want anything to be taken into account in the review. If the case is discontinued, the victim must be informed before the court is told about the decision.¹⁰
- 13 We want to hear if charging and prosecution decisions continue to be an issue and, if so, what should be done to address these.

Question

- 1 How well are charging and prosecution decisions for sexual offence cases working? How can they be improved?

You might think about:

- how well the internal review process is working
- if the views of the person harmed are sufficiently taken into account when making decisions
- the threshold of ‘reasonable prospect of conviction’ and how decisions are made.

Ground rules hearings

- 14 A ground rules hearing is a pre-trial procedure for some offences, including sexual offences. In Victoria, it is available only for witnesses, other than the accused, who are children or people with a cognitive impairment.¹¹
- 15 A ground rules hearing must be held in all cases where an intermediary has been appointed by the court. (Intermediaries who assist with communication between the complainant and the court are discussed in Issues Paper B). The hearing involves a discussion between the prosecution, the defence, the court and, where relevant, an intermediary.¹²
- 16 Its aim is to ensure that witnesses are treated fairly and that 'communication is as complete, coherent, and accurate as possible'.¹³ At the hearing, the Court may make directions about:
 - how witnesses are questioned
 - what questions are allowed
 - how long the questioning can go on
 - if aids can be used to help communicate a question or an answer.¹⁴
- 17 We want to hear if ground rules hearings are working well, and if they should happen in other cases. For example, in the Australian Capital Territory, they are available in criminal proceedings for other groups of people who may face communication difficulties, and for those accused of offences.¹⁵

Question

- 2 How well are ground rules hearings for sexual offence cases working? How can they be improved?

You might think about:

- how criminal proceedings were conducted before ground rules hearings
- if ground rules hearings should be extended to other groups of people.

Special procedures and alternative arrangements for giving evidence

- 18 Giving evidence about sexual offences and being questioned about that evidence can be traumatic for complainants. This can affect the quality of the evidence they give.¹⁶
- 19 The law therefore allows them to give evidence in other ways (alternative arrangements) and, for children or people with a cognitive impairment, provides special procedures for giving their evidence. This section discusses these special procedures and arrangements.

Special procedures

- 20 Children or people with a cognitive impairment can have their police statement recorded (discussed in Issues Paper D). The visual and audio recording of evidence (VARE) can then be used as their evidence-in-chief during trial¹⁷ and in any new trial or appeal.¹⁸
- 21 This protects them from having to give evidence in court and repeat their story. However, they may still be cross-examined during trial.

- 22 Because the VARE is a tool for both investigation and evidence, there can be challenges in using it as evidence. The use of leading questions, for example, may mean it is not admitted as evidence.¹⁹ To provide quality evidence police need to be skilled in interviewing for a VARE.²⁰ Courts need to recognise the dual purposes of the VARE when considering whether to admit it as evidence.²¹
- 23 The VARE is played in a special hearing that is recorded.²² After the VARE is played, the complainant is cross-examined and re-examined in a remote facility. This is linked by closed-circuit television to the courtroom, where the accused and defence lawyer sit.²³
- 24 The recording of the special hearing is played for the jury as the whole of the complainant's evidence at trial.²⁴ It is also played in any retrial or related civil proceeding.²⁵ The court can only grant leave for further examination of the complainant in limited circumstances.²⁶
- 25 Other people may benefit from these special procedures. The Royal Commission into Institutional Responses to Child Sexual Abuse considered their benefits for adult victim survivors of child sex abuse.²⁷ In the Australian Capital Territory, special hearings can be used by complainants who are 'vulnerable adults'. This includes people who are likely to 'suffer severe emotional trauma', or 'be intimidated or distressed'.²⁸
- 26 The Commission considered this issue in 2016. In its report, *The Role of Victims of Crime in the Criminal Trial Process*, it recommended extending special procedures to 'protected victims', defined in a similar way as in the Australian Capital Territory.²⁹ This has not yet been implemented into law in Victoria.
- 27 In its 2020 report, *Committals*, the Commission recommended a formal evaluation of special hearings and these reforms.³⁰

Alternative arrangements for giving evidence

- 28 Adult complainants can give evidence in other ways, including:
- outside the courtroom via closed-circuit television
 - using screens to remove the accused from their direct line of vision
 - allowing a support person to sit with them as they give evidence
 - restricting who can be in court while they give evidence.³¹
- 29 A recording of the complainant's evidence at trial may be played in any retrial or appeal, instead of making the complainant give evidence again.³²
- 30 We want to hear how well these special procedures and alternative arrangements are working, and how they should be improved.

Question

- 3 How well are special procedures and alternative arrangements for giving evidence in sexual offence cases working? How can they be improved?

You might think about:

- other people who would benefit from special procedures or alternative arrangements
- other ways to reduce trauma for complainants.

Laws about the trial process

31 This section discusses some laws relating to the trial process and reforms to those laws to improve the understanding of sexual harm and how complainants are treated in criminal proceedings.

Jury directions

32 In a trial, the judge gives directions to a jury to help them understand the law before they reach a verdict.³³ The Commission’s inquiry into jury directions and other important work led to new laws to improve jury directions.³⁴

33 The *Jury Directions Act 2015* (Vic) requires a judge:

- to give jury directions that are required by the Act
- to give a jury other directions in the Act if they have been requested, unless there are good reasons for not doing so
- to not give a jury any other directions that have not been requested, unless there are substantial and compelling reasons to do so.³⁵

34 Some jury directions are designed to counter common misconceptions about sexual harm (see Table 1).

Table 1: Summary of jury directions relevant in sexual offence trials

Type of direction	Description	Process	When the direction is given
Corrective directions	Corrects certain statements or suggestions, ³⁶ including statements about the reliability of children ³⁷ or complainants as a class ³⁸	Given by judge if statement made	Not specified
Direction on consent and reasonable belief in consent	Explains consent and reasonable belief in consent (for example, that people who do not consent may not be physically injured) ³⁹	Made on request by parties ⁴⁰	After the close of evidence
Direction on delay and credibility	Explains relevance of delay on the credibility of the complainant, ⁴¹ including that delay is common	Given by judge if particular criteria are met	May be given before evidence
Other directions related to credibility or reliability	Explains relevance of differences in the complainant’s account (for example, that differences are common) ⁴² or explains the language and cognitive skills of child witnesses ⁴³	Given by judge if particular criteria are met ⁴⁴	May be given before evidence

The Sexual Violence Legislation Bill (NZ)

New Zealand is considering laws that would require judges to give any direction they consider is needed to address misconceptions about sexual harm.⁴⁵ For example, a judge could direct a jury on the prevalence or features of false complaints, the relevance of the complainant drinking alcohol, and the seriousness of sexual harm committed by family members.⁴⁶

- 35 We are interested in how well the laws on jury directions are working in practice and what should be improved.

Question

- 4 How well are jury directions for sexual offence trials working? How can they be improved?

You might think about:

- how much discretion judges should have in giving jury directions
- the timing or frequency of directions⁴⁷
- if other directions are needed (for example, should the jury be directed that a doubt based on a misconception cannot be a 'reasonable doubt'?).⁴⁸

Complainant's sexual history

- 36 Reforms to sexual offence trials have restricted some evidence and questioning, such as:
- pre-trial cross-examination of complainants who were children or had a cognitive impairment at the beginning of proceedings⁴⁹
 - improper questioning, including questioning based solely on stereotypes.⁵⁰
- 37 The law imposes restrictions on questioning complainants, and introducing evidence, about their sexual history:
- no questions or evidence are allowed about 'the general reputation of the complainant with respect to chastity'⁵¹
 - leave of the court is required to cross-examine a complainant about their sexual activity⁵²
 - a complainant's sexual history cannot be admitted to suggest that the complainant is more likely to have consented to the sexual activity.⁵³
- 38 We want to hear how the process of questioning complainants in criminal proceedings works in practice, and what else should be done to improve this part of the proceedings.

Joint trials and tendency and coincidence evidence

- 39 Evidence of other allegations of sexual harm against an accused may be admissible in a trial as tendency and coincidence evidence.
- 40 Where more than one complainant alleges they have been harmed by an accused, the prosecution can ask for a joint trial of all the charges. Whether this is allowed often depends on the 'cross-admissibility' of the tendency and coincidence evidence. If the evidence is cross-admissible, allegations from one complainant can be supported by the evidence of other complainants.
- 41 In Victoria, there is a presumption in favour of joint trials for sexual offence cases.⁵⁴ The presumption is not rebutted because evidence on one charge is inadmissible on another charge.⁵⁵ However, in practice, separate trials may be ordered more often than they need to be.⁵⁶
- 42 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that laws be changed to make it easier to admit tendency and coincidence evidence in trials and joint trials.⁵⁷
- 43 The reasons for the recommendations included:
- Tendency and coincidence evidence is highly relevant, without a significant risk of unfair prejudice to the accused.⁵⁸
 - Joint trials are less traumatising for complainants because they can feel supported by other complainants.⁵⁹
- 44 In response to the recommendations, the Council of Attorneys-General agreed to implement a Model Bill that would change the test on tendency and coincidence evidence in the Uniform Evidence Law.⁶⁰ New South Wales has already implemented this change in its laws,⁶¹ but Victoria has not.
- 45 We want to hear about:
- the scope of the Model Bill (for example, it applies only to child sexual offences)
 - how decisions on joining or separating trials are made in practice
 - if more reforms are needed, other than implementing the Model Bill, to encourage the joinder of trials in Victoria
 - if more trials could be joined in a way consistent with the right to a fair trial, whether or not the evidence of different complainants is cross-admissible in a trial.

Protection of records

- 46 An accused can collect information from the complainant through a court order to give evidence or hand over documents (subpoena). In our initial research, we heard that these orders can be a burden on complainants.
- 47 There are laws that protect a victim's confidential medical or counselling records (confidential communications). These can only be accessed or used in criminal proceedings by an accused with leave (permission) of the court.⁶² The court can only grant leave if the value of the records substantially outweighs the public interest in preserving their confidentiality and protecting the complainant from harm.⁶³
- 48 In 2016 the Commission recommended giving victims the right to be heard automatically if any such application was made, and to give evidence about the harm in affidavit form.⁶⁴ It also recommended funding a legal service to provide independent advice to victims about such applications, based on a similar service in NSW.⁶⁵ These recommendations have not yet been implemented.

- 49 The issues that have been identified with similar legislation in New South Wales⁶⁶ include:
- In practice, the defence routinely does not apply for leave or give notice to those affected.⁶⁷
 - A subpoena that is issued without leave of the court, or without notice, can still be valid,⁶⁸ undermining the purpose of the protection.⁶⁹
 - Courts order disclosure of evidence too readily.⁷⁰
 - The scope of protection is unclear,⁷¹ including whether it protects counselling records unrelated to the offending⁷² or records made by child protection workers investigating the case.⁷³
 - The defence faces difficulty in any such applications in the absence of being able to examine the records, especially when large numbers of documents are required.⁷⁴
- 50 We want to know if any changes are needed to practice or procedure, regarding the protection of records.

Question

- 5 Is there a need to change any laws on evidence or procedure for sexual offences? If so, what should be changed?

You might think about:

- how judges apply the laws in practice
- what prevents joint trials from happening where there are multiple complainants
- if some trial processes continue to be traumatic for complainants and what could be done about this.

Appeals

- 51 An offender can appeal their conviction or sentence to a higher court.⁷⁵ Appeals can correct legal errors or miscarriages of justice. However, an appeal can prolong the trial process and prevent complainants from moving on with their lives.⁷⁶ Appeals and any retrials may also involve further delays.⁷⁷ The issue of delay is discussed in Issues Paper B.
- 52 Complainants are generally only required to give evidence at trial. Appeal judges have access to the trial transcript and evidence before the trial, including victim impact statements and VAREs.⁷⁸ Recent reforms that are yet to commence mean that the County Court will no longer rehear cases on appeal, and will make decisions based on the evidence and materials that were before the trial court.⁷⁹
- 53 Appeals from the County Court or Supreme Court of Victoria are only available by leave of the Victorian Court of Appeal.⁸⁰ Special leave is required for appeals to the High Court of Australia.⁸¹
- 54 The Court of Appeal may dismiss an appeal, acquit the accused or order a re-trial.⁸² If the Court of Appeal orders a re-trial, the DPP decides whether to proceed with a new trial.⁸³
- 55 It has been suggested that reforms to jury directions have led to fewer appeals based on errors in directions or failures to give directions.⁸⁴
- 56 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that states should monitor the number, type and success rate of appeals in child sexual abuse prosecutions, and the issues raised, to identify areas of the law in need of reform.⁸⁵

Question

6 What are some of the challenges with the appeals process for sexual offence cases? How can these be addressed?

You might think about:

- the frequency of, and reasons for, appeals in sexual offence cases
- if there are any delays that can be avoided in the appeals process.

The Children's Court

57 The Children's Court of Victoria deals with criminal offences by children.⁸⁶

58 For children engaging in harmful sexual behaviour, the Children's Court can adjourn the matter and instead:

- refer the child to attend the Children's Court Clinic, staffed by clinical psychologists and psychiatrists, for assessment, treatment and counselling⁸⁷
- make a Therapeutic Treatment Order, which if completed may result in the withdrawal of charges (see Issues Paper F).⁸⁸

59 The strong focus of the Children's Court is to promote the rehabilitation of young offenders.⁸⁹ This is different to the approach in other courts.

Question

7 How well does the Children's Court of Victoria deal with sexual offence cases? What should be improved?

You might think about:

- how well it responds to the diverse needs and experiences of those involved
- if any of its approaches should be adopted by other Victorian courts.

Other issues

60 We want to hear if there are other key issues about the trial process, and what should be done to address them.

Question

8 What are other issues with the trial process for sexual offences, and how should they be addressed?

Endnotes

- 1 We invite people who have experienced sexual harm and who have participated in a criminal trial process as the complainant to respond to our online form. There is also an issues paper for people who have experienced sexual assault.
- 2 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 3 Ibid.
- 4 Ibid; See, eg, Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).
- 5 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) <<https://www.lawreform.vic.gov.au/all-projects/committals>> xviii–xix, Recommendations 15–23.
- 6 See Crown Prosecution Service (UK), *Victims' Right to Review (VRR)* (Leaflet, 2014) <https://www.cps.gov.uk/sites/default/files/documents/publications/VRR_leaflet.pdf>.
- 7 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 70–3 [4.165]–[4.190], Recommendation 10.
- 8 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) pts III–VI, 405–8 [21.6], Recommendation 41 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 9 See Office of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Policy, 17 September 2020) 2 [2] <<https://www.opp.vic.gov.au/Resources/Policy-of-the-Director-of-Public-Prosecutions-for-Victoria>>.
- 10 Office of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Policy, 17 September 2020) 10 [29] <<https://www.opp.vic.gov.au/Resources/Policy-of-the-Director-of-Public-Prosecutions-for-Victoria>>.
- 11 Director of Public Prosecution (Vic), *Discontinuance Review Framework* (March 2019) [6]–[10] <<https://www.opp.vic.gov.au/Home/Resources/Discontinuance-Review-Framework>>.
- 12 *Criminal Procedure Act 2009* (Vic) s 389A.
- 13 Ibid s 389B(3); County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide No 1/2018, 28 June 2018) 12 <https://www.judicialcollege.vic.edu.au/sites/default/files/2019-07/Multi%20jurisdictional%20Court%20Guide%20for%20the%20IPP_0.pdf>.
- 14 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide No 1/2018, 28 June 2018) 2 [8] <https://www.judicialcollege.vic.edu.au/sites/default/files/2019-07/Multi%20jurisdictional%20Court%20Guide%20for%20the%20IPP_0.pdf>; Judicial College of Victoria, *A Ground Rules Hearing in Action: A Best Practice Video for Judicial Officers and Practitioners* (Flyer, 2019) <<https://www.vicbar.com.au/sites/default/files/Ground%20Rules%20Hearing%20Flyer.pdf>>; *Criminal Procedure Act 2009* (Vic) pt 8.2A. Ground Rules Hearings may also be held in a range of other cases, including those involving family violence offences: s 389A.
- 15 *Criminal Procedure Act 2009* (Vic) s 389E; Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 27 <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 16 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ch 1A–B; ACT Human Rights Commission, *Intermediary Program* (Procedural Guidance Manual, February 2020) <<https://hrc.act.gov.au/wp-content/uploads/2020/05/1.-ACT-Intermediary-Procedural-Guidance-Manual-FEBRUARY-2020.pdf>>.
- 17 Terese Henning, 'Obtaining the Best Evidence from Witnesses with Complex Communication Needs' (Conference Paper, Disability Justice Plan Symposium, 19 November 2015) <https://www.agd.sa.gov.au/sites/default/files/djp_symposium_paper_henning.pdf?v=1490676499>.
- 18 *Criminal Procedure Act 2009* (Vic) pt 8.2A div 5. These indictable offences such as assault, family violence matters, and certain common or aggravated assaulted under the *Summary Offences Act 1966* (Vic) ss 23–4. See generally Judicial College of Victoria, '13.5.1 VARE Procedure', *Victorian Criminal Proceedings Manual* (Online Manual, November 2019) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27695.htm>>.
- 19 *Criminal Procedure Act 2009* (Vic) s 379.
- 20 See generally Judicial College of Victoria, '13.5.1 VARE Procedure', *Victorian Criminal Proceedings Manual* (Online Manual, November 2019) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27695.htm>>.
- 21 Mark R Kebbell and Nina J Westera, 'Promoting Pre-Recorded Complainant Evidence in Rape Trials: Psychological and Practice Perspectives' (2011) 35(6) *Criminal Law Journal* 376, 384.
- 22 See generally Judicial College of Victoria, '13.5.1 VARE Procedure', *Victorian Criminal Proceedings Manual* (Online Manual, November 2019) [37] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27695.htm>>.
- 23 *Criminal Procedure Act 2009* (Vic) s 370.1; Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 27 <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 24 *Criminal Procedure Act 2009* (Vic) ss 367–8, 370, 372, 374.
- 25 Ibid s 374.
- 26 Ibid ss 367–8, 370, 372, 374.
- 27 Ibid s 376.
- 28 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Consultation Paper, September 2016) 383 <<http://www.childabuseroyalcommission.gov.au/policy-and-research/out-of-home-care/consultation-paper>>.
- 29 *Evidence Act (Miscellaneous Provisions) Act 1991* (ACT) s 42.
- 30 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 213, Recommendations 37–8.
- 31 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 129, [11.78]–[11.81], Recommendation 44 <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 32 *Criminal Procedure Act 2009* (Vic) ss 359–60.
- 33 Ibid ss 378–9.
- 34 Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, March 2015) x <<https://www.justice.vic.gov.au/jury-directions-reports>>.
- 35 Victorian Law Reform Commission, *Jury Directions* (Report No 17, 29 July 2009) <<https://www.lawreform.vic.gov.au/all-projects/jury-directions>>.
- 36 *Jury Directions Act 2015* (Vic) ss 15–16.
- 37 Ibid s 7.
- 38 Ibid s 33.
- 39 Ibid s 51.
- 40 Ibid ss 46–47.
- 41 Ibid s 46(1), 47(1).
- 42 Ibid s 52(1).
- 43 Ibid s 54D(2).
- 44 Ibid s 44N(4).
- 45 Ibid s 44N(1), 54D(1).
- 46 Sexual Violence Legislation Bill 2019 (NZ) s 16.
- 47 Ibid.
- 48 See, eg, the direction on consent and reasonable belief in consent: *Jury Directions Act 2015* (Vic) ss 12, 46.
- 49 Olivia Smith and Tina Skinner, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26(4) *Social & Legal Studies* 441, 460. The Commission's preliminary research also suggests that the warning about honest but erroneous memory in cases where there is a long delay in complaint may not be consistent with social science research.
- 50 *Criminal Procedure Act 2009* (Vic) 123.
- 51 *Evidence Act 2008* (Vic) s 41.
- 52 *Criminal Procedure Act 2009* (Vic) s 341.

- 52 Ibid s 342.
53 Ibid s 343.
54 Ibid s 194.
55 Ibid s 194(3).
56 'Victorian Government Response to the Royal Commission into Institutional Child Sexual Abuse', *Department of Justice and Community Safety (Vic)* (Web Page, 11 July 2018) <<https://www.vic.gov.au/victorian-government-response-royal-commission-institutional-responses-child-sexual-abuse>>.
- 57 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 634 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 58 Ibid 639.
59 Ibid 634.
60 Council of Attorneys-General, 'Communiqué' (Media Release, 29 November 2019) <<https://www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communique-November-2019.pdf>>.
- 61 *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW).
62 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt II div 2A. These provisions were introduced in response to the recommendations of the Victorian Law Reform Commission: Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) Recommendations 76–86 <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
- 63 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D.
64 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 25. It also recommended requiring the prosecution to notify victims of their right to appear and the availability of legal assistance, and that the court must be satisfied that the victim was aware of these rights, and limiting the circumstances in which the required notice to the victim could be waived.
- 65 Ibid Recommendation 23. A similar service has since been established in Queensland: Legal Affairs and Community Safety Committee, Parliament of Queensland, *Victims of Crime Assistance and Other Legislation Amendment Bill 2016* (Report No 49, February 2017) <<https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T229.pdf>>.
- 66 *Criminal Procedure Act 1986* (NSW) s 298. These provisions are commonly referred to as the 'sexual assault counselling privilege'.
67 Catherine Gleeson, 'Striking a Balance: The Proper Operation of the Sexual Assault Communication Provisions' (Autumn 2013) *Bar News: The Journal of the NSW Bar Association* 66, 68.
68 It was held by the NSW Criminal Court of Appeal that it was open to the court to treat this as a procedural irregularity: *KS v Veitch (No 2)* [2012] 84 NSWCCA 266; (2012) 84 NSWLR 172.
69 Catherine Gleeson, 'Striking a Balance: The Proper Operation of the Sexual Assault Communication Provisions' (Autumn 2013) *Bar News: The Journal of the NSW Bar Association* 66, 68–69.
70 An example was the order for disclosure that was successfully appealed in *KS v Veitch (No 2)* [2012] 84 NSWCCA 266; (2012) 84 NSWLR 172, 189–90 [75]–[79].
71 Ian Nash, 'Use of the Sexual Assault Communications Privilege in Sexual Assault Trials' (2015) 27(3) *Judicial Officers Bulletin* 21, 20–25.
72 The NSW Court of Criminal Appeal has held that such records are included, but noted that the drafting could be improved if that was the intention: *KS v Veitch (No 2)* [2012] 84 NSWCCA 266; (2012) 84 NSWLR 172, 191 [86].
73 The NSW Criminal Court of Appeal has ruled that the privilege does not extend to such records, unless the records derive from counselling communications: *ER v Khan* [2015] NSWCCA 230; (2015) 254 A Crim R 1.
74 Ian Nash, 'Use of the Sexual Assault Communications Privilege in Sexual Assault Trials' (2015) 27(3) *Judicial Officers Bulletin* 21, 26.
75 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(4).
76 See *Royal Commission into Institutional Responses to Child Sexual Abuse*, (Criminal Justice Report, August 2017) vols VII-X, 332-333 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
77 See generally *ibid* pts VII-X, ch 32.
78 *Criminal Procedure Act 2009* (Vic) s 368(4).
79 *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic).
80 Seeking leave of the court means asking for the court's permission.
81 *Judiciary Act 1903* (Cth) s 35; *Australian Constitution* s 73. The grounds of appeal in the High Court are: a question of law of public importance; a question of law requiring final resolution of the state of the law; consideration of the matter is in the interests of the administration of justice: *Judiciary Act 1903* (Cth) s 35A.
82 *Criminal Procedure Act 2009* (Vic) s 277.
83 Judicial College of Victoria, '20.4.1.9 Orders on a Successful Appeal', *Victorian Criminal Proceedings Manual* (Online Manual, 31 August 2020) [10] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27876.htm>>.
84 Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43 *Criminal Law Journal* 180, 196–197.
85 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) pts VII-X, 355, Recommendation 82 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
86 The definition of a child for this purpose is those over the age of 10 and under the age of 18: *Children, Youth and Families Act 2005* (Vic) s 3. The other Division of the Children's Court is the Family Division which hears applications relating to the protection and care of children and young persons at risk, and applications for intervention orders.
87 'Children's Court Clinic', *Children's Court Victoria* (Web Page, 18 April 2013) <<https://www.childrenscourt.vic.gov.au/legal/research-materials/court-operation>>; *Children, Youth and Families Act 2005* (Vic) s 546.
88 *Children, Youth and Families Act 2005* (Vic) s 248; Children's Court of Victoria, *Innovative Approaches of the Children's Court of Victoria to Sexual Offending and Abuse* (Report, 2012) 7 <<https://www.childrenscourt.vic.gov.au/sites/default/files/INNOVATIVE%20APPROACHES%20OF%20THE%20COURT%20REGARDING%20SEXUAL%20OFFENDING.pdf>>.
89 Children's Court of Victoria, *Statement of Priorities 2019-21* (Policy, 2019) 5 <https://www.childrenscourt.vic.gov.au/sites/default/files/Statement%20of%20priorities_CCV.pdf>.