Embedding therapeutic and restorative responses for victims and perpetrators of sexual harm: Submission to the VLRC Sexual Offences Review

23 December 2020

Victoria Legal Aid

Contents

Acknowledgement of country 4

About Victoria Legal Aid 4

Executive Summary 5

Summary of Recommendations 7

- Preventing sexual offending through education and early intervention 7
- Improving the response to disclosures of sexual harm through the coordination of service responses 7
- Expanding access to early intervention services and programs across Victoria 7
- Enhancing diversionary pathways to prevent future offending 8
- Embedding recent changes to criminal law and procedure relating to sexual offences 8
- Developing system capability and responsiveness through specialist and therapeutic approaches 9
- Improving the effectiveness of therapeutic supports and rehabilitation programs for people convicted of sexual offences 9
- Ensuring that any secondary consequences are proportionate to the offending 10
- Creating restorative pathways based on the needs and preferences of victims of sexual offending 10
- Ensuring the response to sexual offending is culturally safe and co-created with the Aboriginal community 10
- Improving the civil justice response for victims of sexual harassment and harm 11

Preventing sexual offending through education and early intervention 12

- Improving culture and social attitudes to improve gender-equality and reduce sexual harm 12
- Improving access to education about appropriate and lawful sexual behaviour 12
  - Expanding access to the 'Resilience, Rights and Respectful Relationships (RRRR)' curriculum through schools 13
- Improving access to sexual education for people with cognitive impairments and other disabilities 14

Improving the response to disclosures of sexual harm through the coordination of service responses 17

- Disclosures of sexual harm by children in residential care 17
- Improving the response to sexual offending by children in the family violence context 18
- Increasing the use of family violence and personal safety intervention orders to protect victims of sexual harm 19
- Ensuring that people receive appropriate responses and referrals when making disclosures of sexual harm 20

Expanding access to early intervention supports and programs across Victoria 21
Providing funding for early intervention and support 21
Challenges accessing treatment services in regional Victoria 21
Enhancing diversionary pathways to prevent future offending 23
Expanding access to diversion for children and adults accused of sexual offending 23
Improving access to therapeutic supports in the Sexual Offences List 24
Building on the success of diversionary and therapeutic options in the Children's Court 24
Expanding access to Therapeutic Treatment Orders to people over the age of 18 years 25
Use of civil orders as an alternative response to sexual offending by people with cognitive impairment 26
Embedding recent changes to criminal law and procedure relating to sexual offences 28
Recent reforms have improved the conduct of sexual offence proceedings 28
Ensuring the rights of the accused in criminal trial process continue to be protected 29
Relying on existing offences to respond to sexual offending 29
Extending the availability of intermediaries to vulnerable accused 31
Retaining the option for judge alone trials in appropriate circumstances 32
Reducing avoidable delay in sexual offence proceedings 33
Reducing the impact of overcharging 33
Improving quality and timing of disclosure 34
Supporting early resolution in appropriate cases 34
Understanding and planning for any forensic delays 35
Developing system capability and responsiveness through specialist and therapeutic approaches 36
Implementation of a Specialist Sexual Offences Court 36
Improving practice and experience in mainstream courts 37
Ensuring that specialist responses do not result in vicarious trauma and workforce impacts 38
Improving the effectiveness of therapeutic supports and rehabilitation programs for people convicted of sexual offences 40
Ensuring that therapeutic supports can respond to diverse needs and experiences 40
Access to treatment programs for people with cognitive impairments 41
Improved access to therapeutic supports and rehabilitation in custody 41
Improving the case management approach for people in custody 43
Ensuring that any secondary consequences are proportionate to the offending 44
Redefining the scope of the Sex Offender Registry 44
More flexibility in the approach to registration and reporting under the *Sex Offenders Registration Act 2004* 45
Improving the response to children who are registered on the Sex Offender Register 46

Reducing the reliance on post-sentence supervision 48

Creating restorative pathways based on the needs and preferences of victims of sexual offending 49

Enhancing restorative practice in the current response to sexual harm 49

Creating a separate restorative pathway as an alternative to the criminal justice system 50

Ensuring there are appropriate safeguards for all people involved in restorative processes 51

Ensuring the response to sexual offending is culturally safe and co-created with the Aboriginal community 54

Improving the civil justice response for victims of sexual harassment and harm 55

Legal assistance for victims 55

Responses to sexual harassment 56

Alternative dispute resolution processes for sexual harassment 57

Burden on victims in civil proceedings 58

Victims of Crime Assistance Tribunal 59

Data on civil complaints and outcomes 59

www.legalaid.vic.gov.au

Connect with Victoria Legal Aid

Acknowledgement of country

Victoria Legal Aid operates on Aboriginal country throughout Victoria. We acknowledge the traditional custodians of the land and respect their continuing connections to land, sea and community.

About Victoria Legal Aid

Victoria Legal Aid (**VLA**) is an independent statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

In 2018–19, VLA provided assistance to over 100,000 unique clients from our 14 offices across Victoria. Our clients are diverse and experience high levels of social and economic disadvantage. Almost half of our clients are currently receiving social security and one in three of our clients receive no income at all. Over 25,000 people disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds.

VLA has the state's largest criminal defence practice specialising in sexual offences. We have specialist experience in providing advice and representation to people charged with sexual offending. In addition, VLA has a Family and Children's Law Program that prioritises women and children experiencing or at risk of experiencing family violence, which includes sexual violence. Our Civil Law Program also provides assistance to victims of crime through the Victims of Crime Assistance Tribunal (**VOCAT**).

In 2019-20, VLA provided 2,674 criminal legal services to people whose primary (or most serious) charge was for sexual offending. This includes legal information, legal advice, duty lawyer services, grants of legal assistance and minor work files.[1] Most of these clients were adults accused of sexual offences, with 97 of these services being provided to children charged with sexual offences. A proportion of the sexual offending was in the context of family violence.

Legal assistance for people accused of sexual offending are a substantial component of VLA's criminal law practice in all jurisdictions. In 2019-20, the most common sexual offences for clients assisted by VLA were charges of rape, indecent assault, sexual penetration of a child under the age of 16, indecent act with a child under the age of 16 and breach of *Sex Offenders Registration Act 2004* (Vic).

[1] As a breakdown of service delivery, VLA lawyers provided legal information to 878 people charged with sexual offending, provided legal advice to 315 people, represented 555 people in court through VLA's duty lawyer service and conducted 47 minor work files. Both VLA lawyers and private practitioners obtained grants of legal assistance for 879 people where sexual offending was the primary (most serious) charge.

Executive Summary

VLA supports measures to improve responses to sexual offending and the experience of victims in criminal proceedings. We welcome the opportunity to contribute our client and practice experience to the development of reform to improve the justice system response to sexual offending.

The development and implementation of reform to improve the experience of victims of sexual harm has been a feature of the criminal justice system over many years. There has been a positive shift in culture and practice in the response to sexual offending, including in the conduct of criminal proceedings.

Despite this focussed effort there continue to be barriers to reporting sexual harm and attrition through the criminal justice response to sexual offending. There are also continuing issues associated with access to effective interventions that will support the rehabilitation of people accused of sexual offending and reduce the risk of future harm.

People convicted and sentenced of sexual offending are subject to increasingly onerous and restrictive sentencing outcomes. Many spend lengthy periods in custody and remain subject to supervision and reporting requirements long after the completion of their sentence.

VLA supports a response to sexual offending that builds on recent legislative changes to provide additional therapeutic pathways and responses that are flexible and adapted to the individual circumstances and experiences of people who have experienced sexual harm and those that are accused of causing sexual harm.

There is an opportunity to improve the response to sexual offending with a renewed focus on the prevention of sexual offending through education and early intervention. We also support close attention to the therapeutic interventions that will support a better response to sexual offending that reduces the risk of reoffending by addressing the circumstances that may have contributed to the offending.

In our view, new specialist and therapeutic pathways to respond to sexual offences –the piloting of a Specialist Sex Offences Court and new processes that support restorative justice outcomes – have the greatest potential to affect positive change in the response to sexual offending.

Based on our practice experience, this submission supports a renewed response to sexual offending that will:

- prevent sexual offending through education and early intervention
- improve the response to the disclosure of sexual harm through improved coordination of service responses
- expand access to early intervention supports and programs across Victoria
- enhance the diversionary pathways to prevent future offending
- embed recent changes to criminal law and procedure relating to sexual offences
- develop system capability and responsiveness through specialist and therapeutic approaches
- improve the effectiveness of therapeutic supports and rehabilitation programs for people convicted of sexual offences
- ensure that any secondary consequences are proportionate to the offending
- create restorative pathways based on the needs and preferences of victims of sexual offending

- ensure that the response to sexual offending is culturally safe and co-created with the Aboriginal community
- improve the civil justice response to victims of sexual harassment and harm, including a dedicated victims legal service.

We also support other reforms under development that will improve mainstream criminal proceedings, including the implementation of reforms to committal proceedings and associated processes. Other recent criminal justice reforms should be evaluated so that any further changes to law and procedure can be informed by robust qualitative and quantitative data.

These recommendations are based on our practice experience. While we have tried to include specific client examples to illustrate the key issues in the current response to sexual offending, we have not been able to obtain consent to share the experience of many of our clients in this public submission. Given the substantial stigma associated with the nature of the offending and the vulnerability of many of our clients accused of this offending, this is not unexpected. We welcome any further opportunities to contribute this client experience to the development of recommendations to improve the response to sexual offending by the Victorian Law Reform Commission.

In this submission, we generally refer to people who have disclosed sexual harm as victims which reflects the language used to describe victims of crime in Victoria. This means that we have used the word “victim” in circumstances where the sexual harm has been alleged but has not been admitted or proven in criminal proceedings. In some places, we refer to people who have experienced sexual harm as “complainants” to reflect the particular role in criminal proceedings.

Summary of Recommendations

Preventing sexual offending through education and early intervention

We support improvements to the delivery of education to children and young people about the laws relating to sexual activity. In particular, we support close attention to the needs of children with a cognitive impairment to limit harmful sexual behaviours and prevent entry into the criminal justice system.

We recommend:

- that an improved response to sexual offending include attention to the role of cultural and social attitudes towards gender equality in the prevention of sexual harm.
- that the Department of Education and Training mandates the use of 'Sex, young people and the law' as part of the Respectful Relationships curriculum, promoting its use to DET's Project Liaison and Project Lead staff and ensuring relevant teaching staff can participate.
- that the Victorian Government ensure that legal and other education relating to sex and the law reaches all Victorian children, to minimise the risk of children becoming victims of, or being charged with, sexual harm offending.
- that the Victorian Government increase preventative education for all students attending specialist schools and adults with cognitive impairments, by extending and better embedding effective state-wide education programs such as 'Learning the Law'.

Improving the response to disclosures of sexual harm through the coordination of service responses

We support improvements to the service response to limit the harm associated with sexual offending, particularly where a person may be involved in the child protection and family violence systems.

We recommend:

- that the safety and wellbeing of children in the child protection system be protected through the prevention of sexual offending in residential care settings and an improved response to any disclosures of sexual harm, particularly for LGBTIQ children and young people.
- that the response to child sexual offending against a child sibling include access to specialist therapeutic supports that respond to the particular vulnerabilities of this cohort and assist to limit the long-term impacts of the offending on the individual, the victim and their family.
- that new protocols be established to ensure that disclosure of sexual harm (either directly to police or in 'in-person' intervention order applications) will trigger a Victoria Police response, including police-initiated FVIO/PSIO applications in appropriate circumstances.
- that Victoria Police provide consistent follow-up and appropriate referrals to all people disclosing sexual harm or making a complaint about sexual offending

Expanding access to early intervention services and programs across Victoria

We support attention to the availability of specialist therapeutic supports across Victoria for people who may engage in harmful sexual behaviour to reduce barriers to early intervention to reduce the risk of sexual offending.

We recommend:

- that additional funding be made available to support access to early intervention and support to address problematic sexual behaviours for people at risk of involvement in the criminal justice system, without the need for a court order.
- that the availability of service and supports for sexually harmful behaviour in regional Victoria be improved.

Enhancing diversionary pathways to prevent future offending

We support increased access to early intervention and diversionary opportunities for children and adults accused of harmful sexual behaviour or sexual offending.

We recommend:

- that the current requirement that prosecution must consent to diversion be removed.
- that diversion be available for low level sexual offence matters at the discretion of the court, to ensure people are connected to appropriate therapeutic supports and treatment.
- that diversionary and therapeutic options for children and young people accused of sexual harm are consistently made available across Victoria, with funding invested in increasing the range and availability of programs.
- that children and young people should continue to have access to Therapeutic Treatment Orders as a sentencing option in the Children's Court of Victoria even if they turn 18 during the proceedings.
- that consideration be given to extending access to Therapeutic Treatment Orders to people between 18-25 to provide a more flexible response to sexual offending by young people, given growing recognition of the particular characteristics and needs of young adults.
- that consideration be given to the development of a flexible and therapeutic diversionary order for all adults with a cognitive impairment that are accused of sexual offending, based on the Therapeutic Treatment Order available in the Children's Court of Victoria.
- that civil orders under the *Disability Act 2006* and the *Mental Health Act 2014* be considered as an alternative to a criminal justice response for people with a cognitive impairment accused of sexual offending.

Embedding recent changes to criminal law and procedure relating to sexual offences

We support the recent shifts in practice and culture as a result of changes to criminal law and procedure to improve the experience of complainants in sexual offence proceedings. We have identified a number of opportunities to embed these reforms and further improve the response to sexual offending by reducing avoidable delay and providing additional support to vulnerable accused under an expanded intermediaries scheme.

We recommend:

- that changes to increase the admissibility of tendency and coincidence evidence in child sexual offence matters are not required in Victoria.
- that existing Commonwealth and State offences are sufficient to cover new and emerging forms of sexual offending, including technology-based offending.
- that children and people with cognitive impairments who have been accused of sexual harm are provided with in-court supports in circumstances where they may benefit from having some additional procedural assistance.

- that judge alone trials be available where defence and prosecution agree that an accused is unfit to stand trial under the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*.
- that charging practices, early resolution processes and the provision of disclosure be improved to reduce avoidable delay and increase rates of early resolution.
- that the processes for forensic analysis be improved through information sharing and planning so that any impact of any forensic delays on proceedings can be mitigated.

Developing system capability and responsiveness through specialist and therapeutic approaches

We support a Specialist Sex Offences Court to provide a more therapeutic response to sexual offending that focusses on the individual needs of complainants and people accused of sexual offences.

We recommend:

- that a Specialist Sexual Offences Court be piloted to provide a specialist and therapeutic response to sexual offending that:
  - provides an expanded range of therapeutic, diversionary and restorative outcomes;
  - includes enhanced case management and information for complainants in sexual offence proceedings;
  - features a sustainable workforce that has access to appropriate training and support to provide a specialist response in sexual offence proceedings; and
  - facilitates access to specialist responses across Victoria.
- that the monitoring and evaluation of a pilot Specialist Sexual Offences Court include assessment of:
  - impact on wellbeing for workforce of the pilot Specialist Sexual Offences Court;
  - access to therapeutic and diversionary supports for people accused of sexual offending who have the matter resolved through a Specialist Sexual Offences Court; and
  - qualitative assessment of the experience of complainants in sexual offence matters finalised through a Specialist Sexual Offences Court.
- that the response to sexual offending in mainstream courts be improved to build capability, increase access to therapeutic programs, promote improved case management and improve the experience of victims involved in criminal proceedings.
- that the implementation of specialist responses to sexual offending include measures to reduce the impact of vicarious trauma and other workforce impacts that have been linked to increased specialisation in the response to sexual offending.

Improving the effectiveness of therapeutic supports and rehabilitation programs for people convicted of sexual offences

We support changes to the management of people convicted of sexual offending to support them to recover, rehabilitate and transition safely back into the community.

We recommend:

- that community-based and custodial supports and programs provided to people found guilty of sexual offences should be appropriate to their individual needs, including cognitive impairment, mental illness, language and cultural need, histories of trauma and victimisation.

- that a greater range of therapeutic treatment programs are funded for people with a cognitive impairment, to support their individual needs and reduce the risk of sexual offending.
- that people convicted of sexual offending should have access to appropriate custodial programs that support recovery, rehabilitation and safe transition back into the community.
- that all people sentenced to a custodial sentence have access to consistent and individual case management to support their recovery, rehabilitation and transition back into the community.

Ensuring that any secondary consequences are proportionate to the offending

We support improvements to the processes for sex registration and post-sentence supervision to ensure these responses are proportionate to the offending and minimise the impact of these schemes on vulnerable people, such as children and people with a cognitive impairment.

We recommend:

- that the *Sex Offenders Registration Act 2004* allow for greater judicial discretion to:
  (i) determine the appropriate length of time a person should be placed on the Sex Offender Register; and
  (ii) refuse registration in certain circumstances, to prevent unfair outcomes.
- that the Sex Offenders Registration Act adopt a broader spectrum of monitoring and reporting conditions that can be adapted at the discretion of a judge to the individual circumstances of a person and their offending.
- that a legislative presumption be created against placing children on the Sex Offender Register, unless exceptional circumstances exist.
- that post-sentence supervision is not used to manage lack of therapeutic and rehabilitation support during a custodial sentence or insufficient parole planning to support safe transition back into the community.

Creating restorative pathways based on the needs and preferences of victims of sexual offending

We support flexibility in the response to sexual offending, to accommodate the diversity of experience and needs of people who experience sexual harm.

We recommend:

- that restorative principles and practices be incorporated into the current criminal justice response to sexual offending.
- that a structured restorative justice process be established as part of the system response to sexual offending, as an alternative to criminal proceedings.
- that a restorative justice pathway should include strong safeguards to protect all participants.

Ensuring the response to sexual offending is culturally safe and co-created with the Aboriginal community

We support responses to sexual offending and additional pathways for victims of sexual offending that are culturally safe and appropriate for Aboriginal people.

We recommend that the VLRC consult closely with the Aboriginal community and Aboriginal-led organisations to co-create an alternative justice model that can deliver a response to sexual offending that is culturally appropriate and safe for any Aboriginal people involved.

Improving the civil justice response for victims of sexual harassment and harm

We support improvements to the civil justice response to reduce the burden on individual complainants and improve the system support provided to victims of sexual harm.

We recommend:

- that the government fund a dedicated specialist Victims Legal Service, to provide victims of crime with tailored legal information and advice, assistance and legal representation, serviced by specialised lawyers and available statewide.
- consistent with the enforcement powers needed by workplace health and safety agencies, anti-discrimination laws should be amended to create a positive duty to eliminate sexual harassment as far as possible, and empower human rights commissions to make guidelines for compliance and enforce the positive duty.
- improved consistency in alternative dispute resolution processes across courts, tribunals and commissions that deal with sexual harassment complaints, and ensuring that individuals have the opportunity to speak about their experience and the impact on them.
- to improve civil justice responses to sexual harm, we recommend that:
    1. time limitations for civil sexual harassment claims should be significantly extended or removed;
    2. sexual harassment provisions in anti-discrimination law should be amended so that once a victim establishes a prima facie case that the sexual harassment occurred, the burden of proof shifts to the respondent; and
    3. the Victorian Equal Opportunity and Human Rights Commission should be empowered to enforce institutions' obligations to prevent sexual harassment.
- that the Australian Human Rights Commission should be required to record and publish deidentified complaints data, including settlement outcomes, in order to increase transparency of complaints and settlement outcomes, inform strategies to address systemic sexual harassment, and provide a resource to evaluate the effectiveness of the current laws and regulatory regime.

Preventing sexual offending through education and early intervention

Improving culture and social attitudes to improve gender-equality and reduce sexual harm

VLA's practice-based understanding is that sexual violence is driven by wider gender-inequality and societal attitudes that condone violence against women in our communities. Our practice experience informs our view that while the instantiations and other drivers of sexual harassment may vary, the norms of gender and sexuality, including community views of sexual harassment and gender equality, contribute towards the prevalence of sexual harm.[2]

Our practice experience is supported by data. For example, the most recent National Survey of Community Attitudes to Violence Against Women found that 1 in 5 Australians believe domestic violence is a normal reaction to stress, 1 in 3 Australians believe that rape results from men being unable to control their need for sex, and 2 in 5 Australians believe that gender inequality is exaggerated.[3]

Accordingly, addressing sexual violence must include targeting widely-held gendered attitudes which lead to sexual violence, as part of a broader strategy.[4]

Recommendation 1: That an improved response to sexual offending include attention to the role of cultural and social attitudes towards gender-equality in the prevention of sexual harm.

Improving access to education about appropriate and lawful sexual behaviour

There are opportunities to prevent sexual offending through improvements to education and early intervention responses.

---

[2] For more detail see our submission to the *Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces,* 2019, 11 ('**VLA AHRC Submission**'); https://www.legalaid.vic.gov.au/law-reform/building-better-justice-system/change-story-change-system-urgent-action-needed-to-end-sexual-harassment-work. Similar views are held by organisations such as: Our Watch, *Submission to the Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces,* 2018, 8-9; and the Victorian Health Promotion Foundation, *Submission: Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces,* 2018, 9-10.

[3] The periodic National Community Attitudes towards Violence against Women Survey is a population survey conducted every four years; last conducted in 2017 it is due to go into the field again in 2021, with a report to be produced before the end of 2022: Australia's National Research Organisation for Women's Safety Limited (**ANROWS**), *National Community Attitudes towards Violence Against Women Survey,* 2018, 9 and 12.

[4] We make recommendations for improvement to the regulatory response to sexual harassment and harm later in this submission. This includes empowering relevant regulators (for example, workplace health and safety regulators) and human rights commissions to engage in preventative efforts to address sexual harassment and violence in a systemic way, public education to ensure that workplaces and other institutions understand their obligations under anti-discrimination law and what conduct amounts to sexual harassment. We also recommend improved access bility to complaints and settlement data for sexual harassment, to identify trends across individual complaints. For more detail see the VLA AHRC Submission, above n2, 20. See also Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia*, accessed online on 11 December 2020 at https://d2bb010tdzqaq7.cloudfront.net/wp-content/uploads/sites/2/2019/05/21025429/Change-the-story-framework-prevent-violence-women-children-AA-new.pdf.

Our lawyers have observed that young people who are accused of sexual offending are often unaware of the law in relation to the definition and age of consent, the 'two-year rule', and the range of sexual behaviour that may constitute a criminal offence (such as image-based sexual abuse). As some children also become sexually active at a younger age than others, it is important to ensure that education on issues of sex and the law are delivered early enough to prevent inadvertent offending. VLA carries out community legal education (CLE) functions and have identified increasing interest from schools, teachers and secondary school-aged children on the nuances of legal issues connected to sex and sexual harm.

'Sex, young people and the law' (SYPL) is VLA's school-based education program focusing on sexting, cyberbullying and consent. SYPL increases legal literacy amongst young people, to prevent legal issues arising, to foster awareness of local legal and other services and to strengthen referral pathways. SYPL includes:

- an eLearning module for Victorian teachers to expand their legal knowledge on these topics
- an interactive educator kit to support teachers deliver legal education to students
- wallet cards for students to reinforce key information and important phone numbers for help seeking.

SYPL is often delivered as part of the 'Resilience, Rights and Respectful Relationships' (RRRR) curriculum, but this delivery could be more consistent and far reaching.

Expanding access to the 'Resilience, Rights and Respectful Relationships (RRRR)' curriculum through schools

In 2009, the Department of Education and Early Childhood Development (DEECD) commissioned VicHealth to develop a research report, *Respectful Relationships Education: Violence Prevention and Respectful Relationships Education in Victorian Secondary Schools*, which recommended educating school students about violence, arguing that 'schools may be the sites of violence perpetration and victimisation'.[5] It also acknowledged that schools are high-risk locations for gender-based violence.

The 'Resilience, Rights and Respectful Relationships' (RRRR) curriculum, accompanied by the 'Building Respectful Relationships' teachers resource,[6] was developed in response to this report, and is designed by the Department of Education to support secondary schools to deliver education to students on the key themes of gender, respect, violence and power.

In 2016, the Royal Commission into Family Violence (RCFV) recommended implementation of primary prevention strategies to dismantle harmful attitudes towards women, promote gender equality and encourage respectful relationships. As a result, educating young people about respectful relationships became a core part of the Victorian Government's long-term family violence prevention strategy.[7]

The RRRR resources became a core component of the Victorian Curriculum from foundation to year 12 and is now taught in all government and Catholic schools and many independent schools. VLA broadened the focus of SYPL to include training Victorian teachers to deliver the legal education themselves.

VLA has supported the roll out of the Respectful Relationships curriculum through the delivery of teacher training at DET events throughout the state. Since January 2016, VLA has delivered 68 training sessions to teachers, social workers on the topic of sexting. While teacher training has been

[5] Flood, M, Fergus, L & Heenan, M (2009) Respectful Relationships Education: Violence Prevention and Respectful Relationships Education in Victorian Secondary Schools, Department of Education and Early Childhood Development, Victoria, 12.

[6] DET, Resilience, Rights and Respectful Relationships and *Building Respectful Relationships*, 2018.

[7] State of Victoria, Royal Commission into Family Violence: Summary and recommendations, Parl Paper No 132 (2014–16).

the focus of the program, the demand for in-person delivery to students is strong. SYPL sessions made up approximately 30 per cent (n=221) of all CLE sessions delivered by VLA during the 2018-19 financial year, with the bulk of this being delivered to students.

Feedback from Victorian teachers receiving this training has been positive, with 99 per cent of 400 respondents stating that they were more confident to deliver the curriculum after training. Given the mandate on Victorian teachers to deliver this content and the inability of VLA to deliver in-person education in all Victorian schools, the 'train the trainer' model offers a sustainable approach to the delivery of sexting and sexual consent legal education.

VLA staff co-coordinate training with DET's Project Liaison and Project Lead staff, who are tasked with rolling out the Respectful Relationships curriculum. DET employ these staff across 17 regions in Victoria. Some regions have included VLA's legal education on the agenda at their training delivery days, while others have not. This inhibits the reach of the SYPL program. Furthermore, only a limited number of teaching staff for each school are available to attend each of these events due to teaching commitments.

VLA has a comprehensive suite of preventative education resources addressing harmful sexual behaviour. The program has been evaluated and could be better integrated as part of the Respectful Relationships curriculum.

Recommendation 2: That the Department of Education and Training mandates the use of '*Sex, young people and the law'* as part of the Respectful Relationships curriculum, promoting its use to DET's Project Liaison and Project Lead staff and ensuring relevant teaching staff can participate.

The Sentencing Advisory Council (SAC) recently examined sentencing outcomes of image-based sexual abuse in Victoria, which include upskirting, sexting, revenge pornography and intentionally distributing or threatening to distribute intimate images. The report noted a strong connection between image-based sexual abuse, family violence and the use of coercive control, and concluded that low reporting was linked to a widespread perception in the community that image-based sexual abuse was not criminal.[8] Increasing community awareness of the prevalence, associated harms and criminality of these behaviours, it is proposed, could help discourage offending, improve reporting rates and improve the enforcement of this offending.

While VLA supports the important role the RRRR curriculum plays in the legal education of Victorian children, it is clear that community education still has a way to go.

Recommendation 3: That the Victorian Government ensure that legal and other education relating to sex and the law reaches all Victorian children, to minimise the risk of children becoming victims of, or being charged with, sexual harm offending.

Improving access to sexual education for people with cognitive impairments and other disabilities

People with disabilities, especially those with cognitive impairments, are over-represented as victims of sexual offending. They are also particularly vulnerable to incidents of violence and sexual harm in

[8] Sentencing Advisory Council, *Sentencing Image-Based Sexual Abuse Offences in Victoria*, October 2020, p.xi.

residential settings where they are living with other people with cognitive impairments and may also be vulnerable to sexual harm from carers.[9]

Focussed attention on education for people with cognitive impairment has an important role to play in both the prevention and identification of victimisation against people with cognitive impairment and the prevention of sexual offending by people with cognitive impairment.

In our practice experience, people with a cognitive impairment are also overrepresented in the criminal justice system, including as accused in sexual offence matters. This can be linked to a lack of awareness of the impact and unlawfulness of their sexual behaviour. Clients with cognitive impairments, including intellectual disabilities, acquired brain injuries (ABIs) and other cognitive disabilities who are accused of sexual offending can find engagement with police and court processes confusing and intimidating, and may struggle to understand what they have done wrong.

In many cases clients with cognitive impairments who are accused of sexual offending have had limited or no access to sexual education, and often have no understanding of the law in relation to sexual activity. There is a key role for the education system to contribute to the prevention of sexual offending through improvements to the education provided through specialist learning environments.

For some of our clients, their families may not have explained concepts of sexual consent and harassment to their children. In some cases the family may not have understood or accepted that their child or family member has desire to engage in sexual activity. This may be due to feelings of cultural taboo in discussing sexuality within a family setting, a lack of knowledge about the law, fear and concern about the vulnerability of their family member or an inability to know how to convey information about lawful sexual activity in a way that their child or family member is capable of understanding.

The challenges of discussing these issues in a family setting is a further reason to increase the role of education and other support services for people with cognitive impairment to ensure they have access to information about lawful sexual activity.

In 2015, VLA developed *'Learning the law'* in collaboration with the Department of Education and Training (DET), an online teacher's kit of simplified education materials addressing the legal issues associated with fines and driving. In 2017, additional modules on sexting and consent were added after principals and teachers from specialist schools indicated this would benefit their students. The kit is specifically designed for secondary school teachers of students with a mild intellectual disability. VLA provides free professional development sessions for teachers in Victorian schools to assist them to use the modules in the classroom.

A longitudinal evaluation of the project indicated an improvement in young people's knowledge and understanding of relevant laws, and concluded that community legal education can have a significant impact on high need audiences, suggesting there is value in further, targeted research in this area.[10]

We have received positive feedback from specialist schools on *'Learning the law'*, but have observed an inconsistent approach to the provision of sexual education and the law in specialist schools across the state. While some specialist schools proactively seek out content to deliver to their students with intellectual and other cognitive disabilities, other schools do not.

---

[9] Office of the Public Advocate, *Community Visitors Annual Report* 2019-2020, p.19.

[10] Victoria Legal Aid, *Does Community Legal Education Work? – Researching the impact of the Learning the law education kit for young people with a mild intellectual disability*, June 2018, p.15-16.

We support the DET's 'Resilience, Rights and Respectful Relationships' resources being tailored and delivered to all people attending specialist schools, addressing legal issues such as consent and sexual harassment in a way participants can understand and remember.

We support DET recognising *'Learning the law'* as a core resource for delivering legal content in the Respectful Relationships curriculum with specialist schools. We also support the development of an education module targeted to adults with cognitive impairments, who may not have had access to this type of education in the past.

Recommendation 4: That the Victorian Government increase preventative education for all students attending specialist schools and adults with cognitive impairments, by extending and better embedding effective state-wide education programs such as 'Learning the Law'.

Improving the response to disclosures of sexual harm through the coordination of service responses

Disclosures of sexual harm by children in residential care

Children living in residential care can be particularly vulnerable to sexual harm. The Victorian Ombudsman recently investigated complaints that five children were victims of multiple physical and sexual assaults in residential care, either by other children in care or people in the community. The complaints all raised questions about the placement, care and supervision of the children by the Department of Health and Human Services (DHHS) and its Children Protection Unit.[11]

The Victorian Ombudsman's report identified significant failings of the child protection system, including an inability to always prioritise welfare and safety where beds were in such short supply, inadequate supervision and execution of safety plans when a child did not return to the unit, inconsistent practices in relation to Child Protection's incident report and response system, and a lack of guidance for staff on how to support LGBTIQ children.

The following client example demonstrates the need for an improved response to children in residential care who report sexual abuse. It highlights the particular experience of those who identify as LGBTIQ, non-binary or gender fluid, who may be at risk of being subjected to gender or sex-based discrimination and violence as a result of expressing that identity.

Client Story: 'Ben' and his experience of the response to being raped while living in residential care

Ben (not his real name) is a 15-year-old transgender boy with a history of mental health issues. While in residential care, he alleged that he had been raped by another young resident.

While an alternative home was found for him, Ben was placed in a Secure Welfare Service. On arrival, Ben was placed in a female ward. Although Ben understood that this was a physically safer place for him to be than in the male ward, he was not given an option to discuss or consider which ward he felt was most suitable for him.

The girls in the Secure Welfare Ward would continually refer to Ben by female pronouns despite his request for them not to, and staff at the Service also misgendered him and did not demonstrate that they had training or an understanding of the experience of a young transgender person.

"I wanted to talk to a counsellor about what had happened to me and no one was available. I wasn't offered any mental health support and didn't have access to my mental health care team at the hospital."

Staff working at the Secure Welfare Service are not trained counsellors and there are no psychiatry or psychology services on site. During his six weeks in Secure Welfare, Ben's DHHS worker was on leave, so he did not have the opportunity to raise concerns or request access to a counsellor, except when he spoke to VLA Child Protection lawyers (who regularly visit Secure Welfare Services) or his appointed Victorian Legal Aid lawyer.

[11] Victorian Ombudsman, *Investigation into complaints about assaults of five children living in Child Protection residential care units*, October 2020, p.8.

Ben has now left secure welfare and is living in a unit in a different town while his matter is being finalised.

The Victorian Ombudsman's report made a number of recommendations to improve the safety and wellbeing of children in residential care. This includes replacing the existing four-bed model with a new two-bed residential care model, creation of an independent children's advocacy function within the Commission for Children and Young People and ensuring that all alleged physical and sexual assaults are reported to Victoria Police (regardless of whether the victim wants to make a statement) and recorded in the systems of Police and the reporting agency.[12]

We support the recommendations made by the Victorian Ombudsman, not only to prevent sexual harm and to improve the quality of life for children living in residential care, but to also ensure that sexual harm occurring within the Child Protection system is appropriately identified, recorded and addressed.

Recommendation 5: That the safety and wellbeing of children in the child protection system be protected through the prevention of sexual offending in residential care settings and an improved response to any disclosures of sexual harm, particularly for LGBTIQ children and young people.

Improving the response to sexual offending by children in the family violence context

A substantial proportion of sexual offence allegations heard in the Children's Court of Victoria are in relation to sexual offending against siblings. We note that children who commit sexual harm are often also victims of sexual harm themselves and are likely to have experienced family violence from their parents.[13]

A differentiated response is needed for children accused of sexual harm which depends on the severity and nature of the offending, including approaching these matters with a trauma-informed lens. We support a continued focus on therapeutic practices to reduce recidivism and promote family safety, as well as to minimise the long-term impacts of a finding of guilt against a young person.

We support greater access to specialised therapeutic supports for children accused of sexual offending against siblings, which incorporates a trauma-informed response through a family violence lens, and diverts these children away from the criminal justice system. All efforts should be made by the court to avoid *Sex Offenders Registration Act 2004 (***SORA**) registration of these children, to avoid punitive responses against children who have themselves been victims of sexual harm and family violence.

Recommendation 6: That the response to child sexual offending against a child sibling include access to specialist therapeutic supports that respond to the particular vulnerabilities

[12] Victorian Ombudsman, *Investigation into complaints about assaults of five children living in Child Protection residential care units*, October 2020, p.14.

[13] Campbell, E., Richter, J, Howard, J. & Cockburn, H. The PIPA project: Positive Interventions for Perpetrators of Adolescent violence in the home (AVITH), Research Report, March 2020, p.80-81.

of this cohort and assist to limit the long-term impacts of the offending on the individual, the victim and their family.

Increasing the use of family violence and personal safety intervention orders to protect victims of sexual harm

Many examples of sexual offending occur in the context of family violence. It is essential that the service response to these issues is integrated to ensure that people have access to appropriate advice and referrals about their experience of sexual harm in this context.

In our experience assisting women with applications for protection under the *Family Violence Protection Act 2008*, women who have disclosed sexual assault do not receive sufficient support from Victoria Police to make an application for a Family Violence Intervention Order (FVIO) or Personal Safety Intervention Order (PSIO) against the person responsible for the harm. This can occur even where allegations of sexual offending are being actively investigated by Victoria Police and an alleged perpetrator has been arrested and charged with a sexual offence.

Client Story: 'Sophie' and her experience of sexual offending in the context of family violence

Sophie (not her real name) was sexually assaulted by someone known to her and reported this to police, who then commenced to investigate the matter. Sophie sought assistance from VLA in a related FVIO matter where she was named as the respondent. The alleged perpetrator had applied for an FVIO against her following his arrest and interview by Police in relation to the sexual assault. He alleged that she had told people in their community what had happened, and as a consequence he had missed out on a number of employment opportunities. The Court granted his application for a full interim order on the basis of allegations of 'economic abuse'.

Despite Police actively investigating the sexual assault matter at the time the FVIO application was made, they refused to become involved in the proceedings. While her lawyer advised her that there was merit in contesting the making of the FVIO, Sophie decided that she could not manage the stress of going through a contested hearing, given the impact of the proceedings on her mental health. She made her own cross-application for a FVIO and the matter ultimately resolved by way of mutual undertakings, with both FVIO applications withdrawn with the right of reinstatement in the event either party did not comply with the undertaking.

When asked to describe the experience of having to come to court each time the matters were listed, Sophie said that during the entire process she felt that she was on trial; something she never wants another rape victim to experience. Sophie stated it was "offensive and horrifying that [the alleged perpetrator] was allowed to launch a counter-attack on me by abusing a law meant to protect victims of sexual violence."

Even after significant time has passed since Sophie's court matter, she is still disbelieving of what occurred and continues to feel distrustful of police and the court system for what felt like a betrayal.

We see this as an opportunity to achieve a more coordinated response to sexual offending across the two service systems. In our view, Victoria Police should be more proactive in making FVIO/PSIO

applications to protect complainants of sexual assault where a complainant is supportive of this approach, unless the accused perpetrator is a child or is a person with a cognitive impairment.[14]

Victoria Police should also actively seek to become involved in any 'in-person' FVIO/PSIO applications that include allegations of sexual offending. This will further improve the coordination of the response to ensure victims of sexual harm are given advice on the criminal justice options available to respond to sexual harm and receive appropriate referrals for advice and support services.

Recommendation 7: That new protocols be established to ensure that disclosure of sexual harm (either directly to police or in 'in-person' intervention order applications) will trigger a Victoria Police response, including police-initiated FVIO/PSIO applications in appropriate circumstances.

Ensuring that people receive appropriate responses and referrals when making disclosures of sexual harm

There is wide acceptance that people experience a range of barriers when disclosing experiences of sexual harm. Therefore, it is essential that any disclosures of sexual harm receive an appropriate response and referral to support services.

Some of our clients have shared their experience of reporting sexual harm to Victoria Police. We frequently hear examples where a person has made a complaint to Victoria Police but did not hear back or receive any follow-up information. While this may have been a result of the matters being investigated and no action taken, this can be quite distressing for people who have disclosed sexual harm and can leave them feeling uncertain of whether there are any further options available to them or what they can do to seek support and redress. The Victim Services Review emphasises the importance of victims' interactions with police and the provision of information.[15]

While acknowledging the demands on Victoria Police, a follow-up telephone call to let a person know that their matter has been considered, whether or not there has been a decision to proceed with charges, would significantly improve the response to sexual offending through justice processes. We also note that the initial disclosure or complaint is an appropriate time for complainants to be referred to support services, such as CASA, the Victims Help Line, and/or VLA for legal assistance. Our clients have experienced an inconsistent approach to referrals. While we understand that some people do receive referrals, our clients routinely tell us that they did not receive any referrals.

Recommendation 8: That Victoria Police provide consistent follow-up and appropriate referrals to all people disclosing sexual harm or making a complaint about sexual offending.

[14] VLA does not support making intervention orders against children or people with cognitive impairments unless there is no other reasonable alternative.

[15] Centre for Innovative Justice RMIT University, Strengthening Victoria's Victim Support System: Victim Services Review ('**Victim Services Review**') (Final Report, November 2020).

Expanding access to early intervention supports and programs across Victoria

Providing funding for early intervention and support

There are particular challenges for people who seek voluntary treatment for issues relating to sexual behaviours. Support for early intervention is not funded by Medicare through a mental health plan and people are often required to seek private psychological assistance. The cost of this assistance is often out of reach of people. Moreover, some psychologists will not provide assistance without a court order, to ensure funding is available for the support. These issues are more acute in regional locations where there are fewer service providers.

> *"We've approached regional psychologists for early intervention and support and they won't provide therapeutic support without a court order. A lot of this comes down to resourcing the system. Currently, only people that have the financial means can access early intervention and support. For most of our clients this option is simply not open to them."*
>
> Lawyer, Indictable Crime

Issues associated with accessing psychological support are explored in our submission to the Royal Commission into Victoria's Mental Health System.[16] Where a person does not have access to timely and appropriate support in the community there is an increased likelihood of offending that will result in criminal justice involvement.

Where a person cannot access services in their community, there may also be an impact for their treatment and rehabilitation following a conviction for a sexual offence. This issue is discussed further at page 40.

Recommendation 9: That additional funding be made available to support access to early intervention and support to address problematic sexual behaviours for people at risk of involvement in the criminal justice system, without the need for a court order.

Challenges accessing treatment services in regional Victoria

Even once a person is involved in criminal justice processes, there are often significant barriers to accessing treatment for people accused of sexual harm in regional Victoria, including being conflicted out of specialist services that might already be providing assistance to the complainant. Our clients are often required to travel significant distances to access programs, making their compliance more onerous than a participant who lives in closer proximity, and ultimately increasing the likelihood that a person will not continue to access services or complete an order. For example, for children living in the Latrobe Valley, they are often required to travel to Melbourne to access specialist support services.

[16] See generally Victoria Legal Aid, submission to the Royal Commission into Victoria's Mental Health System, *Paving the Roads to Recovery* (June 2020).

People who are open to seeking assistance and treatment for sexually harmful behaviour should be given every opportunity to access that treatment in a way that facilitates successful completion. While engaging in treatment of this nature may result in a better outcome for an accused in their legal matter, it also contributes to reducing recidivism and improving community safety.

We also support a greater allocation of funding for tailored sexual offending treatment programs in regional Victoria, with a particular focus on programs tailored for young people, people with cognitive impairments and people from CALD backgrounds.

Recommendation 10: That the availability of service and supports for sexually harmful behaviour in regional Victoria be improved.

Enhancing diversionary pathways to prevent future offending

While a criminal justice response may be appropriate for more serious examples of sexual offending, there are some matters that might be suitable for diversion into a therapeutic treatment pathway. By responding to the underlying issues that may contribute to offending, the system response is more likely to support a person towards recovery and rehabilitation.

The likelihood of re-offending also varies and depends on the type of offence, the circumstances in which the offence has occurred and the circumstances of the person at the time of offending. There is a range of conduct that falls within the scope of sexual offending. This can include accessing child abuse material, image-based sexual offending, exposure offending, inappropriate touching and more serious offences such as rape. The response to sexual offending should be flexible and responsive to the individual accused of sexual offending, the individual circumstance of the offending and the nature of the sexual offence.

Expanding access to diversion for children and adults accused of sexual offending

There are opportunities to increase the use of diversion as part of the response to sexual offending.

Currently, police can recommend a diversion program for summary offences that do not have a minimum or fixed sentence. A person accused of the offending must take responsibility for the offence to be considered for diversion. If police consent to a diversion, the Court Diversion Coordinator makes a suitability assessment and recommends conditions and services for the diversion. The diversion must also be approved by a magistrate. A person who successfully completes the conditions and does not commit further offences during the diversion period will not have the matter recorded as part of their criminal history.

Diversion programs have been shown to reduce re-offending in young people.[17] This may be because they engage people with therapeutic supports to address the underlying causes of the offending behaviour and reduce the stigma and distress associated with criminal proceedings. Our practice experience is that diversion programs in the Children's Court of Victoria are working well, offering an opportunity to educate the child on the scope of the law and reduce the risk of re-offending.

There is also benefit associated with ensuring that court staff are appropriately trained on these issues, ensuring appropriate diversion conditions are included on any order for diversion. For example, in 2018 VLA provided training to Children's Court Diversion Co-ordinators from across the state on the issues of sexting and consent. Feedback from this training was extremely positive and indicated that many co-ordinators would be interested in further training to better support participants in the diversionary process for sexual offending.

VLA continues to advocate for greater access to diversionary options in the Magistrates' Court of Victoria, particularly for young adults, including for low-level sexual offence matters that are deemed to be appropriate for diversion. The use of diversion in these circumstances may encourage a person

[17] A young person who participates in a diversion program is less l kely to reoffend than a young person whose case is determined in court and is subsequently incarcerated, even where the seriousness of the offending is taken into account: Caitlin Grover, 'Youth Justice in Victoria' Victorian Parliamentary Library & Information Service (Research Paper, April 2017), p.7.

to take responsibility for their offending and address the issues that may contribute to their offending. It also provides an opportunity to avoid the long-term implications of having a criminal record for a sexual offence.

We also support the removal of the current requirement that Victoria Police consent to diversion. This will ensure that that the option of diversion is open to the magistrate as flexible response to sexual offending in appropriate circumstances. This could include, for example, referral into treatment to deal with issues that may contribute to the sexual offending. This will ensure that the best outcome can be achieved based on person's individual circumstances and the nature of the offending.

Recommendation 11: That the current requirement that prosecution must consent to diversion be removed.

Recommendation 12: That diversion be available for low level sexual offence matters at the discretion of the court, to ensure people are connected to appropriate therapeutic supports and treatment.

Improving access to therapeutic supports in the Sexual Offences List

The Sexual Offences List in the Melbourne Magistrates' Court is often regarded as a specialist response to sexual offending, yet the therapeutic programs available to judicial decision makers in this list are the same as any other Magistrates' Court in Victoria.

Most commonly ordered is engagement with the Specialist Offender and Treatment Service (SOATS) which provides general treatment for people charged with sex offences (including people with cognitive impairments), and the Sexually Abusive Behaviours Treatment Service (SABTS) which provides an early intervention response for children and young people aged 10 to 18 years who have engaged in problem sexual or sexually abusive behaviours.

The waiting periods for entry into these programs can often be lengthy. This is especially significant given lengthy delays in court proceedings which means that Court-mandated treatment may not be accessible for a significant period of time. This is a missed opportunity for timely intervention to meet the therapeutic needs of this cohort.

Building on the success of diversionary and therapeutic options in the Children's Court

The Children's Court of Victoria has a broader range of diversionary and therapeutic options to support the response to sexual offending by children. These different approaches reflect and respond to the unique needs of children and young people and ensure they are treated consistent with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and United Nations Convention on the Rights of the Child.

Our lawyers support the way the Melbourne venue of the Children's Court of Victoria currently deals with sexual harm committed by children, including having a specialised sexual offences list, utilising voluntary therapeutic treatment orders (TTOs) as sentencing dispositions and consideration of diversion for sexual offences. We have observed positive outcomes for clients who are linked to therapeutic treatment such as the Sexually Abusive Behaviours Treatment Service and are provided with the opportunity to address their offending behaviour.

However, as discussed above in relation to early intervention and support, there are issues associated with access to therapeutic responses in regional Victoria. The effect of this is postcode injustice where children do not have the same level of access to these therapeutic and diversionary options based on where they live.

In addition, our lawyers often make extensive enquires to connect a client with treatment in circumstances where there is no court order that requires treatment but the client is seeking engagement in therapeutic supports on a voluntary basis (often while their legal matter is still progressing through the criminal justice system). People who are required to access treatment due to a court order are prioritised over voluntary participants, due to insufficient services being available in many regional areas. This misses the opportunity for a timely intervention to provide therapeutic support.

Recommendation 13: That diversionary and therapeutic options for children and young people accused of sexual harm are consistently made available across Victoria, with funding invested in increasing the range and availability of programs.

Expanding access to Therapeutic Treatment Orders to people over the age of 18 years

In the Children's Court, when a child accepts responsibility for sexual offending, a Therapeutic Treatment Order (TTO) is a possible outcome. A TTO is an intensive treatment order for a child exhibiting sexually abusive behaviour that involves the child's whole family. If successfully completed, the charge will not remain on the child's criminal record. This is a good legal outcome for a child, which prioritises treatment.

Our lawyers have observed excellent therapeutic outcomes for young clients accused of sexual offending who have their matter dealt with in the Children's Court of Victoria. However, a TTO can only be ordered for children aged 17 years old or younger. We have noted anomalous outcomes for clients who turn 18 while their matter is progressing through criminal proceedings. While a matter is eligible to be heard in the Children's Court if a young person is under 18 years of age at the time of offending, they are deemed ineligible to be considered for a TTO when they turn 18.

This places pressure on legal practitioners to resolve a client's matter before they turn 18, rather than allowing time to negotiate an appropriate resolution with prosecutors. In addition, delay in resolving a matter is often due to system issues such as court listing pressures or delays in relation to disclosure of evidence. However, these system impacts result in considerable unfairness for a young person by limiting the sentencing outcomes available to them when their matter is finalised.

Client story: Mark's experience of access to Therapeutic Treatment Orders being limited to children under 18 years old.

Mark (not his real name) was 17 years old when he was charged with rape. The allegations were from more than 2 years earlier when he was 15 years old; there had been a significant gap in time since the police investigation had been conducted. There were various evidentiary issues including a lack of statements from key witnesses, reliability issues with those who had provided statements, no forensic evidence that positively identified Mark and a lack of other circumstantial evidence. These problems and Mark's denial of the allegations against him pointed in the direction of a contested hearing.

In this case, however, there were time pressures as the client was turning 18 years old in a few months, which would render him ineligible for a TTO upon sentence. This meant that it was likely the client would suffer significant procedural disadvantage due to having insufficient time to contest his case, if a TTO were to remain an option. Although matters are usually prosecuted in a timely manner in the Children's Court, it is not uncommon for procedural delay to occur in some circumstances, through no fault of the accused.

This places an unfair burden on a young person to choose between contesting the charges against them and taking advantage of a sentencing option that will minimise the impact on their future prospects. This is not a decision a young person should have to make.

Recommendation 14: That children and young people should continue to have access to Therapeutic Treatment Orders as a sentencing option in the Children's Court of Victoria even if they turn 18 during the proceedings.

We also support consideration of extending access to TTOs to young adults. Recent research has identified the particular needs and characteristics of young people involved in the criminal justice system, as well as the need to provide criminal justice interventions that respond to the continuing brain development of young people up to the age of 25.[18] The Sentencing Advisory Council recommends a range of sentencing options be created to response to the needs of this young cohort. We support TTOs being available to young adults accused of sexual offending.

Recommendation 15: That consideration be given to extending access to Therapeutic Treatment Orders to people between 18-25 to provide a more flexible response to sexual offending by young people, given growing recognition of the particular characteristics and needs of young adults.

Finally, we also see a role for therapeutic orders in the response to sexual offending for adults with cognitive impairment accused of sexual offending. We support consideration of introducing a new therapeutic order for responding to sexual offending by adults with a cognitive impairment, based on the success of this therapeutic treatment in the Children's Court of Victoria.

Recommendation 16: That consideration be given to the development of a flexible and therapeutic diversionary order for all adults with a cognitive impairment that are accused of sexual offending, based on the Therapeutic Treatment Order available in the Children's Court of Victoria.

Use of civil orders as an alternative response to sexual offending by people with cognitive impairment

We support use of interventions outside the criminal justice system in appropriate circumstances to limit the harm associated with criminal justice involvement, particularly for people who have a cognitive impairment or mental health issue.[19]

[18] See further Sentencing Advisory Council, *Rethinking sentencing for young adult offenders in Victoria* (2019).

[19] See further Victoria Legal Aid, submission to the Royal Commission into Victoria's Mental Health System, *Paving the Roads to Recovery* (June 2020).

The consideration of civil orders as an alternative to criminal justice responses to sexual offending by people with cognitive impairment should be part of the response to sexual offending by people with a cognitive impairment. For example, an order under the *Disability Act 2006* or the *Mental Health Act 2014* may be more appropriate for connecting a person to support and treatment than entrenchment in criminal justice responses that do not have the same therapeutic orientation.

This may also assist to ensure that a person has access to appropriate services and treatment as part of a system response to sexual offending.

Recommendation 17: That civil orders under the *Disability Act 2006* and the *Mental Health Act 2014* be considered as an alternative to a criminal justice response for people with a cognitive impairment accused of sexual offending.

Embedding recent changes to criminal law and procedure relating to sexual offences

Recent reforms have improved the conduct of sexual offence proceedings

There has been sustained effort through law reform and practice to improve the experience of complainants in sexual offence proceedings. In our experience, these reforms have resulted in significant changes to the conduct of trials for sexual offences. Our lawyers have seen clear shifts in the practice and culture associated with criminal trials.

Many witnesses now provide their evidence through alternative processes. There are restrictions on cross-examination of vulnerable witnesses, the implementation of ground rules hearings and intermediaries have provided additional structure and support to vulnerable witnesses and the use and form of jury directions has been substantially improved.

Many of these reforms implement recommendations of the Victorian Law Reform Commission. Additional recommendations, such as reforms to committal proceedings, are also under active consideration by government. This may include changes to charging practices, improvements to disclosure and further limits on cross examination of complainants in committal proceedings. VLA has contributed to the development and implementation of many of these reforms.[20]

In our practice experience, the changes to the trial process to reduce trauma for the accused have altered the conduct of criminal trials and improved the culture in the legal profession in the response to sexual offending.

> *"There is no question that courtroom culture has changed. While cross examination is still used to test the evidence,* it is very *rare for complainants to be humiliated or demeaned in the witness box. I've seen advocates hold each other accountable for acceptable courtroom conduct".*
>
> Senior Public Defender, Victoria Legal Aid

While there may be other changes to the mainstream criminal justice system that could be made to improve the experience of all users of the system, in our submission we should first embed and evaluate recent reforms, such as the pilot intermediaries scheme, the impact of ground rules hearings and changes to pre-trial cross examination, as well as implementing and evaluating proposed changes to the committal system. These evaluation processes will assist to identify any changes that will deliver further improvements to the response. In particular, we consider that reform

[20]For example, in 2014, we made a submission to the Department of Justice Review of Sexual Offences Consultation Paper, in which we noted the importance of the review from a community safety perspective and in supporting vulnerable victims. We also acknowledged that maximum penalties for some sexual offences were too low. In 2015, VLA made a submission to the VLRC on the role of victims of crime in the criminal trial process in which we supported the use of restorative justice principles in the sentencing process (including in cases of sexual offending), in order to provide a more meaningful outcome for victims. In 2016 we made a submission to the Victorian Royal Commission into Institutional Child Sexual Abuse in which we advocated for increased tailoring of detention and supervision order to address risk, and graduated and supported pathways for reintegration of child sex offenders. In August 2019, VLA made a submission to the VLRC on the Review of Committals which included recommendations that are relevant to the response to sexual offending.

to reduce avoidable delay and expanded access to intermediaries to vulnerable accused are two measures that will improve criminal proceedings for sexual offences in mainstream courts.

However, while this work is underway, we consider the real opportunity to achieve positive change in the response to sexual offending is through innovation and therapeutic responses to this offending. The creation of a Specialist Sex Offences Court and the option of new restorative pathways are key reforms that will provide improve the response to sexual offending through responses that centre the needs of the individuals involved in these processes.

Ensuring the rights of the accused in criminal trial process continue to be protected

We caution against some proposed further reforms, such as rules relating to the admissibility of evidence. In our view, these are essential protections against prejudice in criminal proceedings.

VLA does not support the proposal to increase the admissibility of tendency and coincidence evidence in trials for child sexual offences. VLA has concerns about the impact of changes to admissibility of this evidence on the presumption of innocence and the rights of the accused in criminal proceedings.

In our view, Victoria is a leading jurisdiction in jury direction and criminal procedure, particularly in relation to criminal proceedings for sexual offences, and further reform to evidence law is not necessary. Other jurisdictions are not as advanced as Victoria in their approach to these issues and may need to address any perceived deficiencies within their own jury direction and criminal procedure legislation. In our view the existing reforms in Victoria, along with the High Court decisions in *Bauer* and *McPhillamy* have appropriately addressed the concerns raised by the Royal Commission into the Institutional Responses to Child Sexual Abuse.

Recommendation 18: That changes to increase the admissibility of tendency and coincidence evidence in child sexual offence matters are not required in Victoria.

Relying on existing offences to respond to sexual offending

In our experience, existing sexual offences, in both State and Commonwealth law, are sufficient to cover new and emerging types of sexual offending, such as technology-facilitated sexual abuse.

Since the introduction of two new sexting charges of 'intentionally distributing an intimate image'[21] and 'threaten to distribute intimate image'[22] in 2014, VLA has recorded an increase in clients seeking legal assistance for these charges.[23]

[21] s.41DA, *Summary Offences Act 1966* (Vic).

[22] s.41DB, *Summary Offences Act 1966* (Vic).

[23] In the financial year 2016/17, 14 services of legal information, legal advice, duty lawyer representation or a grant of assistance was provided for intentionally distributing an intimate image as a 'primary matter' (which may be the most serious of a number of charges). By financial year 2019/20, this number had increased to 38 services. Similarly, in financial year 2016/17, 4 services of legal information and duty lawyer representation were provided for the charge of threaten to distribute intimate image – by 2019/20 this number had increased to 10 services of legal information, legal advice, duty lawyer representation or grants of legal assistance.

The Commonwealth charge of using a carriage service to menace is also frequently utilised by police to address image-based sexual abuse. Where clients are also sentenced to other State offences, the law requires that they be given a separate penalty for the Commonwealth charge.

The Sentencing Advisory Council (SAC) recently examined sentencing outcomes for the 478 image-based sexual abuse offences sentenced in 306 cases in the four years to 2018–19.[24] They found that:

- more than half (54 per cent) of these cases had a family violence flag;
- the most common sentencing outcomes in image-based abuse cases were community correction orders (27 per cent), imprisonment (22 per cent) and fines (19 per cent);
- the offences of distributing an intimate image and threatening to do so now account for 80 per cent of all image-based sexual abuse offences sentenced in Victoria each year;
- three-quarters (75 per cent) of sentenced image-based abuse cases involved at least one other offence; and
- the low rates of recorded image-based abuse offences, along with high numbers of co-sentenced offences, suggest that reporting rates are low.

The SAC concluded that the low rates of reporting for this type of offending was due to a lack of awareness in the community that this kind of behaviour was a criminal offence.

We understand the particular harm associated with this type of offending. Our family violence lawyers have reported a strong relationship between image-based sex offending and family violence. While images are often taken with the consent or knowledge of the victim during the course of a relationship, a perpetrator may then threaten to distribute the image in order to cause shame and embarrassment, as a form of coercive control and emotional abuse. Threats to distribute intimate images can be a major issue for victims, especially for young people where they are concerned about friends, parents or school receiving these images.

Affected family members in FVIO applications are often reluctant to take any further action against a respondent, beyond securing the FVIO to stop the family violence from continuing, for the following reasons:

- they may wish to stay in a relationship with the perpetrator (as long as the abusive behaviour can be addressed);
- they may be carefully managing their own safety, and be concerned that police intervention may escalate the violence (particularly where they have been threatened not to call police);
- they may have separated from the perpetrator but wish to maintain a civil co-parenting arrangement, and may be concerned that making a criminal complaint could jeopardise this;
- the court process can involve re-living trauma and embarrassment for a victim of family violence, particularly if the charges progress to a contested hearing where they are required to give evidence; and
- there can also be concern about the consequences of criminal penalties and/or convictions for the perpetrator who may by continuing to provide child maintenance payments or be sharing the care of children.

Where there is no relationship to a perpetrator, the victim may be reluctant to report offending which relate to intimate images of themselves for fear of public embarrassment and stigmatisation, as well as being anxious about the criminal process.

[24] Sentencing Advisory Council, *Sentencing Image-Based Sexual Abuse Offences in Victoria*, October 2020.

VLA does not currently support the creation of new specific offences to address new and emerging offending such as image-based sexual abuse, as the criminal justice system already provides a response to this offending. We support a greater focus on increasing community understanding and awareness of this type of offending, particularly in a family violence setting, to increase levels of reporting and reduce rates of offending.

Recommendation 19: That existing Commonwealth and State offences are sufficient to cover new and emerging forms of sexual offending, including technology-based offending.

Finally, we do not support the creation of a new offence with a lower maximum penalty.[25] In our experience this new offence in not likely to result in early resolution of many rape charges. People are often unwilling to accept early resolution of rape charges due to the stigma associated with this type of offending, the possibility of imprisonment, the experience of people convicted of sexual offences in custody and the possibility of onerous reporting and supervision requirements following the completion of sentence.

Extending the availability of intermediaries to vulnerable accused

Our practice experience is that where a person has been accused of sexual harm, and is a child or has a cognitive impairment, the court process can be extremely distressing and confusing. Defence lawyers and barristers are required to spend significant additional time with their client, explaining concepts, trying to put them at ease, and ensuring that they are prepared for what they will be hearing and seeing during the court process.

"For accused people with a cognitive impairment, we find there is a lot of non-legal work required of their advocates to support them through the proceedings. Having an independent support like those available to witnesses would assist the conduct of these proceedings."

Program Manager, Criminal Law

In order for an accused to receive a fair trial, there may be circumstances where an accused may benefit from having specialised in-court support, similar to the support provided to vulnerable witnesses, through the use of intermediaries. This option is already available to vulnerable witnesses under the pilot intermediaries' scheme.

In the United Kingdom, vulnerable witnesses have a statutory right to assistance from a Registered Intermediary, who are professionally approved and employed by the Ministry of Justice.[15] They are usually communication specialists with backgrounds as teachers, psychologists, speech and language therapists. While no statuary scheme exists for vulnerable accused, intermediaries may be requested where the court is satisfied that one will be of assistance to ensure a fair trial. Intermediaries may assist in preparing an accused to give their evidence but may also provide assistance throughout a trial in some circumstances.

[25] Issues Paper E raises the possibility of a new rape offence with a lower maximum penalty to encourage earlier resolution of rape offending with a guilty plea in appropriate circumstances.

We consider that an independent support person, formally appointed by a Victorian court, would ideally spend time with the accused before proceedings commence, learning about how their youth or disability may present difficulties for them during a court hearing. By sitting with them in the dock, they may also be able to indicate to the court when the accused is becoming fatigued and needs a break, when they have a question about proceedings, where they need a particular concept broken down into simpler terms, or where they need a concept explained in another way (eg visually, rather than verbally). Where an speaks a language other than English, an intermediary would ideally be able to communicate directly in their preferred language.

Recommendation 20: That children and people with cognitive impairments who have been accused of sexual harm are provided with in-court supports in circumstances where they may benefit from having some additional procedural assistance.

Retaining the option for judge alone trials in appropriate circumstances

Access to judge alone trials with the consent of an accused person has been a feature of the justice response to the COVID-19 emergency.

Emergency legislation enabled County Court trials to occur by judge-alone in some circumstances. As a result, certain criminal proceedings (including unfitness matters) were able to proceed without a jury. While VLA supports the right of an accused to have their matter heard before a jury of their peers, we are of the view that judge alone trials for unfitness matters, particularly in circumstances of sexual offending where both the defence and prosecution are in agreement as to unfitness, are appropriate for judge-alone trials.

While we do not support judge alone trials replacing jury trials for all sexual offence proceedings, we consider that judge alone trials have a continuing role to play in the criminal justice system, particularly in circumstances of sexual offending where both the defence and prosecution are in agreement as to unfitness.

We particularly support a role for judge alone trials in the response to sexual offending in circumstances where a person might be unfit to stand trial. Currently, a jury has a role in the fitness investigation and special hearing under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA).

Most commonly, an expert report addressing the issue of fitness is produced by the defence, with the prosecution also able to have the accused assessed by their own expert. Experts (either psychiatrists, psychologists or neuropsychologists) will usually attend court to give evidence and be cross-examined.

In some circumstances, both experts for the defence and prosecution may agree with the conclusion that an accused is unfit, rendering the investigation largely uncontested. Even in these cases, legislation requires that a jury must still be empanelled to determine the question of fitness, with the judge providing jury directions in relation to the expert's views, to guide the jury to the appropriate decision.

Where a person is found to be unfit, a jury then needs to consider whether the accused committed the act alleged in a special hearing.

This shift towards judge-alone assessment of fitness to stand trial has been under consideration for some time and is included in the Crimes (Mental Impairment and Unfitness to be Tried) Bill 2020 that

is currently before the Victorian Parliament. This Bill implements a recommendation of the VLRC in the review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* where it recommended that fitness be determined by a judge rather than a jury. It found that fitness to stand trial was akin to a pre-trial issue that did not need to be determined by a jury.[26]

We support this shift given the various benefits to both the accused and the complainant through more timely resolution of these proceedings. Where a fitness investigation and special hearing may often run in excess of five days, including empanelling two juries and hearing evidence from complainants, other witnesses and experts, a fitness investigation and special hearing by judge-alone could potentially take only a couple of hours.

This is a significant saving in court time and resources, especially where an accused is legally aided. Where the charges relate to sexual offending, a complainant may also not be required to give evidence, relying instead on their statements being tendered. There is also a substantial benefit in a complainant avoiding the trauma of attending court to give evidence before a jury in circumstances where a person is not fit to stand trial.

Recommendation 21: That judge alone trials be available where defence and prosecution agree that an accused is unfit to stand trial under the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*.

Reducing avoidable delay in sexual offence proceedings

There are a number of factors that contribute to delay in the resolution of sexual offence proceedings. While many matters are currently delayed due to the impact of the COVID-19 pandemic, there are some systemic issues that have endured for many years. Key issues contributing to delay include:

- charging practices that may result in charges being laid that will not proceed to prosecution;
- barriers to negotiating early resolution of charges with a plea;
- scope and timing of disclosure of material relevant to the proceedings;
- delay in the testing of forensic evidence and the examination of information technology equipment.

Substantial reforms have targeted the issue of delay in sexual offence proceedings, with particular attention to the experience of child complainants and complainants with a cognitive impairment. In our view, these changes have assisted to reduce the impact of delay for these vulnerable complainants.

In our view, further changes in practice will contribute to a reduction of delay in sexual offence proceedings. This position aligns with recommendations of the VLRC in their review of committal proceedings.[27]

Reducing the impact of overcharging

VLA supports improvements to charging practices to reduce the filing of charges that do not proceed to prosecution. Changes in the number and nature of charges that proceed can be particularly challenging for victims, can place an additional time and resource burden on criminal justice

[26] See Victorian Law Reform Commission (2014) *Final Report of the review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

[27] See generally Victorian Law Reform Commission, *Committals,* March 2020.

agencies, and can delay a guilty plea. In our view, significant changes to support early resolution can be achieved through:

1. a focus on improving the appropriateness of the initial charges;
2. early engagement and oversight of the charges by the relevant prosecuting agency;
3. improved disclosure and active engagement with the evidence by both the prosecution and defence lawyers at the earliest opportunity and well before any committal hearing.

Any charges should reflect the actual criminal conduct for which a person is accused and for which guilt can be proven on the available evidence.

The practice of charging an accused with multiple offences in relation to one incident, or charging too serious an offence for the conduct, or both, is commonly referred to as 'overcharging'. Overcharging has several detrimental impacts on participants in the system including the time spent considering and testing charges and the potential distress to victims when charges are reduced in number or seriousness.

The impacts of overcharging may be magnified for vulnerable people who have a cognitive impairment or mental illness, language barriers and other communication barriers, are homeless, or have a criminal record. A focus on improving the appropriateness of the initial charges is more efficient and is fairer to both the victim and the person accused of sexual offending.

This should also include ensuring that the correct charge is identified by Victoria Police for historical sexual offending. In our experience there can be issues associated with the identification of correct charges by Victoria Police, often due to layers of reform to sexual offences over many years. This can also contribute to avoidable delays in these proceedings.

Improving quality and timing of disclosure

Disclosure is central to a person's rights in criminal proceedings.[28] Timely disclosure is also critical to facilitating early resolution. In our experience, defence lawyers cannot provide proper advice on the merits of a case without disclosure of all of the supporting evidence. Furthermore, clients are often not persuaded by the strength of a case until they have seen the information for themselves. This may impact a person's willingness to enter an early guilty plea.

VLA supports the requirements for disclosure in sexual offence cases involving a child or cognitively impaired complainant. The new Form 32A has been introduced for these cases is intended to prevent delayed disclosure in these cases. This detailed disclosure requirement is to be served at the same time as the hand-up brief.[29] We support a requirement for this level of disclosure in all sexual offence cases. We also support certification of disclosure by prosecuting agencies.

Supporting early resolution in appropriate cases

Lawyers play a significant role in supporting accused people to develop insight and accountability for their conduct. In some cases, this can facilitate early resolution of the charges with a plea of guilty.

[28] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25 recognises that a person charged with a criminal offence in Victoria is entitled to be 'informed promptly and in detail of the nature and reason for the charge'.

[29] Magistrates' Court of Victoria, Practice Note 3 of 2019.

Ensuring that prosecutor has the time and authority to progress early resolution discussions will reduce the volume of matters proceeding to trial and will deliver an earlier outcome for victims of sexual harm.

In our experience however, there can be challenges progressing early resolution with the prosecution who may be unwilling to entertain a plea to a reduced number or seriousness of charges. While this may be appropriate in some cases, based on the bulk overcharging practices (discussed above) we consider there are opportunities to improve this practice. There is a general reluctance to use prosecutorial discretion to withdraw or discontinue cases or reduce the number of charges which can cause additional trauma for complainants if those charges are not likely to result in a conviction.

In addition, the "stage appropriate" resolution options proposed by the prosecution can sometimes be an unsatisfactory resolution option. For example, a plea of guilty to all the charges is the only early resolution option available.

In other examples there is delayed engagement with the brief of evidence by someone with authorisation to negotiate and resolve ahead of committal proceedings.

In addition, the processes for authorising "course of conduct" charges can delay proceedings. We support engagement between Victoria Police and the OPP during the investigation stage to settle any course of conduct charges.

We support more active approaches to the resolution of matters ahead of committal proceedings. This could be supported by better training for defence lawyers and the prosecution to identify early resolution options such as rolled up or representative charges.

In addition, we support innovation in the pathways to resolution. For example, early identification of matters which could be resolved through restorative actions and processes will potentially reduce the number of contested matters and provide additional options for victims who may not want to proceed to trial due to their individual preferences and circumstances.

Understanding and planning for any forensic delays

Delays in the analysis of forensic evidence and information technology devices (such as computer hard drives) can also contribute to avoidable delay in sexual offence proceedings.

VLA supports closer collaboration and communication between the courts, practitioners and forensic services. In our view, forensic services and analysts should have an active presence or voice in communicating to the court which services they can realistically deliver, as well as the time frames in which it can be delivered. This could be through initial advice to the prosecution and/or informant which is communicated to the court, or through the processes supporting disclosure.

Recommendation 22: That charging practices, early resolution processes and the provision of disclosure be improved to reduce avoidable delay and increase rates of early resolution.

Recommendation 23: That the processes for forensic analysis be improved through information sharing and planning so that any impact of any forensic delays on proceedings can be mitigated.

Developing system capability and responsiveness through specialist and therapeutic approaches

Implementation of a Specialist Sexual Offences Court

VLA supports the role of specialist and problem-solving courts in the criminal justice system to enable a specialist and therapeutic response that can address the underlying circumstances of offending and provide increased support for victims of crime. These approaches have already demonstrated effective results through the Drug Court, Koori Court, Specialist Family Violence Courts (SFVCs) and the Assessment and Referral Court (ARC).

These specialist courts focus on helping people to address underlying factors that contribute to their offending behaviour and can produce life-changing results. While the sentencing options remain the same as mainstream courts, judicial officers, prosecutors and defence lawyers are recognised for their particular knowledge and expertise and processes are designed with the needs of participants at the centre. Specialist court support services are also tailored to meet the particular needs of their participants.

Our recent experience with the implementation of Specialist Family Violence Courts in Shepparton, Ballarat and Moorabbin is particularly relevant when considering a specialist sexual offences court for Victoria. There are strong benefits for victims of family violence associated with a holistic response to their needs and the resolution of their legal issues. There are also important benefits associated with the approach to perpetrator accountability and the supports to assess relevant risks and needs of all parties.

The provision of specialist support services to both the complainant and the accused is a key component of the positive outcomes in these specialist settings. Initiatives such as the use of safe waiting areas and remote witness facilities provide assurance to complainants that their matter will be taken seriously, and that their safety will be a key consideration during the proceedings.

In December 2016, the New Zealand District Court commenced the Sexual Violence Court Pilot (SVCP) to establish best practice for the conduct of certain sexual violence trials, within existing legislation. The District Court developed the 'Sexual Violence Court Pilot: Guidelines for Best Practice', which aimed to improve case and trial management of offences of sexual violence by reducing pre-trial delay and ensuring flexible, workable trial arrangements.[30]

A recent evaluation of the two-year SVCP concluded that, overall, the pilot was considered by stakeholders to be a success, in that the intended outcomes of improved timeliness and improved practices in case and trial management were achieved.[31] Case managers proactively managed files to enable early identification of issues that could cause delay, only judges who had participated in a judicial education program on the complex dynamics of sexual violence and vulnerable witnesses were able to hear pilot matters, and courtrooms were prioritised for pilot cases.

Benefits to trial management included changes to the timing of the presentation of evidence, greater use of alternative modes of evidence and close attention to the application of guidelines on cross-examination. While the case review stage contributed to a small increase in timeframes, there were

[30] Sexual Violence Court Pilot: Guidelines for Best Practice, New Zealand District Courts, p.1.

[31] *Evaluation of the Sexual Violence Court Pilot*, Report prepared by the Gravitas Research and Strategy Limited for the Ministry of Justice, N.Z., June 2019, p.2.

significant decreases in overall timeframes for the duration of a matter due to more comprehensive trial preparation.

Benefits to complainant witnesses involved in the pilot included the use of separate entrances and secure waiting spaces, communication assistances, pre-trial meetings with the presiding judge and existing practices of pre-trial court education visits, and assistance from independent victims' advocates.[32]

Challenges were also identified. This included the availability of sufficient judicial resource, the sufficiency and reliability of technology, physical building design constraints and space availability (particularly to ensure the safety of complainant witnesses), the small pool of defence counsel at one of the pilot sites, and inconsistencies around cross-examination, as well as a significant gap in the level of independent support provided to complainant witnesses.

We support consideration of the creation of a similarly focused specialist sexual offences court in Victoria, to provide a more specialised legal response to sexual harm, as an opportunity for increased therapeutic justice for both complainants and accused. As a high percentage of sexual offending occurs within a family violence setting, consideration must be given to ensuring that the foundations of a specialist sexual offences court align with best-practice family violence approaches as demonstrated in the SFVCs.

Recommendation 24: That a Specialist Sexual Offences Court be piloted to provide a specialist and therapeutic response to sexual offending that:

- provides an expanded range of therapeutic, diversionary and restorative outcomes;
- includes enhanced case management and information for complainants in sexual offence proceedings;
- features a sustainable workforce that has access to appropriate training and support to provide a specialist response in sexual offence proceedings; and
- facilitates access to specialist responses across Victoria.

Recommendation 25: That the monitoring and evaluation of a pilot Specialist Sexual Offences Court include assessment of:

- impact on wellbeing for workforce of the pilot Specialist Sexual Offences Court;
- access to therapeutic and diversionary supports for people accused of sexual offending who have the matter resolved through a Specialist Sexual Offences Court; and
- qualitative assessment of the experience of complainants in sexual offence matters finalised through a Specialist Sexual Offences Court.

Improving practice and experience in mainstream courts

While we support the implementation of therapeutic courts to improve the response to sexual offending, we consider that the responses to sexual offending in mainstream courts should also be enhanced through access to a more specialist response that includes restorative, therapeutic and diversionary responses.

[32] Ibid, p.3.

This should include:

- the introduction of sexual offence lists within the Specialist Family Violence Courts for summary sexual offences to ensure people have access to a response to sexual offending in a family violence context that can be dealt with locally through a family violence lens;
- further and continuing specialist training for all judicial officers and court staff dealing with complainants in sexual offence proceedings, with a particular focus on trauma-informed practice;
- recognition of the technical complexity of sexual offence matters and the need to ensure people have access to appropriate training and experience to improve the conduct of these matters;
- requirement that all courts dealing with sexual offending follow best practice for working with complainants in sexual offence matters, including ensuring complainants of sexual harm have access to safe waiting areas and remote witness facilities at court;
- introduction of a case management approaches to support the identification of matters suitable for early resolution and the timely progression of other indictable sexual offence matters; and
- improved access to therapeutic supports and responses to sexual offending across Victoria to support access to programs and compliance with any conditions imposed in response to sexual offending.

In our view improvements to the capability in responding to sexual offending and the introduction of specialist approaches may also assist to reduce the number of appeals in sexual offence proceedings.

Recommendation 26: That the response to sexual offending in mainstream courts be improved to build capability, increase access to therapeutic programs, promote improved case management and improve the experience of victims involved in criminal proceedings.

Ensuring that specialist responses do not result in vicarious trauma and workforce impacts

The risk of vicarious trauma and workforce fatigue has increasingly become a primary consideration for VLA as part of service provision. In respect of the Specialist Family Violence Courts, we ensure that our lawyers are not continuously exposed to family violence content or experience adverse mental health implications from working with perpetrators of family violence. This has been managed by rostering lawyers for 'non-family violence' duties each week and providing opportunities for lawyers to de-brief and seek support from practice leaders within the organisation.

VLA previously had a specialist sex offences team, but absorbed this team into our general Indictable Crime Team in part of because of the concern about staff wellbeing of undertaking only sexual offences work.

The New Zealand Sexual Violence Court Pilot Evaluation also raised the issue of detrimental impacts upon judges and court registry staff dealing with sexual violence cases on a daily basis. While case managers reported getting greater job satisfaction from being able to proactively manage and be the single point of contact for case files, it was acknowledged by stakeholders that the nature of sexual

violence cases can have a detrimental psychological impact upon those administering the pilot and noting that staff 'burn out' could compromise the ongoing success of the model.[33]

Balancing the need for a specialised response to sexual offending with the need to ensure the workforce is protected and nurtured in the work that they do is an important consideration for the criminal justice system.

We also support the consideration of impacts on staff working within Specialist Sexual Offending Courts as part of the evaluation of any future pilot of this approach.

Recommendation 27: That the implementation of specialist responses to sexual offending include measures to reduce the impact of vicarious trauma and other workforce impacts that have been linked to increased specialisation in the response to sexual offending.

[33] *Evaluation of the Sexual Violence Court Pilot*, Report prepared by the Gravitas Research and Strategy Limited for the Ministry of Justice, N.Z., June 2019, p.80.

Improving the effectiveness of therapeutic supports and rehabilitation programs for people convicted of sexual offences

Ensuring that therapeutic supports can respond to diverse needs and experiences

Our lawyers often struggle to find treatment programs that sufficiently accommodate a client's diverse needs, including their cultural background, disability, mental health, sexual identity and their own, sometimes significant, history of trauma or abuse. In addition, the programs and supports provided in custody do not accommodate individual needs and experiences that may intersect with their sexual offending. While these characteristics do not make it more likely that a person will commit a sexual offence, these factors are relevant to the delivery of more responsive support towards recovery and rehabilitation. These programs should take into account:

(i) the cultural stigma of sexual offending within some communities;
(ii) the importance of trauma-informed practices when working with people convicted of sexual offences (many of whom have also been victims of abuse themselves[34]);
(iii) the problems associated with mixing low-risk and high-risk people when conducting group work;
(iv) a significant proportion of sexual offending is within a family violence context (rather than stranger offending); and
(v) the importance of accessing treatment in a person's first language.

The challenges of access to tailored programs to respond to sex offending has been attributed to a failure to prioritise treatment and rehabilitation as part of the criminal justice system's response to sexual offending, despite growing evidence that community treatment programs, particularly those with a focus on cognitive behaviour therapy, contribute to reducing recidivism rates.[35]

In our experience, issues associated with access to appropriate health, therapeutic and rehabilitation support within custody is a challenge for all people within custody. However, these challenges may be even more acute for people convicted of sexual offending given the stigma associated with this offending and the potential for post-sentence supervision and other restrictions on their community participation. The link between access to rehabilitation in custody and the use of post-sentence supervision is discussed further below.

> *"The offending my client committed was serious and his lengthy sentence is a reflection of that. My client wants to be rehabilitated. But the programs available to him in prison need to be better tailored. He has a history of childhood trauma and abuse and a mental illness. Sharing intimate details in a group setting where he is unable to communicate effectively with therapists is less effective at supporting recovery and rehabilitation."*
>
> Lawyer, Indictable Crime

There are also limitations due to the lack of differentiation between different types of offending. For example differentiating between 'contact offending' and child sex abuse material (CSAM)/ 'online only' offending. Recent academic research suggests that people who are charged with CSAM

[34] Dr. Gelb, K. *Recidivism of Sex Offenders Research Paper*, Sentencing Advisory Council, January 2007, p.17.
[35] Ibid, p.34.

offences have distinct characteristics and intervention needs when compared to contact sexual offenders, with CSAM-only offenders significantly less likely to sexually reoffend than dual offenders.[36]

We support access to more tailored, therapeutic treatment options for people accused or found guilty of sexual offending, which address the diverse needs of people who have committed sexual offences, as well as the range of offending.

We also support Aboriginal community-controlled organisations being resourced to design and deliver therapeutic programs addressing sexual harm, incorporating community consultation to ensure programs are culturally safe and take into account the experience of colonisation, trauma and dispossession.

Recommendation 28: That community-based and custodial supports and programs provided to people found guilty of sexual offences should be appropriate to their individual needs, including cognitive impairment, mental illness, language and cultural needs, histories of trauma and victimisation.

Access to treatment programs for people with cognitive impairments

As noted above, there is a need for appropriately specialised sex education and treatment programs for adults with cognitive impairments and other disabilities who are accused of sexual offending. Most treatment programs are only available to people placed on court orders as a result of being charged with offending, such as supervision orders (pursuant to the CMIA) or justice plans.

Research shows that low functioning people accused of criminal offences, such as those with an intellectual disability, require 3 to 5 years of treatment for the concepts to be assimilated and for treatment to have any effect.[37] This requires a coordinated strategy of program implementation across the state, to ensure early intervention is readily available for as long as is needed.

Education and treatment programs tailored to cognitive impairment are important in preventing and addressing sexual abusive behaviours within this cohort. We support the creation of a broader range of programs, tailored to a variety of levels of cognitive impairment, that also take into account cultural needs, sexual orientation and access in regional Victoria.

Recommendation 29: That a greater range of therapeutic treatment programs are funded for people with a cognitive impairment, to support their individual needs and reduce the risk of sexual offending.

Improved access to therapeutic supports and rehabilitation in custody

In 2015, the Victorian Ombudsman conducted an investigation into the rehabilitation and reintegration of prisoners in Victoria, triggered by the growth in prisoner numbers, concerns with rates of reoffending and spiralling costs to the community. The Victorian Ombudsman, Deborah Glass, noted that:

[36] Henshaw, M., Arnold, C., Darjee, R., Ogloff, J and Clough, J. *Enhancing evidence-based treatment of child sexual abuse material offenders: The development of the CEM-COPE Program*, Australian Institute of Criminology, October 2020, p.4.

[37] Dr. Gelb, K. *Recidivism of Sex Offenders Research Paper*, Sentencing Advisory Council, January 2007, p.38.

"the public expects violent offenders to serve time, but incarceration is only a temporary solution in over 99 per cent of cases. The corrections system must work better to rehabilitate and reintegrate prisoners."[38]

The investigation made a range of recommendations including:

- reviewing current practices and procedures for identifying and screening prisoners with a cognitive disability, including ABI, to ensure that these functions are carried out by staff with specialist knowledge;
- piloting and evaluating alternative case management structures and approaches that do not solely rely on prison officers to perform this role;
- increasing the availability of offending behaviour programs to ensure that the needs of the prison population, including those on remand, are met in a timely fashion;
- exploration of options to address post-release housing for former prisoners.[39]

Corrections Victoria's Specialist Offender Assessment & Treatment Service (SOATS) is responsible for delivering programs and services to sexual offenders within the Victorian prison system. Their 'Offender Management Framework' requires that a SOATS assessment be conducted upon entry into the prison system as a sentenced prisoner where they have been sentenced to a short term of imprisonment, but for those who have received longer sentences, SOATS assessment will only be conducted 30 months prior to a prisoner's earliest release date.[40] This means that prisoners may spend a significant proportion of their early years in prison without receiving access to specialised treatment and rehabilitation.

We consider that planning for transition back into the community should commence from the moment a person enters custody. Comprehensive treatment and rehabilitation supports for people convicted of sex offences should be provided for the duration of their custodial sentence. Progress should be closely monitored through improved case management responses.

The Adult Parole Board Manual states that the most common program for male sexual offenders in prison is the group-program 'Better Lives' program for sexual offenders, which varies in length and intensity from 3 to 9 months depending on the risk category.[41] Women convicted of sexual offences are treated in prison but through individual rather than group-based programs. While group-based therapeutic programs may be suitable for some people, many people convicted of sexual offences have also been victims of sexual offending and this approach might not be appropriate for people with histories of trauma. For these people, group-based programs can be re-traumatising, and may result in further embedding problematic sexual behaviour.

We also support funding being allocated to longitudinal studies of rehabilitation programs for people convicted of sex offences, in order to determine their long-term efficacy and their ability to reduce recidivism.

Recommendation 30: That people convicted of sexual offending should have access to appropriate custodial programs that support recovery, rehabilitation, and safe transition back into the community.

[38] Victorian Ombudsman, Investigation into the rehabilitation and reintegration of prisoners in Victoria, September 2015, p.2.

[39] Ibid, p.154-6.

[40] Corrections Victoria, Offender Management Framework – Offender Management Prison Pathway, June 2016.

[41] Adult Parole Board of Victoria, Parole Manual (2020 edition), p.13.

Improving the case management approach for people in custody

We support a revised case management approach for people who are in custody to ensure that they have access to appropriate rehabilitation and support. The Victorian Ombudsman has recently highlighted the tensions and challenges for the current case management response that relies on location-based case management as an additional duty for prison officers rather than a system-wide response.[42] Issues arise where a person is transferred to different prison locations as this can interrupt continuity in the approach to their support and rehabilitation.

Recommendation 31: That all people sentenced to a custodial sentence have access to consistent and individual case management to support their recovery, rehabilitation and transition back into the community.

[42] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015, p.5.

Ensuring that any secondary consequences are proportionate to the offending

We support refinement of the scope of the Sex Offender Register (**SOR**) under the *Sex Offenders Registration Act 2004,* to support improved outcomes that are adapted and proportionate to the nature of the offending. This should include more flexibility in the decision to include a person on the SOR, more flexibility in the reporting conditions and a different response to children which takes into account their age and vulnerability, risk of reoffending and ability to comply with reporting requirements that are equivalent to the requirements for adults.

Research suggests that sexual reoffending rates are substantially lower than general reoffending rates, and that people accused and convicted of sexual offending are not homogenous - different sub-groups reoffend at different rates.[43] While the SORA attempts to manage risk of reoffending, by treating all people convicted of sexual offending in the same way, and requiring the same level of monitoring and reporting once registration has occurred, the scheme may not provide an appropriately targeted response to manage the any risk to the community.

Redefining the scope of the Sex Offender Registry

VLA is concerned about some of the client outcomes due to the rigid legislative requirements for registration on the SOR. In our experience, the current approach does not sufficiently take into account the individual circumstances of each case. This is particularly relevant to young and/or cognitively impaired persons whose sexual offending is one-off or situational.

There are significant long-term impacts for clients placed on the SOR, including difficulties obtaining employment and housing, social isolation, increases in mental health issues and substance abuse, and the creation of barriers to resolving Child Protection matters. These impacts are often a barrier to rehabilitation, increasing risk of re-entry into the criminal justice system.

The SORA requires certain people who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time.[44] The objective of the scheme is to reduce the likelihood that people will re-offend and to facilitate the investigation and prosecution of any offences that they may commit. The reporting period of an adult can be for eight years (minimum reporting period), 15 years or life,[45] depending on the offence that has been committed.

Where an adult is sentenced for an offence *other* than for a Class 1 or 2 offence (broadly categorised as 'sexual offending against children'), or a child is sentenced for a Class 1 or 2 offence, registration is not automatic and the court may make a discretionary order.[46] The court must be satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons or of the community (but that risk need not be specifically identified).[47] While 'risk' is not explicitly defined in the SORA, the case of *Bowden* [2013] VSCA 382 at [33] construed it as a 'real' risk, and therefore not fanciful.

---

[43] S. Huang, (Victoria Legal Aid), Sexual Recidivism: what is known and what remains to be understood? (November 2014), p.2.

[44] Section 1, *Sex Offenders Registration Act 2004* (Vic)

[45] Sections 34, 35 and 36, *Sex Offenders Registration Act 2004* (Vic)

[46] Section 11, *Sex Offenders Registration Act 2004* (Vic)

[47] Section 11(3)-(4), *Sex Offenders Registration Act 2004* (Vic)

Once a person is placed on the SOR, they are required to make an initial report. This includes disclosure of a number of personal details, including names known by, date of birth, address, employment, email address/es, internet service providers, internet identities, social media identities and accounts, names of children with whom they come into contact with, details of tattoos or distinguishing marks, and anticipated travel outside Victoria.[48] The person is then required to report annually for the duration of registration, as well as when any of those personal details change (usually within 14 days, but for certain information, such as reportable contact with a child, it must be reported within 1 day).

A person who is subject to life-time reporting obligations may apply to the Supreme Court to become exempt from reporting, if they have not committed a registrable offence for a period of 15 years since registration.[49] However, even if they are successful in their application, they will still remain on the SOR and be prohibited from child-related employment.

Similarly, any person on the SOR is also prohibited from applying for or engaging in 'child-related employment', which covers a broad range of employment including educational institutions, community services, and any clubs, associations or movements that provide services or conduct activities for children.[50] This is regardless of whether the registrable offence was related to child sexual offending or whether or not it was a contact offence.

We continue to assist clients in relation to breach of the SORA. Most of these people receive assistance from duty lawyers at court. The most common outcome for clients where a duty lawyer provides assistance in a SORA breach matter, is a fine with conviction. VLA guidelines require that an accused be 'at risk of an immediate term of imprisonment' in order to be eligible for a grant of assistance,[51] meaning that only people charged with the more serious breaches of SORA will be eligible for a substantive grant of aid under our guidelines.

More flexibility in the approach to registration and reporting under the *Sex Offenders Registration Act 2004*

There can be unfair outcomes due to the rigidity of the registration and reporting requirements under the SORA. The current approach does not sufficiently take into account the individual circumstances of each person and their offending. For example, some clients have been charged with breach of SORA reporting obligations where they have failed to notify police of their residential address as a result of homelessness. Moreover, being registered on the SOR can also be a direct cause of homelessness, with clients experiencing difficulties obtaining public or private housing or being accepted into share houses.

In our experience, clients may even receive harsher penalties for reporting obligation breaches than the sentence for the original offending. The application of penalties for non-compliance rarely address the factors contributing to a failure to comply with reporting obligations, such as lack of suitable accommodation and access to appropriate community supports.

VLA support a more nuanced approach to registration under SORA, including consideration of judicial discretion to determine the length of time on the Register and to refuse to place an accused

[48] Section 14, *Sex Offenders Registration Act 2004* (Vic)

[49] Sections 39-45, *Sex Offenders Registration Act 2004* (Vic)

[50] Sections 67-68, *Sex Offenders Registration Act 2004* (Vic)

[51] Victoria Legal Aid Criminal law guidelines 1.1 and 1.2, *VLA Handbook for Lawyers.*

on the Register in circumstances where it is not appropriate based on the individual circumstances of the individual and the offending. We also support imposing a broader spectrum of reporting obligations, which can be adjusted to take into account:

- the nature of the offending;
- the views of the victim;
- the age and circumstances of the person convicted of sexual offending;
- the prospects for rehabilitation;
- the degree of actual risk that the person poses to the community; and
- the impact of registration on the person and their individual circumstances.

We also support a more nuanced approach to charging people for breaches of the SORA, which takes into account the challenges they may face with long-term reporting compliance in circumstances where they may experience mental health issues, homelessness or cognitive impairments.

Recommendation 32: That the *Sex Offenders Registration Act 2004* allow for greater judicial discretion to:
(i) determine the appropriate length of time a person should be placed on the Sex Offender Register; and
(ii) refuse registration in certain circumstances, to prevent unfair outcomes.

Recommendation 33: That the *Sex Offenders Registration Act 2004* adopt a broader spectrum of monitoring and reporting conditions that can be adapted at the discretion of a judge to the individual circumstances of a person and their offending.

Improving the response to children who are registered on the Sex Offender Register

Many of the children we assist in the Children's Court are charged with offending that may make them liable to registration on the SOR. Between 2017-18 and 2019-20, the most common offences for grants of legal assistance for children charged with serious sexual offending related to indecent act with a child under the age of 16, indecent assault, rape and sexual penetration of a child under the age of 16.

The Victorian Aboriginal Legal Service (VALS), in a recent submission to the Legal and Social Issues Committee of the Victorian Parliament, highlighted the circumstances that can lead to the inclusion of a child on the SOR. This client story is reproduced below with permission from VALS.

Client Story: 'James' and his experience of being a registered on the Sex Offender Registry for sexual offences committed as a child.

James (not his real name) had consensual sex on two occasions at the age of 17 with his girlfriend Shania, then aged 15. After James turned 18, they had consensual sex on two further occasions while Shania was still 15 years old. The relationship ended amicably, and they went their separate ways and did not see each other for many years.

James struggles with mental health and alcohol abuse in his early adulthood. In their mid-thirties, Shania and James reunited briefly. One evening James visited Shania whilst intoxicated. They were both drinking and talking, and both became intoxicated. James asked Shania to have sex with him. Shania refused and an altercation occurred, with assaults on

both sides. Shania later reported this incident to the Police, and also reported the details of their consensual sexual relationship in their teenage years.

James was charged in relation to the recent incidents, as well as with a historical charge of sexual penetration of a child under the age of 16 years. He pleaded guilty and was convicted of the charges, and sentenced to seven months imprisonment for the sexual penetration of a child under 16 years. As a result of the historical charge, James was placed on the Sex Offenders Registry for a period of 15 years.

Shortly after being placed on the Sex Offender Registry, James' young daughter was placed into his care by the Family Court. Because of his registration as a Sex Offender, James is unable to participate in the school and extracurricular activities with his daughter and her peers. He has struggled to find work and often chooses not to apply for jobs because of the shame of having to disclose his conviction.

James is now in the process of applying to be removed from the Sex Offenders Registry through a narrow provision applying only to people who were aged 18 or 19 at the time of the offence, where the victim was a minor. However, even if James is removed from the Registry, he will still face discrimination in employment because of his criminal history.[52]

While there is narrow exception may be applicable to James,[53] his story is also an example of the unintended consequences of the response to child sexual offending in the context of teenage peers having consensual relationships. It also demonstrates the way SORA can affect the lives of people in various ways even when the relevant offending was committed as a child

While the SORA does not mandate that a child must be placed on the SOR 'merely because' they are sentenced for a Class 1 or 2 offence, they may still be made 'registerable' by the making of a sex offenders registration order.[54] Children that are included on the SOR do not have the same period of registration as adults. For example, if a person was a child when a registrable offence was committed, then the length of the reporting period is half what it would otherwise be (or 7 ½ years in the case of a reporting period for life).[55]

However, in all other respects a child on the SOR is treated as equivalent to an adult convicted of sexual offending. This includes being required to comply with the same reporting obligations as an adult. In our experience, this raises particular challenges for children and young people who may not have the capability to comply with the conditions and reporting obligations.

We assist people who were placed on the SOR as children that face significant criminal justice consequences as young adults for technical breaches. For many of these young people being on the SOR can be harsher than the original sentence in circumstances where there is no continuing risk to the community.

In addition, this approach does not take into account that children's brains are still developing well into their 20s, and that even the most capable child may struggle to understand how to report, what is required to be reported and when certain matters need to be reported. This increases the chances of

[52] Victorian Aboriginal Legal Service, *Submission to the Legal and Social Issues Committee Inquiry into a Legislated Spent Convictions Scheme*, 17 July 2019, p.9. This case example has been reproduced with consent from VALS.

[53] Section 11A of SORA provides that a person found guilty by a court of a registrable offence that is a specified offence may apply for a 'registration exemption order' if they were 18 or 19 at the time of offending, and not more than 19 years of age during the commission of the offence.

[54] Section 6(3)(a), *Sex Offenders Registration Act 2004* (Vic)

[55] Section 35, *Sex Offenders Registration Act 2004* (Vic)

these children re-entering the criminal justice system for breach of the conditions of the SOR. Research supports the need for a different approach to managing risk of sexual reoffending in children.[56]

In our practice experience, we do not see many charges for breaches of SORA in the Children's Court. However, these charges start to emerge in the adult jurisdiction of the Magistrates' Court once a child turns 18. This is supported by VLA data which indicates that our we do not assist many children for charges associated with breach of SORA conditions, there is a notable increase in demand for advice or representation for this charge for young people between 18 and 25 years. For financial years 2016-17 to 2019-20, VLA provided legal advice, grants of legal assistance or duty lawyer representation to 91 young people aged between 18 and 24 for breach of SORA orders.

We support creation of a legislative presumption that children should not be placed on the SOR unless exceptional circumstances can be demonstrated, such as the level of actual risk to the community. This will help to reduce the risk of future stigmatisation and to improve rehabilitation prospects for children who commit sexual harm. This is consistent with adopting a more nuanced, trauma-informed approach to monitoring children who have been found guilty of sexual harm, which acknowledges that these children have often been victims of harm and abuse themselves.

We also support that where an offender is convicted of a sexual offence as a child, or is sentenced when they are 21 years or older for an offence committed as a child, and then successfully apply to have that offence spent under the proposed Victorian spent convictions scheme, that removal from the SOR should also be automatically facilitated in those circumstances.

Recommendation 34: That a legislative presumption be created against placing children on the Sex Offender Register, unless exceptional circumstances exist.

Reducing the reliance on post-sentence supervision

In our experience, post-sentence supervision under the *Serious Offenders Act 2018* is sometimes relied upon to address shortcomings in the therapeutic and rehabilitation support provided when a person is serving their custodial sentence. In addition, as discussed above, applications are sometimes made where parole planning has not commenced in a timely way.

We support greater cohesion, planning and collaboration between custodial treatment and rehabilitation programs for sexual offending and post-release responses. We recommend that the onus be placed upon Corrections Victoria to ensure that people have access to tailored supports from the beginning of their sentence, that aims to reduce their risk of reoffending post-release, rather than simply refusing parole and transitioning the person into post-sentence supervision under the Serious Offenders Act. We assist clients responding to last minute applications for post-sentence supervision when sufficient parole planning has not been undertaken.

Recommendation 35: That post-sentence supervision is not used to manage lack of therapeutic and rehabilitation support during a custodial sentence or insufficient parole planning to support safe transition back into the community**.**

[56] Dr. Ge b, K. *Recidivism of Sex Offenders Research Paper,* Sentencing Advisory Council, January 2007, p.16-17.

Creating restorative pathways based on the needs and preferences of victims of sexual offending

Enhancing restorative practice in the current response to sexual harm

There are clear limitations associated with the use of criminal justice processes as the primary response to sexual offending. We support the creation of additional processes and practices that will assist to provide further pathways for accountability and healing based on the needs and preferences of victims of sexual offending.

Our experience working in jurisdictions that emphasis restorative and problem-solving approaches can create better outcomes for both victims and people accused of criminal offending. Restorative pathways can facilitate accountability for people who caused harm and healing for those who have been harmed.

We see particular value for restorative practices at potential points of attrition within the criminal justice system. In addition, even where a criminal prosecution has reached a conclusion, this may not bring resolution for a victim of sexual offending. There are many examples from our practice where the conclusion of a criminal prosecution has not addressed or resolved the harm. By supplementing the current processes with access to restorative practices, such as the inclusion of a restorative outcome at sentencing, the experience of victims and their satisfaction with the outcome of the proceedings may be improved.

We also support the creation of a dedicated restorative pathway that will give victims the option of a response that is a complete alternative to the criminal justice system. This is discussed further below.

Sexual offences are currently excluded from many therapeutic criminal justice processes. Current restorative justice and /therapeutic court supports (such as Court Integrated Services Program, group conferencing, specialist courts and diversion) exclude serious sexual offences, but also sexual offending more generally. This can operate as a significant barrier to achieving restorative justice for sexual offending within the criminal justice system. This creates a significant gap in court supports for people accused of sexual harm, even where they admit their guilt and seek to engage with supports to address their offending behaviour. However, given the potential to promote accountability and address harm there is a clear role for these therapeutic programs in the response to sexual offending.

There are a number of factors that make it more likely that people will seek to contest sexual offence matters, including the stigma associated with sexual offending, the possibility of imprisonment, evidentiary issues, registration as a sex offender and the potential for post-sentence supervision.

We also support the integration of restorative options within current processes. For example, the early identification of matters that might be suitable for resolution in the Sex Offences List in the Magistrates' Court of Victoria. There have been some preliminary discussions between staff of VLA and Victoria Police about how restorative processes could assist the early resolution of matters in this list. This would be initiated by the prosecution after early conferencing with the complainant to better understand what they want to achieve through the criminal justice process. We support further exploration of these opportunities and the commencement of a pilot to integrate restorative practice in the early resolution of matters in the Magistrates' Court of Victoria.

Creating a separate restorative pathway as an alternative to the criminal justice system

There are many potential advantages associated with an alternative response that may provide a pathway where a victim of sexual harm does not want to pursue criminal proceedings and a criminal conviction. This may be particularly beneficial in circumstances where there is a continuing relationship between two people that needs to be preserved.

The Centre for Innovative Justice (CIJ) has closely examined the use of innovative justice responses to sexual offending. CIJ defined restorative justice as "a broad range of practices which attempt to repair the harm caused by a crime by collectively including those with a stake in the offence in its resolution".[57] The report noted the potential of restorative justice to provide victims with more choice in their pursuit of justice, and to create a justice system that is 'responsive, inclusive, flexible and fair'. It was concluded that, "with comprehensive safeguards and a coordinated, properly resourced system - sexual offence restorative justice conferencing has the potential to meet more of the justice needs of those victims who are being failed by the existing system".[58]

CIJ recommended that sexual offence restorative justice conferencing be implemented in a phased approach (similar to NZ and the ACT), to allow the criminal justice system to adapt; for legal culture to change; professionals to develop expertise; and services to evolve.[59]

While being clear that any restorative process must be strictly consent-based for all participants, CIJ identify clear benefits for victims in being able to give a first-hand narrative of what occurred and the impact it has had, and for the perpetrator in bearing witness to that narrative, hopefully gaining insight and accountability for their actions. The process may also provide opportunity to find solutions to the harm caused.

Support for restorative justice practices to address sexual harm are developing increasing support across Australia. The Cicada Project (a collaboration between Central Tablelands and Blue Mountains Community Centre and Dr Jane Bolitho, a criminologist and restorative justice expert from UNSW), has been exploring the merits of restorative justice for victims of sexual assault through a health-justice response. They utilise the United Nations' definition of restorative justice in a criminal legal setting as:

> *"any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party".*[60]

CIJ consider that restorative justice outcomes can be incorporated into existing criminal justice processes through the use of existing adjournment provisions and diversion processes such as Youth Justice Conferencing in the Children's Court. They support the introduction of national standards and training and accreditation of practitioners to ensure that restorative justice programs can be formally recognised and monitored, in line with international best practice models in countries such as New Zealand, Canada and the UK. VLA supports consideration of a restorative justice

---

[57] Centre for Innovative Justice, Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community, May 2014, p.12.

[58] Centre for Innovative Justice, Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community, May 2014, p.7.

[59] Ibid, p.8.

[60] Deakin-Greenwood, T., *Restorative pathways after sexual assault*, 2020.

approach for adults engaged in the criminal justice system as either complainants or accused, to assist in responding to sexual harm. This may be as either:

(i) a supplementary component to the case resolution or sentencing process; or

(ii) an alternative to proceeding with a prosecution, in appropriate cases.

We do, however, believe that a sufficiently phased approach is necessary, which allows for active monitoring and evaluation of outcomes, to ensure the process is safe for participants and reduces the risk of unanticipated consequences.

Any model that is adopted should also be designed in a way that is flexible enough to be utilised at all stages of the legal process, rather than exclusively as an exception to contesting charges and taking the matter to trial. VLA sees potential in also utilising a restorative justice approach within criminal proceedings at the following stages:

- As an alternative or prior to reporting to police
- As an alternative or prior to charging an accused with sexual offending
- Prior to a plea of guilty being commenced by an accused
- Following a plea of guilty.

In addition to taking into account participation by an accused in restorative justice conferencing for the purposes of sentencing, we believe that the court should also have capacity to strike a matter out following a plea, to give the court flexibility to respond to the specific circumstances of a matter, and to incentivise participation and early pleas. An accused could be held accountable through conditions regarding treatment, and requirements to be of good behaviour for extended periods of time, similar to existing diversion practices.

Recommendation 36: That restorative principles and practices be incorporated into the current criminal justice response to sexual offending.

Recommendation 37: That a structured restorative justice process be established as part of the system response to sexual offending, as an alternative to criminal proceedings.

Ensuring there are appropriate safeguards for all people involved in restorative processes

Any restorative process should not cause any harm for the participants in the process and we support a number of safeguards being embedded in the restorative justice model.

For that reason, we support restorative processes being available with the consent of both the person who has been harmed and the person who is alleged to have caused the harm. This should be fully informed and free consent that includes discussion and advice about the nature of the process, the requirements for participation, the scope of the alleged conduct covered by the restorative process and the potential outcomes. There should be a shared understanding of the confidentiality of the process and the restrictions on the use of any of the information disclosed during the restorative process for any future proceedings ahead of agreeing to restorative processes.

There must also be safeguards to protect all parties to the restorative process from any secondary consequences associated with their participation. This should include ensuring that participation is confidential and conducted on a “without prejudice” basis.

While restorative processes will not necessarily operate as a barrier for prosecution of any related offending, anything that an accused person discloses, directly or indirectly, during participation should not be able to be used against them in future legal proceedings or to further any criminal investigations against them. This will help to facilitate a process that supports accountability and reflection on the impact of any sexual harm.

While the process will need to be flexible to respond to the individual needs of participants, there should be transparency in the process supported by clear criteria and expectations associated with participation. It should be facilitated by people who have specific experience or expertise on restorative practices and processes. Consideration should be given to mandatory qualifications or professional accreditation for people facilitating restorative justice processes. This should include a particular focus on addressing sexual harm.

To ensure that the response remains independent and impartial, we consider that any restorative process should be facilitated by an independent agency. However, we do see a role for support to be provided to participants, including victims, as part of the process. This should include legal representation.

As noted above, we support flexibility in the approach adopted to ensure that the process does not cause harm or trauma to the participants. This should include the capacity to facilitate engagement remotely and the use of one-on-one processes to support the development of an acceptable restorative outcome.

Close attention should be given to people who may have additional requirements to support safe participation in restorative justice processes. This should include consideration of cultural safety and inclusivity, particularly when considering the needs of Aboriginal people, people from culturally and linguistically diverse communities and LGBTIQ+ communities where the specific dynamics and experience of sexual harm may require a different response.

While we consider that restorative processes should be available to children and young people and people with a cognitive impairment, we note that the particular needs and challenges associated with these processes for people who may not have clear understanding of the nature and impact of the relevant conduct.

We also support restorative pathways being available in relation to all offences, subject to the requirement that both parties consent to participate in the process. This will preserve a flexible response that is based on the needs and preferences of the individuals involved. We note that the Royal Commission into the Institutional Responses to Child Sexual Abuse did not recommend that historical sexual offending be included in a restorative approach to sexual offending. This was due to concerns about power imbalance, the fact that many victims would not be unwilling to engage in sucgh a process, and offenders may be unwilling or unavailable to engage.[61] We consider that the requirement that participants provide fully informed consent ahead of participation limits the need to exclude any particular categories of offending.

As an alternative response to criminal proceedings, we do not support a role for Victoria Police in the restorative justice process. However, they will retain a role in the process given the expectation that charges will not be progressed in circumstances where a restorative outcome has been achieved. This will include a specific role in prescribing the relevant legal outcome for people who agree to

[61] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report, August 2017), p.189.

participate in restorative processes when accused of causing sexual harm. This is similar to current arrangements relating to access to diversion.

Ideally, people accused of causing harm will be open to taking responsibility for the harm when consenting to participate. However, this should not be an eligibility requirement for participation. This should be assessed on a case by case basis to ensure that appropriate matters are identified for a restorative justice process. By including accountability as a precondition to participation it may limit the potential role of restorative justice in the promotion of insight and accountability for sexual harm. Assessment of the suitability of matters will also assist to filter out any people who might seek to use the restorative justice process to cause any further harm.

In our view, participants should have access to independent support, including legal advice and assistance, as part of the process.

Recommendation 38: That a restorative justice pathway should include strong safeguards to protect all participants, including:

- **Consent** All parties must provide free and fully informed consent to engaging in the process.
- **Confidential and without prejudice** Participation must be confidential and conducted on a 'without prejudice' basis – nothing that anything an accused discloses, directly or indirectly, during participation should not be able to be used against them in future legal proceedings or to further criminal investigations against them.
- **Transparent process** Any model should have a transparent process with clear guidelines on the conduct of the process.
- **Professional experience and accreditation.** Any model should be facilitated by people who have appropriate training in addressing sexual harm. Consideration should be given to requiring professional accreditation to facilitate restorative justice processes.
- **Flexibility in format** Any model should be flexible enough to respond to the needs to the parties involved, including the ability to facilitate engagement remotely through a mediator, rather than face to face, where required.
- **Responsive to individual needs** Cultural safety and inclusivity should be primary considerations when determining eligibility and approach to the restorative process, particularly when considering the needs of First Nations communities, young participants, CALD communities, LGBTIQ+ communities and people with disabilities.
- **Impartiality** The process should be impartial and not be convened by advocacy groups. An independent agency should be considered for the coordination of the process to ensure all participants experience an impartial process.
- **Accountability and admissions** Accepting responsibility for harm done should not be an eligibility requirement for participation but may be an outcome of the process.
- **Limitations on Victoria Police** Victoria Police should not be present or involved in the restorative process – the process should be seen to be separate to criminal proceedings;
- **Clear Outcome** Where a restorative justice process is undertaken at the suggestion of police, the accused must receive written confirmation from the police of the proposed outcome (i.e. withdrawal of charges), similar to the current process for accepting an offer of diversion;
- **No offences should be expressly excluded** Historical sexual offending should not be automatically excluded from the eligibility criteria, noting that all parties must freely consent to engagement.
- **Dedicated Support** Independent support, including legal advice and assistance, should be available for participants before, during and after the process.

Ensuring the response to sexual offending is culturally safe and co-created with the Aboriginal community

The creation of any new responses to sexual offending, including any dedicated Aboriginal justice models, must be done in close consultation with Aboriginal-led organisations and community to ensure practices are culturally appropriate and safe for all parties involved.

We note the commitment in the Aboriginal Justice Agreement to explore restorative responses in the criminal justice system.

The value of culturally safe therapeutic approaches has been demonstrated in the Koori Court where Aboriginal elders or respected persons advise the Judge or magistrate on cultural issues relating to the accused and their offending behaviour, including explaining relevant kinship connections and how particular crimes have affected the Indigenous community. We note that sexual offence matters are currently excluded from the Koori Court.

Recommendation 39: That the VLRC consult closely with the Aboriginal community and Aboriginal-led organisations to co-create an alternative justice model that can deliver a response to sexual offending that is culturally appropriate and safe for any Aboriginal people involved.

Improving the civil justice response for victims of sexual harassment and harm

Legal assistance for victims

There is currently no dedicated legal service to help victims. While there are several government agencies that provide support for victims of crime, these are non-legal in nature, including the Victims of Crime Helpline, Victims Support Agency, Child Witness Service and the Witness Assistance Program delivered through the OPP. In criminal trials, the OPP does not represent victims of crime and does not provide legal assistance or advice to victims.

Several reviews have highlighted this gap and recommended that there should be a specialist victims legal service:

- The recent CIJ *review of the victim support system in Victoria* made a key finding that "victims of crime wanted, but had no source of, dedicated and comprehensive legal advice." The review also identified that victims of crime often had a range of unmet legal needs beyond the criminal justice process, which could escalate if not addressed. The review recommended a new Victims Legal Advice Service to provide victims of crime with tailored legal information and advice, referrals and discrete task assistance, serviced by specialised lawyers who have an understanding of the needs and experiences of victims of crime, and the application of trauma-informed approaches to legal practice.[62]
- The VLRC identified several barriers for victims in seeking an award of assistance from VOCAT. The VLRC concluded that "The effect of the above [challenges] is that victims are unlikely to navigate the VOCAT system without a lawyer"[63] and highlighted accessibility concerns for victims, particularly where victims cannot access legal advice and assistance.[64] The VLRC recommended that in applying for state funded financial assistance, *victims should have a right to be represented by a legal practitioner.*[65]
- In a separate review of victims in the criminal trial process, the VLRC recommended that VLA be funded to establish a service for victims of violent indictable crimes in response to its finding that there is no dedicated legal service for victims to turn to and that there is no obvious pathway for a victim who wants to obtain advice on their legal entitlements.[66]
- The SAC *Report on compensation and restitution for victims of crime* identified a lack of legal assistance as a significant barrier for victims, and recommended creating a victims legal service.[67] SAC also recommended the government consider establishing a specialist victims' legal service that would provide comprehensive free legal advice to victims of crime on their options for compensation, including orders for restitution or compensation under the *Sentencing Act 1991* (Vic), VOCAT, civil compensation and/or any applicable compensation

[62] Victim Services Review, 17.

[63] VLRC, *Review of the Victims of Crime Assistance Act 1996* (**VOCAT Report**) (Report, September 2018), 83.

[64] VLRC Victims Report, 238.

[65] VLRC VOCAT Report, above n5, recommendation 17(a).

[66] VLRC Victims Report, Recommendation 23.

[67] Sentencing Advisory Council, *Restitution and Compensation Orders* (Final Report, October 2018) Recommendation 8.

schemes; and provide legal information or advice throughout the criminal trial process where this is not provided by other agencies.

Recommendation 40: That the government fund a dedicated specialist Victims Legal Service, to provide victims of crime with tailored legal information and advice, assistance and legal representation, serviced by specialised lawyers and available statewide.

Responses to sexual harassment

As discussed above, community views of sexual harassment and its responses can contribute towards the prevalence of sexual harm.[68] VLA provides advice and representation to clients who experience sexual harassment. Our clients tell us that the system is failing to stop sexual harassment occurring and meaningfully address it when it does. *Issues Paper H - Sexual Offences: Civil law and Other Non-Criminal Responses*, refers to the Australian Human Rights Commission (**AHRC**) inquiry, which identified various barriers to reporting sexual harassment and finding justice.[69]

Current systems for identifying and resolving sexual harassment rely on individuals making complaints, which does not capture most occurrences of sexual harassment.[70] Among other reasons, victims may be reluctant to make a complaint due to the impact the process has on their mental health, and fears of any negative impacts on their reputation and career that a complaint may have. This fear is supported by the finding that 'almost one in five people who made a formal report were labelled as a trouble-maker, victimised, ostracised or resigned.'[71]

Further, the individual complaints system does not prevent future sexual harassment or harm. Outcomes in sexual harassment complaints rarely require employers to take preventative systemic action, and complaints often resolve confidentially rendering them unable to act as a deterrent to others. The effect of this lack of positive duty to prevent sexual harassment is that employers and organisations, and other bodies, are not required to assess their policies and procedures until an incident of sexual harassment has already occurred and the respondent seeks to avoid vicarious liability in a legal claim.[72]

While employers are required to provide a safe working environment so far as is reasonably practicable by work health and safety laws,[73] sexual harassment has not been prioritised as a psychological and physical workplace hazard,[74] with no regulations, codes of practice, or significant

[68] For more detail see the **VLA AHRC Submission**, above n2.

[69] Citing: 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-sexualharassment-national-inquiry-report-2020>.

[70] Less than 1 in 5 people who experience sexual harassment take action, and only 1 in 100 make a legal complaint to the AHRC or State or Territory equivalent: Australian Human Rights Commission, *Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces* ('**AHRC National Survey on Sexual Harassment'**), 2018, 9.

[71] Ibid, 73-75.

[72] VLA AHRC Submission, above n2, 21–24.

[73] See for example the Model Work Health and Safety Bill 2016 (Cth) section 19 and the Occupational Health and Safety Act 2004 (Vic) section 21.

[74] For example there is no content on the Comcare website about sexual harassment: https://www.comcare.gov.au/preventing/hazards accessed 2 February 2019, nor is there any content on the Victorian Work Safe website about sexual harassment other than to note workers can get advice from a human rights commission: https://www.worksafe.vic.gov.au/topics accessed 2 February 2019.

enforcement activity being made regarding sexual harassment.[75] As a result, there is little guidance on effective sexual harassment prevention for employers and organisations, and other bodies, and little impetus for them to prioritise sexual harassment prevention.

The work health and safety framework must make it clear that the duty to provide a safe working environment includes an obligation to eliminate sexual harassment from the workplace. The framework should include the power for work health and safety agencies to assess and enforce compliance with sexual harassment prevention obligations. There is evidence that in this context, obligations are more effective when they are backed by a threat of punishment for non-compliance.[76] Consideration should be given to how these frameworks can be extended to all other duty holders.

In Victoria we have a positive obligation on organisations to prevent sexual harms and harassment, as well as a right to seek redress; however in Victoria the positive obligation is not enforceable. The current positive duty imposed by the *Equal Opportunity Act 2010* (Vic) on employers and duty holders to prevent sexual harassment is only enforceable through investigation by the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) which does not have the powers to compel compliance.[77]

Recommendation 41: consistent with the enforcement powers needed by workplace health and safety agencies, anti-discrimination laws should be amended to create a positive duty to eliminate sexual harassment as far as possible, and empower human rights commissions to make guidelines for compliance and enforce the positive duty created.

Alternative dispute resolution processes for sexual harassment

We routinely represent clients with complaints of sexual harassment in alternative dispute resolution processes (ADR) across various jurisdictions, including the Fair Work Commission, the AHRC, VEOHRC, Courts and Tribunals. Our experience is that our clients often want the opportunity to explain to the respondent their experience of the harassment and its impact on them. When not provided with this opportunity, clients often leave feeling that their dispute and related feelings remain unresolved, even though the parties may have reached a settlement agreement. In some cases, an outcomes focussed process can impede resolution because a party is unwilling to agree to settle their dispute in the absence of feeling heard.

ADR processes can be restorative for victims, as it can provide the opportunity for victims to the share the impact of their experience and have more meaningful participation in proceedings.

Our experience of ADR processes reflects the findings of Kingsford Legal Centre's survey: that there is a problematic lack of consistency. In particular, some mediators will be engaged with the issues and informed of the relevant legislative provisions, whilst others will take a hands-off approach and allow the process to be driven by the legal representatives. Inconsistences in these processes makes it difficult for us to prepare clients for what to expect and can compound their distress. In many cases,

[75] The *Model Work Health and Safety Bill 2016* (Cth) does not define sexual harassment, the *Model Work Health and Safety Regulations 2019* (Cth) do not set out detailed requirements for how employers can comply with their duties in relation to sexual harassment, and there is no model code of practice to provide practical guidance to employers as to how they can comply with their duties regarding sexual harassment.

[76] VLA AHRC Submission, above n2**Error! Bookmark not defined.**, 28–30, citing See Ian Ayres and John Braithwaite (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press.

[77] VLA AHRC Submission, above n2, 29.

clients will feel pressured to resolve their claim on terms that do not meet their interests. They may also not have been afforded sufficient time or opportunity to share the impact of their experience on them, nullifying one of the central benefits of ADR processes.

Increasing consistency in the use and application of ADR processes in courts, tribunals and commissions that deal with sexual harassment complaints could significantly improve the experiences of sexual harassment complainants. Institutions that deal with sexual harassment complaints could set out basic guidance for ADR processes in sexual harassment complaints, which should include specific time for individuals to speak about their experience and the impact of the harassment on them.

Recommendation 42: improved consistency in alternative dispute resolution processes across courts, tribunals and commissions that deal with sexual harassment complaints, and ensuring that individuals have the opportunity to speak about their experience and the impact on them.

Burden on victims in civil proceedings

In order to bring a civil claim, the burden is on victims themselves to initiate proceedings. As research has confirmed that victims of sexual offending are unlikely to make a complaint for a range of reasons,[78] reliance on the traditional burden in this context is counter-productive against supporting victims to recover from their experience.

Compounding the challenges for victims in initiating civil proceedings, the timeframes for bringing civil claims for sexual harassment are very short.[79] There are many reasons why people who have experienced sexual harassment do not seek legal advice and file a legal complaint within that statutory time limit, including the severe impact on their mental health, and their reluctance to come forward in the first place (as described above).[80]

In the context of this review, which seeks to improve civil responses to sexual harm, we reiterate our recommendation to the AHRC Review, that time limitations for civil sexual harassment claims should be significantly extended, or removed.[81]

The inadequate obligation on organisations to take positive steps to address the risk of sexual harassment combined with the lack of enforcement of obligations, serves to promote the status quo in which sexual harassment is not addressed and continues to be perpetuated.

In order to counteract the power imbalance resulting from the cumulative impact of these factors, we recommend that sexual harassment provisions in anti-discrimination law should be amended,

---

[78] As noted above, the 2018 Australian Human Rights Commission's Fourth National Survey on Sexual Harassment in Australian Workplaces confirmed that less than 1 in 5 people who experience harassment take action, and only 1 in 100 make a legal complaint to the AHRC or equivalent State or Territory agency: **AHRC National Survey on Sexual Harassment**, 9.

[79] Under the *Sex Discrimination Act 1984* (Cth), a claim must be brought within 6 months. Under the *Equal Opportunity Act 2010* (Vic), a claim must be brought within 12 months. Comparing to other employment related rights of action in Australia the time limit for all non-dismissal related civil remedy provision protections in the Fair Work Act is 6 years: *Fair Work Act 2009* (Cth) section 544.

[80] VLA AHRC Submission, above n2**Error! Bookmark not defined.**, 38.

[81] If we look to overseas jurisdictions for comparison Ontario, Canada has recognized the barriers to early reporting and completely removed the limitation period for civil sexual harassment lawsuits. CBC Radio (2018) *Civil cases for sexual harassment — a new avenue for women seeking justice?* Accessed online on 1 February 2019: https://www.cbc.ca/radio/thecurrent/the-current-for-january-08-2017-1.4475517/civil-cases-for-sexual-harassment-a-new-avenue-for-women-seeking-justice-1.4475519

drawing on the approach in section 361 of the *Fair Work Act 2008* (Cth), such that once a victim establishes a prima facie case that the sexual harassment occurred, the burden of proof shifts to the respondent.

In conjunction with this, we also recommend that VEOHRC should be empowered to enforce the positive duty on institutions, such as workplaces, to prevent sexual harassment.[82] The suite of powers should range from education and training, to prosecution, sanctions and compensation or redress orders.[83]

Recommendation 43:

To improve civil justice responses to sexual harm, we recommend:

1. time limitations for civil sexual harassment claims should be significantly extended or removed;
2. sexual harassment provisions in anti-discrimination law should be amended so that once a victim establishes a prima facie case that the sexual harassment occurred, the burden of proof shifts to the respondent;
3. the Victorian Equal Opportunity and Human Rights Commission should be empowered to enforce institutions' obligations to prevent sexual harassment.

Victims of Crime Assistance Tribunal

Issues Paper H - Sexual Offences: Civil law and Other Non-Criminal Responses, identifies difficulties for victims in accessing VOCAT. VLA provides information, advice and representation to victims of crime seeking to access financial assistance from the VOCAT, however our VOCAT practice is small as we only provide ongoing assistance to clients who have been unable to obtain private legal assistance.[84] We will not make detailed submissions on VOCAT in this review, as there have been previous reviews of VOCAT and victims compensation.

In our submission to the VLRC review of VOCAT, VLA emphasised the importance of legal representation in novel or complex matters, suggesting that this service could be incorporated into the victims legal service previously recommended by the VLRC. We also recommended that any compensation scheme must be co-designed with people with lived experience, particularly people affected by family violence and Aboriginal and Torres Strait Islander people and that the requirement to consider an applicant's past criminal history should be removed from the financial assistance scheme.

Data on civil complaints and outcomes

Issues Paper H asks how data on outcomes from other justice processes could be collected to improve our understanding of sexual offending. the extent of sexual harassment as a wide-spread

[82] ie, s 15 of the *Victorian Equal Opportunity Act* (2010).

[83] For further detail see the VLA submission, 29-30.

[84] VLA provided only 95 legal advices on VOCAT matters in FY2020, 111 in FY2019, 108 in FY2018. Over the three financial years 2015/16 to 2017/18, the number of legal services (legal information, legal advice, minor work, grants of legal aid) VLA provided in relation to VOCAT matters was approximately 10 percent of the total number of VOCAT applications. We do not maintain records of matters where we have not assisted due to capacity.

problem is obscured from the public, governments and regulators. There is limited publicly available data and information about complaints of sexual harassment that are initiated.

This is due in part to:

- The low numbers of legal complaints that proceed to final hearing, with most settling out of court on the basis that the details of the complaint remain confidential. In our practice experience, these settlement clauses are routine.
- As noted by Issues Paper H, civil litigation outcomes are not included in sexual harm statistics or data gathering.
- An absence of consistent recording and reporting of deidentified complaints outcome data from relevant statutory commissions. Although the Australian Human Rights Commission publishes some deidentified details of complaints proceeding to conciliation, including settlement outcomes, these records are ad-hoc and are not consistently updated.

If available, this data could inform strategies to address systemic sexual harassment by identifying drivers, patterns of abuse and industry trends. It would also provide a resource to evaluate the effectiveness of the current laws and regulatory regime.

The lack of transparency also acts as an inhibitor for would-be complainants. Resourcing statutory commissions to consistently record and report publicly on sexual harassment complaints data would address this issue. Ideally both aggregate and disaggregated data would be made available.

We are also of the view that aggregated data on settlement outcomes, both financial and non-financial, would also be a valuable resource for potential complainants. In addition, any reporting and recording mechanism would also ideally capture matters resolved prior to final hearing at the Victorian Civil and Administrative Tribunal, the Federal Court and Federal Circuit Court.

Recommendation 44: That the Australian Human Rights Commission should be required to record and publish deidentified complaints data, including settlement outcomes, in order to increase transparency of complaints and settlement outcomes, inform strategies to address systemic sexual harassment, and provide a resource to evaluate the effectiveness of the current laws and regulatory regime.