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Responding to Victorian Law Reform Commission's *Improving the Response of the Justice System to Sexual Offences: Issues Papers*

A Submission by Gatehouse Centre,

Royal Children's Hospital

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Improving the Response of the Justice System to Sexual Offences
A Response from The Gatehouse Centre

1 Introduction

The Gatehouse Centre (Gatehouse) welcomes the opportunity to respond to the Victorian Law Reform Commissions' (VLRC) *Improving the Response of the Justice System to Sexual Offences*: *Issues Papers*. While acknowledging the significant reforms made in the wake of the VLRC's *Sexual Offences: Final Report* (2004), the Victorian *Betrayal of Trust* report (2013) and the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse (2017), Gatehouse believes there is still much to be done to make the Victorian sexual assault system work better for children and young people.

Our submission will restrict itself to those areas where Gatehouse believes its expertise and experience enable it to make a valuable contribution. Accordingly, we shall approach the issues raised by the VLRC from the perspective of (i) children and young people who have experience sexual harm and (ii) young people who are exhibiting sexually harmful behaviours. We shall not address matters concerning adult victims or offenders.

2 About the Gatehouse Centre

Gatehouse is a department of the Royal Children's Hospital in Melbourne and a member of Sexual Assault Services Victoria (formerly CASA Forum). Gatehouse provides counselling, advocacy and 24-hour Crisis Care to children and young people who have experienced sexual abuse, either as victims, as children displaying problematic sexualised behaviour or as young people engaging in sexually harmful behaviour. Gatehouse also provides secondary consultations to other professionals, has a state-wide Training and Education program and have recently initiated a Research program. Service provision and practise at Gatehouse is driven by Developmental and Family systems informed perspectives and are strongly trauma informed. Children, young people, and their families are understood in their context, and the meaning which they bring to their experiences is central to the work we collaboratively undertake with them.

3 Issues Paper A - Working Together to Respond to Sexual Offences

3.1 Obstacles to Justice

Many of the obstacles that prevent children and young people who have experienced sexual harm and their families from pursuing criminal justice are well-known and persistent. It is useful, however, to highlight several here:

a) Poor conviction rates for sexual offences tend to discourage potential complainants from reporting and persevering in the criminal justice process. Indeed, very few allegations of sexual abuse against children are ever tested in court.

b) Even if conviction rates were more encouraging, many children, young people and families are discouraged by the protracted nature of the criminal justice process. The thought of being in a prolonged state of anxiety, experiencing frequent procedural disturbances to their recovery process and suffering the persistent threat or actual harm of re-traumatization is more than enough to dissuade many from pursuing criminal justice.

c) The response by SOCIT is inconsistent and sometimes counterproductive. Gatehouse has observed that some SOCIT members are inclined to emphasize the difficulties of the criminal justice process and its low conviction rate, while failing to outline the supports available to potential complainants. Gatehouse is aware of instances where this approach has deterred some children, young people, and families from formally reporting sexual harm. While Gatehouse recognizes that we are dutybound to honestly inform children, young people and families about the nature and prospects of the criminal justice process, we believe there is also a duty to inform them about the supports available to them during criminal justice proceedings. As we recommend elsewhere in this submission, support through the criminal justice process would be greatly enhanced by establishing a system of Independent Child Advocates.[1]

[1] See below p.13.

3.2 Coordination & Collaboration Across the Sexual Assault System

Coordination and collaboration between the various service types that comprise the sexual assault system remains fraught and inconsistent. This lack of service integration is expressed in numerous ways across the system and stems from multiple causes. Here we will only highlight a few relevant examples of service gaps and poor coordination.

Mental Health Services: There is a serious service gap in the Western suburbs of Melbourne for 15-17yos presenting with mental health issues that do not involve psychotic features or Borderline Personality Disorder traits. Support for young people who have experienced sexual harm is compromised if those young people present with untreated mental health issues. Moreover, persistent mental health issues decrease the chances that a young person will be able to formally report sexual harm or sustain their participation in drawn-out criminal justice proceedings. It can also interfere with providing a just hearing for young people accused of exhibiting sexually harmful behaviours.

Family Violence Services (FVSs): The Victorian Government accepted those recommendations by *The Royal Commission into Family Violence* that touched on the need for greater collaboration and integration between SASAs and FVSs.[2] Subsequently, Member of SASS Victoria Forum and Domestic Violence Victoria have been engaged in a "project to consider the interface between family violence and sexual assault sectors".[3] This project has recently completed its report and SASS Victoria and FVSs will consider its contents in early 2021. Consequently, it would be premature to make any recommendations here. Rather, in light of the frequent comorbidity of family violence and sexual harm, we can only reaffirm our commitment to improving collaboration SASS Victoria and FVS.

Child Protection: From Gatehouse's vantage-point, the likelihood of a report being substantiated seems to vary from one Child Protection worker to another. That is, it seems that similar cases of alleged sexual harm are not always treated in a similar fashion, which suggests a concerning element of arbitrariness in the Child Protection

[2] State of Victoria, *Royal Commission into Family Violence: Summary and Recommendations, Parl Paper No 132 (2014–16), Recommendations 31 & 32, p.54.*

[3] See https://www.vic.gov.au/family-violence-recommendations/determine-whether-family-violence-and-sexual-assault-services

decision-making process. Obviously, any such arbitrariness is antithetical to natural justice, as well as the best interests of children and young people.

One possible explanation for this seeming variation is that Child Protection workers are not consistently applying the legal standard for substantiation. In cases of sexual harm, that standard comprises a two-part test:

a) Are there reasonable grounds for believing that the child has suffered or is likely to suffer significant harm as a result of sexual abuse; &

b) Is it the case that the child's parents have not protected, or are unlikely to protect, the child from such harm?[4]

At an operational level, Child Protections workers need to have a shared and consistent understanding of what constitutes sufficient evidence to warrant the formation of a reasonable belief that a child is need of protection. However, Gatehouse's experience suggests that there is not a uniform understanding or consistent application of the standard. Accordingly, Child Protection should ensure that its training, policy and procedures, and quality assurance mechanisms are clear and robust enough to minimise the type of arbitrary decision-making that Gatehouse has observed.

The following may serve as an example of the arbitrary and variable nature of some in Child Protection decision-making. A young child twice disclosed to their psychologist that they had experienced sexual harm at the hands of a family member. The child then made a similar disclosure to their Gatehouse counsellor. Despite these three disclosures, the child failed to repeat the allegation in any of the subsequent Child Protection and SOCIT interviews. In the absence of the child's direct testimony, Child Protection declined to substantiate the case and SOCIT discontinued their investigation. However, after 15-months of advocacy, Gatehouse was finally able to convince Child Protection that the testimony of the psychologist and the Gatehouse counsellor was sufficient grounds for Child Protection to form a reasonable belief that the child was in need of protection. Yet, this welcome reversal occurred even though no new evidence had emerged between Child Protection's initial decision to refuse substantiation and their subsequent substantiation of the case. The

[4] *Children, Youth and Families Act 2005* (Vic) s.162(1)(d). See also the *Child Protection Manual*, https://www.cpmanual.vic.gov.au/policies-and-procedures/phases/investigation/decision-outcome-investigation.

only thing that changed was that the case was transferred to a different region and assigned to a different Child Protection worker. Resolution of such issues should not take so long nor should it be dependent upon which Child Protection worker is assigned the case. Rather, Gatehouse suggests that the sworn testimony of a credible witness to a child disclosure should be regarded as sufficient grounds to form a reasonable belief that a child is in need of protection, especially where disclosure has been repeatedly made to the same witness or to more than one witness, and where there is a plausible reason for why the child has not repeated their disclosures to Child Protection or SOCIT (e.g., discomfort with talking to strangers). However, adoption of this standard is not sufficient, there also must be a uniform practice of apply the standard to all relevant cases.

Additionally, Child Protection worker's exhibit significant variability in their willingness to seek protective orders from the Children's Court of Victoria. It is not uncommon for Gatehouse to be advised by one worker that there are insufficient grounds upon which to request an order from the Court, only to subsequently receive the opposite advice upon the appointment of a new worker to the case. In these instances, the case is the same and the known facts about the case are the same, but the advice has changed as the worker changes. Again, this suggests a certain arbitrariness in the Child Protection decision-making system. Accordingly, when it comes to seeking protective orders, Child Protection should ensure that its training, policy and procedures, and quality assurance mechanisms are clear and robust enough to minimise the effect of idiosyncratic decision-making.

Child Protection & Victoria Police: Where a report of sexual harm initiates both a Child Protection and a criminal investigation, it is essential that Child Protection and Victoria Police coordinate their investigatory efforts. These agencies should formulate a shared investigatory plan in order to minimise the impact that their investigations might have on the children, young people and families involved in the case, while maximising the forensic thoroughness of their inquiries. For example, a coordinated approach to child interviews could allow a single interview to serve the forensic needs of both agencies, while mitigating the risk of re-traumatisation that arises with multiple interviews.

Obviously, a coordinated investigation needs to consider the different evidentiary standards that apply to the criminal courts and the Family Division of the Children's Court of Victoria. However, this does not preclude the possibility that a properly

coordinated investigation would uncover evidence that bolsters both the civil and the criminal case.

Finally, we suggest elsewhere[5] that VLRC consider the benefits of creating a team of independent Expert Child Interviewers (ECIs) tasked with conducting the interview of young complainants and other child witnesses. ECIs would be skilled in conducting interviews that respect the needs of children and young people, while also trained to elicit testimony of the highest probative value for both civil and criminal proceedings. In the current context, ECIs could conduct interviews that would stand as evidence in both the Child Protection and SOCIT investigations. Accordingly, ECIs are one way to coordinate Child Protection and SOCIT investigations, increase the forensic value of child interviews, and mitigate the negative impact that investigations can have on children, young people, and their families.

Sexual Offences and Child Abuse Investigation Teams (SOCITs): Gatehouse understands that Victoria Police are currently reviewing their Code of Practice, including how they undertake sexual offences investigations and how in the course of such investigations they collaborate with organisations like MEMBER OF SASS VICTORIAs. While Gatehouse welcomes such a review, it also notes that this review is being conducted without consulting the very organisations with which Victoria Police are seeking to partner. This seems to be a missed opportunity to develop and formalise a shred set of operational expectations, which would likely improve the quality of coordination and collaboration between Victoria Police and SASS Victoria.

Sexual Offences Refence Group (SORG): When the SORG was first established it was comprised of various Victorian Government representatives, Victoria Police, and organisations like Sexual Assault Services Australia. Subsequently, the SORG was divided into two groups, one of which is now chaired by Victoria Police and includes service sector representatives. However, this group has no senior Victorian Government representatives empowered to make decisions and give directions. As such, when service providers raise systems issues within this forum, the concern is noted but there is no mechanism for developing and implementing solutions. Gatehouse suggests that were the SORG to return to its original configuration, chaired by the Victorian Government and consisting of representatives with appropriate decision-making power, then the SORG could become a powerful agent for

[5] See below p.17.

improving coordination and collaboration between the many agencies in the Victorian sexual assault system.

4 Issues Paper B – Key Issues in the Criminal Justice System

4.1 A Specialist Problem-Solving Sexual Offences Court

Gatehouse supports the creation of a Victorian specialist problem-solving sexual offences court. Establishing such a court would build upon the important work done by the Victorian Magistrates' and County Court Sexual Offences Lists. Indeed, as the VLRC's Issues Papers suggests, such a specialist court promises to reduce delays, speed up cases and increase the likelihood of early guilty pleas. Each of these outcomes would mitigate some of the anxiety and life disruptions that victims experience under the current system. Furthermore, a specialist court model could improve the treatment and questioning of child-complainants and other child witnesses.

However, as a recent evaluation of New Zealand's Sexual Violence Pilot Court shows, these laudable goals are not achieved by simply creating a specialist court. For instance, the evaluation found that pilot court lawyers continue to question children and young people in ways that are:

- Not age-appropriate (e.g., using complex language and leading questions);
- Often developmentally exploitative; &
- Undermining of the probative power of children and young people's testimony and the court's capacity to discover the truth.

Moreover, the evaluation found that child-complainants, child witnesses and families continue to report that cross-examination is the most stressful aspect of the trial experience.[6]

Consequently, VLRC should carefully consider the design features of any specialist sexual offences court. As the recent New Zealand pilot evaluation shows, considerable effort must be made to clearly identify, establish, and maintain high quality standards for any such incipient specialist court. This effort will require:

[6] Isabel Randell, Fred Seymour, Clare McCann, Tamara Anderson, Suzanne Blackwell, *Young Witnesses in New Zealand's Sexual Violence Pilot Court* (May 2020) The Law Foundation New Zealand http://www.lawfoundation.org.nz, 60-61.

i) Clear laws and policies (e.g., on questioning child-complainants and other child witnesses in a manner that is sensitive to a child's stage of development and to the impact of trauma on children and young);

ii) Expert and ongoing training for judges, prosecutors and defense lawyers in the nature and effects of sexual harm, as well as in the practices of the specialist sexual offences court;

iii) Periodic court quality assurance assessments; &

iv) Granting judges, prosecutors and defense lawyers access to appropriate clinical support services.

Just as the Victorian Child Safe Standards have been introduced to establish, maintain, and enforce child safety standards amongst Victorian organizations, so to a specialist sexual offences court must have clear standards and practices to guide and measure its performance. Second, the expert and regular sexual harm training of court officers should include instruction on child development, the effects of trauma on memory and behaviour, the complex nature of grooming and family power dynamics, and the appropriate methods for questioning child-complainants and other child witnesses. Third, periodic performance reviews are necessary to objectively assess the developing culture of the specialist court and the functioning and well-being of its individual officers. Finally, all those working with victims of sexual harm run the risk of experiencing vicarious trauma. Judges, prosecutors, and defence lawyers working in a specialist sexual offences court would be frequently exposed to very disturbing testimony and visual evidence. Vicarious trauma is not only harmful to a person's well-being, but it can also lead to a decline in performance and increase staff turnover which in turn could negatively impact the quality standards of the specialist court. Access to appropriate clinical support services can ameliorate the impact of chronic vicarious trauma.

A specialist problem-solving sexual offences court has the additional advantage of being better placed to address the comorbidities that frequently accompany the sexual harm of children and young people (e.g., family violence, substance use, mental illness, disability, homelessness, etc.). Left unaddressed, each of these comorbidities are not only a serious injury to the basic human rights of children and young people but are also a significant impediment to their immediate safety and well-being, as well as their long-term healthy development. It is a key strength of

problem-solving courts that they can facilitate access to a range of support services (e.g., SASS Victoria, family violence, mental health, drug and alcohol, homelessness support service, etc.). In this way, a specialist problem-solving sexual offences court could make a significant contribution to preventing future harm to children and young people, while facilitating the amelioration of the harm already done to children and young people who come before the court.

4.2 Other Court Reforms – Judge-Alone Courts & Professional Jurors

If Victoria chooses to establish a specialist problem-solving sexual offences court, it must also determine whether that court should be constituted as a standard jury trial court, a judge-alone court, or a court that makes use of professional jurors. Gatehouse sees some advantage in each of the latter suggestions. Both models promise to meet the same challenge, namely, to prevent juries from weighing evidence and drawing inferences in a way that is influenced by common community biases and mistaken beliefs about children and the nature of sexual harm (e.g., biases and mistaken beliefs about the reliability of children's testimony; the language and cognitive skills of children; the evidentiary meaning of delayed reporting; the effects of trauma on memory; the effects of grooming and family power dynamics; etc.). A judge-alone model meets this challenge by excluding juries altogether and a professional jury model overcomes the problem by empaneling jurors whose professional training mitigates the risk that they will be influenced by such common biases and mistaken beliefs. Both models require that the finder-of-fact (whether judge or professional jury) be well trained in all relevant aspects of sexual harm. The training needs to be both expert and periodic because both the law and the applicable science changes over time.

Gatehouse recognizes that both models have their advantages. A judge-alone specialist court diminishes the number of people in court and so likely mitigates some of the stress experienced by the complainant and other witnesses. It also means that training and quality assurance measures can target a fewer number of people (viz., the judge, prosecutor, and defense lawyer). Alternatively, Victorians are familiar with, and perhaps reassured by, the presence of juries. Admittedly, unlike traditional juries, professional juries do not inject into the criminal proceedings a supposedly common set of community standards. Nonetheless, professional juries would still bring to bear a type of experience and set of professional standards that are independent of the

culture of the bench and the bar, including a robust understanding of the needs of children, young people and adults who have experienced sexual harm.

Finally, the use of professional jurors is often recommended as a means for dealing with cases involving highly technical matters that might otherwise overtax a normal jury (e.g., complex financial crimes or complicated cybercrimes). Consequently, one might ask whether sexual offences are sufficiently complex to warrant the use of professional juries. Gatehouse believes that there is a reasonable case to be made in favor of such an analogy. For sexual offence trials frequently involve complex issues of how the behavior and testimony of children can be affected by the neuro-psychological impact of trauma; the sophisticated psychology of grooming and family power dynamics; the complicated nature of child development, memory, and language processing; and the complex nature of neuro-developmental disorders. It seems unreasonable to expect traditional juries to fully appreciate the complicated interactions of these various factors or for a judge's jury direction to adequately compensate for a jury's lack of understanding of these matters. For this reason, Gatehouse believes that there is some merit in the analogy between the use of professional jurors in highly technical areas like cybercrime and the complex background knowledge required to properly understand the dynamics of sexual harm and to capably weigh the testimony of those who have experienced sexual harm, especially children.

Accordingly, Gatehouse encourages the VLRC to give serious consideration to recommending the establishment of a specialist problem-solving sexual offences court that is either constituted as a judge-alone court or a court employing professional jurors. In either case, training, quality assurance and supervision must be at the heart of a well-resourced model that is orientated to preserving the rights of children and young people both in and outside the courtroom.

4.3 Justice Delayed & the Children's Witness Service (CWS)

From initial report to final appeal, the protracted nature of the criminal justice process remains a serious problem. For those who have experienced sexual harm, the delay of justice is very often a delay (or at the very least a constant disruption) to the process of healing. The thought of handing over one's life to years of investigation, pre-trail hearings, trial and appeals, certainly causes some to think twice about reporting sexual harm and subjecting themselves to the criminal justice process.

While Gatehouse regards the CWS as an important mitigatory force in this area, it cannot be expected to overcome all the ill-effects of the protracted criminal justice process. For despite the work of the CWS, meetings can remain overwhelming for children, comprising of too many legal professionals who do not adequately explain their roles or understand the impact of trauma om children or that children's need and capabilities vary with their stage of development. Children come away from these encounters feeling confused, anxious, often with a disturbing sense of having been subjected to extreme personal scrutiny and with little confidence that they have been heard and understood. Despite the laudable efforts of the CWS, the criminal justice process remains protracted, disjointed, and adversarial and this is often to the detriment of children's well-being.

Additionally, the constant changing of dates and the last-minute cancellations of hearings can be very disruptive to the lives of children and their families. The anxiety arising in the lead-up to every hearing date and the multiplication of this anxiety by the frequent (often last minute) rescheduling of meetings can have detrimental psychological and physical health effects. In one recent case, Gatehouse supported a young person in their final year of school. The frequent rescheduling of hearing dates and the concomitant exacerbation of this young person's anxiety led to her missing an entire term of school. It is impossible to precisely calculate the long-term impact these disruptions will have on this young person's future education and career opportunities, but the risk for considerable damage is very real. In such a case, it would be reasonable for this young person to conclude that seeking justice only harmed her further. If we wish to encourage those who have experienced sexual harm to report offences and pursue justice, both for themselves and for the sake of the community in which they live, we need to do a better job of protecting them through the process.

Finally, families - even those whose cases have resulted in a successful conviction - often describe their journey through the criminal justice process as a prolonged experience of distress. Here we provide one recent and illustrative case, Gatehouse supported a family whose case would eventually result in the conviction of the person accused of harming their child. However, despite this successful outcome, the family had been highly distressed by the process. Indeed, the significance of their distress was such that, when their child was subsequently sexually assault by a different offender, the family refused to go through the court process again. This understandable decision, nevertheless, left this child without justice, the offender

without accountability and the community without protection against future harm. Accordingly, while Gatehouse supports the work of CWS, we believe that reforming the protracted, adversarial, and highly disruptive criminal justice process remains an urgent priority.

4.4 Independent Child Advocates

Gatehouse suggests establishing *Independent Child Advocates* within the Victorian sexual assault system. These positions would be similar to the *Independent Sexual Violence Advisors* in the UK.[7] Moreover, this recommendation is echoed by the authors of a recent evaluation of the New Zealand Sexual Violence Pilot Court. Having carefully examined the experience of young witnesses and their families in the New Zealand court system, these authors concluded that:

> The provision of a single case manager or 'navigator', available to support the family for the duration of the investigation, trial, post-trial period and sentencing would meet many of the needs raised by families. This would ensure comprehensive information provision, support with referral to counselling and other required services. This navigator could act as a single point of contact for families and could provide liaison with other relevant parties such as police and court staff.[8]

As we envisage it, an Independent Child Advocate would be assigned to all children and young people experiencing sexual harm, as well as to children and young people accused of harmful sexual behaviours. They would be assigned to children and young people soon after the initial report and through to the conclusion of all criminal or alternative justice proceedings. As such, Independent Child Advocates would be the one constant and familiar presence for children, young people and families as they journey through the criminal justice process. Applying a child-cantered approach, Independent Child Advocates would work to create a safe and trusted relationship with children, young people, and their families, providing a dependable source of information and support.

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[7] VLRC, *Issues Paper B – Sexual Offences: Key Issues in the Criminal Justice System*, para 35.

[8] Isabel Randell, Fred Seymour, Clare McCann, Tamara Anderson, Suzanne Blackwell, *Young Witnesses in New Zealand's Sexual Violence Pilot Court* (May 2020) The Law Foundation New Zealand http://www.lawfoundation.org.nz, 62.

The principal task of the Independent Child Advocate would be to ensure that the needs of children and young people are met and that their rights are respected. They would achieve this objective by:

- Providing children, young people and their families with all relevant information and educating them about the sexual assault system and their rights within that system;
- Liaising and coordinating with other parts of the sexual assault system (e.g., Child Protection, Victoria Police, the DPP, CWS, Intermediaries, SASS Victoria, etc.
- Making referrals to ancillary support services (e.g., Mental Health services, Child and Family Services, etc.); &
- Advocating for children and young people's interests within the sexual assault system.

The involvement of Independent Child Advocates at the investigatory level could include assisting in the preparation for interviews and, where appropriate, advocating for the appointment of an intermediary. They can also liaise with investigators on behalf of the complainant and their family. Similarly, as we suggest elsewhere in this submission, an Independent Child Advocate can advocate for children and young people's interests by ensuring that prosecutorial charging decisions and the reasons behind those decisions are clearly and promptly communicated to children, young people, and their families. Moreover, if the Victorian Government accepts the VLRC's recommendation that complainants be granted the right to request an internal review of DPP charging decisions, then Independent Child Advocates can assist children, young people, and families to request a review and help them to lay out the grounds for this request.[9] Independent Child Advocates could also attend the pre-trial Ground Rules Meeting to ensure that the child's interests are represented in that forum.[10]

4.5 Intermediary Pilot Scheme

Another recent reform that Gatehouse would like to endorse is that of the Intermediary Pilot Scheme. However, it should be noted that the roll out of this scheme

[9] See below p.13.

[10] See below p.22.

has not been without problems. For instance, Gatehouse recently supported a young person with a clearly noted cognitive deficit. Yet, despite their cognitive deficit, the young person was not offered an Intermediary. This is likely another instance of poor pre-interview preparation and a lack of coordination between services. Had Gatehouse been contacted in the course of preparing for the interview or at the very least given prior notice of the interview, then the relevant parties could have been informed of the young person's cognitive deficit and ensured they received the benefit of an Intermediary. However, no such pre-interview coordination occurred and so the young person was left unsupported and the probative value of their testimony may well have been diminished as a consequence.

5 Issues Paper C _ Defining Sexual Offences

5.1 Responding to Adolescents Exhibiting Sexually Harmful Behaviours

As the VLRC considers the need for creating additional sexual offences to regulate technology driven anti-social sexual behaviours (e.g., cyberflashing), it is worth noting that any such change to the criminal law is likely to have a considerable impact upon young people. Young people are often early adopters of new technology and they are increasingly conducting their relationships (including their intimate relationships) through digital devices and via an ever-expanding array of social media platforms. The development of healthy and responsible sexual identities is a complex process, often involving mistakes and misunderstandings. It becomes even more challenging when that development is occurring online. While it is vital that we protect all Victorians from online sexual harassment and image-based abuse, it is also important that we avoid unnecessarily criminalizing the mistakes of adolescent development. Accordingly, Gatehouse suggests that VLRC consider a tiered and targeted approach to adolescents exhibiting sexually harmful behaviours. One that offers support, guidance, and accountability before resorting to the criminal law. We discuss this approach below.[11]

[11] See below p.20.

6 Issues Paper D – Report to Charge

6.1 Multidisciplinary Centers (MDCs)

Gatehouse regards the MDC model as an important innovation that has improved coordination and collaboration between SOCIT, Child Protection, SASS Victoria, Family Violence response services and Community Health Nurses. However, the model is somewhat undermined by its use of a 'lead agency' funding model. Lead agencies (in most MDCs the lead agency is Victoria Police) are the principal conduit for both funding and Victorian Government contract communication. This structurally advantageous position often causes lead agencies to exert an oversized influence over the management of the relevant project. This inequitable dynamic sits uncomfortably with a project designed to create and maintain cross-agency coordination and collaboration. For MDCs, this problem is exacerbated by the fact that Victoria Police is a workforce in constant churn. This churn results in frequent changes to SOCIT membership, which is disruptive to MDC leadership and the goal of creating a permanent culture of integration. In light of this problem, Gatehouse suggests that the Victorian Government review the MDC model to ascertain whether MDCs would benefit from (i) appointing as lead agency services other than Victoria Police (e.g., Mallee Sexual Assault Unit is the lead agency for the highly successful Mallee MDC) or (ii) the creation of an independent coordinator position to coordinate the day-to-day work of MCDs.

Additionally, Gatehouse regards the absence of forensic pediatricians from MDCs to be a weakness of the current model. The absence of forensic pediatricians seems to work against system integration, while putting further imposts upon complainants who must visit a different service to see forensic pediatricians. This increases the likelihood of complainants having to re-tell their story to a practitioner that does not have access to information gathered at the MDC.

6.2 Interviewing Children

Interviewing children is a crucial aspect of a statutory investigation.

Interviewers need to:

- Be committed to developing the requisite skill set
- Have access to ongoing training and evaluation.

- Be supported to build their skills through regular participation in interviews of children and young people.

There must be a dedicated staff group who will need ongoing support and time in position to develop the necessary experience and skills. The Gatehouse Centre is concerned that the high rate of staff turnover it has observed in SOCIT units and Child Protection Intake/Investigative units is not conducive to meeting the high standards essential to this work.

Gatehouse would encourage this review to consider if improvements are required to the recruitment and management of interviewers. We say more on this matter later.

Gatehouse is also concerned at the lack of planning of some interviews of children and young people. This can lead to practice which is not child centred as evidenced by the following observations.

- Interviewers seldom try to meet children before conducting the interview, even though children feel more comfortable and are more cooperative if they are talking to someone they know and with whom they have an established rapport.
- Some interviewers do not seem to *thoroughly* assess the needs and circumstances of children prior to interviewing them. Consequently, these interviewers can make poor decisions about venue selection (e.g., choosing places in which children do not feel safe) and the improper proximity of accused persons during the interview (e.g., an accused family member being present in the home while the interview is being conducted). They may also fail to devise effective strategies for interviewing children which maximise the chances of garnering testimony of high probative value. This is especially relevant when considering developmental stages of the child or young person, trauma, family power dynamics, disability, language processing difficulties and other neuro-developmental disorders (e.g., autism).
- Interviews can be arranged with little notice to families and no coordination with support services (e.g., therapeutic services). Failing to notify CASAs in a timely fashion has the effect of denying children the benefit of therapeutic support before and immediately after the interview.

- Some interviews seem to duplicate one another e.g. separate police and child protection worker interviews, which increases the risk of re-traumatizing the child.

Consequently, Gatehouse suggests that VLRC consider the benefits of establishing a system of Expert Child Interviewers (ECIs) for both criminal justice and child protection matters. ECIs would be highly trained professionals, licenced and regulated by the state, independent of both Victoria Police and Child Protection, and recognised by courts as expert witnesses in all aspects of child testimony. ECIs could be used to garner child-testimony in all cases involving children who are the victims of serious crime or witnesses to serious criminal behaviour. The creation of ECIs promises to improve the interview experience for children, decreasing the need for multiple interviews, decreasing the harm (given ECIs careful relationship building) of multiple interviews, and increasing the probative value of children's testimony. Depending upon the needs of the child or young person, SOCIT and Child Protection would be either present for the interview or would have access to the VARE upon completion of the interview. Accompanying the VARE, ECIs could produce a report to assist SOCIT, Child Protection, and the Court in interpreting the child or young person's testimony.

Indeed, it is important to appreciate that the safety of children and the forensic value of their testimony are not competing concerns. Children are more likely to provide the clearest and most complete testimony, when they are interviewed soon after the alleged events, in an environment in which they feel safe, and by a trusted and expert interviewer. Understanding and respecting the needs of children is not simply a necessary condition for conducting an ethical interview, it is in fact the most effective way to gather accurate and complete child testimony. Eliciting such testimony is a cornerstone in building a criminal justice system that works for children and is fair to complainant and accused alike.

As already indicated, interviews by ECI would be conducted in a fashion consistent with the current visual and audio recorded evidence (VARE) laws. However, Gatehouse suggests that VLRC consider a further innovation to the rules of evidence, namely, that persons with language processing problems and oral communication disabilities be provided:

a) the opportunity to provide real-time written responses to interviewer questions (e.g., typing answers); or

b) some other appropriate communication supports (whether human or technological);

in order to accurately capture their testimony and respect their human rights.

It should be noted that the task of providing translation services to traumatised children and young people from culturally and linguistically diverse (CALD) households requires more than the relevant language skills. Every translation is an interpretation and comprehending the testimony of traumatised children and young people requires an understanding of the effects of trauma, disability (if relevant) and the basics of child development, especially language development. Translators also need to be able to put the interviewer's questions to the child in a manner that is age appropriate. Accordingly, it seems appropriate to consider whether translation services for CALD children and young people are forensically adequate.

Gatehouse would also recommend that a documented planning meeting is required prior to any investigative interview with a range of factors addressing health, child development and communication taken into consideration as means to enhance the quality of the interview.

7 Issues Paper E – The Trial Process

7.1 Communicating Investigatory & Prosecutorial Decisions

The *Victims' Charter Act 2006* (Vic) governs the way investigators, prosecutors and victims' services are meant to respond to victims of crime. Gatehouse not only supports the basic principles enshrined in the *Victim's Charter*'s but, as a victim's services agency, is legally obliged to conduct itself in accordance with those principles.[12] Gatehouse believes that this recent extension of the *Victim's Charter* to cover victim's services agencies is an important and just reform.

[12] *Victims' Charter Act 2006* (Vic) ss.3(1),18(1), 19, 19A, 19B.

The *Victim's Charter* informs the standards outlined in the *Policy of the Director of Public Prosecutions for Victoria*.[13] Under these laws and standards, investigators are required to "inform a victim, at reasonable intervals, about the progress of an investigation", including the decision to discontinue the investigation.[14] Likewise, prosecutors have a duty to promptly inform victims about all charging decisions (e.g., decisions about whether to bring charges or not, the type of charges to be brought, any subsequent changes to the initial charges, any decision to discontinue charges, and any plea deals conditioned on bringing lesser charges) and explain the reason behind those decisions.[15]

However, it is our experience that adherence to these standards is inconsistent and often inadequate in their execution. For, even when prosecutors do inform victims and their families about their charging decisions, they either do not explain the reasons behind these decisions or they state those reasons in a way that fails to effectively communicate their meaning to victims and their families. Yet, just as we expect investigators, judges, and juries to take children's developmental capacities into account when interviewing children or weighing their testimony, we should likewise expect investigators and prosecutors to attend to the developmental, cultural, and linguistic needs of children, young people and their families when seeking to explain to them investigatory and prosecutorial decisions.

Furthermore, the current process of prosecutorial decision-making largely excludes victims and their families. Prosecutorial decisions tend to be delivered as *faits accomplis* that are to be accepted by victims and not contested. This can leave children, young people and their families feeling confused, hurt, and angry when charges are reduced or discontinued. By way of example, despite a successful prosecution of an offender that arose after a protracted pre-trial process, an eventual guilty plea and a custodial sentence, a Gatehouse client was distressed to see her offender in her workplace some months after the sentencing. After following up with the investigating officer, the client's family was advised that the offender had successfully appealed his sentence and been released. Furthermore, although the offender regularly came to the Gatehouse client's workplace, the family were

[13] See https://www.opp.vic.gov.au/getattachment/a26fab55-0c8a-48a9-b4e5-71f3a898e6cb/DPP-Policy.aspx & https://victimsandwitnesses.opp.vic.gov.au/victims/commitment-to-you.

[14] *Victims' Charter Act 2006* (Vic) s.8.

[15] *Victims' Charter Act 2006* (Vic) s.9.

advised that an intervention order was not warranted because he did not interact with or seem to even be aware of the client's presence. This is just one example of how the experience of powerlessness and shame that often accompanies sexual harm can be compounded by a prosecutorial decision-making process that denies victims any sense of agency and leaves them feeling unheard and unprotected by their community. When this happens, victims and families can come away not only believing that they have been denied justice but that they have also been further harmed by the very public institutions that are meant to protect them. Obviously, such adverse experiences tend to undermine the creation of a culture in which those who experience sexual harm feel empowered to report that harm.

While acknowledging that the DPP can only proceed to charges when they believe there is a reasonable prospect of conviction, Gatehouse hopes that the VLRC will consider strategies to improve ways in which investigators and prosecutors communicate with children and young people experiencing sexual harm, as well as with their families. As emphasised in other parts of this submission, we believe it is essential that all those investigating, prosecuting, and judging sexual offences against children and young people receive effective and regular training in child development, the dynamics of sexual offending and victimisation, the effects of trauma and, especially relevant here, strategies for effectively and respectfully communicating with children and young people who have experienced sexual harm and with their families.

Alongside adequate training, we would support increasing the involvement of victims and families in the prosecutorial decision-making process. Here the recent amendment of the *Victims' Charter Act 2006* (Vic) is of some help. Upon learning that a victim of crime believes that an agency has failed to uphold the principles of the *Victims' Charter*, an investigators, prosecutors, or victims' services agencies are obliged to inform effected person of the complaints process.[16]

This is also another area in which the creation of Independent Child Advocates would be beneficial.[17] Victims and families could rely upon an Independent Child Advocate to liaise with investigators and prosecutors, while keeping them informed about any developments in their case. Additionally, an Independent Child Advocate can

[16] *Victims' Charter Act 2006* (Vic) s.19.

[17] See above p.13.

advocate for the child's interests as prosecutorial decisions are being made, and then assist children, young people, and their families to understand the reasons for the DPP's decisions. While not relieving investigators and prosecutors of their obligation to communicate with children, young people and their families in an open and effective manner, the presence of an Independent Child Advocate, who has the sort of expert training detailed above, would certainly aid clearer and more respectful relations between victims and the various officers within the sexual assault system.

Finally, Gatehouse would encourage the VLRC to persist with its previous recommendation that Victoria establish a "a right for victims to seek internal review of a decision by the Director of Public Prosecutions to discontinue a prosecution or to proceed with a guilty plea to lesser charges".[18] Such a right of review would surely strengthen the means by which the interests of children and young people can be protected. Independent Child Advocates could contribute to such a review process by representing the child's interests and supporting the child and their family to clearly state their concerns to any reviewer.

7.2 Ground Rules Meetings

Gatehouse is concerned that amongst those currently authorized to participate in pre-trial Ground Rules Meetings there is no one whose principal duty it is to advocate for the interests of a child-complainant. Even if one regards this task as belonging to the prosecutor, it is unreasonable to think of this being the prosecutor's *principal* duty. Rather, any obligation a prosecutor might have to represent the interests of a child-complainant is in protentional conflict with their own interest in winning a lawful conviction. For example, Gatehouse has observed prosecutors encouraging young people to forgo their right to provide visual and audio recorded evidence (VARE) and instead provide direct testimony in trial. In these cases, prosecutors have told young people and their families that the likelihood of securing a conviction increases if the jury can observe the child's in-person testimony. Whether or not this is an accurate statement of jury behavior, it is clearly a rationale that does not have the child's interests at its center. Consequently, Gatehouse would encourage the VLRC to consider means by which young people's interest can be better represented in

[18] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (2016), 74.

Ground Rules Meetings. One possibility would be to include in these meetings an Independent Child Advocate.[19]

7.3 Giving Evidence

We believe that there is a gap in the current rules governing children's testimony in sexual assault cases. Currently, the only child witnesses afforded the right to provide VARE is the complainant. The rationale for allowing child-complainants the right to give VARE is that it protects the child from the general psychological stress caused by court proceedings and, most importantly, to mitigate the risk of the child being re-traumatized in the course of having to retell their story in open court, before the accused, and under cross-examination. It is also likely that child-complainants are afforded the opportunity to provide VARE because using skilled interviewers to conduct interviews under safe, age-appropriate and respectful conditions is the best way to elicit from children testimony that is of the highest possible probative value.

However, a child witness that is not the complainant is granted no such consideration. This practice seems worthy of review as the reason for granting child-complainants the right to give VARE seems to argue for granting the same right to other child witnesses. Children who have witnessed the abuse of another child can have experienced trauma themselves. As such, they are at risk of being re-traumatized by open court questioning. The risk of re-traumatization is particularly high in cases where the child witness is the complainant's sibling and so has likely been subject to the same family environment as the complainant (e.g., other forms of family violence). The distress of child witnesses is likely all the more serious in those cases in which the child is to give evidence against a family member (e.g., where their father is the accused) and that family member is present in court.

Furthermore, like the case of child-complainants, the testimony of other child witnesses is likely to be of the highest probative value when it is elicited by skilled interviewers and garnered under safe, age-appropriate, and respectful conditions. For example, capturing evidence closer to the alleged events can be particularly important when dealing with young children's memories. The course of any given criminal proceeding can be quite protracted. Accordingly, trials can be held several years after the alleged events took place. In all that intervening time, there is a risk

[19] See above p.13.

that young children's memories will fade or be reshaped by the narratives of other family members. Avoiding faded or influenced memories seems to be in the interest of all parties (viz., the complainant, the accused, and the State). Accordingly, there is good reason for granting non-complainant child witnesses the right to give VARE.

In sum, Gatehouse would encourage VLRC to consider expanding the right to give VARE to non-complainant child witnesses. At minimum, this right should be extended to non-complainant child witnesses where one of more of the following conditions hold true:

- There is a risk that examining the child in open court will cause them harm, including the possibility of re-traumatization;
- The accused is a family member (e.g., parent, grand-parent, sibling, etc.) or a very close associate of the family;
- The age and capacities of the child indicates that recording the child's testimony close in time to the alleged offending is important for ensuring that the child memory is clear, and their testimony is accurate and complete; &
- The child exhibits traits (e.g., developmental stage, trauma, neurodevelopmental disorder, language processing difficulties, etc.) that indicate that their testimony will be at its highest probative value when provide in the form VARE.

7.4 Jury Direction

With respect to sexual offences against children and young people, there seems to be many issues that call for jury direction (e.g., the reliability of children's testimony; the language and cognitive skills of children; what inference the jury should draw from delays in reporting; the effects that trauma can have on memory; the effects trauma, grooming and family power dynamics can have on behavior and testimony of children; etc.). These issues are so little understood in the community and so frequently present in these trails that scientifically informed, clear, and consistent jury directions is of the upmost importance. Gatehouse observes that this yet another reason why it important that judges receive expert and regular training in the broad sexual harm to children and young people. It is also another reason to favor for the establishment of a specialist sexual offences court.[20] For in specialist courts, judges (along with other officers of the court) would not only receive the requisite training, they would also accumulate considerable experience in directing juries on those complicated issues that so often arise in child sexual offences cases.

7.5 Evidence in Relation to Complainant's Behavior

In a recent case, Gatehouse supported an 18yo woman who had been sexually assaulted in her home. Some hours before the assault, the young woman had met her assailant - who was otherwise unknown to her - at a local bar. She subsequently left the bar and returned home alone. Later that night, the assailant accompanied the young woman's roommate back to the complainant's place of residence and subsequently entered her bedroom and raped her. During the course of the trial, the defence was able to introduce a CCTV recording from inside the bar where the complainant had first met her assailant. The CCTV recording was played in open court and the defence lawyer closely scrutinised the complainant's behaviour, questioning her about her conduct and seeking to adduce from the recorded encounter evidence of her later consent. The experience of having this recording shown in court and being cross-examined about it was highly distressing to the young woman.

Gatehouse suggests that the probative value of a CCTV recording made hours before an alleged assault is highly suspect. Even if the recording could demonstrate that the complainant had 'flirted' with the accused, this fact could never provide evidence

[20] See above p.8.

that she consented to sex hours later, at a different locale and after she had left the bar with no arrangement to meet the accused again. Moreover, we would draw the VLRC's attention to the introduction of such CCTV evidence as a new vector for intimidating complainants in court and creating unjustified doubt amongst jury members. Having a recording of your behaviour played to an open court can be as intrusive and humiliating as having defence lawyers question you about the clothes you were wearing during your assault or about your sexual history. We do not mean to suggest that such evidence should be wholly inadmissible, but we would urge the VLRC to consider such evidence as being of a sensitive nature and to recommend clear rules around its admissibility, the manner in which is played in court and the appropriate lines of questioning that may be used upon its introduction.

7.6 Protection of Medical & Counselling Records

Gatehouse supports the VLRC's previous recommendation that victims be automatically given the right to be heard on any application by the accused to collect the victim's private medical or counselling records. We also endorse the VLRC's recommendation that victims be granted legal aid funding in order to access independent legal advice on such matters. Gatehouse regularly challenges such applications, but we are concerned that vulnerable families and less well-resourced support agencies submit to such applications because they lack the knowledge and wherewithal to assert their rights. Finally, Gatehouse would encourage the VLRC to consider whether there are ways, consistent with legal fairness, in which a successful application can be granted with the caveat that only defense counsel may view the records, while they are withheld from the accused. Defense counsel would then introduce into open court only those aspects of the records deemed admissible by the presiding judge.

8 Issues Paper F – People Who Have Committed Sexual Offences

8.1 Diverse & Complex Needs

Gatehouse is well acquainted with the diverse and complex needs of young people who exhibit sexually harmful behaviours. The following are particularly prevalent:

- neuro-developmental disorders (e.g., autism, ADHD, intellectual disabilities, traumatic brain injury, fetal alcohol spectrum disorder, language processing difficulties, etc.);
- mental illness
- experience of family violence, whether directly and indirectly; &
- exhibiting two or more of the above vulnerabilities.

There have been welcome developments within Victoria in services working with young people who exhibit sexually harmful behavior. There remains a challenge of integration/coordination of services and timely access for some young people. Gatehouse suggests that, like children and young people who have experienced sexual harm, children and young people who exhibit sexually harmful behaviours would benefit from the appointment of an Independent Child Advocate. It is recognized that young people are well supported by their lawyers in the context of legal proceedings. The advocate would be responsible for helping the young person navigate the range of services which they may encounter outside the domain of legal representation.[21]

8.2 Responding to Adolescents with Emerging Sexually Harmful Behaviors

When responding to young people with emerging sexually harmful behaviours, we must recognise that adolescents are still developing socially, culturally, cognitively (including executive functioning), and emotionally. As such, the primary goal of early intervention for first-time and low-level harmful sexual behaviours should be to (i) encourage the young persons to acknowledge the harm they have caused and (ii) take responsibility for their actions, while (iii) supporting them to develop the values, beliefs and social skills needed to conduct themselves as healthy and responsible sexual persons. Furthermore, sexually harmful behaviours often emerge within difficult developmental environments (e.g., family violence, substance use, mental illness, neuro-developmental disorders, etc.). Through no fault of the young person, these environments can disrupt the development of healthy and responsible sexual identities. Early intervention should seek to identify these risk factors and work to ameliorate their negative effects. The unnecessary criminalization of sexual

[21] See above p.13.

developmental problems should be avoided, although the safety of victims and the wider community must be considered paramount.

Accordingly, Gatehouse suggests that the VLRC consider the benefits of creating a comprehensive, tiered, and targeted response to young people with emerging sexually harmful behaviours. Such a system would require both:

1. Early detection systems for identifying young people with emerging sexually harmful behaviors (see box below); &
2. Early intervention systems for responding to young people with emerging sexually harmful behaviors (see box below).

Early Detection System

Components of the early detection system could include:

- Existing vehicles for early detection (e.g., schools, hospitals, CASAs, Child Protection, SOCITs, etc.).

8.2 Therapeutic Treatment Orders (TTOs)

Victorian governments have for several years recognized the importance of an early intervention process in relation to sexually harmful behaviour. It has led to the development of state-wide service provision.

One of the strengths of the Victorian response to children and young people who engage in harmful sexual behaviour, has been an appreciation of seeking to avert a criminal process where possible; and when required a criminal response maintains a strong rehabilitative focus. DHHS Child Protection can play an important role in assessing the safety and best interests of young people who engage in harmful sexual behaviour.

Gatehouse wishes to highlight the success of the TTO system and underscore how important it is for holding young people exhibiting sexually abusive behaviors to account, while helping them to learn to express their sexuality in a healthy and responsible manner. In this way, the TTO system is a vital means for the prevention of further incidences of sexual harm. Opportunities exist to integrate the current TTO

system with a Restorative Justice Approach and a *Circles of Support and Accountability* model.[22]

It is the opinion of Gatehouse that the development of the Therapeutic Treatment Order within Child Protection legislation is a welcome recognition that a criminal response is not always appropriate or necessary to address the behaviours.

Gatehouse is also aware of the sensitive practice that police and child protection apply in decision making in situations of intrafamilial sexual harm such as between siblings. Decision making by police and child protection demonstrates an awareness of the challenge faced by parents and carers seeking to protect one child from another; attend to the impacts of harm disclosed and try to maintain a prospect of family unity. It is a time of great stress for families.

[22] See pp.31& 29 respectively.

Early Intervention System

a) If the sexually problematic behaviour is considered a low-level, less serious matter then a combination of the following approaches might be indicated:
    - Referral to SABTS
    - Restorative Justice Forum (see below p.32); &
    - Assessment for comorbidities and referral to appropriate support services (e.g., SABTS counselling, mental health services, family violence services, etc.).

b) If the sexually problematic behaviour is considered to be serious and may constitute a crime and/ or a previous intervention has not achieved the desired outcome, then an augmented version of the current system is indicated:
    - Therapeutic Treatment Order (see below p.28);
    - Restorative Justice Forum (see below p.32); &
    - Circles of Support & Accountability (see below p.31).

While this sketch provides only an incomplete picture of a comprehensive, tiered, and targeted response to young people with emerging sexually problematic behaviours, it is offered to the VLRC with the hope that it will consider how Victoria might better respond to this cohort of young people in a manner that protects the community, while avoiding the unnecessary criminalization of developing and often vulnerable young people. We believe that accountability can be retained at the heart of such a system, while also keeping young people with emerging sexually problematic behaviours out of the criminal justice system and supporting them towards a healthy and responsible sexual adulthood. Moreover, by employing the methods of

restorative justice, such a tiered system can support this cohort of young people, while providing those experiencing sexual harm with a forum in which they can be heard, have the harm done to them acknowledged and provide them with an opportunity to see the offender being held accountable.

8.3 Circles of Support & Accountability

Gatehouse endorses the *Circles of Support and Accountability* model. Consideration should be given to using this model in combination with Therapeutic Treatment Orders (TTO). A circle of support and accountability could be established during the life of a TTO. This would mean that, upon completing their TTO, the young person would continue to enjoy benefits of a well-established support system whose objective is to help them reintegrate into the community and continue towards developing a healthy and responsible sexuality. This intervention could also assist young people who have a conviction for a sexual offence and maybe involved with a criminal justice intervention.

8.4 Sex Offender Register

Gatehouse objects to the publication of the sex offender register, in which the registerable offence was committed by a minor. Any law permitting the publication of these types of offences risks violating the rights of children and young people who break the law. Specifically, the right to be governed by penal laws that promote their dignity and worth, support their reintegration into their community and encourage their assumption of a constructive role in society.[23] It also amounts to the imposition of a life-long sentence of public shaming and the permanent curtailment of life-opportunities (e.g., career opportunities, perhaps opportunities to start a family, etc.). This would seem to run counter to the principle found in human rights law that sentencing children and young people under the criminal law should be a last resort, should be no more punitive than is necessary, and should take account of the children's stage of development.[24] Moreover, international human rights law explicitly bans the life-long incarceration of children and young people. We submit that any penalty with the power to impose continuous, life-long punishment is an unjust way to treat juvenile offenders. The publication of registrable offences committed as a minor

[23] United Nations, *Convention on the Rights of the Child*, art 40

[24] United Nations, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, art 2; United Nations, *Convention on the Rights of the Child*, art 40.

is an example of this type of unjust treatment. Children and young people should be allowed to grow-up and the force of criminal sentences, when served, should come to an end.

Furthermore, the publication of registrable offences committed as a minor is antithetical to aims of reintegration and the prevention of further offending. Those who in their childhood exhibited developmental problems involving sexually abusive behaviors do not deserve to be publicly shamed for the rest of their lives. Especially as the factors that led to the disturbance of their sexual development (e.g., witnessing or experiencing family violence) may not have been within their control. Indeed, such public shaming risks opening such persons to the risk of vilification and even violent retaliation, which in turn could lead to their social isolation. Such social isolation runs counter to their continued mental health and so increases the risk of reoffending. Accordingly, the publication of registrable offences committed as a minor is an infringement of the rights of the child, an insult to our conception of just and proportional punishment and may place community members at greater risk of sexual harm. For these reasons such publication should not be countenanced.

9 Issues Paper G – Restorative & Alternative Justice Models

9.1 Restorative Justice Models

Gatehouse would welcome this commission consider the use of restorative justice models for responding to sexual offences. Specifically, we believe that a restorative justice approach would suit some cases of sibling abuse and first-time, low-level inappropriate behaviors and offending.

A restorative justice approach provides the injured party an opportunity to tell their sibling about hurt they have endured and to then witness their sibling take responsibility for their actions and apologize for the hurt they have caused. It is a basis upon which the sibling relationship might begin to heal. In addition, it can pave the way to repairing other relationships within the family system (e.g., parent-child relationships) that might have been injured by the sexual offending.

Furthermore, Gatehouse believes that the VLRC should consider how restorative justice models might be employed in responding to young people who have engaged in relatively less serious harmful sexual behaviours and/or have committed

first-time sexual offences. Frequently Gatehouse encounters such situations with peer aged interactions in which a combination of inexperience and poor decision making in intimate matters will require guidance and an appreciation of upset or harm caused.

Gatehouse is of the view that it is important that any participant in a Restorative Justice process is adequately prepared. While not formally involved in a restorative justice program, Gatehouse has experience of exploring ideas of acknowledgement and apology within its therapeutic work. Gatehouse has learnt such work can take time. For example a program of individual work with a young person who has caused sexual harm will need to be implemented prior to any sense of confidence the young person could meaningfully participate in a restorative justice meeting/series of meetings to be of assistance to the person harmed.

When skillfully facilitated, this experience of accountability can be a transformative experience for a young offender and victim alike. Indeed, combining restorative justice forums with the existing TTO system and the proposed *Circles of Support and Accountability* model would make for a powerful and just response to young people who exhibit sexually harmful behaviours.

9.2 Principles Informing the Use of Restorative Justice Forums

Gatehouse suggests that any restorative justice response to sexually harmful behaviours should involve the following:

- The use of only highly trained facilitators to manage the process;
- A victim-centered approach, including a careful screening process for establishing that a restorative justice approach is a safe and appropriate response for the victim;
- Robust supports for the victim (e.g., the presence of a trusted adult, therapeutic supports, etc.) before and after the restorative justice process;
- Integration of the restorative justice system with therapeutic services (i.e., victims support services and SABTS), the TTO system and post-TTO supports (e.g., *Circles of Support and Accountability*);

- That access to restorative justice proceedings is conditioned on the accused young person taking responsibility for the sexual harm they have caused (even if they do not intend to plead guilty to any associated criminal charge); &
- That the proceedings avoid shaming young offenders.

Finally, when considering the design of a Victorian restorative justice model, we recommend that VLRC look to the work of the Australian Association of Restorative Justice, the South Australian youth conferencing model, the *Prevention Project Dunkelfeld*, and *Project Restore* in New Zealand.

10 Issues Paper H – Civil Law & Other Non-Criminal Responses

10.1 The Relationship between Civil and Criminal Justice

In Gatehouse's experience, complainants are seldom informed about the power of prosecutors to apply for civil orders that prevent an accused from disposing of their property. Moreover, we are aware of cases in which the accused has been found guilty but when the complainant seeks to sue in civil court, they discover that in the course of the criminal proceedings the guilty party had gifted his assets to various family members. We suggest that the DPP establish consistent practices around informing the complainant and their family of the possibility of applying for these property orders. Furthermore, we observe that the introduction of Independent Child Advocates could help ensure that the pertinent information is provided to the complainant and their family.[25]

Additionally, Gatehouse suggests that when a complainant successfully applies to the sentencing court for compensation or restitution after a guilty verdict, it is the sentencing court that is empowered to enforce the order. Currently, if the guilty party fails to pay the ordered compensation or restitution, then the complainant has to initiate a separate civil action. This seems to place an unnecessary burden on the complainant. They have to expend time and resources in taking civil action, interact with yet another group of legal officials, and once again endure further delay and

[25] See above p.13.

disruption to their healing process. It would seem much better for the complainant if the sentencing court were able to enforce its own compensation or restitution orders.

11 Conclusion

Finally, Gatehouse wishes to thank the VLRC for this opportunity to comment on the important matters raised by their *Improving the Response of the Justice System to Sexual Offences: Issues Papers*. Gatehouse values the work of the Commission and wish it well in its current task of improving the sexual assault system for all Victorians, especially children and young people experiencing sexual harm.