

Issues Paper H

# Sexual Offences: Civil Law and Other Non-Criminal Responses



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## Issues Paper H

# Sexual Offences: Civil Law and Other Non-Criminal Responses

## Introduction

- 1 This paper is about responses to sexual harm through justice processes other than the criminal process (other justice processes). It covers:
  - civil law
  - laws targeting sexual harassment
  - the Victims of Crime Assistance Tribunal
  - redress schemes
  - regulations and codes of conduct, and service provider policies and obligations.
- 2 The paper is for:
  - people who have used other justice processes to deal with sexual harm
  - people who work in other justice processes or in criminal justice
  - researchers and others interested in the subject.
- 3 The criminal justice system may not meet all the needs of people who have been sexually harmed.<sup>1</sup> Other justice processes may better meet some of their needs, such as to explain the impact of the harm and have their experience acknowledged.<sup>2</sup>
- 4 In this paper, we ask:
  - if there are best practice examples from other justice processes that could be used in the criminal justice system to improve support for people who have been sexually harmed
  - how the interaction between other justice processes and the criminal justice system could be improved.

Issues Paper H is one of eight papers.  
View them at [https://lawreform.vic.gov.au/sex\\_offences\\_2020/issues\\_papers](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.

## Civil law

- 5 A person who has been sexually harmed can sue the person who harmed them or a related institution ('the defendant') for their injuries. In civil law, the person bringing the case ('the plaintiff') must prove that the defendant committed a wrong ('tort').
- 6 The type of tort depends on who is being sued. An individual can be sued for 'battery'. This is intentional contact with another person's body that is harmful or offensive. Sexual assault is a form of battery.<sup>3</sup> If the defendant is an institution, the relevant tort is negligence.
- 7 The Royal Commission into Institutional Responses to Child Sexual Abuse found that the civil justice system had failed people harmed by child sexual abuse.<sup>4</sup> In response,<sup>5</sup> Victoria:
- removed time limits for suing for child sexual abuse<sup>6</sup>
  - introduced legislation to make it easier to sue institutions with complex legal structures<sup>7</sup>
  - imposed a duty on organisations to take reasonable steps to prevent the sexual abuse of children under their care (the 'organisational duty of care').<sup>8</sup>

## Relationship between civil and criminal justice

- 8 There are differences and similarities between the civil and criminal justice systems (see Table 1). A difference is the lower burden of proof in civil proceedings. A similarity is that plaintiffs often find it traumatic to give evidence and be cross-examined during the trial.<sup>9</sup>
- 9 Regardless of how civil cases are finalised, the outcome of civil litigation is not included in sexual harm statistics or data gathering.

**Table 1: Differences between the criminal justice system and the civil system**

Feature	Criminal justice system	Civil system
Standard of proof to establish wrongdoing	Beyond reasonable doubt	Balance of probabilities (a lower standard than 'beyond reasonable doubt')
Role of person harmed by the wrongdoing	A witness for the prosecution (the police or the Office of Public Prosecutions prosecute criminal charges on behalf of the state). The person harmed is not represented by a lawyer.	A party to the proceeding, who sues on their own behalf and usually has their own lawyer to represent them.
Outcome	Verdict of guilty or not guilty (and if guilty a sentence might be served). Potential for public acknowledgement of the crime.	If there was assault or breach of duty of care: financial compensation. Potential for public acknowledgement of the wrong.

- 10 The civil and criminal justice systems interact with each other. For example, before a criminal verdict, the prosecution may apply to the court for a civil order ('a restraining order') to prevent an accused disposing of their property.

- 11 The person harmed may apply to the sentencing court for compensation or restitution after the accused has been found guilty.<sup>10</sup> A compensation order made by a sentencing court is a civil debt owed by the person responsible to the person harmed. This means that if the person responsible refuses to pay, the person harmed must take civil action to have the order enforced.<sup>11</sup>

## Responding to sexual harassment

- 12 Sexual harassment is unwelcome sexual behaviour that is offensive, humiliating, or intimidating (for example, a sexual advance or request for sexual favours).<sup>12</sup> Usually this behaviour is not criminal. However, federal and state laws ban sexual harassment in many places, including schools, clubs, and workplaces.<sup>13</sup>
- 13 Victorian law imposes a duty on employers and others, such as schools, to take steps to prevent sexual harassment.<sup>14</sup> It is also against the law to victimise someone because they have complained about sexual harassment, or because they supported someone who did.<sup>15</sup>
- 14 Compensation for sexual harassment can be claimed under either federal or state laws, but not both.<sup>16</sup>

**Table 2: Federal and state responses to sexual harassment**

Level	Description
Federal	The Australian Human Rights Commission can investigate and try to resolve complaints through conciliation. If a complaint cannot be resolved, the matter can be decided by a federal court.
Victoria	The Victorian Equal Opportunity and Human Rights Commission can investigate and try to resolve complaints through conciliation. Applications can also be made directly to the Victorian Civil and Administrative Tribunal. The Tribunal can order compensation or other action to redress loss, damage or injury, and to prevent further harassment. <sup>17</sup>

- 15 A recent Australian Human Rights Commission (AHRC) inquiry found women, young people, Aboriginal people, LGBTIQ people, and those from culturally and linguistically diverse backgrounds are more likely to be sexually harassed. It identified various barriers to reporting sexual harassment and finding justice.<sup>18</sup>
- 16 The AHRC's recommendations included:
- taking action to promote gender equality<sup>19</sup>
  - ensuring damages reflect current understandings about the effects of sexual harassment<sup>20</sup>
  - educating and training police and judicial officers<sup>21</sup>
  - creating a best practice guideline on non-disclosure agreements that could require, for example, de-identified reporting of all sexual harassment cases<sup>22</sup>
  - imposing a positive legal duty on employers to establish good workplace cultures.<sup>23</sup>
- 17 Employers and some other entities in Victoria, such as schools, already have a duty to take reasonable and proportionate measures to eliminate sexual harassment, discrimination and victimisation.<sup>24</sup>
- 18 There are several technology-assisted responses designed to make it easier to report sexual harassment (see box).

## Technology-assisted responses to sexual harassment

### Victorian Equal Opportunity and Human Rights Commission interactive online sexual harassment response tool

This 'chatbot' allows employers, people who have been harassed, and bystanders to identify what sexual harassment is and how to respond, including connecting them to support and referral services. The technology is automated, providing standardised responses to the information and choices entered by the user.<sup>25</sup>

### Online reporting tools for sexual harassment on campus

Some universities and colleges, such as Ormond College, provide tools to let students who have been harassed or assaulted, or who know someone who has, to report it online, without identifying themselves. This allows students to report sexual harm without exposing themselves or engaging in a formal justice process. The tool can direct them to support services. It may also help the college or university understand the problem better.

## The Victims of Crime Assistance Tribunal

- 19 Victims of any violent crime in Victoria, including sexual offences, can apply for financial assistance or compensation to the Victims of Crime Assistance Tribunal (VOCAT). The crime must have been reported to police and have directly resulted in injury or death.<sup>26</sup>
- 20 VOCAT can make compensation orders if it is satisfied, on the balance of probabilities, that the harm is a result of the crime.<sup>27</sup> A finding of guilt in a criminal court is not needed although, in some cases, the Tribunal will wait for any criminal process to finish first. The Tribunal can also allow the person responsible for the harm to contest the application, but this is rare.<sup>28</sup>
- 21 VOCAT provides a low cost and relatively informal setting for people who have been harmed to tell their story.<sup>29</sup> For some, an award by VOCAT publicly acknowledges their harm and validates their experience.<sup>30</sup>
- 22 We have previously recommended that VOCAT should be replaced by a more flexible compensation scheme. This would be administered by the Victims of Crime Commissioner. As well as financial assistance, it would provide a forum for acknowledgement and recognition of the harms suffered.<sup>31</sup>

## Redress schemes

- 23 Redress schemes are set up in an institution or sector to compensate people who have experienced sexual harm. Some are run by a single institution. Others are run by government, with institutions covering some of the costs.
- 24 The standard of proof required under redress schemes is usually lower than either the criminal or civil burden of proof (Table 3). Most redress schemes provide for restorative engagement processes, such as allowing the person harmed to explain the effects of the harm to a senior representative of the institution.

**Table 3: Examples of redress schemes**

Features	National Redress Scheme	Victoria Police’s Restorative Engagement and Redress Scheme
Target group	People who experienced child sexual abuse while in the care of an institution or organisation before 1 July 2018 <sup>32</sup>	Former and current Victoria Police employees who experienced sex discrimination, sexual harassment, or other forms of sexual harm in the workplace before 12 December 2019 <sup>33</sup>
Administration	The Commonwealth Department of Social Services	The Department of Justice and Community Safety
Standard of proof	‘Reasonable likelihood’; interpreted to mean ‘more than merely plausible’, and not ‘fanciful’ or ‘remote’ <sup>34</sup>	Account is ‘plausible’; there is ‘enough information to reasonably satisfy a person undertaking an assessment that the behaviour occurred’ <sup>35</sup>
Core elements	Direct personal response, such as an apology from the institution  Provision of counselling and psychological care  Financial payments (capped at \$150,000)	Restorative engagement process  Provision of counselling  Financial payments

## Other regulatory regimes

- 25 Some regulatory regimes also protect against and provide measures to respond to sexual harm. These include regulations and codes of conduct, such as in community clubs or in a sector or profession (see box).<sup>36</sup> Government departments also require that service providers or contractors comply with relevant policy.<sup>37</sup>

### The Victorian Disability Worker Commission (VDWC)

The VDWC upholds safety standards through a code of conduct that currently applies to all disability workers in Victoria. The code imposes a duty on disability workers to ‘take all reasonable steps to prevent and respond to sexual misconduct’.<sup>38</sup>

The VDWC can investigate any breach and take action against workers. In serious cases, it can order them to stop providing disability services.<sup>39</sup> If there are allegations of criminal conduct, it may refer the matter to the police.<sup>40</sup>

- 26 The Royal Commission into Institutional Responses to Child Sexual Abuse noted that ‘an effective response to institutional child sexual abuse will often require both a criminal justice response and a regulatory response’.<sup>41</sup>

## Please tell us your views

- 27 We are interested to know if any of the justice processes discussed here, or others you wish to draw to our attention, provide best practice examples for how the criminal justice system should support people who have been sexually harmed. We would also like your views on how other justice processes interact with the criminal justice system.

## Questions

- 1 What aspects of other justice processes provide best practice examples for supporting people who have experienced sexual harm?
- 2 How can the interaction between other justice processes and the criminal justice system be improved?

*You might think about:*

- what is best practice for responding to sexual harm
- how other justice processes meet the needs of those who have been sexually harmed
- any problems that arise from the interaction between criminal and other justice responses to sexual harm
- how data on outcomes from other justice processes could be collected to improve our understanding of sexual offending.

## Endnotes

- 1 See Issues Paper G. The limited focus of the criminal justice system and the varied justice needs of people harmed by sexual offending are discussed in 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) 9 <<https://cij.org.au/research-projects/sexual-offences/>>; Centre for Innovative Justice, RMIT University, *It's Healing to Hear Another Person's Story and Also to Tell Your Own Story: Report on the CJ's Restorative Justice Conferencing Pilot Program* (Report, October 2019) 3 <[https://cij.org.au/cms/wp-content/uploads/2018/08/rmit\\_8691-rjcpp-report-web.pdf](https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf)>.
- 2 Note that other justice processes should also ensure procedural fairness and respect the rights of people who are accused of sexual offending and related behaviours such as sexual harassment.
- 3 Judicial College of Victoria, '2.2.3 Intentional Torts— Sexual Assault', *Civil Juries Charge Book* (Online Manual, 14 April 2014) <<https://www.judicialcollege.vic.edu.au/eManuals/CJCB/45338.htm>>.
- 4 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, September 2015) 5 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.
- 5 The changes listed here were also made in response to the earlier findings in Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (Parliamentary Paper No 275, 2013) <<https://www.parliament.vic.gov.au/58th-parliament/fcdc/inquiries/article/1788>>.
- 6 *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic); Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse Are Less Helpful than They Appear' (2020) 43(2) *University of New South Wales Law Journal* 452, 455. Victoria has also legislated to allow courts to set aside past judgments concluded after a limitation period had expired, and settlements reached while a limitation period applied, where the court finds it is just and reasonable to do so. See Victorian Government, *Annual Report 2019—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2019) 15 <<http://www.vic.gov.au/victorian-government-annual-report-2019-royal-commission-institutional-responses-child-sexual-abuse/redress-civil-litigation-report-2015>>.
- 7 *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic); Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse Are Less Helpful than They Appear' (2020) 43(2) *University of New South Wales Law Journal* 452, 455. The Funding Guideline for Services to Children, which commenced on 1 July 2019, requires nongovernment organisations that receive government funding to provide services to children to be incorporated and insured against child abuse: Victorian Government, *Annual Report 2019—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2019) 15 <<http://www.vic.gov.au/victorian-government-annual-report-2019-royal-commission-institutional-responses-child-sexual-abuse/redress-civil-litigation-report-2015>>.
- 8 *Wrongs Act 1958* (Vic) s 91(2), (3). A criminal offence of 'failure to protect' was also created. It applies to people within organisations who knew of a substantial risk of child sexual abuse by someone in the organisation in relation to a child under its care and who had the authority to reduce or remove the risk, but negligently failed to do so: Victorian Government, *Failure to Protect: A New Criminal Offence to Protect Children from Sexual Abuse* (Factsheet, 2017) <[https://www.justice.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2020/06/e0/4460c5147/failure\\_to\\_protect\\_betrayal\\_of\\_trust\\_factsheet\\_2017.pdf](https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/e0/4460c5147/failure_to_protect_betrayal_of_trust_factsheet_2017.pdf)>. This offence is discussed in Issues Paper C. In addition, Victoria now has a 'reportable conduct' scheme administered by the Commission for Children and Young People. 'The scheme ... require[s] organisations that have a high level of responsibility for children to report allegations of child abuse and child related misconduct to the Commission for Children and Young People. Certain community service organisations funded by the Department of Health and Human Services [are] covered by the scheme.' *Ibid* 6.
- 9 This was emphasised in submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse. See, eg, Centre for Excellence in Child and Family Welfare Inc, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5—Civil Litigation* (2015) 4 <<https://www.cfecfw.asn.au/wp-content/uploads/2015/05/Royal%20Commission%20-%20Issues%20Paper%205%20-%20Civil%20Litigation.pdf>>; Knowmore, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5—Civil Litigation* (17 March 2014) 20 <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%2017%20Knowmore.pdf>>.
- 10 Office of Public Prosecutions (Vic), *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (Booklet, 2013) 5–7 <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/December-2013/c-Financial-assistance-brochure-for-victims>>.
- 11 Office of Public Prosecutions (Vic), *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (Booklet, 2013) <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/December-2013/c-Financial-assistance-brochure-for-victims>>. Office of Public Prosecutions (Vic), 'Proceeds of Crime', *Our Work* (Web Page, 2016) <<https://www.opp.vic.gov.au/Our-Work/Proceeds-of-Crime>>.
- 12 *Equal Opportunity Act 2010* (Vic) s 92(1). The Act specifies that 'a reasonable person would have anticipated [the behaviour] would cause someone to feel offended, humiliated or intimidated'. In federal law, sexual harassment is defined along similar lines: *Sex Discrimination Act 1984* (Cth) s 28A.
- 13 Including the *Sex Discrimination Act 1984* (Cth); *Equal Opportunity Act 2010* (Vic), fair work laws, and workplace health and safety provisions.
- 14 *Equal Opportunity Act 2010* (Vic) s 15 (this obligation also applies to discrimination and victimisation).
- 15 *Ibid* ss 103, 104.
- 16 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment* (Report, 2020) 451 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.
- 17 *Equal Opportunity Act 2010* (Vic) s 122.
- 18 Such as insecure work and temporary visa status: Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment* (Report, 2020) 75, 192–7 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.
- 19 The AHRC characterises sexual harassment as a form of sexual violence and argues that policies to redress gendered power imbalances are necessary to combat it: *Ibid* 18, 23, 25, 34, recommendations 6, 7.
- 20 *Ibid* 29, 505–6.
- 21 *Ibid* 34, 506, 584, 589–90, recommendations 24, 40.
- 22 *Ibid* 443, 559–60, 563–4, recommendation 38.
- 23 *Ibid* 28, 34–5.
- 24 *Equal Opportunity Act 2010* (Vic) s 15. In 2020, the Victorian Equal Opportunity and Human Rights Commission produced an updated 'Guideline' to assist employers to meet this duty, including six minimum standards designed 'to tackle the underlying drivers of sexual harassment, break down barriers that deter victims from reporting and build safe, respectful workplaces': Victorian Equal Opportunity and Human Rights Commission, *Preventing and Responding to Workplace Sexual Harassment—Complying with the Equal Opportunity Act 2010* (Guideline, August 2020) <<https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>>.
- 25 'Sexual Harassment Support and Response Tool', *Victorian Equal Opportunity & Human Rights Commission* (Web Page, 2020) <<https://www.humanrights.vic.gov.au/resources/respond-to-sexual-harassment/>>.
- 26 'Frequently Asked Questions', *Victims of Crime Assistance Tribunal* (Web Page, 2016) <<https://www.vocat.vic.gov.au/how-apply/frequently-asked-questions>>; Office of Public Prosecutions (Vic), *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (Booklet, 2013) <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/December-2013/c-Financial-assistance-brochure-for-victims>>.
- 27 The orders can be made for physical injury or emotional distress, medical expenses, counselling, and loss of earnings. Office of Public Prosecutions (Vic), *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (Booklet, 2013) <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/December-2013/c-Financial-assistance-brochure-for-victims>>.
- 28 'Frequently Asked Questions', *Victims of Crime Assistance Tribunal* (Web Page, 2016) <<https://www.vocat.vic.gov.au/how-apply/frequently-asked-questions>>.

- 29 There are no fees associated with filing a VOCAT application, and an applicant need not be legally represented: Ibid.
- 30 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) 90–91 <<https://cij.org.au/research-projects/sexual-offences/>>; 'Frequently Asked Questions', *Victims of Crime Assistance Tribunal* (Web Page, 2016) <<https://www.vocat.vic.gov.au/how-apply/frequently-asked-questions>>; *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 192 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 31 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 29, July 2018).
- 32 The Scheme started on 1 July 2018 and will run for 10 years. All Victorian Government institutions are covered by the scheme. See *National Redress Scheme* (Web Page) <<https://www.nationalredress.gov.au/>>.
- 33 The discrimination/harassment/violence must have been committed by a Victoria Police employee and must have occurred while the person subjected to it was working: 'Restorative Engagement and Redress Scheme', *Victorian Government* (Web Page, 24 April 2020) <<http://www.vic.gov.au/redress-police-employees>>.
- 34 Australian Government, '3.2.1 What Does "Reasonable Likelihood" Mean?', *National Redress Guide* (Online Guides to Social Policy Law Version 1.03, 1 July 2019) <<https://guides.dss.gov.au/national-redress-guide>>.
- 35 'Restorative Engagement and Redress Scheme', *Victorian Government* (Web Page, 24 April 2020) <<http://www.vic.gov.au/redress-police-employees>>.
- 36 In relation to the regulation of community and sporting organisations, see the resources available at 'Safeguarding Children and Young People in Sport, Everybody's Responsibility', *Vicsport* (Web Page, 2020) <<https://vicsport.com.au/blog/1244/safeguarding-children-and-young-people-in-sport-everybodys-responsibility>>. An example of professional regulation is the Australian Health Practitioner Regulation Agency (Ahpra), which sets standards that must be met by all registered health practitioners in Australia. Ahpra and its National Boards, which have oversight of different areas of practice, can take disciplinary action for breaches of professional standards, including in relation to sexual misconduct. See Australian Health Practitioner Regulation Agency, 'Ahpra & National Boards', *Home* (Web Page, 2020) <<https://www.ahpra.gov.au/>>.
- 37 For example, government departments impose obligations on staff and service providers to 'be aware of, and comply with, relevant standards, screening requirements, program requirements and policies on preventing, reporting and responding to child sexual abuse'. See 'Children, Youth and Families—Sexual Assault', *Children, Youth and Families* (Web Page, 2019) <<https://providers.dhhs.vic.gov.au/criminal-offences-improve-responses-child-sex-abuse>>.
- 38 'Disability Service Safeguards—Code of Conduct', *Victorian Disability Worker Commission* (Web Page, 2020) <<https://www.vdwc.vic.gov.au/rights-and-responsibilities/disability-worker-code-of-conduct>>.
- 39 Ibid.
- 40 Ibid.
- 41 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 112 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.

