Victorian Law Reform Commission – Improving the Response of the Justice System to Sexual Offences

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Contact:

Maurice Stuckey, Policy Lawyer
[redacted]

Andy Kuoch, Paralegal
[redacted]

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INTRODUCTION

The Law Institute of Victoria ('**LIV**') welcomes the opportunity to provide a formal submission to the Victorian Law Reform Commission's ('**VLRC**') Inquiry — *Improving the Response of the Justice System to Sexual Offences* ('**the Inquiry**'). The LIV is the peak membership body for the Victorian legal profession, representing over 18,500 lawyers, students and people working in the law in Victoria, interstate and overseas. Our members are legal professionals from all practice areas, and work in the courts, academia, policy, state and federal government, community legal centres and private practice. The LIV's membership includes expert lawyers who specialise in, amongst other practice areas, sexual offences, family violence and child protection — with specific interests in the balance of rights of victim-survivors and the potential for prejudice against an accused.

This submission is largely informed by the LIV's Criminal, Administrative, Human Rights and Technology and Innovation Legal Policy Sections.

RECOMMENDATIONS

The LIV recommends:

1. An alternative simplified process for VOCAT applications which solely seek costs for counselling;
2. Increased resources for the VOCAT lists to reduce waiting times, and/or the creation of a VOCAT specialised family violence and sexual assault list;
3. That VOCAT Tribunal members view each subsequent act of violence as compounding trauma rather than separate one-off events and take this into account when making determinations;
4. Maintain the option to opt-in to judge alone trials;
5. Insert a definition of 'administers' to provide clarity to the operation of section 46 of the *Crimes Act 1958* (Vic).
6. A separate provision in the *Migration Act 1958* (Cth) to afford legal protection from visa cancellation for victims of violence who are dependent on the visa of a perpetrator whose visa has been cancelled;
7. Amendment to s140 of the *Migration Act 1958* (Cth) which provides for 'consequential cancellation' of dependents where the primary applicant's visa has been cancelled due to the operation of ss 109, 116, 128, 133A, 133C;
8. Against allowances for pre-recorded hearings as a matter of course;
9. The removal of legislated automatic and mandatory registration for those who commit non-violent sexual offences, to be replaced by registration based on an individual, expert assessment of risk;
10. That only those assessed by experts as posing a threat to the sexual safety of children or other members of the community should be included on the register;
11. That young people are included on the register only in exceptional circumstances;

12. The establishment of a panel of experts to review the circumstances of existing registered sex offenders in order to determine whether the registrants should continue to be on the register;
13. Introduce a positive duty on employers in the SDA to eliminate sexual harassment, with a focus on bystander training as part of anti-discrimination training within organisations;
14. Amend the definition of “sexual harassment” in the SDA to specifically include online harassment and the use of technology and social media to perpetrate sexual harassment; and
15. Clarify the scope of “employment”-related sexual harassment to specifically include conduct towards any person performing work, not just in an employment relationship or in a workplace.

The Impact of the changes that have been implemented since the VLRC last reported on:

a) Sexual Offences (2004)

Cross-Examination

The LIV acknowledges the importance of addressing victim-survivors' re-traumatisation in the VLRC's recommendation that an accused must not personally cross-examine a complainant or a protected witness in a criminal proceeding for a sexual offence.[1] This prohibition on 'personally' cross-examining a victim is consistent with best practice approaches to abating victim re-traumatisation. However, wider contextual issues are important, and cross-examination may reveal factors such as undisclosed discussion or collaboration between witnesses, including relevant, physical or mental health conditions or significant incidents in the lead-up to the alleged offending.[2]

The LIV support the ability for a self-represented accused to receive a court appointed lawyer for cross-examination if the requirement arises.[3] The cross-examination of complainants is often entirely necessary and has considerable utility to elicit essential facts and context. The LIV would strongly oppose any attempts to erode the ability to cross-examine, given its significant role in ensuring a fair trial and the gravity, nature and consequences of the accusations.

Case Study

In a case involving a rape charge, the complainant, in her police statement, described a non-consensual sexual event but gave virtually no detail about the surrounding context. The accused instructed that he and the complainant had been communicating via Facebook prior to the incident, and had arranged to meet, to take drugs and to have sex. This was put to the complainant during cross-examination at the committal hearing and she acknowledged the extensive prior arrangements. If the complainant had never been cross-examined at committal both the prosecution and defence would have been operating under a completely inaccurate understanding of the context and events leading up to the incident.

[1] Victorian Law Reform Commission ('VLRC'), Sexual Offences (Final Report, 2004) 245 ('Recommendation 94 –97'); VLRC, 'Improving the Response of the Justice System to Sexual Offences: Issues Paper A – H (October 2020) 3 [8].

[2] Law Institute of Victoria ('LIV'), Submission to the Victorian Law Reform Commission's *Review into Committals* (October 2019) 9 <https://www.liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/October-2019/LIV-supports-retaining-and-improving-committal-hea/20191002_LIV_VLRCCommittalReviewFINAL.PDF.aspx>.

[3] Criminal Procedure Act 2009 (Vic) s 357.

Prior Sexual Activity

The LIV accepts that the VLRC's recommendation was in opposition to the LIV's view that there was no need to amend section 37A of the Evidence Act 2008 (Vic), in relation to the admissibility of prior sexual activity of the complainant, as this section was administered extremely carefully by trial judges.[4] While the final report recommended otherwise, the LIV maintains that the law as it stood — with 'special rules of evidence in relation to certain offences which related to rape' — ought to be maintained, given that the section had worked as intended and carefully administered, with the Judge's permission always sought before a complainant is cross-examined about their sexual activities or where evidence of such activities are put before the jury.

b) Victims of Crime in the Criminal Trial Process (2016)

The LIV acknowledges that victims undergo an arduous path through the criminal justice process. A victim's experience is deeply personal and often traumatic, exacerbated by the trial process itself. The fragmented approach to accessing the Victims of Crime Assistance Tribunal ('VOCAT') — the absence of integrated support systems; needs and risk assessments; case coordination; and the financial support scheme — are leading to larger demands on the Magistrates' Court of Victoria ('MCV').

While VOCAT can provide an avenue for restorative justice, the delays in applications due to unprecedented demand,[5] have the potential to contribute to re-traumatising victims of sexual assault. The immediacy of the needs of victims of sexual assault, particularly in applying for interim awards that include urgent financial assistance — for example, to cover costs for counselling, are often still subject to complex barriers. This would be particularly acute for a victim of sexual assault that may also have an illness, cognitive impairment, and/or other form of disability that is either pre-existing or caused by the sexual assault. As a result, this may significantly impede their ability to accurately recount the experience of their sexual assault in the required statutory declaration.

[4] VLRC, 'The Role of Victims of Crime in the Criminal Trial Process (Report, August 2016) 204, 210-211 ('Recommendations 68, 69-75').

[5] Victims of Crime Assistance Tribunal (Annual Report 2017-2018) 39 <https://www.vocat.vic.gov.au/sites/default/files/publication/2020-08/11593%20MCV%20VOCAT%20Annual%20Report%202017-18_Web%20Final.pdf>; VLRC, 'Family violence and the Victims of Crime Assistance Act 1996' (Consultation Paper) [11.53] <https://www.lawreform.vic.gov.au/content/introduction-15#footnote-5750-19>.

Recommendation 1: An alternative simplified process for VOCAT applications which solely seek costs for counselling;

Recommendation 2: Increased resources for the VOCAT lists to reduce waiting times, and/or the creation of a VOCAT specialised family violence and sexual assault list;

Recommendation 3: VOCAT Tribunal members to view each subsequent act of violence as compounding trauma rather than separate one-off events and take this into account when making determinations.

The LIV considers there are numerous other protections in place for victims and vulnerable witnesses not only pursuant to the *Criminal Procedure Act 2009* (Vic),[6] but by the protections enshrined in the *Victims Charter* — to be upheld by prosecuting agencies. There are also expectations and obligations upon the professionals who operate within the criminal justice system to 'minimise the trauma experience in the court-room without jeopardising a fair trial for the accused'.[7] While recent amendments to the *Victims of Crime Assistance Act 1996* (Vic) under the *Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020* (Vic), providing for Tribunal Officers to make and finalise decisions in many matters,[8] thereby reducing the burden on Magistrates' and working towards a reduction in the backlog of matters; the LIV acknowledges that this will be in-part a matter requiring favourable budget outcomes for timely implementation.

c) Jury Directions (2009)

Why judge-alone trials have not been used often

Since COVID-19, numerous legislative amendments have been introduced to ensure the administration of justice could continue to operate. The authorisation of measures taken such as mandated remote hearings, administrative adjournments, judge-alone trials and the introduction of hybrid courts or 'pop up' courts, have to a great extent facilitated the ongoing operations of the justice system.

[6] *Criminal Procedure Act 2009* (Vic) Part 8.1- 8.2.
[7] Department of Justice Sexual Assault Advisory Committee*, Charter of Advocacy for Prosecuting and Defending Sexual Offence Cases* (2010) 1.
[8] *Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020*, ss 7, 8, 12.

Whilst the LIV supports the permanency of opt-in judge-alone trials, the LIV supports the wording of item 23 in Issues Paper B:

> *'juries are an important feature of the criminal justice system. They represent the community and their values. They are a check on potential abuses of power. Removing juries could undermine trust in the criminal justice system, and the right to a fair trial.*'

Many lawyers and their clients hold this view, which is reflected in the low rates of opting in for judge-alone trials. However, the LIV recommends an extension to judge-alone trials for 12 months so that once a sufficient amount of matters have been dealt with by judge-alone, a better idea of the efficacy of this process can be attained.[9]

Delays

The LIV supports the continuation of the COVID-19 amendments to allow for hearings on the papers, as it reduces the need for appearances and cuts down on delays. However, in seeking other ways to improve the efficiency of the justice system, whilst the LIV supports the option to opt-in to judge-alone trials, juries should not be abolished for sake of efficiency for the above stated reasons.

Recommendation 4: Maintain the option to opt-in to judge alone trials.

How well are support programs for people who have experienced sexual harm working?

Intermediary Pilot Scheme

The Intermediaries Pilot Program ('**IPP**') which operated until 30 June 2020,[10] sought to improve the quality of evidence of vulnerable witnesses and reduce trauma associated with justice system processes, by allowing eligible witnesses to access professional intermediaries that can assess and make recommendations as to their communication

[9] LIV, Letter to the Hon Jill Hennessy, 'COVID-19 and the Victorian Legal System' (23 July 2020) <https://www.liv.asn.au/getattachment/Professional-Practice/Supporting-You/COVID-19-Hub/LIV-Member-Services---Support/20200723_LTR_PRES_AG_CovidResponse.pdf.aspx>.
[10] VLRC, 'The Role of Victims of Crime in the Criminal Trial Process' ('recommendation 30').

needs. The LIV anticipates that the efficacy of the IPP will be evident once the pilot has been evaluated.

While the IPP captures child complainants for the above reasons and adult complainants with cognitive impairments, the intermediaries are unable to make further referrals, even where they identify unmet support needs. These witnesses are likely to be victims of crime as well and are likely to be more vulnerable to victimisation, with complex support needs that require specialist rather than generalist services.[11] Additionally, in pointing to potential benefits of intermediary schemes in other jurisdictions such as England and Wales, it is important to note that in these jurisdictions an intermediary is also available to the accused. In order for the right to a fair trial to be upheld, it is important that access to services which assist with giving evidence be equally available to the accused and to other witnesses.

Witness Support Services

In contrast to the IPP, the Victim Assistance Program ('**VAP**') is able to provide guidance in organising the most therapeutic intervention as well as providing emotional support. The program provides practical support, assistance with tasks in relation to the criminal justice process and therapeutic interventions. Importantly, sexual offences (comprising sexual assault, child sexual assault and abuse, rape and indecent assault) account for 14.05 per cent of all types of crime handled by the VAP (rates which are higher than those reported to the Helpline).[12] The VAP recorded an increase of 43.3 per cent in the number of cases involving clients under the age of 18 in the second quarter of 2020, when compared to 2019.[13]

The LIV supports the implementation of Recommendation 39 of the VLRC to provide practical assistance awards by the decision-maker for the expenses listed in (a)-(g),[14] and to ensure that the amounts provided via financial assistance as recognition correspond as far as possible with victims' views of appropriate recognition (noting availability and resourcing limitations).

[11] Centre for Innovative Justice, 'Strengthening Victoria's Support System — Victim Services Review' (November 2020) 41.
[12] ibid 109-110.
[13] See Crime Statistics Agency, Family Violence Database: Children and Young People' <https://app.powerbi.com/view?r=eyJrIjoiNzAyZjJlOWUtNzExMS00NjBjLTgzMzYtNjQ2ZDIxNTFjMDQ5IiwidCI6IjcyMmVhMGJlLTNlMWMtNGIxMS1hZDZmLTk0MDFkNjg1NmUyNCJ9>.
[14] VLRC, 'Assistance Available under the Proposed Act for Victims of Crime Financial Assistance' (Recommendation 39').

How well is Victoria's model of communicative consent working? Should there be any changes?

Crimes Amendment (Sexual Offences) Act 2016

The insertion of section 46 applies to both sexual penetration and sexual touching, aligning the fault element of rape offences by focusing on intention to give, withhold or withdraw consent.[15] The LIV considers that focusing on the ability to give, withhold or withdraw consent (rather than on the overpowering of a person's will) is consistent with modern understandings of lack of consent,[16] which do not require proof that a complainant physically resisted a sexual act in order for lack of consent to be established. The LIV supports the common law position that a person who does not give any thought to whether another person is consenting to sexual penetration is guilty of rape.

Section 46 *Crimes Act* refers to the administration of an intoxicating substance for a sexual purpose. However, 'administers' is not defined in this section nor elsewhere in the Crimes Act. Unlike the section 19 offence to administer certain substances, section 46 contains no consent consideration for when the administering of an intoxicating substance will be an offence — potentially capturing situations such as a person purchases another person a drink at a bar with the hope that doing so may make the other person more amenable to taking part in a sexual act. This is presumably not the intention of the act.

Recommendation 5: Insert a definition of 'administers' to provide clarity to the operation of section 46 of the *Crimes Act 1958* (Vic).

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[15] *Crimes Amendment (Sexual Offences) Act 2016,* s 46.

[16] *Laz v R* [1998] 1 VR 453 [460], 'Court unanimously concluded that it was a misdirection by a trial Judge to direct a jury that evidence of failure to say or do anything constitutes prima facie proof of free agreement to a sexual act was absent'); *Crimes Act 1958* (Vic) s 37(a). See also *Crimes Amendment (Rape) Act 2007* (Vic), ss 37, 37AA, 37AAA.

Do you support access to alternative ways of reporting sexual harm? Why or why not? If you support alternative ways of reporting sexual harm, what features should they have?

The barriers people face in reporting sexual harm

The LIV considers there are a range of intersecting factors that influence the decision to report sexual offences. These include fear of giving evidence and a weighing of the offence against the potentially significant life changes that could result from reporting, such as the ending of relationships with the offender and the offender's family and friends, ongoing DHHS involvement and unknown accommodation outcomes. Some victims experience (however misguided) concerns that they will be perceived as being equally to blame, hold doubts as to whether reporting is actually doing the right thing and/or fear the consequences that may flow from reporting the offending party, who in addition to being physically violent can wield other forms of power over the victim such as being the sole provider or owner of the family home.

LIV members report that through their involvement with victims in sexual offence matters, anecdotally it is common for the victim to express they do not wish for the offender to go to jail. For example, there will be some cases where the perpetrator is the victim's father and the breadwinner of the family and they do not necessarily want him to be sent to jail but want at least some form of justice.

There is an absence of diversionary programs linking to support that do not involve the criminal justice system. When victims are seeking help their immediate thought is to call the police, where criminal charges may follow when police arrive at the scene, even where there is a statement of no complaint. While the police may perform risk assessments, more diversionary type programs are needed in lieu of the criminal justice process.

The diverse needs and experiences of people who have experienced sexual harm

Whilst the LIV acknowledges the following is largely outside the scope and jurisdiction of the VLRC, it is important to understand the significant impact being the victim of a state sexual offence can have on visa holders.

CALD Women

Women from CALD communities who have experienced sexual violence face additional barriers of financial and emotional dependence on others, family, cultural, religious and community pressures.[17] There have been consistent reports by service providers of increasing numbers of young African women accessing unplanned pregnancy and relationship services, and concerns about domestic violence and relationship breakdown.[18] It is critical that cultural responsiveness is integrated into policy and practice responses to the exploitation of women and children, given that many young women described a range of sexually inappropriate or violent behaviours but spoke of the difficult of reporting formally or to their parents', due to a fear that the situation may worsen.[19]

Seeking Asylum and Temporary Visa Holders

Beyond the social and economic disadvantage that deter the pursuit of asylum claims in Australia, the direct consequences of migration law and policies intentionally place people in situations of visa status insecurity — due to the clear lack of coherence in policy that are diametrically opposed — to protect women and children from family and sexual violence, but in effect, leaving them with a limited ability to access help. These policies include:

- limited family violence provisions available under some partner visa categories;

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[17] Natalie Taylor and Judy Putt, *Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia* (Trends & issues in crime and criminal justice, No. 345, Australian Institute of Criminology, 2007).

[18] Donna Chung, Colleen Fisher, Carole Zufferey and Ravi K Thiara, 'Preventing Sexual Violence against young women from African backgrounds' (2018) 540 *Australian Institute of Criminology* 1.

[19] Donna Chung, Colleen Fisher, Carole Zufferey and Ravi K Thiara, 'Preventing Sexual Violence against young women from African backgrounds' (2018) 540 *Australian Institute of Criminology* 10.

- cancellations of visas for victims and their children due to the sole actions of the perpetrator;
- requirements for residential addresses to lodge valid protection visa applications (where applicant is in crisis or temporary accommodation);
- Status Resolutions Support Service ('**SRSS**') criteria precluding family violence as a ground for eligibility.

The COVID-19 pandemic has worsened the situation through exclusion of temporary visa holders from all government support packages, 'rendering them homeless, destitute and forced onto the street or into insecure accommodation'[20] facing higher risks of physical and sexual violence. The perverse situation created is that victims of family and sexual violence are incentivised to return to the control of their perpetrators, trapping both the victim and often their children at a high risk of continuing violence. Members report that controlling partners often interfere and control postal mail or email. As such, they leave victims unable to receive communication from the Department or their legal representatives without placing further risk to their safety.[21] This can create issues where important documents are not received by the Department or their legal representatives within non-extendable deadlines, resulting in adverse outcomes to the victims.

Protection Visa Applicants

Dependent visa holders who experience violence are typically in a vulnerable position and this visa would allow individuals to ensure the security they need to rebuild their lives. The LIV considers it imperative to prevent consequential visa cancellations where a victim survivor has their visa cancelled due to the violence perpetrated against them. While the introduction of Schedule 2 of the Migration Regulations 1994 recognised the situation where victims of family violence are compelled to remain in violent situations, it applies to a narrow cohort and does not cover, amongst others,[22] people on bridging visas, nor protection visa applicants. Notably, members have not observed the Minister's use of personal, non-compellable powers to intervene in individual cases concerning

[20] Asylum Seeker Resource Centre, Submission to the House Standing Committee on Social Policy and Legal Affairs *Inquiry into Family, Domestic and Sexual Violence* (23 July 2020) 4.
[21] Ibid 11 ('for example, invitations to interviews, hearings or decisions on their application).
[22] ibid 5 ('457 spouse visas; student visas; people whose temporary visas are cancelled due to actions of the perpetrator; or those who breached conditions of their temporary visa due to domestic abuse; or who are no longer 'dependent' and have ongoing family court matters related to children').

sexual violence or family violence, although these powers are conferred for cases involving 'unique and exceptional' humanitarian circumstances.[23]

A protection visa applicant requires essential documents, often left behind in conflict, to progress their applications especially if it is separate to their former partners. Due to the Department requiring consent of their partner to release previously submitted applications on their behalf for the release of information, requires a victim to contact perpetrators — which is not legally permissible when intervention orders are in place. This is exacerbated by the progressive amendments to the thresholds for visa cancellations on criminal grounds,[24] creating a need for victims, often women and children, to rely on the perpetrators of violence and exposing them to ongoing risk, should they be worried about the prospect of losing their visa and that of their children's, which is predominantly the case reported by members. The LIV considers that these victims are at an enormous disadvantage in seeking protection, leaving them to face removal to her home country of which was the initial source of gender-based violence and other forms of persecution.

Recommendation 6: A separate provision in the Migration Act 1958 (Cth) to afford legal protection from visa cancellation for victims of violence who are dependent on the visa of a perpetrator whose visa has been cancelled.

Recommendation 7: Amendment to s140 of the Migration Act which provides for 'consequential cancellation' of dependents where the primary applicant's visa has been cancelled due to the operation of ss 109, 116, 128, 133A, 133C.[25]

This would incentivise greater reporting by removing the fear for victim survivors that they could have their visa cancelled where criminal charges are brought against the perpetrator (which is of even greater importance where sexual violence), with whom they rely on for their visa status. The amendments to the threshold for visa cancellations on character grounds and the proposal to broaden the scope of visa cancellation processes

[23] Department of Home Affairs, 'Status Resolution Service: Ministerial Intervention' <https://immi.homeaffairs.gov.au/what-we-do/status-resolution-service/ministerial-intervention#content-index-11>.
[24] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth); *Migration Amendment (Strengthening the Character Test) Bill 2019* ('designated offences').
[25] *Migration Act 1954* (Cth) s109 ('incorrect information'), s116 ('general power to cancel'), s128 ('when holder outside Australia'), s133A ('Minister's personal powers to cancel on s109 grounds'); s133C ('Minister's personal powers to cancel visas on s116 grounds').

through designating offences,[26] creates an untenable scenario where cases that result in the cancellation of the perpetrator's visa would subsequent cancel the visas for the dependent victim-survivor and their children. It creates a perverse situation where those seeking protection from violence face graver consequences by doing so than if there were to say nothing.

The Implications for Investigations and Prosecutions

During the 2018-19 period, Australian Bureau of Statistics ('**ABS**') data estimates for those who experienced sexual assault, only approximately 28 per cent reported the most recent incident to police.[27]

The context of sexual offences reporting, however, should not be conflated with the amount of not guilty verdicts, in part due to the high burden of proof, the absence of eyewitnesses and meaningful forensic evidence. Instead, members have stated that meeting the 'prospects of conviction' threshold is improving due to the cultural shifts over the last eight years, the effectiveness of jury directions; and increased awareness of family violence, sexual violence and harassment.

In terms of resolution rates, members have noted a correlation between their clients facing long sentences and an increased willingness to fight the case to its conclusion, which for a complainant can be a daunting process.

For alternatives to improve outcomes see pages 21 and 23 regarding restorative and therapeutic justice.

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

Members report that the Office of Public Prosecutions ('**OPP**') consistently receive briefs with insufficient evidence and information, resulting in charges not being able to proceed. Police training and ongoing professional development should require a more prescriptive approach to writing briefs, ensuring that they are sufficiently detailed and written to a

[26] *Migration Act 1954* (Cth) s51; see also *Migration Amendment (Strengthening the Character Test) Bill 2019.*

[27] Australian Bureau of Statistics, *Crime Victimisation, Australia (2018-19) <https://www.abs.gov.au/statistics/people/crime-and-justice/crime-victimisation-australia/latest-release>.*

consistent high standard in order to improve the ability for the OPP to pursue charges. Moreover, when someone presents at a police station, it would be beneficial for the police to discuss the process more clearly during the statement making process, as members have reported a culture of police assuming victims are inherently aware of the process, consequences on the alleged offender and the protracted and prolonged nature of pursuing a conviction. However, many victims are not and therefore lawyers have difficulties in managing their expectations and often victims are surprised when consequences such as the father is arrested in front of their children and remanded.

Alternative arrangements for giving evidence

The LIV acknowledges the utility of providing alternative arrangements for giving evidence, however this should not be available to complainants as a matter of course. Such 'arrangements' would cease to be 'alternative' should they became customary. It is considered that all parties would be disadvantaged by the insertion of a layer of insulation between the court proceedings and the complainant's evidence, prosecution, defence and jury alike. Isolation from the courtroom can exaggerate spatial hierarchies, 'generates barriers to communication, comprehension and confidentiality', and reduces an accused to 'pixels on a screen', hereby 'provoking concerns of "presumptive guilt" instead of presumptive innocence'.[28]

Pre-recorded hearings

If all of the complainant's evidence was able to be recorded prior to the trial, that would interfere unduly with the normal flow of the proceedings and that this may well be to the disadvantage of the prosecution case, as well as the defence case. The recommendations made by the VLRC,[29] include amending section 37C of the Evidence Act 2008 to give all adult complainants in sexual offence trials the right to give evidence by CCTV.

[28] Law Council of Australia, 'The Justice Project: Courts and Tribunals' (Final Report – Part 2, August 2018) 79 <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Courts%20and%20Tribunals%20%28Part%202%29.pdf>.

[29] Victorian Law Reform Commission ('VLRC'), Sexual Offences (Final Report, 2004) 196 ('Recommendation 59')

The LIV queries:

1. At present, children and people with impaired mental functioning can record their evidence-in-chief before trial. Should the law be changed to enable the evidence-in-chief of all complainants in sexual offence cases to be recorded prior to the trial?
2. If so, should any restrictions be imposed on adult complainants who want to pre-record their evidence?
3. Should all of a complainant's evidence (evidence-in-chief, cross-examination and re-examination) be able to be recorded prior to the trial?
4. If so, should this apply to all sexual offence complainants, or only to complainants who fall within particular categories (such as children and complainants with impaired mental functioning)?

Recommendation 8: The LIV urges against allowances for pre-recorded hearings as a matter of course.

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

What is working well in responding to harmful sexual behaviour in children? What improvements can be made?

Members report that the way offending is dealt with in the Children's Court is effective, in particular, the use of therapeutic treatment orders, and suggest development of additional therapeutic treatments for persons with intellectual disabilities. The LIV maintains that there is no evidence to suggest that juvenile sex offenders will become adult sex offenders — importantly, they are not necessarily manifestations of sexual deviance but rather a part of an overall pattern of antisocial and offending behaviour.[30] Where community protection is deemed important, the custodial sentence is framed as necessary to address this underlying behaviour— which is not consistent with the above view that children committing a sexual offence will necessarily or are likely to do so as

[30] Riddhi Backley, Lorana Bartels, 'Sentencing and treatment of juvenile sex offenders in Australia' (2018) 555 *Australian Institute of Criminology* 5.

an adult. Sentencing options include specialist treatments that may better address sexually abusive behaviours.[31]

Section 3 of the *Children, Youth and Families Act 2005* (Vic) ('**CYFA'**) defines 'child' as excluding any person who is of or above the age of 19 years. The LIV considers there ought to be proper and appropriate consideration for an accused who is 18 or 19 years of age as to their vulnerability by reason of their immaturity. Moreover, 'sexually abusive behaviours' is not defined in the CYFA or in any other legislation. The Therapeutic Treatment Board has adopted the following working definition:

> "A child has exhibited sexually abusive behaviours when they have used their power, authority or status to engage another party in sexual activity that is either unwanted or where, due to the nature of the situation, the other party is not capable of giving consent (for example, animals or children who are younger or who have a cognitive impairment)."

Child Victim-Survivors

In August 2015, the Commission for Children and Young People ('**CCYP**') released a report, *"…as a good parent would…",* following an inquiry into the adequacy of provisions of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care. The inquiry confirmed reports of alleged sexual abuse and sexual exploitation in residential care of children at ages as young as seven. The inquiry reported the use of surveillance cameras in bedrooms and disproportionate reprisals for bad behaviour.[32] Rather than the normal punishment a child may face for disobedience, a child in residential care is usually faced with explaining their actions to a police officer, with the potential of facing criminal charges for more serious behaviour.

The inquiry concluded that Department of Health and Human Services ('**DHHS**') do not adequately monitor or enforce compliance with the required practice standards and called for urgent redevelopment of residential care facilities, making nine key recommendations. The LIV supports the CCYP recommendations, primarily that the DHHS:

[31] ibid 7.

[32] Commission for Children and Young People, Inquiry into Sexual Abuse or Sexual Exploitation of Victorian Children and Young People in Residential Care (Final Report, 2015) 103.

- establish an independent advocate to support children in residential care; and
- establish an independent visitor program to every residential care unit.

However, barriers to reporting in child sex offender cases remain, including issues pertaining to the:[33]

1. Difficulties in prosecuting sexual assault cases involving young victims;
2. Lack of corroborating and forensic evidence;
3. Delays in reporting the offence and a focus on children's credibility during trial;
4. Multiple jury warnings and directions given that can undermine evidence given by children.

How well are rehabilitation or reintegration measures for people who have committed sexual offences working? How can they be improved?

Restorative and Therapeutic Justice

The LIV endorses further research into restorative justice, which can bring together all those involved, to talk about the impact of the crime and encourages offenders to take responsibility for their actions. There is evidence from a University of New South Wales report requested by the Royal commission into Institutional Responses to Child Sexual Abuse, that participation in restorative justice programs can improve victim well-being and is perceived to be procedurally fair and worthwhile.[34] The LIV recommends the VLRC explore restorative justice alternatives such as that which was piloted in New Zealand.[35] In this pilot, a daughter (the victim of incest) supported by a counsellor met with her father (the offender) in prison, where he was supported by a psychologist. They talked through the issues and the victim stated that they felt validated and heard. The requirements for the pilot are for a guilty plea, informed consent by the victim and an assessment of

[33] Riddhi Backley, Lorana Bartels, 'Sentencing and treatment of juvenile sex offenders in Australia' (2018) 555 *Australian Institute of Criminology* 5.
[34] Jane Bolitho, Karen Freeman, 'The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms', *Report for the Royal Commission into Institutional Responses to Child Sexual Abuse'* (March 2016).
[35] Bebe Loff, Bronwyn Naylor, Liz Bishop, 'A Community-Band Survivor-Victim Focussed Restorative Justice — A Pilot: Report to the Criminology Research Advisory Council' (July 2019) <https://www.aic.gov.au/sites/default/files/2020-05/CRG-33-14-15-Final-Report.pdf>.

offender suitability. Additionally, the LIV recommends reviewing the recent work of RMIT University's Centre for Innovative Justice in the restorative justice space.[36]

How well are post-sentence detention and supervision, and sex offender registration working? How can they be improved?

Sex Offenders Registration Act 2004 (Vic) ('SORA')

While the LIV supports the existence of the Sex Offender's Register, we stress that its primary purpose should be to protect members of the Victorian community, especially children, from people who represent a genuine threat. The mandatory registration of offenders and the lack of ongoing review are undermining the purposes of the register, stretching police resources, contributing to the issue of delay in the courts, and, in some cases, leading to extremely unfair outcomes. The LIV submits that SORA registration decisions should be discretionary and based on whether an offender poses significant risk of further sexual offending.

The SORA should be amended so that offenders are not mandatorily included on the register upon a finding of guilt for certain offence, particularly non-violent offence. Inclusion should be a matter for judicial discretion, and ought only to apply to those offenders who, upon expert assessment, are deemed to pose an ongoing risk to the sexual safety of members of the community. The Sex Offenders Register should also be reviewed to remove those registrants who pose little risk, especially children. By doing so, it would be consistent with the VLRC's Report into Sex Offenders Registration;[37] it would maintain the purpose, integrity and utility of the register; and lower administration costs by excluding those offenders posing little risk to the sexual safety of members of the community.

Upon review by the Review Panel, broad classes of offenders should be immediately removed from the register, subsequent to an application to VCAT. The LIV submits that those offenders who received a non-conviction penalty should be automatically eligible

[36] Centre for Innovation Justice, Victoria's Victim Support System: Victim Services Review (Final Report, November 2020) <https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>; CIJ, Improving Support for Victims of Crime: Key Practice Insights (November 2020); ANROWS, 'Improved Accountability: The Role of Perpetrator Intervention Systems' (Research Report, June 2020).

[37] VLRC, 'Sex Offenders Registration' (Final Report, 2011) [6.3].

to apply to VCAT, along with offenders who received a non-custodial penalty (given that sexual offences are excluded from the Spent Convictions Scheme).[38]

The LIV supports the LCA in its view that:

> "Inclusion on the Register, and the reporting obligations it entails, has the potential to extend a persons' contact with police and the criminal justice system well beyond the expiry of any sentence they receive. Likewise, it casts the constant spectre of negative exposure and unwarranted discrimination over a persons' future employment opportunities and engagement in the community. The consequences, particularly for first time and one-off offenders, can be unduly punitive"[39]

Recommendation 9: The removal of legislated automatic and mandatory registration for those who commit non-violent sexual offences, to be replaced by registration based on an individual, expert assessment of risk

Recommendation 10: That only those assessed by experts as posing a threat to the sexual safety of children or other members of the community should be included on the register;

Recommendation 11: That young people are included on the register only in exceptional circumstances; and

Recommendation 12: The establishment of a panel of experts to review the circumstances of existing registered sex offenders in order to determine whether the registrants should continue to be on the register.

[38] Legislative Council Legal and Social Issues Committee, 'Inquiry into a Legislated Spent Convictions Scheme: A Controlled Disclosure of Criminal Record Information framework for Victoria' (August 2019) [66]-[67].

[39] Law Council of Australia, 'Policy Statement on Registration and Reporting Obligations for Child Sex Offenders' (2011) 2.

If a restorative justice model is adopted, what should its features be?

United Nations High Commissioner for Human Rights[40]

The Protection of Victims of Sexual Violence: Lessons Learned workshop, victims discussed key measures of protection especially against reprisals, intimidation and stigmatisation of victims of sexual violence, which included efforts to preserve and conceal victims' identity throughout all stages of the process.[41] The workshop report identified the utility of allowing victims to testify behind a screen or using other methods to prevent victim's faces to be seen — such as through testifying from a separate room, facilitated through the use of simultaneous AVL (or the use of pre-recorded statements).

See page 18 '***Alternative Arrangements for Giving Evidence'*** for further on pre-recorded statements.

New Zealand

In New Zealand, since 2014 all criminal cases, subject to certain criteria, must be adjourned for restorative justice to be considered prior to sentencing, with no limitations upon the type of offending expressly excluded, including 'sexual violence offences'.[42] A recent study of victim experiences with restorative justice conferencing in New Zealand found a high percentage of victim satisfaction (84 per cent) attesting to its effectiveness as a form of reparations.[43] The restorative justice methodology is further supported by international criminal law's focus on victim redress and participation, which the VLRC agreed improves outcomes for individuals and is capable of 'being applied beyond victim-offender mediations and family group conferencing. Using the International Criminal Court as an example, the reparations and victim participation process can be seen to offer an opportunity to serve victims' justice needs—being heard, having their interests taken into account, contributing to the fact-finding and truth-telling exercise and

[40] United Nations High Commissioner for Human Rights, 'Protection of Victims of Sexual Violence: Lessons Learned' (Workshop Report, 2019) [3].
[41] ibid [5].

[42] Jim Boyack, Helen Bowen and Chris Marshall, 'How does restorative justice ensure good practice?' in Howard Zehr and Barb Toews (eds) *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004).

[43] Ministry of Justice, New Zealand, *Restorative Justice Victim Satisfaction Survey* (Research report, 2016) 4.

recognising and restoring the victims' agency and dignity.[44] Moreover, there is now additional accreditation and specific best practice guidelines, and a practice guide was recently completed for the European Forum of Restorative Justice.[45]

Other best practice guides for lawyers who work with people who have experienced sexual violence include:

- Legal Aid Queensland: http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Best-practice-guidelines/Lawyers-working-with-people-who-have-experienced-sexual-violence#toc-principle-2-prioritise-safety-2
- Centre Against Sexual Assault Standards of Practice: https://www.casa.org.au/assets/Documents/victorian-casa-standards-of-practice-manual.pdf
- Department of Health and Human Services 'Responding to allegations of physical or sexual assault': https://fac.dhhs.vic.gov.au/sites/dhhsfac/files/2017-09/Responding%20to%20allegations%20of%20physical%20or%20sexual%20assault.doc
- Department of Health and Human Services 'Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse': https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/46/97b7af2c8/common%2Bguiding%2Bprinciples%2Bfor%2Bresponding%2Bto%2Bcivil%2Bclaims%2Binvolving%2Ballegations%2Bof%2Bchild%2Bsexual%2Babuse.pdf

[44] VLRC, '*Alternative Criminal Justice Models'* (1 April 2020), <https://www.lawreform.vic.gov.au/content/3-alternative-criminal-justice-models> [3.26].

[45] Restorative Justice Council UK Ministry of Justice (2011). Best Practice Guidance for Restorative Practice. www.restorativejustice.org.uk/sites/default/files/resources/files/Best%20practice%20guidance%20for% 20restorative%20practice%202011.pdf. Accessed 20/10/15.

Is there a role for new initiatives to enable people who have experienced sexual harm to tell their stories and have them acknowledged? Why or why not?

The recent amendments under the *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic) provides for victim-survivors to self-publish their identity and tell their stories plays an important part of therapeutic justice, ownership and empowerment.[46] Complainants often keep sexual assault experiences a secret to protect family members or because of societal pressure. By the time the complainant is ready to engage with the legal system, they often want their stories told. Protecting this disclosure would allow victim-survivors to locate their experiences within a larger context and enhance group solidarity. As the VLRC notes, without being able to speak openly about the experience, 'public debate and discussion […] is muted and robbed of the personal element which so often resonates with the community'.[47] The LIV commends the common approach adopted across all jurisdictions following these amendments, with the Supreme Court, County Court and Magistrates' Court providing consistent and updated guides and application forms.[48]

However, the LIV raised concerns about the effect on an accused, when a victim-survivor publishes their stories while proceedings are pending or the initial trial is ongoing. Despite voicing disapproval for self-publication during this stage, the wording 'whether or not a proceeding in respect of the alleged offence or offence has commenced, is being conducted or has been finally determined' remains. The LIV maintains that this will likely prejudice the accused, particularly if there is widespread media coverage of the victim's version of events. Further, the LIV queries, considering the similarities of obligations and acknowledging the defences where victim consent is required, whether the media should

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[46] Kathleen Daly, Danielle Wade, 'Sibling Sexual Violence and Victims' Justice Interests: A Comparison of Youth Conferencing and Judicial Sentencing' in Estelle Zinsstag, Marie Keenan (eds.), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions,* (Routledge, 2017) 143-178.

[47] VLRC, 'Prohibition on Publication under the Judicial Proceedings Reports Act' (19 August 2020) [9.68].

[48] Supreme Court of Victoria, 'Guide for People Seeking Permission to Publish Information about Victims of Sexual Offences' (Webpage, September 2020) <https://www.supremecourt.vic.gov.au/criminal-division/guide-for-permission-to-publish-information>; County Court, 'Guide to applying for permission to publish information about victims of sexual offence' (17 September 2020) <https://www.countycourt.vic.gov.au/forms-and-fees?filters[keyword]=permission%20to%20publish>; Magistrates' Court of Victoria, 'Guide for people seeking permission to publish information about victims of sexual offences (17 September 2020) <https://mcv.vic.gov.au/sites/default/files/2020-12/Magistrates%27%20Court%20Guidance%20Form%20-%20JPRA.pdf>.

be placed at a higher obligation for disclosing than victim-survivors. The *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic) would operate to provide a defence for media organisation where publication is proven, on the balance of probabilities, to have occurred with the victim having provided the accused permission to publish and is in accordance with limits, if any, set by the victim.[49] The LIV suggests that media seeking to publish should be subjected specifically to a higher degree of scrutiny when seeking to publish victim-survivor stories, given the scope for abuse and potential for serious outcomes such as the discharging of tainted juries, inaccessibility to a trial by jury due to the breadth of the coverage or the risk for trials to proceed without identifying jurors who have consumed the media coverage of the victims version of events. A take-down order will not be a sufficient to remedy in such circumstances.

Is there a need to change any of Victoria's technology-facilitated sexual offences, or their application? If so, what changes?

The LIV acknowledges the Victorian Government have limited scope in technology-facilitated sexual offences, however the following is pertinent to the VLRC's enquiry of how this area of legislation can be improved.

The sharing of intimate images without consent is, at times, linked to intimate partner and family violence situations, with 1 in 4 women reporting having experienced emotional abuse from a former or current partner, and 1 in 6 reporting having experienced physical violence (2016).[50] Overall, the eSafety Commissioner has been successful in having image-based abuse material removed in more than 80 per cent of cases, despite nearly all websites reported to date being hosted overseas.[51] The eSafety Commissioner's powers to address seriously harmful content have been strengthened under the new *Enhancing Online Safety Act 2015* (Cth), including that the definition of 'seriously harmful content' be based on content that would be illegal under the Commonwealth Criminal Code including:

- child sexual abuse material;[52]

[49] *Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020,* s 3(3) (1BB).
[50] Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (2019)
[51] Department of Communications and the Arts, Online Safety Legislation Reform—Discussion Paper, 33.
[52] *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth).

- abhorrent violent material;[53] and
- content that promotes, incites or instructs in serious crime.

Internet Platforms

The eSafety Commissioner also received new powers to notify companies, if they are hosting 'abhorrent violent' material, thus triggering a take-down requirement. However, there are concerns regarding the speed requirements for takedowns, as while steaming or recording 'rape' is included within the definition of 'abhorrent violent material',[54] the timeliness of removal powers is called into question as 'expeditiously' is undefined, although the second reading speech refers to the Christchurch Attack — suggesting 'expeditious takedown' is defined in hours or minutes.[55] Contrastingly, in Germany, the *Netzwerkdurchsetzungsgesetz (Network Enforcement Act)* requires internet platforms with more than 2 million users to have in place reporting systems for hateful posts and to delete reported content if it is illegal under the German Criminal Code within 24 hours. Implemented in 2018, this legislation has reportedly led to Facebook increasing the German based staff resources dedicated to moderating German content.[56] Mirroring the concerns expressed by the LIV in its submission to the Australian Competition and Consumer Commission's *Draft News Media Bargaining Code*,[57] due to the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) being written with major platforms in mind — focusing on Facebook in parliamentary debates — will in effect entrench 'only companies with sufficient resources to dedicate to complying with such burdensome laws'.[58]

Recommendation 12: Clarity in the definition of 'expeditiously' under the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth), including whether the take-down obligations account for the company's resources and ability to abide by a reasonable time, with particular regard to smaller platforms/ social media organisations.

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[53] *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth).
[54] *Criminal Code Act 1995* (Cth), s 474.34.
[55] https://www.lawfareblog.com/australias-new-social-media-law-mess
[56] UK Digital, Culture, Media and Sport Committee's Disinformation and 'fake news' final report February 2019, pp.12-13
https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf
[57] Law Institute of Victoria, Submission to the Australian Competition and Consumer Commission — *Draft News Media Bargaining Code* (28 August 2020).
[58] Evelyn Douek, 'Australia's New Social Media Law is a Mess (LAWFARE, 10 April 2019) <https://www.lawfareblog.com/australias-new-social-media-law-mess>.

Table 2: Federal and State Responses to Sexual Harassment

Section 28B of the *Sex Discrimination Act 1984* (Cth) ('SDA") states that it is unlawful to sexually harass: an employee of the person,[59] a person who is seeking to become an employee of the person,[60] a fellow employee or person seeking employment with the same employer,[61] a commission agent or contract worker of the person,[62] a person seeking to become a commission agent or contract worker of the person,[63] a fellow commission agent or contract worker,[64] a partner in the same partnership or a person seeking to become a partner in the same partnership,[65] and a fellow workplace participant.[66]

Given the organisation of some workplaces in Australia may be highly complex or fragmented, the LIV supports the broad interpretation generally provided by courts to section 28B.[67] This allows for an interpretation which incorporates the object of the SDA, as expressed in section 3(c): 'to eliminate, as far as possible, discrimination involving sexual harassment in the workplace'. As has been reasoned in several cases, the human rights protection afforded by section 28B justifies this broad construction.[68]

Risk identifiers

Section 28(1A) of the SDA covers the various circumstances that are considered in relation to sexual harassment which may include these drivers. Additionally, particular workplaces may be more susceptible to sexual harassment, such as male dominated industries. 'Risky culture' or poor workplace cultures may also include accepting the status quo of an organisation. Recently, VCAT awarded a complainant $10,000 in damages after she complained of sexual harassment and was told by her employer "you are working in a man's working environment and you need to expect that kind of unwanted attention".[69] The Fourth National Survey on Sexual Harassment in Australian

[59] *Sex Discrimination Act* s 28B(1)(a).
[60] ibid s 28B(1)(b).
[61] ibid s 28B(2).
[62] ibid s 28B(3)(a).
[63] ibid s 28B(3)(b).
[64] ibid s 28B(4).
[65] ibid s 28B(5).
[66] ibid s 28B(6).
[67] See for example *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 at 70 (Kiefel J).
[68] *AB v Western Australia* (2011) 244 CLR 390 at 24; *IW v City of Perth* (1997) 191 CLR 1 at 12 (Brennan CJ and McHugh J) and 39 (Gummow J); *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 371 (Brennan J).
[69] *XVC v Joanne Baronessa* (Human Rights) [2018] VCAT 1492.

Workplaces conducted by the AHRC in 2018 ('survey') revealed that the most common forms of sexual harassment were offensive comments or jokes (59 per cent women and $26 per cent men), inappropriate contact (54 per cent women and 23 per cent men) or unwelcome touching (51 per cent women and 21 per cent men).[70] The survey highlighted:

- people aged 18 to 29 were more likely than any other age group to experience workplace sexual harassment;
- people who identify as gay, lesbian were more likely to have experienced sexual harassment than heterosexual people;
- Aboriginal and Torres Strait Islander people were more likely to have experienced workplace sexual harassment than people who are not Aboriginal or Torres Strait Islander; and
- people with a disability were more likely than those without a disability to have been sexually harassed in the workplace.

Action against sexual harassment in the workplace requires a combination of legal frameworks, as well as greater enforcement, adequately funded and empowered institutions, and better public awareness of the issue.

The following recommendations aim to support workplaces to establish best practice approaches when dealing with sexual harassment in Australian workplaces. There are two types of recommendations based on best practice —prevention and response. Both are essential to regulate and reduce sexual harassment in the workplace with the aim of providing measures to prevent sexual harassment occurring in the workplace,[71] and steps to respond appropriately if it has occurred.

Recommendation 13: Introduce a positive duty on employers in the SDA to eliminate sexual harassment, with a focus on bystander training as part of anti-discrimination training within organisations.

Recommendation 14: Amend the definition of "sexual harassment" in the SDA to specifically include online harassment and the use of technology and social media to perpetrate sexual harassment.

[70] Australian Human Rights Commission, 'Everyone's business: Fourth National Survey on Sexual Harassment in Australian Workplaces' (2018) 8.
[71] *Sex Discrimination Act 1984* (Cth) s 28B.

Recommendation 15: Clarify the scope of 'employment-related sexual harassment' to specifically include conduct towards any person performing work, not just in an employment relationship or in a workplace.

In terms of best practice in Victoria, the LIV supports the Victorian Equal Opportunity and Human Rights Commission's checklist[72] and guidelines on preventing and responding to sexual harassment which includes:[73]

- Explain what sexual harassment and sex discrimination is under the relevant State legislation, and provide clear examples;
- Include information on how employers can prevent sexual harassment in the workplace, for example conducting assessments of the workplace culture, and providing ongoing education and training particularly for employees in leadership roles;
- Include a clear, fair and timely complaints process that provides procedural fairness and defined disciplinary outcomes where sexual harassment is substantiated;
- Provide both the complainant and alleged harassers with referrals to employee assistance programs (EAP);
- Provide the alleged harasser an opportunity to bring a support person during disciplinary meetings;
- Make the sexual harassment policy easily accessible to all staff, including those with disabilities and to new staff;
- Communicate the policy regularly so that staff are reminded that non-compliance will not be tolerated;
- Keep information confidential as far as possible;
- Non-victimisation of complainant or witness as a result of reporting; and

[72] Victorian Equal Opportunities and Human Rights Commission, 'Guideline: Sexual harassment – complying with the Equal Opportunity Act 2010' (September 2014) 29-30.

[73] Law Institute of Victoria, Submission to the Law Council of Australia — Addressing Sexual Harassment in the Australian Legal Profession (23 August 2019**).**

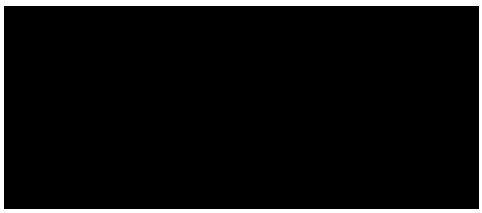
- Review, monitor and update the policy regularly, and communicate changes or updates to the policy.

CONCLUSION

The LIV welcomes any further opportunity to provide feedback and be consulted on proposed changes and implementation of any recommendations following this Inquiry.

Should you require any clarification as to the above, please contact Criminal Law Section Policy Lawyer Maurice Stuckey or Paralegal Andy Kuoch at CriminalLawSection@liv.asn.au.

Yours sincerely,



Tania Wolff
President
Law Institute of Victoria