



# Submission to the Victorian Law Reform Commission

Improving the Response of the Justice System  
to Sexual Offences

January 2021

## **Contents**

<b>1. Introduction</b>	<b>1</b>
<b>2. The Victims of Crime Commissioner and the Victims' Charter</b>	<b>4</b>
<b>3. About this submission</b>	<b>5</b>
<b>4. The extent of the problem</b>	<b>7</b>
<b>5. A Victorian strategy addressing sexual assault</b>	<b>11</b>
<b>6. A trauma-informed justice and service system response</b>	<b>13</b>
<b>7. A strengthened victims' services system and new Financial Assistance Scheme</b>	<b>15</b>
<b>8. Victim-led choice and control over case progression</b>	<b>18</b>
<b>9. Participation</b>	<b>27</b>
<b>10. Legal advice and legal representation</b>	<b>34</b>
<b>11. Specialised support and justice responses</b>	<b>42</b>
<b>12. Cultural change and education within the legal profession</b>	<b>54</b>
<b>13. Evidence and procedure</b>	<b>64</b>
<b>14. Other aspects of the criminal law</b>	<b>71</b>
<b>Appendix A: Summary of recommendations</b>	<b>78</b>

# 1. Introduction

I welcome the opportunity to make a submission to the Victorian Law Reform Commission's (VLRC) review: *Improving the Response of the Justice System to Sexual Offences*. I commend the Victorian Government's commitment to reviewing the justice and service systems' response to sexual offences.

Despite the range of reforms introduced over the past few decades,<sup>1</sup> victims continue to perceive, or experience, barriers to seeking justice and an appropriate service system response following sexual assault.

Although one in five women in Australia will experience sexual assault,<sup>2</sup> research consistently demonstrates that sexual offences are under-reported, under-prosecuted, and under-convicted.<sup>3</sup> Sexual assault has been described as an 'invisible crime', one which fails to progress through the justice system almost every time.<sup>4</sup>

It is clear there is still much work to do to meet the needs of victims of sexual assault.

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<sup>1</sup> A number of changes to evidence law and court procedure have been implemented to meet the needs of victims of sexual offences including alternative ways to give evidence, prohibitions against asking victims about their sexual history, suppression and closed court orders and restrictions on accessing and using a victim's confidential counselling and medical records. See, for example, Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 18. See also Nicole Bluett-Boyd and Bianca Fileborn, Australian Institute of Family Studies, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions* (Research Report 27, March 2014) vii.

<sup>2</sup> Australia's National Research Organisation for Women's Safety, *Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (Research Report, 2016) 50.

<sup>3</sup> Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 2; RMIT Centre for Innovative Justice, *Innovative justice responses to sexual offending* (Report, May 2014) 6; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (Report, September 2017) 14.

<sup>4</sup> The attrition rate in sexual assault matters is discussed further below. Naomi Neilson, 'A grim reality: The justice system and sexual assault cases' *Lawyers Weekly* (27 April 2020). See also Georgina Heydon and Anastasia Powell who refer to this as a 'justice gap': Georgina Heydon and Anastasia Powell, 'Written-response interview protocols: an innovative approach to confidential reporting and victim interviewing in sexual assault investigations' (2016) (6) *Policing and Society* 631, 631.

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Negative perceptions of the legal system's response to sexual assault—including concerns by victims that they may not be believed or treated seriously—continue to inform victims' decisions not to report sexual assaults.<sup>5</sup>

Around 80 per cent of people who experience sexual assault do not engage with the justice system.<sup>6</sup>

Victims who do report sexual assault may experience traumatising investigative and forensic processes, processes which not only exacerbate their trauma but, in some circumstances, also impact on the likelihood of a successful prosecution.<sup>7</sup>

While many cases will never proceed to trial, for those victims who are required to participate, the criminal trial process can be one of the main sources of victims' secondary trauma. As Professor Anne Cossins asserts, 'for many victims, the sexual assault trial is an ordeal, sometimes described as bad or worse than the original abuse, a place where the complainant's behaviour is on trial'.<sup>8</sup>

Professor Cossins describes sexual assault trials as 'one of the last arenas in which law reformers have been unsuccessful in preventing the sexual assault trial from descending into a character assassination of the complainant'.<sup>9</sup> In this context, Cossins describes a victim's decision to participate in a sexual assault trial as 'a huge risk'.

It should not be a 'huge risk' for victims to seek justice through our criminal justice system.

Our justice and service system response should not pose more harm than good for victims of sexual assault.

I have been told by victims that the criminal justice process is more traumatising than the sexual assault itself. Victims have told me that they would not have

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<sup>5</sup> Wendy Larcombe et al, 'I think it's Rape and I think He Would be Found Not Guilty: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25 (5) Social and Legal Studies 611, 613; Australia's National Research Organisation for Women's Safety, *Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (Research Report, 2016) 68.

<sup>6</sup> Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press 2017) 146.

<sup>7</sup> Mohammed M et al, 'Australian stakeholders' views on improving investigative interviews with adult sexual assault complainants' (2019) 26 (5) Psychiatry, Psychology and Law 724, 725; Georgina Heydon and Anastasia Powell, 'Written-response interview protocols: an innovative approach to confidential reporting and victim interviewing in sexual assault investigations' (2016) (6) Policing and Society 631, 637 who refer to 'aggressive questioning' of victim-complainants.

<sup>8</sup> Annie Cossins, 'Why her behaviour is still on trial: the absence of context in the modernisation of the substantive law on consent' (2019) 42 (2) UNSW Law Journal 462, 462.

<sup>9</sup> Ibid 463.

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pursued a criminal justice response had they been aware of the lengthy and traumatic process, particularly the trauma caused by cross-examination.

While key justice institutions may point to legislative and procedural reform as evidence of an improved system response, many victims and specialist victim support workers are far more pessimistic in their assessment of the effectiveness of such reforms.<sup>10</sup> Victims continue to feel traumatised, ignored or dismissed by a system that is meant to address the harm caused to them.

The prevalence of stereotypes and myths surrounding sexual assault, combined with the high burden of proof in criminal trials, compound the difficulties faced by victims in sexual assault cases. Some of these issues feel intractable. However, I believe there are ways to improve victims' experiences of the justice system through a range of reforms that, together, would make the justice system more victim-centric, trauma-informed and culturally safe.

This submission calls for a justice and service system response that recognises victims of sexual assault as active participants in the criminal justice system with different—although no less important—rights and entitlements to the accused. It articulates how each area of law, policy and practice should be reviewed (and reformed) in a trauma-informed way. It envisages a justice system that enables more meaningful participation by victims of crime.

While some of the issues explored in this submission relate specifically to sexual assault victims, many issues also extend to other victims of crime. It is appropriate that consideration be given to how the criminal justice process can better meet the needs of *all* victims. For this reason, some of the recommendations made in this submission may have a broader application than sexual assault victims. As noted by the VLRC in its 2016 report *Victims of Crime in the Criminal Trial Process*, victims are participants in the criminal justice system. Their role is essential to the effective functioning of the criminal justice system.<sup>11</sup>

The justice system should not only uphold victims' participatory and procedural justice rights as articulated in the *Victims' Charter Act 2006* (Vic) ('Victims' Charter'), but further the Charter's broader intent—that is, balance a justice system that for too long has ignored the needs of victims of crime.<sup>12</sup>

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<sup>10</sup> See, for example, Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 47.

<sup>11</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 30.

<sup>12</sup> When introducing the Victims' Charter Bill into parliament, the then Attorney-General stated that the Charter would facilitate ongoing cultural change within the criminal justice system. See: Victoria, *Parliamentary Debates*, Legislative Assembly, 14 June 2006, 2047 (Rob Hulls).

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## 2. The Victims of Crime Commissioner and the Victims' Charter

The Commissioner is an independent point of contact for victims who have experienced difficulties or confusion when dealing with the criminal justice system and government and non-government victims' services.

Under the *Victims of Crime Commissioner Act 2015 (Vic)*, the Commissioner is empowered to advocate for the respect, recognition and inclusion of victims of crime in the justice system by:

- investigating complaints made by victims about their treatment by justice agencies and victims' services
- conducting inquiries into systemic issues that affect victims of crime
- representing the concerns of victims to government
- providing advice to the Attorney-General, the Minister for Victim Support and government departments and agencies about improvements to the justice system to meet the needs of victims of crime.

A key part of the Commissioner's role is monitoring the compliance of justice agencies and victims' services with the Victims' Charter. The Commissioner has a role in holding justice agencies and victims' services to account for their treatment of victims of crime.

The *Victims' Charter Act 2006* requires prescribed agencies to demonstrate compliance with the Victims' Charter and its principles. Prescribed agencies include Victoria Police, the Office of Public Prosecutions, community legal centres and government-funded sexual assault, family violence and specialist victims' support services.

The *Victims of Crime Commissioner Annual Report 2019-20* reports on prescribed agencies' current systems, policies and processes for ensuring compliance with the Charter. The most recent annual report demonstrates that while awareness of

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the Victims' Charter is high amongst prescribed agencies, nearly 70 per cent are yet to put systems and processes into place to comply with the legislation.

Prescribed agencies' compliance with the Victims' Charter directly impacts how victims of sexual assault will experience both the justice and service system. It is vital that the Charter leads to the implementation of victim-centric standards, procedures and cultural change within justice institutions and victim support services.

Agencies must increase their capability to comply with the Charter principles. As with many of the legislative reforms introduced to address issues with the criminal justice system's response to sexual assault, the Victims' Charter is only effective when implemented in a meaningful way.

As Commissioner, each year I will monitor and report on agency compliance with the Victims' Charter.

## 3. About this submission

### 3.1. Scope

The justice and service system response to sexual offences is complex, encompassing a range of generalist and specialist support services and an array of investigatory, prosecutorial and judicial system responses. Given the scope of this review, this submission outlines relevant information and insight based on the Victims of Crime Commissioner's legislative powers and functions under the *Victims of Crime Commissioner Act 2015 (Vic)*.

Due to the breadth of issues discussed across the VLRC Issues Papers, and the high-level nature of some issues' exploration, it may be necessary for some issues identified in the Options Papers, and reform options arising, to be subject to further consultation with key stakeholders. Alternatively, some areas of the law may merit their own stand-alone inquiry or review, as in the area of the laws of consent in New South Wales and Queensland.

### 3.2. Terminology

The way in which those harmed by crime identify themselves, and their experience of crime, is deeply personal. As noted in the VLRC's *Guide to Our Issues*

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Papers, those who have experienced sexual harm may use one or more of the following terms:<sup>13</sup>

- victim-survivor
- victim
- complainant or witness

Some people may not identify with any of these terms.

In this submission, the term ‘victim’ or ‘victim of sexual assault’ is predominantly used, because it aligns with the Victims of Crime Commissioner’s legislative functions and powers under the *Victims of Crime Commissioner Act 2015* (Vic), and the definition of victim in the Victims’ Charter. However, it is acknowledged that these terms may not represent all experiences.

In this submission, ‘sexual assault’ or ‘sexual offences’ is predominantly used to refer to all forms of sexual touching without consent, including rape. As noted in the VLRC’s *Guide to Our Issues Papers*, this is because ‘sexual assault’ may be more familiar with members of the community.

Some aspects of the law (and associated commentary) use the term ‘vulnerable’ to refer to some victims that experience barriers to accessing justice or are entitled at law to specific programs or legal protections. The term ‘vulnerable’ may be used in the context of the literature or specific programs that use this term. It is acknowledged that the terms ‘vulnerable’ or ‘vulnerability’ may not represent some people’s identity or experience.

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<sup>13</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Guide to Our Issues Papers* (2020) 8.

## 4. The extent of the problem

As briefly outlined above, despite a range of reforms introduced over the past few decades to address concerns relating to sexual assault—and the justice system's response to it—substantial barriers to justice still exist for victims of sexual assault.

Key issues in relation to sexual assault include:<sup>14</sup>

- **Additional barriers to justice for some victims of crime:** as noted in the VLRC's *Guide to Our Issues Papers* it is more difficult for some people to access the justice system.<sup>15</sup> There continue to be additional barriers to appropriate justice and service sector responses for people with disability, male victims of sexual assault, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, older members of our community, people who identify as LGBTIQA+, people in custodial settings, people experiencing homelessness, people with mental illness and young people, including young people in out of home care.<sup>16</sup> There is evidence of significant under-reporting of sexual assault for particular victims of crime, including Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, children and older people.<sup>17</sup>
- **Lack of reporting:** 83 per cent of Australian women did not report their most recent incident of sexual assault to the police.
- **Higher incidents of victimisation for some populations:** young women aged 15–34 accounted for more than half (53 per cent, or 11,000) of all police-recorded female sexual assault victims in 2018; people with disability were 1.7 times as likely to have experienced sexual violence (including assault and threats) since the age of 15; people living in the most disadvantaged areas of

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<sup>14</sup> These key issues are all explored in: Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 3-6.

<sup>15</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Guide to Our Issues Papers* (2020) 3.

<sup>16</sup> See also RMIT Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 74 – 75.

<sup>17</sup> See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 230.

Australia are 1.5 times as likely to experience partner violence as those living in areas of least disadvantage.<sup>18</sup>

- **Lack of successful prosecution:** national and international research consistently demonstrates that incidents of rape and sexual assault are significantly under-prosecuted and under-convicted.<sup>19</sup> Victorian research estimates that over two thirds of sexual assault incidents recorded by Victoria Police do not progress to court.<sup>20</sup>

## 4.1. Attrition

While it can be difficult to track how sexual assault incidents recorded by police progress through the Victorian justice system, it is possible to consider trends over time.

**Figure 1** below shows the number of sexual assault incidents recorded by Victoria Police compared with the total number of finalised outcomes for defendants relating to 'sexual assault and other related offences'.<sup>21</sup> It shows a growing disparity between the two data sets. Over the eight-year period analysed, the number of sexual assault incidents recorded by Victoria police increased by 72 per cent—more than double the number of cases finalised in Victorian courts.

While the year an incident is recorded by Victoria Police does not always directly correspond to the year that a matter proceeds through the court system, even accounting for a lag between incident date and court finalisation, it is clear that the number of incidents being recorded by Victoria Police is accelerating at a far greater rate compared to court finalisations.

This would suggest the attrition rate for sexual assault remains high.

<sup>18</sup> Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (2019) viii-ix

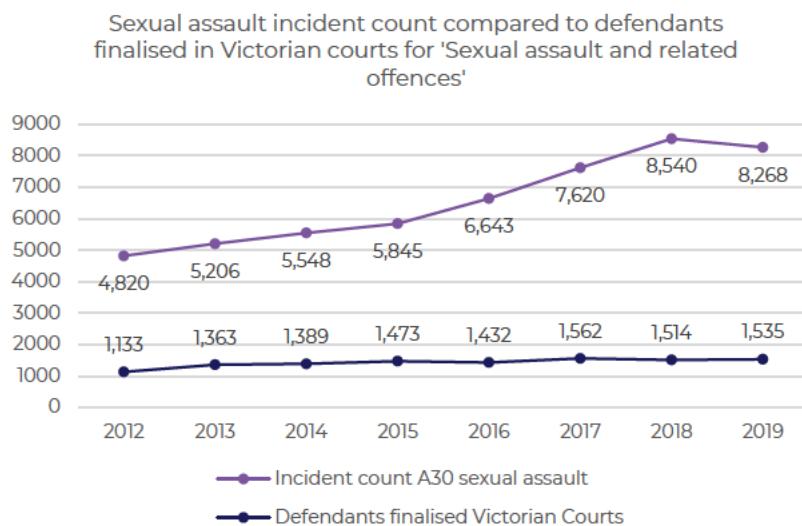
<sup>19</sup> See also Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 2; RMIT Centre for Innovative Justice, *Innovative justice responses to sexual offending* (Report, May 2014) 6; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (Report, September 2017) 14.

<sup>20</sup> Crime Statistics Agency, *Attrition of sexual offence incidents across the Victorian criminal justice system* (2017) <[www.crimestatistics.vic.gov.au/research-and-evaluation/publications/attrition-of-sexual-offence-incidents-across-the-victorian](http://www.crimestatistics.vic.gov.au/research-and-evaluation/publications/attrition-of-sexual-offence-incidents-across-the-victorian)>

<sup>21</sup> This graph uses data obtained from Australian Bureau of Statistics and Crime Statistics Agency. See Australian Bureau of Statistics, Criminal Courts Australia, 2018-19 – Table 21 (Catalogue No 45130D0005\_201819, 27 February 2020); Crime Statistics Agency, *Criminal incidents and rate per 100,000 population by principle offence – July 2010 to June 2020* (September 2020)

This is consistent with Australia-wide research, which confirms that although reports of sexual offences in Australia have increased over recent years, attrition of sexual offence cases has remained high and conviction rates have remained low.<sup>22</sup>

**Figure 1. Sexual assault incident count compared to defendants finalised in Victorian courts**



## 4.2. Myths and misconceptions relating to sexual assault

Myths and misconceptions continue to influence the way in which sexual assault is recognised and responded to. These permeate every level of the justice system, influencing initial reporting rates as well as decisions made by legal professionals about whether a case should proceed through the justice system.<sup>23</sup>

Prevalent myths and misconceptions in sexual assault relate to:<sup>24</sup>

- **Perceptions about rates of false allegation:** members of the community, and some members of our justice system, continue to believe that false

<sup>22</sup> Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 1.

<sup>23</sup> Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 2; Nicole Bluett-Boyd and Bianca Fileborn, Australian Institute of Family Studies, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions* (Research Report 27, March 2014) 16.

<sup>24</sup> Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 3-6; See, generally, Australian Institute of Family Studies, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (Report, September 2017).

rape allegations are high, and that many people lie and fabricate reports of rape and sexual assault.

- **What constitutes 'real rape' or sexual assault:** widespread belief holds that rape and sexual assault involves violent attacks by strangers rather than rapes perpetrated by those known to their victim, often characterised by coercive control and/or grooming behaviours rather than the use of physical force or violence.
- **Trauma responses:** for example, that emotional victims of sexual assault are more credible than unemotional victims.
- **Reliability of evidence by people with disability and mental health issues:** people with disabilities and/or mental health issues are often incorrectly presumed to be 'unreliable witnesses', despite evidence confirming people with disabilities and/or mental health issues can reliably relay accurate details of assault when interviewed appropriately.<sup>25</sup>

### 4.3. A gendered problem

Sexual offences are overwhelmingly perpetrated by males and most sexual offence victims are female.<sup>26</sup> However, as outlined further below, it is important to remember that broader victim cohorts, including people who identify as male, gender diverse or non-binary can also be victims of sexual assault. This submission assumes all victims of sexual assault are entitled to the same justice and service system responses, regardless of gender identity, while also acknowledging the gendered nature of sexual violence.

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<sup>25</sup> Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 11.

<sup>26</sup> Australian Institute of Family Studies, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (Report, September 2017) 14; Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 9.

## 5. A Victorian strategy addressing sexual assault

Victoria does not have a dedicated strategy addressing sexual violence. While *Free From Violence: Victorian's Strategy to Prevent Family Violence and all forms of Violence Against Women* relates to all forms of violence against women, of which sexual assault is one form, this strategy does not address non-familial sexual assault for broader victim cohorts including people who identify as male, gender diverse or non-binary.

New South Wales and Queensland both have specific sexual assault strategies.<sup>27</sup>

In Queensland, the strategy sets out the 'Government's vision for a Queensland where everyone lives free of the fear, threat or experience of sexual violence.'<sup>28</sup> It identifies priority areas for action, including both preventing and responding to all forms of sexual violence. While the strategy recognises that sexual violence is a gendered issue, it includes prevention and responses to all people who experience sexual violence.

It is promising that the Victorian government has indicated that a sexual assault strategy will be developed as part of the *Family Violence Rolling Action Plan 2020-2023*.<sup>29</sup> This is in recognition of the intersection between sexual assault and family violence. While sexual assault is often experienced within a family violence context, and a sexual assault strategy developed as part of the broader family violence reforms is appropriate because of this intersection, it is also important that the strategy responds to all types of sexual assault. While women and children are overwhelmingly the victims of intra-familial sexual assault,<sup>30</sup> it is important other victims are also recognised in Victoria's sexual assault strategy.

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<sup>27</sup> New South Wales Government, *NSW Sexual Assault Strategy 2018–2021* (2019); Department of Child Safety, Youth and Women, Queensland Government, *Prevent. Support. Believe. Queensland's Framework to address Sexual Violence* (2020).

<sup>28</sup> Department of Child Safety, Youth and Women, Queensland Government, *Prevent. Support. Believe. Queensland's Framework to address Sexual Violence* (2020) 2.

<sup>29</sup> Victorian Government, *Family Violence Reform Rolling Action Plan 2020-2023* (2020).

<sup>30</sup> Victorian Government, *Sexual Assault and Family Violence: Sexual assault within a family violence context* (Web Page) <<https://www.vic.gov.au/family-violence-reform-second-rolling-action-plan/sexual-assault-and-family-violence>>

As noted in *Issues Paper A*, the effectiveness of the sexual assault system depends on strong relationships between parts of the system and shared goals.<sup>31</sup> As the VLRC Issues Papers outline, and as this submission asserts, the extent of the problem suggests significant and sustained reform will be required over time.

Without a dedicated sexual assault strategy assessing the effectiveness of reforms over time, and measuring progress through robust data collection and evaluation, addressing deficits in responses to sexual assault may be ad hoc and disjointed. A dedicated Victorian strategy to prevent and respond to all forms of sexual assault would articulate a shared vision and clear goals, as well as provide a model of governance and accountability to track progress against goals.

It is vital that there be a sustained focus on the justice and service system response to sexual assault over time, guided by an overarching whole-of-government vision. As part of this strategy, the data and research gaps, some of which are highlighted in *Issues Paper A*, should also be identified and strategies implemented to address them.

**Recommendation 1: That the Victorian Government develop a Victorian strategy to prevent and respond to sexual assault which:**

- **outlines the government's key prevention and response priority areas, including implementation of recommendations arising from the VLRC's review**
- **identifies the data, research and evaluation gaps in relation to sexual assault, and implements strategies to address them to ensure progress can be measured over time**
- **provides a structure and framework for key initiatives to be monitored and evaluated through a model of across-system governance**
- **articulates what 'success' would look like in Victoria's response to sexual assault to guide a continued focus over time.**

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<sup>31</sup> Victorian Law Reform Commission, *Issues Paper A: Working Together to Respond to Sexual Offences: Systems* (2020) 8.

## 6. A trauma-informed justice and service system response

Much has been said about the need for trauma-informed responses to victims of crime over the past decade.<sup>32</sup> One of the objectives of the *Victims' Charter Act 2006* (Vic) is to help reduce the likelihood of secondary victimisation by the criminal justice system.<sup>33</sup> Trauma-informed responses are key to reducing the risk of secondary victimisation by the criminal justice system.

Given the extent of the problem faced by victims of sexual assault, as outlined above, it is clear our justice and service system response to many victims of sexual assault is not trauma-informed. While there are some aspects of the adversarial criminal justice system that, by their very nature, will not be victim-centred, even laws and processes that advance the interests of the state and the rights of the accused should be reviewed with a trauma-informed lens.

To the maximum extent possible, the justice and service system should adopt a trauma-informed approach, uphold victims' rights and entitlements and ensure a fair process for the accused. Each area of law, policy and practice as it relates to sexual assault should be reviewed (and reformed) in a trauma-informed way to fulfil the objectives of the *Victims' Charter*—that is, reduce the likelihood of secondary victimisation by the criminal justice process.

Research suggests that trauma-informed law, policy and practice:<sup>34</sup>

- realises the impact of trauma and recognises the signs of trauma

<sup>32</sup> See, for example, Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996* (Consultation Paper, June 2017) xiv; Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, July 2018); Royal Commission into Family Violence, *Volume IV Report and Recommendations* (March 2016) 18.

<sup>33</sup> *Victims' Charter Act 2006* (Vic) s4(1)(c)

<sup>34</sup> For discussion of aspects of trauma-informed practice, see generally: Holly Ramsey-Klawsnik and Erin Miller, 'Polyvictimization in later life: Trauma-informed best practices' (2017) 29 (5) *Journal of Elder Abuse & Neglect*, 339-350; Nicole C. McKenna & Kristy Holtfreter, 'Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness' (2020) *Journal of Aggression, Maltreatment & Trauma* (published online); Blue Knot Foundation, *Trauma-informed Practice: How important is this for domestic and family violence services?* (2016) <<https://www.blueknot.org.au/Home/Front-Page-News/ID/46/Trauma-informed-Practice-in-Domestic-and-Family-Violence-Services>>; Orygen, The National Centre of Excellence in Youth Mental Health, *Clinical practice in youth mental health: What is trauma-informed care and how is it implemented in youth healthcare settings* (2018) <[orygen.org.au/Training/Resources/Trauma/Clinical-practice-points/What-is-trauma-informed-care-and-how-is-it-implemented-in-youth-healthcare-settings](https://orygen.org.au/Training/Resources/Trauma/Clinical-practice-points/What-is-trauma-informed-care-and-how-is-it-implemented-in-youth-healthcare-settings)>.

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- actively seeks to reduce re-traumatisation
  - emphasises physical, psychological, and emotional safety for victims
  - provides victims with voice and choice, including different ways to engage to minimise harm
  - creates opportunities for victims to rebuild a sense of control and empowerment
  - recognises that trauma may impact victims' engagement with the process
  - is responsive to victims' diversity
  - promotes trust and transparency in process and decision making.

These principles should guide the comprehensive review of each area of law, policy and practice as it relates to sexual assault.

**Recommendation 2: That sexual assault laws, policies and practice be reviewed by the VLRC according to the extent to which it is trauma-informed, including whether it:**

- **realises the impact of trauma and recognises the signs of trauma**
- **actively seeks to reduce re-traumatisation**
- **emphasises physical, psychological, and emotional safety for victims**
- **provides victims with voice and choice, including different ways to engage to minimise harm**
- **creates opportunities for victims to rebuild a sense of control and empowerment**
- **recognises that trauma may impact victims' engagement with the process**
- **is responsive to victims' diversity**
- **promotes trust and transparency in process and decision making.**

## 7. A strengthened victims' services system and new Financial Assistance Scheme

The November 2020 report *Strengthening Victoria's Victim Support System: Victim Services Review*, by RMIT's Centre for Innovative Justice (on behalf of the Department of Justice and Community Safety), identified the need for a strengthened victims' services system. Amongst its findings, the review suggested the need for:

- a range of access points that recognise the barriers to reporting that are faced by some communities within Victoria and by victims of certain crime types
- ongoing access to a single point of contact for victims as their needs change over time
- stronger connections with, and referrals between, victim services and other specialist responses within the family violence and sexual assault sectors
- access to independent legal advice.

The report articulates a vision for a fully integrated victim support model which includes:

- an integrated, phone-based Victim Support Centre (VSC) that provides a core response to victims of crime including case coordination and proactive, phone-based outreach
- a more intensive, case management model to be delivered through a network of community-based agencies across the state
- a new Victims Legal Advice Service (VLAS) to provide victims of crime with trauma-informed legal information and advice, referrals and discrete task assistance.

The Department of Justice and Community Safety is also progressing work to develop a new Financial Assistance Service (FAS) for victims of crime in response to the Victorian Law Reform Commission's 2018 review of the *Victims of Crime*

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Assistance Act 1996 (Vic) (VOCAA) and the operation of the Victims of Crime Assistance Tribunal (VOCAT).

The VLRC's review of the VOCAA found specific barriers to accessing financial assistance for victims of sexual assault because of:<sup>35</sup>

- the two-year application time limit (given many victims of sexual assault will delay reporting sexual assault)
- the legislative requirement for crimes to be reported to police in order to apply for VOCAT assistance (given many victims of sexual assault will not report sexual assault to police)
- delays in receipt of VOCAT awards, including victims of sexual assault waiting approximately a year for awards for counselling
- legislative requirements requiring alleged perpetrators to be notified about VOCAT applications, despite victims' safety fears
- legislative provisions requiring consideration of a victim's character and behaviour,<sup>36</sup> potentially giving rise to victim-blaming stereotypes.

The Victorian Government agreed in principle to implementing all recommendations contained in the VLRC's VOCAA review which would create a new Financial Assistance Scheme (FAS) for victims.

Taken together, these broader victims' services and FAS reforms aim to improve the service system response for *all* victims of crime. If fully implemented, these reforms would undoubtedly improve access to appropriate support for victims of sexual assault and assist them in their recovery process. For this reason, it is vital these reforms are implemented in full, and appropriately funded.

**Recommendation 3: To ensure all victims of crime, including victims of sexual assault, have access to a strengthened victim support and financial assistance scheme, the Victorian Government should establish and fund:**

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<sup>35</sup> These issues are summarised in Chapter 5: Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, July 2018) 48-86.

<sup>36</sup> This is a broad character and behaviour consideration and may encompass actions before, during or after an alleged crime. See eg, Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, July 2018) 60.

- **the enhanced victim support service model outlined in Strengthening Victoria's Victim Support System: Victim Services Review**
- **the full rollout of a new Financial Assistance Scheme, incorporating all recommendations of the VLRC's review to enhance access and equity for victims of crime.**

**All current, and future victims' services, including the new Financial Assistance Scheme, should be prescribed agencies under the Victims of Crime Commissioner Regulations 2020, to enable appropriate oversight and compliance with Victims' Charter obligations.**

## 8. Victim-led choice and control over case progression

### 8.1. Alternative pathways to reporting sexual assault

As *Issues Paper A* notes, most people who experience sexual assault do not go straight to police. For some victims of sexual assault, attending a police station to report a crime can be an 'insurmountable barrier'<sup>37</sup> and prevent victims from reporting sexual assault.<sup>38</sup>

Some victims will experience more complex barriers to attending a police station to report sexual assault. For example, recent research relating to the lived experience of sexual violence among trans women of colour from culturally and linguistically diverse backgrounds found particularly negative experiences with police. Research participants reported feelings of judgement, blame, mistrust and a lack of acknowledgment that sexual violence had occurred when interacting with police and legal professionals. One participant stated: 'I'd never look at a police officer and feel safe'.<sup>39</sup>

Discussion in relation to ways to improve police responses to sexual assault and drive ongoing cultural change in Victoria Police are discussed further below at 2.4. These broader cultural changes, which continue to be a focus of Victoria Police, may address some of concerns victims have in reporting directly to police.

However, there is also evidence to suggest alternative forms of reporting, including anonymous or confidential reporting options, might assist victims of crime to disclose sexual assault.<sup>40</sup>

<sup>37</sup> Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (30 April 2015) 11.

<sup>38</sup> Monash Health and South Eastern Centre Against Sexual Assault & Family Violence, *Keep following the yellow brick road. The trials, tribulations and triumphs of collocated police, child protection and sexual assault workers* (2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>

<sup>39</sup> Australia's National Research Organisation for Women's Safety, *Crossing the line: Lived experience of sexual violence among trans women of colour from culturally and linguistically diverse (CALD) backgrounds in Australia* (Research Report, 14/2020) 10.

<sup>40</sup> Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (30 April 2015) 11; Georgina Heydon and Anastasia Powell, 'Written-response interview protocols: an innovative approach to confidential reporting and victim interviewing in sexual assault investigations' (2016) (6) *Policing and Society* 631.

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Confidential and anonymous reporting options are an emerging area of police and service system practice and have not yet been comprehensively evaluated. Nonetheless, research they are now ‘generally supported as an important feature of sexual assault policy and responses, given both the prevalence of sexual assault and significant under-reporting of these crimes’.<sup>41</sup>

Alternate pathways to reporting crime provide an avenue for victims to express what happened to them in a confidential way and can remove the fear associated with making a formal report to police. Researchers suggest these options ‘might provide a mechanism through which victim-survivors might build resilience, access support, and ultimately decide to make a formal report’.<sup>42</sup> Victoria’s South Eastern Centre Against Sexual Assault suggest that safe, anonymous online reporting may encourage victims to report an incident formally to police in the future.<sup>43</sup>

One of the benefits of confidential and/or anonymous reporting options include the potential for such reports to convert to formal police reports, which in some circumstances has been estimated at around 15 per cent of matters.<sup>44</sup> Research also suggests ‘a well-documented and detailed initial report, even one made confidentially, has the potential to substantially reinforce the quality and credibility of a victim-survivor’s testimony in court’.<sup>45</sup>

There are some limited models of alternative reporting in Australia. For example, the Bravehearts Sexual Assault Disclosure Scheme operates nation-wide and is a confidential and anonymous alternative reporting scheme for historical child sexual abuse offences. After victims complete an online form, Bravehearts contacts the victim to discuss options.<sup>46</sup>

In New South Wales, the NSW Police Sexual Assault Reporting Option (SARO) form is available for people who do not want to make a formal report to police. A SARO questionnaire is not the same as making a formal report to police and will not initiate a criminal investigation.<sup>47</sup> NSW police state that ‘The primary purposes of a SARO is to make a record of what occurred, in addition to allowing the NSW Police

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<sup>41</sup> Georgina Heydon and Anastasia Powell, ‘Written-response interview protocols: an innovative approach to confidential reporting and victim interviewing in sexual assault investigations’ (2016) (6) *Policing and Society* 631, 635.

<sup>42</sup> Ibid 636.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid 641.

<sup>45</sup> Ibid.

<sup>46</sup> Bravehearts, *Sexual Assault Disclosure Scheme*, (2021) <<https://bravehearts.org.au/SADS>>.

<sup>47</sup> New South Wales Police, *Sexual Assault Reporting Option (SARO) Form*, <[https://www.police.nsw.gov.au/crime/sex\\_crimes/adult\\_sexual\\_assault/sexual\\_assault\\_categories/saro](https://www.police.nsw.gov.au/crime/sex_crimes/adult_sexual_assault/sexual_assault_categories/saro)>.

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Force to gather information on sexual offences and offending'.<sup>48</sup> The form can be completed anonymously and victims can choose how much information to include.<sup>49</sup>

Queensland's Alternative Reporting Option (ARO) scheme also enables victims to fill an online form. The information provided can be used to solve other reported offences of a similar nature, but victims can remain anonymous and the information does not initiate a criminal investigation.

In Victoria, an anonymous report can be made online via the Crime Stoppers portal.<sup>50</sup> Victims of child sexual abuse (historical or current) within a religious or institutional setting can email Victoria Police directly.<sup>51</sup> Otherwise, online reporting is only available to complainants of theft, lost property and property damage of up to \$5,000.<sup>52</sup>

Given the individual and structural barriers faced by some victims of crime to reporting a crime, anonymous and confidential reporting options should be available as part of a suite of options for victims of sexual assault so that victims can engage with the justice system in a way that best meets their safety and justice needs. This is in acknowledgement that some victims may never want to proceed through the criminal justice system, but may wish to provide anonymous information to assist police investigations. It may also provide some victims with the option of a 'safer' first step towards reporting. This may be particularly important for some victims of crime who may be fearful of police or face structural or physical barriers to attending a police station. Given the additional barriers faced by some victims, as outlined above, alternative pathways to reporting could have particular benefits for people with disability, male victims of sexual assault, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people who identify as LGBTIQA+, people in

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<sup>48</sup> New South Wales Police, *Sexual Assault Reporting Option (SARO) Form*, <[https://www.police.nsw.gov.au/crime/sex\\_crimes/adult\\_sexual\\_assault/sexual\\_assault\\_categories/saro](https://www.police.nsw.gov.au/crime/sex_crimes/adult_sexual_assault/sexual_assault_categories/saro)>. As noted in Georgina Heydon and Anastasia Powell's research, data from anonymous reports can be compiled and analysed to identify localised trends and sexual assault 'hotspots': Georgina Heydon and Anastasia Powell, 'Written-response interview protocols: an innovative approach to confidential reporting and victim interviewing in sexual assault investigations' (2016) (6) *Policing and Society* 631, 636.

<sup>49</sup> New South Wales Police, *Sexual Assault Reporting Option (SARO) Form*, <[https://www.police.nsw.gov.au/crime/sex\\_crimes/adult\\_sexual\\_assault/sexual\\_assault\\_categories/saro](https://www.police.nsw.gov.au/crime/sex_crimes/adult_sexual_assault/sexual_assault_categories/saro)>.

<sup>50</sup> <<https://www.crimestoppersvic.com.au/report-a-crime/>> see also <<https://crimestoppers.com.au>> which directs users to the relevant state police to report a crime anonymously.

<sup>51</sup> Victoria Police, *Reporting Sexual Offences to Police* (2020) <[https://www.police.vic.gov.au/sites/default/files/2020-03/Reporting%20Sexual%20Offences\\_A6%20booklet\\_web.pdf](https://www.police.vic.gov.au/sites/default/files/2020-03/Reporting%20Sexual%20Offences_A6%20booklet_web.pdf)>.

<sup>52</sup> Victoria Police, *Online Reporting* <<https://onlinereporting.police.vic.gov.au>>.

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custodial settings, people experiencing homelessness, people with mental illness and young people, including young people in out-of-home care.

While there are already some options for alternative reporting in Victoria, as outlined above, a more victim-friendly and well publicised alternative pathway for reporting might assist victims who are hesitant to come forward.

A model of online reporting should allow victims to elect how much information they provide and indicate whether they consent to a follow-up conversation undertaken by an appropriately trained and skilled support worker. This support worker should be able to provide advice on reporting options and processes, provide referrals to counsellors and/or specialist police members and provide broader information about victims' services and financial assistance available to victims of crime. This role could be undertaken by sexual assault liaison workers or Independent Sexual Violence Advisors. These roles are discussed further below.

**Recommendation 4: Alternative reporting options should be available for victims of sexual assault. These alternative reporting pathways should:**

- **be victim-friendly and well publicised**
- **accommodate victim diversity, including diversity in language, culture, gender and sexual identity**
- **allow victims to elect how much information they provide and whether they consent to further contact by an appropriately trained and skilled support worker.**

## **8.2. Alternative ways of interviewing victims and collecting evidence**

There is emerging research suggesting written reporting mechanisms, as opposed to face- to-face police-led verbal interviews, may provide some victim-survivors with a way to provide an initial account of the crime in a less confronting environment. Some research refers to this as a 'self-administered interview' (SAI) or a 'written-response interview protocol' (WRIP).

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SAI/WRIPs involve victims answering a set of written instructions that guide them through the same memory enhancing steps of a cognitive interview, but in written form.<sup>53</sup>

Some of the benefits of a SAI or WRIP are said to include:<sup>54</sup>

- offering victims the opportunity to write their story in their own time, with prompts and guidelines carefully designed to maximise recall and focus on key aspects<sup>55</sup>
- serving as a 'first response' tool where there may be delays (for example, while waiting for a specialist sexual offences investigator to conduct an in-person interview in regional/rural areas)
- the ability to preserve the details of a victim's narrative where there are delays or where a victim makes an initial report to police, but is reluctant to proceed with a formal report at that time.

The SAI or WRIP may also assist with accessibility for culturally diverse people as the form can be translated into community languages which enables victims to document their account as soon as possible in their own words.<sup>56</sup> It is also suggested there may also be improved accuracy through translating written language compared with interpreting spoken language.<sup>57</sup>

Emerging research suggests anonymous and confidential reporting options, as outlined above, can be combined with SAI/WRIP techniques to capture full accounts from victims. If SAI/WRIP forms are carefully constructed, they can engage victims in the reporting process sensitively, while also providing victims with the necessary guidance about the recall and reporting process consistent with the memory enhancing steps of a cognitive interview.<sup>58</sup>

It is important that any initiatives like this are part of a suite of options for victims.

**Recommendation 5: Alternative ways of collecting evidence and interviewing victims should be explored, including:**

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<sup>53</sup> Georgina Heydon and Anastasia Powell, 'Written-response interview protocols: an innovative approach to confidential reporting and victim interviewing in sexual assault investigations' (2016) (6) *Policing and Society* 631, 638.

<sup>54</sup> See generally, Ibid 631.

<sup>55</sup> Ibid 639.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid 641.

- **providing victims with the opportunity to complete a 'self-administered interview' (SAI) or participate in a 'written-response interview protocol' (WRIP)**
- **integrating anonymous and confidential reporting options with SAI/WRIP techniques to save victims from having to repeat their story**
- **looking at how alternative ways of collecting evidence can accommodate victim diversity, including diversity in language and culture.**

### 8.3. Alternative, parallel, restorative or innovative justice

The appropriateness of restorative or alternative justice models for sexual assault has been the subject of considerable debate for some time.<sup>59</sup>

Opponents to restorative justice pathways suggest victims should not have to seek 'alternative' justice pathways simply because the criminal justice system does not accommodate their interests and needs. This sentiment has been confirmed by research with victims of sexual assault. For example, Hayley Catherine Clark's research with victims of sexual assault found that although some victims did not consider the criminal justice system an appropriate mechanism for addressing their experience of sexual assault, they believed that the criminal justice system ought to address their justice needs.<sup>60</sup>

At the same time, there is now a consistent body of work suggesting that some victims perceive restorative justice as fairer, more satisfying, more respectful, and more legitimate than what is offered by the justice system.<sup>61</sup> Restorative justice provides an opportunity to hold offenders accountable and provides victims with an opportunity to tell their story on their own terms.<sup>62</sup> In this context, Wendy Larcombe suggests 'the criminal law's monopoly on sexual assault must be

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<sup>59</sup> See, for example, Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 177. For the purposes of this submission, I refer to restorative justice as a 'process' (rather than an 'outcome'). This is consistent with other definitions: see, for example, Meredith Rossner 'Restorative justice and victims of crime: Directions and developments' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Taylor & Francis Group, 2017), 231. The terms 'alternative', 'restorative', 'parallel' or 'innovative' are also referenced due to the ways in which such processes can sit within, alongside or outside the traditional justice system.

<sup>60</sup> Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 81.

<sup>61</sup> Meredith Rossner 'Restorative justice and victims of crime: Directions and developments' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Taylor & Francis Group, 2017), 238.

<sup>62</sup> Kelly Richards et al, 'What Do Victim/survivors of Sexual Violence think about Circles of Support and Accountability' (2020) *Victims and Offenders* 1, 3.

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broken. Rape and sexual assault cannot always, and perhaps should not always, be criminally prosecuted.<sup>63</sup>

This research is consistent with the approach of Victoria's South Eastern Centre Against Sexual Assault (SECASA) who, as part of their therapeutic support for victims of sexual assault, have facilitated alternative/restorative processes at the request of victims for many years. An evaluation of the SECASA approach found that being heard and having harms acknowledged was the strongest motivation for victims of crime to participate in alternative processes.<sup>64</sup>

Case studies from SECASA's alternative/restorative process reveal victims' strong desire to speak openly with the offender in a way that communicates the harm caused, and provides the offender with an opportunity to acknowledge or, in some cases, apologise for the harm.<sup>65</sup> This kind of open dialogue is incompatible with the adversarial trial process.

What my office has heard is that not all victims of crime want the same thing. For this reason, it is clear that the conventional criminal justice system, with its single pathway of prosecution through the courts, cannot meet the needs of all victims of sexual assault.<sup>66</sup> Similar findings were made by the Royal Commission into Family Violence, which observed that with robust safeguards in place, a restorative justice process should be made available to victims who wish to pursue such an option.<sup>67</sup>

Ensuring that sexual assault is treated as criminal conduct by the justice system—where this is a victim's wish—remains paramount. Creating a trauma-informed and victim-centric criminal justice response to sexual assault should not preclude provision of alternative or parallel restorative pathways where this is a victim's

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<sup>63</sup> Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press, 2017), 150. See also RMIT Centre for Innovative Justice, *Innovative justice responses to sexual offending: Pathways to better outcomes for victims, offenders and the community* (Report, May 2014) 6.

<sup>64</sup> Bebe Loff et al, *A Community-Based Survivor-Victim Focused Restorative Justice – A Pilot* (Report to the Criminology Research Advisory Council, July 2019) 20.

<sup>65</sup> See, for example, Monash Health and South Eastern Centre Against Sexual Assault, *Restorative Justice, sexual assault and family violence* (17 July 2016) <<https://www.casa.org.au/assets/Documents/restorative-justice-sexual-assault-and-family-violence.pdf>>

<sup>66</sup> RMIT Centre for Innovative Justice, *Innovative justice responses to sexual offending: Pathways to better outcomes for victims, offenders and the community* (Report, May 2014) 6.

<sup>67</sup> Royal Commission into Family Violence, *Summary and Recommendations* (2016) 31.

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wish. As noted by RMIT's Centre for Innovative Justice, victims should have a suite of options available.<sup>68</sup>

The community's denunciation of sexual offending, as provided for through the traditional justice response, should continue where possible. However, the government should undertake a comprehensive consultation process with victim-survivors to seek a range of views on establishing a pilot program providing alternative justice options.

In considering the program's scope, the guidelines previously suggested by the VLRC and the Victorian Royal Commission into Family Violence are informative. The VLRC has previously highlighted that restorative justice for indictable crime must be understood as requiring a different approach to that applied for less serious offending or youth offending and should:<sup>69</sup>

- be supplementary, not diversionary
- only ever proceed with the informed consent of any victims involved
- be tailored to respond to the interests and needs of victims, rather than focusing primarily on the rehabilitation of the offender.

It is vital that any alternative, parallel or restorative practice also be grounded in learnings from the existing programs in Victoria, including:

- the Department of Justice and Community Safety's redress and restorative engagement scheme for victims of workplace sexual harassment and sexual assault at Victoria Police
- the Department of Justice and Community Safety's Family Violence Restorative Justice program
- Youth Justice Group Conferencing
- RMIT's Open Circle
- SECASA's restorative justice practices with sexual assault victims.

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<sup>68</sup> RMIT Centre for Innovative Justice, *Innovative justice responses to sexual offending: Pathways to better outcomes for victims, offenders and the community* (Report, May 2014) 6. Kathleen Daly also refers to this as a 'menu of options': see Kathleen Daly 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton, Felix Mukwiza Ndahinda (eds) *Justice for Victims: Perspectives on rights, transition and reconciliation* (Routledge, 2014) 378-395, 381.

<sup>69</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 183.

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Without a comprehensive external review of the current restorative or alternative justice pathways in Victoria—and robust victim-centric research into the outcomes for victims of crime—it is difficult to determine victims' satisfaction with the existing pathways. Victims' views on the 'success' of these programs should be the guide. Accordingly, a comprehensive, holistic external review of the existing programs should be undertaken to ensure best practice in restorative justice is shared across the justice and service system. It is vital that victims' voices and experiences are at the centre of any reviews and learnings from existing programs.

This review should also consider whether these programs continue to exist as stand-alone restorative justice programs, or (in light of the increasing number of programs) whether a more streamlined approach should be developed providing victims with a consolidated, central contact point and a clearer sense of pathways to various restorative justice programs.

Alternative forms of participation or alternative justice responses—such as restorative justice—can meet more of victims' most commonly articulated needs, including participation, voice, validation, vindication and offender accountability.<sup>70</sup> The provision of alternative or restorative justice pathways within our justice system should not be viewed as sending a signal to the community that sexual harm is not a serious criminal offence. Providing options for victims of crime acknowledges that victims have a variety of justice needs and not all of them can be met by the traditional criminal justice system.

**Recommendation 6:** **The Victorian government should commence a comprehensive consultation process with victim-survivors to seek a range of views on establishing a pilot program providing alternative justice options in sexual assault matters.**

**Recommendation 7:** **The Victorian government should undertake a comprehensive review of existing restorative justice programs in Victoria to:**

- **ensure best practice in restorative justice is shared across the justice and service system**
- **ensure victims' voices and experiences of restorative justice are at the centre of learnings and evaluations of existing programs**

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<sup>70</sup> RMIT Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report, April 2019) 38.

- ensure programs respond to victim diversity, including diversity in language, culture, gender and sexual identity
- explore whether these programs should continue to exist as stand-alone programs, or whether a more consolidated, centralised and streamlined approach should be developed providing victims with a central contact point and a clearer sense of pathways to various programs.

## 9. Participation

### 9.1. Statutory recognition of victims as participants in the criminal justice process

Too often, victims of crime feel ignored, silenced and excluded from the criminal justice process. It has been suggested that the criminal trial process gradually ‘overshadows’ the needs of victims of crime as the criminal process progresses.<sup>71</sup>

A recent review by RMIT's Centre for Innovative Justice into Victoria's victims' service system found that victims of crime often describe having limited or no opportunity to participate in the criminal justice process. This sense of disconnection from the justice system results in victims feeling that their experience does not matter.<sup>72</sup> Victims have described their role in the justice system as that of 'outsiders' and 'passive receiver[s] of information'.<sup>73</sup>

In 2018, the Victims' Charter was amended to acknowledge the victim's role as a participant, but not a party, in proceedings for criminal offences.<sup>74</sup> The statutory recognition of victims as participants in the criminal justice process is key to legitimising the victim's role and voice.<sup>75</sup>

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<sup>71</sup> Nicole Bluett-Boyd and Bianca Fileborn, Australian Institute of Family Studies, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions* (Research Report 27, 2014) vii.

<sup>72</sup> RMIT Centre for Innovative Justice, *Improving support for victims of crime: Key practice insights* (Report, November 2020) 14.

<sup>73</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 33.

<sup>74</sup> *Victims' Charter Act 2006* (Vic) s4(l)(ba).

<sup>75</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 48.

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In its 2016 report, *Victims of Crime in the Criminal Trial Process*, the VLRC observed that while Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides guarantees to the accused during the trial process (for example, to be informed of the nature and reason for the charge and to be afforded the right to a fair hearing), there are no rights enshrined for victims of crime. The VLRC concluded that incorporating the interests of victims into section 25 of the Charter of Human Rights and Responsibilities would add to the integrity of what constitutes a fair trial in Victoria.<sup>76</sup>

Consistent with the VLRC's previous recommendation in its report *Victims of Crime in the Criminal Trial Process*, Victoria's Charter of Human Rights and Responsibilities should be amended to recognise the interests of victims in the criminal trial process, and the rights and entitlements that arise as a result of those interests.

**Recommendation 8: Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) should be amended to recognise the rights of victims in the criminal trial process as articulated in the Victims' Charter.**

## **9.2. Enabling meaningful participation in the criminal justice process**

With increased participation and voice in the criminal justice process, victims perceive a more equitable and impartial justice system.<sup>77</sup> When victims are excluded from decisions, such as plea resolutions, the trauma of crime victimisation can be exacerbated.<sup>78</sup>

Prosecutorial decision making is a key area of concern for victims. Victims are more likely to feel treated fairly by the criminal justice system when prosecutors give victims an opportunity to express their wishes, take their views into consideration and accord victims recognition and respect.<sup>79</sup>

The Victims' Charter enshrines a number of key participatory rights for victims in relation to prosecutorial decision making. These go beyond information provision and include a positive obligation on the Office of Public Prosecution's (OPP) to

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<sup>76</sup> Ibid 40.

<sup>77</sup> Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations* (Palgrave Macmillan, 2020) 7-8.

<sup>78</sup> Ibid 20.

<sup>79</sup> RMIT Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (2019) 9.

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seek the views of a victim before making a decision. Under section 9B of the Victims' Charter, the DPP must seek the views of a victim before deciding to:

- substantially modify the charges
- discontinue the prosecution of the charges
- accept a plea of guilty to a lesser charge
- appeal a sentence
- appeal an acquittal.

Research relating to OPP communication with victims during the prosecution process demonstrates that victims want to be appropriately consulted during key stages of the process, not simply 'told' of prosecutorial decisions.<sup>80</sup>

The importance of genuine consultation with victims during the prosecution process is heightened in cases of sexual assault because of the persistent myths and misconceptions that pervade decision making at all stages of the process.<sup>81</sup>

Recent Victorian research conducted by RMIT's Centre for Innovative Justice has highlighted that it is not uncommon for the defence to make a plea offer at the start of a trial, placing the prosecution under 'pressure to make a decision quickly, on the "steps of the court"'.<sup>82</sup> In RMIT's report, it was recommended that further work be undertaken with Victorian courts to highlight the value of providing sufficient time to the prosecution for consultation with victims about plea resolutions.<sup>83</sup>

Consultation during the criminal justice process is one of the few rights granted to victims of crime. A victim's right to participate and be consulted at key stages of the criminal justice process should not be impacted by a perceived need (or real pressure) to expedite cases. This is even more vital given the current court backlog caused by COVID-19.

While the Victims' Charter enshrines a victim's right to be meaningfully consulted about plea resolutions, the Charter also provides an exception where 'it is not

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<sup>80</sup> Ibid 10.

<sup>81</sup> Mary Iliadis and Asher Flynn, 'Providing a check on prosecutorial decision-making: an analysis of the victims' right to review reform' (2018) 25 *British Journal of Criminology*, 550-568.

<sup>82</sup> RMIT Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (2019) 14. See also Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 136.

<sup>83</sup> RMIT Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (2019) 16.

practical to contact the victim given the speed or nature of the proceeding'.<sup>84</sup> This exception in the Victims' Charter creates a tension between the intent of the Victims' Charter and victims' actual experience of the trial process. It also places undue pressure on prosecutors to meet their Victims' Charter obligations while facing pressure from defence counsel and judicial officers 'on the steps of the courts'.

The Victorian justice system must adapt to better accommodate victims' participatory rights as provided for by the Victims' Charter. Practices of the court, prosecution and defence must evolve so that victims' participatory rights are respected and implemented in practice. Accordingly, section 9B(2)(b) of the Victims' Charter should be removed so that a victim's right to be consulted under the Victims' Charter at key stages of the prosecution process is an unrestricted entitlement.

**Recommendation 9: Section 9B(2)(b) of the Victims' Charter should be removed so that a victim's right to be consulted under the Victims' Charter at key stages of the prosecution process is an unrestricted entitlement and must be accommodated by the criminal trial process.**

### 9.3. Independent Victim Right to Review scheme

Research confirms that attitudes and beliefs held by legal professionals, including police and prosecutors, contribute to case attrition rates in sexual assault matters. Police and prosecutors make decisions about whether a case can proceed based on their perceptions and expectations about the likelihood of a successful prosecution.<sup>85</sup> Some of these decisions can be based on misconceptions about sexual offences.<sup>86</sup>

These value judgements—including judgements about the reliability and credibility of a victim of sexual assault—are made along a victim's journey through the justice system. In this context, research suggests that the ability to

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<sup>84</sup> Victims' Charter Act 2006 (Vic) s9B(2)(b).

<sup>85</sup> Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 2. Discussion about the OPP's perceptions of the likelihood of successful prosecution in a recent sexual assault case can be found at: Richard Baker, 'DPP drops former priest rape case' *The Age*, 14 December 2020, 1.

<sup>86</sup> Elli Darwinkel, Martine Powell and Patrick Tidmarsh, 'Improve Police Officers' Perceptions of Sexual Offending Through Intensive Training' (2013) 40 (8) *Criminal Justice and Behaviour* 895, 896. For example, research suggests that police investigators tend to perceive emotional victims of sexual assault as more credible than unemotional victims. See: Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of sexual crimes against adult victims: Barriers to justice* (Australian Institute of Criminology, 2020) 6.

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independently review police and prosecution decisions may be more crucial in sexual offence cases than other criminal offences.<sup>87</sup>

In the United Kingdom, victims can seek a review of decisions not to charge, to discontinue or otherwise terminate proceedings.<sup>88</sup> This is known as the Victims' Right to Review Scheme (VRR), which has been in operation since 2014.<sup>89</sup> The scheme is administered by the Crown Prosecution Service (CPS), broadly equivalent to the Office of Public Prosecutions in Victoria.

The UK's CPS, in outlining the rationale for the VRR scheme, states:<sup>90</sup>

*It is an important principle that people should be able to rely on decisions taken by the CPS as being final and that such decisions should not ordinarily be revoked. However, we also recognise that a careful balance must be struck between providing certainty to the public in our decision making and not allowing wrong decisions to stand. It is right therefore, in order to maintain public confidence in the criminal justice system, that the CPS will sometimes have to look again at a prosecution decision, and change it if it is found to be wrong. If a decision is found to be wrong, it may be necessary to commence or re-institute criminal proceedings.*

Under the VRR, a request for review proceeds initially via a 'local resolution' pathway. The decision is checked by a local prosecutor who has not been involved with the case. If the matter cannot be resolved at the local level, the decision will proceed to an independent reviewing prosecutor who approaches the case afresh.<sup>91</sup>

Noting the challenges that continue to be experienced in successfully prosecuting sexual assault, the case study below is a powerful illustration of the significance of a VRR scheme in sexual assault matters:<sup>92</sup>

*The ability of the VRR to respond to victims' substantive and procedural justice needs can be demonstrated in the following childhood sexual abuse case that resolved because of the VRR. In this case, the victim reported historic sexual offences to police, at which stage the CPS decided there would be no further action and did not proceed with charges. On the victim's behalf, a victim support*

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<sup>87</sup> Mary Iliadis and Asher Flynn, 'Providing a check on prosecutorial decision-making: an analysis of the victims' right to review reform' (2018) 25 *British Journal of Criminology*, 550-568.

<sup>88</sup> Crown Prosecution Service, *Victims' Right to Review Scheme* (2020) <<https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme>>

<sup>89</sup> Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations* (Palgrave Macmillan, 2020) 71.

<sup>90</sup> Crown Prosecution Service, *Victims' Right to Review Guidance* (2016) 9.

<sup>91</sup> Crown Prosecution Service, *Victims' Right to Review Scheme* (2020) <<https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme>>

<sup>92</sup> Mary Iliadis and Asher Flynn, 'Providing a check on prosecutorial decision-making: an analysis of the victims' right to review reform' (2018) 25 *British Journal of Criminology*, 550-568, 556.

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*organization later requested this decision be reviewed using the VRR. After the initial review, the local CPS decided to reinstate the charges and proceed to trial. This trial resulted in a hung jury. A second trial was run in which a unanimous guilty verdict was reached and the offender was sentenced to a maximum 14 years imprisonment.*

For sexual assault matters, the VRR offers ‘a way to potentially challenge and limit problematic misperceptions and stereotypes of sexual violence informing prosecuting decisions’.<sup>93</sup> In the case study above, the victim’s rape crisis support worker stated that the VRR gave the victim ‘some feeling of control’ and met the ‘victims’ procedural and substantive justice needs’.<sup>94</sup>

The Independent Victims’ Commissioner for London, Claire Waxman, has described the UK’s VRR as ‘an important check and balance, empowering victims to challenge charging decisions that they are not happy with.’<sup>95</sup> Academic Mary Iliadis contends that independent review mechanisms do not alter the structural position of victims in the criminal justice system, as victims do not become a party to criminal proceedings, but such participatory mechanisms empower victims and increase their satisfaction with the criminal justice system.<sup>96</sup>

In its 2016 report, *Victims of Crime in the Criminal Trial Process*, the VLRC discussed, but ultimately did not recommend, an independent VRR scheme. However, the VLRC recommended that the need for a scheme for independent review of decisions to discontinue a prosecution or proceed with a plea of guilty to lesser charges should be revisited in five years.<sup>97</sup>

Recent media has highlighted the ways in which victims can feel confused and distressed by prosecutorial decision making in sexual assault cases.<sup>98</sup> Recent media has also suggested Victoria Police decision making may still be inconsistent in sexual assault cases. A former Victoria Police criminologist recently told the media: ‘We are yet to fix the clarity of decision making and getting policing to the point where it makes its own decisions under absolutely clear criteria and

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<sup>93</sup> Ibid 558.

<sup>94</sup> Ibid 556.

<sup>95</sup> Claire Waxman, *Review of Compliance with the Victims’ Code of Practice: Findings, recommendations and next steps* (Report, March 2019) 16.

<sup>96</sup> Mary Iliadis, *Adversarial Justice and Victims’ Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 163.

<sup>97</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 76.

<sup>98</sup> Richard Baker, ‘DPP drops former priest rape case’ *The Age*, 14 December 2020, 1.

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authorises, or doesn't authorise, on those criteria and lets the prosecutorial services be the attrition point'.<sup>99</sup>

These are complex decisions. There is no doubt the high burden of proof in criminal trials creates significant challenges for police and prosecutors. While significant work has been done within the Office of the Public Prosecutions to provide victims with better access to reasons for prosecutorial decisions,<sup>100</sup> a VRR would provide victims with an avenue to seek independent review of decisions after proper internal review processes have been exhausted.

A VRR scheme would also address issues concerning some victims of crime who face additional barriers to investigation and prosecution, such as victims with disability and who are often 'presumed to be unreliable witnesses' and 'are twice as likely to have their stories seen by investigators as false reports'.<sup>101</sup>

The government should introduce an independent VRR scheme in Victoria. Consideration should be given to a VRR scheme sitting independently of both the police and prosecution and reviewing decisions made at both the investigatory and prosecutorial stages of the process.<sup>102</sup> The scheme should be underpinned by new rights in the Victims' Charter.

**Recommendation 10: The Victorian Government should introduce a Victims' Right to Review scheme underpinned by new rights contained in the Victims' Charter Act enabling independent review of police and prosecution decisions after internal review options are exhausted.**

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<sup>99</sup> Nicole Precl, Rachael Dexter and Eleanor Marsh, 'Are we failing victims of sexual violence?' *The Age*, 13 September 2019 <[www.theage.com.au/interactive/2019/are-we-failing-victims-of-sexual-violence/](http://www.theage.com.au/interactive/2019/are-we-failing-victims-of-sexual-violence/)>

<sup>100</sup> Office of Public Prosecutions, *Requesting reasons for decisions* (2017) <<https://victimsandwitnesses.opp.vic.gov.au/witnesses/requesting-reasons-for-decisions>>

<sup>101</sup> Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020) 11.

<sup>102</sup> Academics point to the importance of independent review schemes operating separately from the original decision making body. See, for example, Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 163; Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations* (Palgrave Macmillan, 2020) 71.

## 10. Legal advice and legal representation

Victims' rights and entitlements span multiple pieces of legislation and various government and court policy documents.<sup>103</sup> Because of this, many victims may be unaware of, or misinterpret, their rights and entitlements.

The VLRC's 2018 *Review of the Victims of Crime Assistance Act 1996* emphasised the wide-ranging legal needs of victims of crime. These needs encompass the various rights and entitlements arising during the criminal justice process (such as Victim Impact Statements and alternative arrangements for giving evidence), but also navigating financial assistance and compensation processes, civil intervention orders, child protection, family law, criminal law and fines.<sup>104</sup>

Because victims' needs are diverse, some victims' legal needs will be greater or more complex than others. In some circumstances, victims may only require limited legal advice. This might be advice about how to apply for financial assistance or what their rights are under the Victims' Charter.

In other circumstances, victims' legal needs will be significant. In the case of sexual assault victims, some victims will need to understand their rights and entitlements relating to laws of evidence, such as dealing with applications to access confidential medical or counselling records.

For this reason, it is suggested victims should have:

- access to **specialist legal advice**
- the right to **independent legal representation** in sexual assault cases.

There is currently no pathway in Victoria to specialist victims' legal advice. As outlined further below, **specialist legal advice** should encompass tailored victims' legal information and advice using a trauma-informed approach.

<sup>103</sup> Including Sentencing Act 1991 (Vic), the Victims of Crime Assistance Act 1996 and relevant protections afforded victims under the Criminal Procedure Act 2009 (Vic), Evidence (Miscellaneous Provisions) Act 1958 (Vic), Evidence Act 2008 (Vic), Public Prosecutions Act 1994 (Vic), Judicial Proceedings Reports Act 1958 (Vic), and Open Courts Act 2013 (Vic).

<sup>104</sup> Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, 2018) 204.

As also outlined further below, **independent legal representation** in sexual assault cases would be a substantial shift in legal procedure. Legislative reform would be required to enable victims to have an independent legal representative at key stages of the criminal justice process to uphold their rights and interests.

These two approaches are discussed further below.

## 10.1. Specialist legal advice for victims of crime

The 2020 report *Strengthening Victoria's Victim Support System: Victim Services Review* found considerable unmet demand for specialist, independent legal advice for victims of crime.<sup>105</sup> The report suggested that access to specialist, tailored legal advice for victims would provide for early intervention by way of legal 'issues spotting' and help link victims to suitable organisations for ongoing legal support.<sup>106</sup>

While any victim of crime can engage a lawyer, there is currently no dedicated legal advice service for victims of crime. This means victims have no identifiable pathway to specialist victims' legal advice. It also means victims can sometimes engage lawyers who do not specialise in the range of issues that intersect with victims' legal issues, nor do they provide a trauma-informed service.

A victims' legal advice service should be established providing tailored legal information and advice delivered by specialist legal professionals who have a trauma-informed and culturally safe approach. Specialist lawyers would have received specific training and education (and ongoing professional development) in victims' rights and entitlements spanning the relevant criminal, administrative and civil law.<sup>107</sup>

The victims' legal service should be well publicised and immediately 'visible' to members of the community. The service should be recognisable as the pathway to specialist victims' advice through clear and consistent branding of the service as the gateway to specialist victims' legal advice. The service should provide accessible entry-points across Victoria, including regional areas where access to legal representation can be more challenging for victims.

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<sup>105</sup> RMIT Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 13.

<sup>106</sup> Ibid 152.

<sup>107</sup> Including Sentencing Act 1991 (Vic), the Victims of Crime Assistance Act 1996 (Vic) and relevant protections afforded victims under the Criminal Procedure Act 2009 (Vic), Evidence (Miscellaneous Provisions) Act 1958 (Vic), Evidence Act 2008 (Vic), Public Prosecutions Act 1994 (Vic), Judicial Proceedings Reports Act 1958 (Vic), and Open Courts Act 2013 (Vic).

The need for a dedicated, specialist victims' legal advice service has been previously highlighted in the 2020 review *Strengthening Victoria's Victim Support System: Victim Services Review*, as well as in the VLRC's 2016 report *Victims of Crime in the Criminal Trial Process*. The models proposed were different, although, both reports advocated for the establishment of a dedicated victims' legal advice service delivered by a publicly funded legal service.<sup>108</sup> Having regard to previous models and proposals for a victims' legal advice service, the VLRC should consider the best model for delivering a publicly funded victims legal advice service.

**Recommendation 11: The Victorian Government should establish a publicly funded victims' legal advice service that:**

- **provides tailored legal information and advice delivered by specialist legal professionals using a trauma-informed and culturally safe approach**
- **is well publicised and immediately 'visible' to members of the community as the pathway to specialist victims' advice**
- **has accessible entry-points across Victoria, including regional areas.**

## 10.2. Independent legal representation for victims of sexual assault

Victims of sexual assault can be shocked to realise that although a state's case would not proceed without their evidence, they are not afforded the same right to legal representation during the court process as an accused. Many victims mistakenly believe prosecutors are 'their lawyers' and can prioritise their rights and needs.<sup>109</sup>

A recent study outlining victims' views relating to their interactions with the Office of Public Prosecutions (OPP) highlighted victims' concerns about prosecutors'

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<sup>108</sup> *Strengthening Victoria's Victim Support System: Victim Services Review* suggested the legal advice service should integrate with the existing victims' services system operated by the Department of Justice and Community Safety and would be delivered by a 'publicly funded legal service provider co-locating with existing victims' services': Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 151. In *Victims of Crime in the Criminal Trial Process*, the VLRC recommended Victoria Legal Aid should be funded to establish a service for victims of violent indictable crimes: Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, 2016) xxiv.

<sup>109</sup> Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 35.

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'subdued' advocacy as compared to victims' perception of the more 'passionate' advocacy demonstrated by defence lawyers.<sup>110</sup>

Similarly, a major review into Ireland's responses to sexual assault (the 'Gillen Review') concluded that:<sup>111</sup>

*...for many [sexual assault] complainants, the absence of a legally trained advocate acting on their behalf is both shocking and upsetting. Complainants are often left feeling vulnerable and exposed, merely seen as 'collateral damage' in a process in which they are not a party and have no independent voice.*

Academic Fiona E Raitt has described victims' disadvantage during the criminal trial process as follows: 'Complainants have only a limited voice: they can give evidence but as they cannot canvass their rights, they depend upon another to do so. As neither prosecutors nor judges are equipped to represent these interests, complainants must look elsewhere.'<sup>112</sup>

While consideration of independent legal representation for victims of crime is not novel, progress has been slow because of perceived concerns that such representation would erode the structure of the adversarial model where the prosecution represents the state and the defence the accused. There is, however, a growing body of research advocating the benefits of introducing independent legal representation for victims of crime during the criminal trial process.<sup>113</sup> Some academics suggest that limited legal representation for victims during the criminal trial process—within clearly defined parameters—would not necessarily infringe upon the rights of the accused.<sup>114</sup>

Victims already have existing (but limited) rights to participate at key points in the criminal justice process. For example, in sexual offence cases, victims can seek leave to appear and make submissions in response to applications to access confidential medical or counselling records. However, research suggests that not all victims in sexual assault cases are being advised of their right to seek leave to appear in court in response to an application to subpoena, access or use

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<sup>110</sup> RMIT Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (2019) 13.

<sup>111</sup> Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 173.

<sup>112</sup> Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) 9 *Criminal Law Review*, 729-749, 739.

<sup>113</sup> Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations* (Palgrave Macmillan, 2020) 71.

<sup>114</sup> Mary Iliadis, Submission No 8 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (30 September 2015) 11. See also Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 173.

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confidential medical or counselling records.<sup>115</sup> Few victims engage their own lawyers to participate in these trial processes.<sup>116</sup>

The VLRC stated in its 2016 report, *Victims of Crime in the Criminal Trial Process* that at this point of the criminal justice process:<sup>117</sup>

*...victims need legal representation, independent of the prosecution, to ensure that they do not lose the right to protect their confidential communications in a situation where their interest conflicts with the prosecution's. Sometimes prosecutors may be reluctant to oppose an application, even where the victim objects. Sexual assault counsellors told the [VLRC] that conflicts between the interests of the prosecution and the victim can arise frequently.*

In New South Wales, the government has introduced a state-funded legal representation scheme for complainants of sexual offences called the Sexual Assault Communications Privilege Service (SACPS).<sup>118</sup> SACPS helps protect the privacy of counselling notes and other confidential therapeutic records in criminal proceedings involving sexual offences, supporting sexual assault victims to claim the privilege when their confidential records are subpoenaed.

SACPS lawyers have received specialised training and only represent the interests of the complainant, in contrast to the role of a prosecutor who must represent the interests of the state. SACPS can also guide the court on the operation of the communications privilege and the complainant's right to privacy. A similar scheme exists in Scotland and Ireland.<sup>119</sup>

Other independent legal representation schemes go further than New South Wales. In England and Wales, a pilot Sexual Violence Complainants' Advocates (SVCA) scheme provides a form of independent legal representation at the following stages of the process:<sup>120</sup>

- reporting to police, including advice on the process and what to expect
- attendance at interviews (to ensure procedures are followed and victims are aware of their options)

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<sup>115</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 109.

<sup>116</sup> Ibid 143.

<sup>117</sup> Ibid 145.

<sup>118</sup> Legal Aid New South Wales, *Sexual Assault Communications Privilege Service* (2020) <<https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>>

<sup>119</sup> Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 168-169.

<sup>120</sup> Ibid 169.

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- investigation/disclosure
  - pre-trial/trial—acting in the best interests of the complainant at hearings for the right to cross-examine on previous sexual history and attending trial as a silent party to ensure sexual history evidence is not introduced without a successful application.

In Denmark, state-funded legal representation has been extended to all victims of crime. The complainant's legal representative:<sup>121</sup>

- can be present at the police interview
- ensures complainants are kept updated about the progress of the case
- has the right to be present throughout the victim's examination and cross-examination and can object to questions put by both the prosecution and the defence
- may call witnesses to address the impact of the crime on the complainant at the sentencing stage.

Ireland may soon introduce legal representation for victims of sexual and other gender-based violence at the early stages of the process (for example, police report stage).<sup>122</sup>

As with other major victim reforms, such as Victim Impact Statements (including the reading aloud of VISs), alternative arrangements for giving evidence and intermediaries,<sup>123</sup> independent legal representation for victims, even in a limited form, may be strongly opposed by some justice stakeholders. Nevertheless, given the overwhelming failings of the current system for victims of sexual assault, proper consideration must be given to more significant reforms such as this.

As noted by Arie Freiberg and Asher Flynn, while legal representation for victims might sit 'in contrast to the traditional model of an adversarial system, it may provide a mechanism to better recognise the needs of victims of crime, without encroaching on the rights of the accused or the role of the court'.<sup>124</sup>

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<sup>121</sup> Ibid 170.

<sup>122</sup> Ibid 168.

<sup>123</sup> Intermediaries have been described as 'little short of revolutionary' in that they introduced 'a new participant in the criminal trial process': Natalia Antolak-Saper and Hannah MacPherson, 'Vulnerable Witnesses and Victoria's Intermediary Pilot Program' (2019) 43 *Criminal Law Journal* 325, 337.

<sup>124</sup> Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations* (Palgrave Macmillan, 2020) 105.

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Ireland's Gillen Review concluded that 'the current arguments in favour of granting a measure of independent separate representation publicly funded [for victims of crime] far outweigh the objections'.<sup>125</sup> Academic Fiona E Raitt has suggested that effective participation in the criminal justice system for complainants may never be achieved without some degree of independent legal representation.<sup>126</sup>

Without independent legal representation, victims in sexual assault matters may not be aware of their legal rights and interests, nor in a position to advocate for them to be upheld. Confusion caused by complex legal processes can be compounded by the shock and trauma caused by victimisation, which means many victims are not in a position to advocate for themselves.<sup>127</sup> In practice, this means that although victims have rights 'on paper' during the criminal trial process, they may not be aware of them, or be in a position to advocate for them.

Victims of sexual assault should have the right to legal representation at key stages of the criminal justice process. Criminal law procedure should be amended to enable victims to be legally represented at key stages of the criminal justice process. This would not elevate victims to be parties to a proceeding, but could provide victims with the right to an independent legal representative in relation to:

- applications to subpoena, access or use confidential medical or counselling records
- applications to be cross-examined on, or admit evidence about, sexual history
- access and eligibility for the intermediary scheme, special protections and alternative arrangements for giving evidence (discussed further below)
- representing victims' rights with respect to Victim Impact Statements at the sentencing phase.

Given the trauma experienced by victims of sexual assault during cross-examination, consideration should also be given to whether it would be appropriate for victims to have independent legal representation during cross-examination, as occurs in Denmark where state-funded legal representatives have the right to be present throughout the victim's examination and cross-

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<sup>125</sup> Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 173.

<sup>126</sup> Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) 9 *Criminal Law Review*, 729-749, 749.

<sup>127</sup> Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations* (Palgrave Macmillan, 2020) 98.

examination and can object to questions put by both the prosecution and the defence.<sup>128</sup> Independent legal representation at this stage could assist with compliance with protections under the Evidence Act,<sup>129</sup> including protecting complainants from questions that are unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive or put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate.

**Recommendation 12: Victims of sexual assault should have the right to an independent legal representative to represent their rights and interests at key stages of the criminal justice process including in relation to:**

- applications to subpoena, access or use confidential medical or counselling records
- applications to be cross-examined on, or admit evidence about, the sexual activities of the complainant
- access and eligibility for the intermediary scheme, special protections and alternative arrangements for giving evidence.

**Consideration should also be given to whether it would be appropriate for victims to have independent legal representation during cross-examination, as occurs in Denmark, to uphold protections under the Evidence Act 2008 (Vic) in relation to inappropriate questions or questioning.**

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<sup>128</sup> Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 170.

<sup>129</sup> Evidence Act 2008 (Vic) s41(3).

# 11. Specialised support and justice responses

## 11.1. Co-located and specialised investigatory and support services

Many victims of sexual assault are daunted and overwhelmed by the prospect of having to walk into a police station to make a report. Evidence suggests that victims regard this as a significant barrier to reporting a crime.<sup>130</sup>

Specialist responses, like Multidisciplinary Centres (MDCs), which locate police and other support services away from publicly identifiable police stations, have been found to improve outcomes for victims of sexual offences.<sup>131</sup> Co-location of support services and increased specialisation of police, as provided for in Victoria's MDCs, has resulted in a more private, user-friendly and streamlined response to sexual assault victims, thereby increasing reporting of sexual assault and the wellbeing of victims.<sup>132</sup>

The importance of access to specialised support, as provided for by the MDC model, is highlighted in the following case study from South Eastern Centre Against Sexual Assault. The case study emphasises how a non-specialised response can deter victims from progressing with a criminal matter in sexual assault cases.<sup>133</sup>

*[A client] said that at the time she was raped she had attended the local Police Station and spoken to the General Duties member on the desk who the victim felt was not helpful. She had walked out, decided not to report and returned*

<sup>130</sup> Monash Health and South Eastern Centre Against Sexual Assault & Family Violence, *Keep following the yellow brick road. The trials, tribulations and triumphs of collocated police, child protection and sexual assault workers* (2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>

<sup>131</sup> Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 225; Department of Justice & Regulation and Victoria Police, *Victorian Government Response to Royal Commission: Current Approaches to policing in child sexual abuse matters* (2015) 13; Success Works Pty Ltd, *Sexual Assault Reform Strategy: Final Evaluation Report* (Prepared for Department of Justice) (2011) 24; Northern Centre Against Sexual Assault (NCASA), Submission No 34 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (28 October 2015) 3.

<sup>132</sup> Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 226; Monash Health and South Eastern Centre Against Sexual Assault & Family Violence, *Keep following the yellow brick road. The trials, tribulations and triumphs of collocated police, child protection and sexual assault workers* (2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>.

<sup>133</sup> Monash Health and South Eastern Centre Against Sexual Assault & Family Violence, *Keep following the yellow brick road. The trials, tribulations and triumphs of collocated police, child protection and sexual assault workers* (2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>

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*home...After talking with the [SECASA] counsellor the young woman agreed to meet a SOCIT member. This only entailed walking down the corridor [in the MDC] to see if a Police member was free. The young woman subsequently reported and after some investigation an offender was located.*

*Before the MDC, the counsellor would have suggested that the young woman might want to talk to local Police. An appointment would have been made for her at the local [police station]. Counsellors are usually too busy to accompany a client to the Police Station. We know that people find it daunting to go to a Police Station and often do not follow through...*

Independent evaluations have confirmed that MDCs:<sup>134</sup>

- provide a welcoming environment for victims and families, which is focused on their safety and wellbeing
- streamline responses so victims access help more efficiently, including increased collaboration between services
- improve the range and quality of support for victims, their families and support people
- contribute to increased reporting of sexual crime to police and reduce the number of withdrawals from justice system processes
- lead to more just outcomes through the provision of higher quality investigation briefs.

Evidence suggests the enhanced service response provided by the MDC approach breaks down barriers to reporting and helps to ensure victims of sexual assault receive specialised responses when they wish to disclose.

Despite evidence of MDCs enhancing the wellbeing of victims and improving reporting rates, there are only seven MDCs across Victoria.<sup>135</sup> This means the specialised MDC response is not universally available to all victims of sexual assault.

Further investment in the MDC model has already been advocated by key stakeholders.<sup>136</sup> In 2015, the then-Department of Justice and Regulation suggested

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<sup>134</sup> Victoria Police, *Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018-2023* (2017) 15.

<sup>135</sup> Victoria Police, *Sexual offences and child abuse investigation teams* (2020)  
<<https://www.police.vic.gov.au/sexual-offences-and-child-abuse-investigation-teams>>

<sup>136</sup> Monash Health and South Eastern Centre Against Sexual Assault & Family Violence, *Keep following the yellow brick road. The trials, tribulations and triumphs of collocated police, child protection and sexual assault workers* (2016) <<https://www.casa.org.au/assets/Documents/keep-following-the-yellow-brick-road.pdf>>

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as part of its response to the Royal Commission into Institutional Child Sexual Abuse that further consideration be given to expanding the MDC model to additional areas to ensure an effective and consistent approach to responding to sexual offences throughout Victoria.<sup>137</sup>

The MDC model should be expanded across Victoria to enable a consistent approach to responding to sexual offences throughout Victoria.

**Recommendation 13: The Multidisciplinary Centres (MDC) model should be expanded to additional areas across Victoria to ensure a consistent approach for all victims of sexual assault across the state.**

## **11.2. Integrated specialist family violence and sexual assault responses**

The intersection between family violence and sexual assault is already well known. Addressing this intersection is part of the ongoing reforms responding to the recommendations of the Victorian Royal Commission into Family Violence.<sup>138</sup>

The Victorian Government has been exploring ways to better integrate responses to sexual assault and family violence at a practical level for at least a decade.<sup>139</sup> The Victorian Royal Commission into Family Violence recommended the Victorian Government undertake a review into the two sectors to consider their integration.<sup>140</sup> A Victorian Auditor-General's Office report from May 2020 stated that 'work is still underway to determine how [Support and Safety] hubs will collaborate with sexual assault services'.<sup>141</sup>

Sexual Assault Services Victoria (formally known as CASA Forum) and Domestic Violence Victoria 'will shortly complete a joint project exploring how they can better interface with The Orange Door [Support and Safety Hubs] network to

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<sup>137</sup> Department of Justice & Regulation and Victoria Police, *Victorian Government Response to Royal Commission: Current Approaches to policing in child sexual abuse matters* (2015) 15.

<sup>138</sup> Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 215; Victorian Government, *Sexual Assault and Family Violence* (2020) <<https://www.vic.gov.au/family-violence-reform-second-rolling-action-plan/sexual-assault-and-family-violence>>

<sup>139</sup> The Victorian Royal Commission into Family Violence noted a 2011 evaluation of the Victorian Government's Sexual assault Reform Strategy which recognised the need to integrate the responses 'at a practice level'. See Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 233.

<sup>140</sup> Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 235.

<sup>141</sup> Victorian Auditor-General's Office, *Managing Support and Safety Hubs* (2020) 12.

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provide integrated support to victim survivors of family violence where sexual assault has been a feature of their experience.<sup>142</sup>

Improved integration across the specialist family violence and sexual assault sectors would provide victims of sexual assault with a more integrated, connected and state-wide network of specialised support to more seamlessly support victims. I endorse the government's continued work to explore ways in which specialist family violence and sexual assault responses can be integrated.<sup>143</sup>

### **11.3. Single point of contact – sexual assault liaison/independent sexual violence advisers (ISVAs)**

Many victims acutely feel the burden of constantly trying to obtain information and stay informed about the progress of their matter.<sup>144</sup>

*...the current way that victims of crime navigate through the system involves too many different organisations and parties and it was only after proceedings I actually understood what each person was meant to do...who is meant to be doing what and what is each party's role, and therefore because there's that and then there's a prosecutor and then there's the police and then there's you as victims, how do you navigate all of those people and know who's meant to be providing you with what?*

Victims often need to liaise between, and across, systems and services such as police, specialist sexual assault services, witness assistance services and financial assistance services. A victim may need to:

- seek case updates from the police informant
- engage with a Centre Against Sexual Assault (CASA) for counselling
- meet with the Office of Public Prosecution's Victim and Witness Assistance Service about being a witness in an upcoming trial
- engage a lawyer to navigate the Victims of Crime Assistance Tribunal (VOCAT) process.

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<sup>142</sup> Victorian Government, *Sexual Assault and Family Violence* (2020) <<https://www.vic.gov.au/family-violence-reform-second-rolling-action-plan/sexual-assault-and-family-violence>>

<sup>143</sup> Victoria Police, *Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018-2023* (2017) 16.

<sup>144</sup> RMIT Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (2019) 72. See, also, RMIT Centre for Innovative Justice, *Improving support for victims of crime: Key practice insights* (2020) 14.

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A recent review of the victim support system in Victoria found that victims were often confused about what supports were available.<sup>145</sup> Without a single point of contact, victims experienced the victim support system as ‘a series of disconnected interactions.’<sup>146</sup>

Many victims want a single point of contact—someone who can stay with them throughout the entire justice process and ‘join the dots’ between each of the overlapping, yet often disconnected aspects of the justice and service system.

In the context of sexual assault, the Australian Institute of Family Studies has previously suggested the introduction of a ‘Sexual Assault Liaison’ (SAL), a dedicated support worker who would commence engagement with the victim from the time of first report to police to:<sup>147</sup>

- provide information about options and procedures at every stage of the criminal justice process
- establish connections to counsellors, police, prosecution and court support workers
- assist victims with alternative justice options
- organise structured follow-up with victims after the committal or trial process.

In the United Kingdom (UK), a similar role as envisaged by the Australian Institute of Family Studies is undertaken by Independent Sexual Violence Advisers (ISVAs).

ISVAs act as a single point of contact for victims from the point of disclosure and, when relevant, throughout the court process.<sup>148</sup> ISVAs provide impartial information to victims about all of their options, such as reporting to the police, accessing sexual assault services and sexual violence counselling.<sup>149</sup> ISVAs are not legal advisers but they can provide impartial information regarding the criminal justice process.<sup>150</sup>

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<sup>145</sup> RMIT Centre for Innovative Justice, *Strengthening Victoria’s Victim Support System: Victim Services Review* (2020) 12.

<sup>146</sup> RMIT Centre for Innovative Justice, *Strengthening Victoria’s Victim Support System: Victim Services Review* (2020) 38.

<sup>147</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Research Report 27 (Australian Institute of Family Studies, 2014) 62.

<sup>148</sup> Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements* (2017) 16.

<sup>149</sup> Ibid 5.

<sup>150</sup> Ibid 13.

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ISVAs can:<sup>151</sup>

- provide impartial information regarding making a report to police
- provide emotional support to the victim as they decide whether to report
- help the victim understand the police investigation process
- support the victim through interviews, hearings and pre-trial meetings with prosecution
- provide accurate and impartial information on the prosecution process and what will happen in the court, for example facilitating pre-trial court familiarisation visits.

During the court process, the ISVA can:<sup>152</sup>

- accompany the victim to the court and provide emotional support
- keep the victim updated on how the court case is progressing
- support the victim in court or while they give evidence remotely.

Some of the functions outlined above in relation to both ISVAs and SALs may already be performed by either generalist or specialist victim support services in Victoria. However, it is not clear that these services are integrated in a way that victims have a single point of contact throughout. Some services may not engage with victims at early stages of the process (such as the OPP's victim and witness service) while other services (such as a CASAs) may be unable to support victims at court throughout an entire trial process. This contributes to victims experiencing disconnected and disjointed support.<sup>153</sup>

Sexual Assault Liaison or Independent Sexual Violence Adviser roles should be introduced to provide victims of sexual assault a single point of contact during their recovery journey. SALs or ISVAs should act as a 'connector' across both the service and justice system, providing victims of sexual assault with a single point of contact from the point of disclosure through to the completion of the criminal process (if relevant). While the proposed new victim support model outlined in *Strengthening Victoria's Victim Support System: Victim Services Review*, if implemented, may improve victims' experience of the support 'system', sexual

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<sup>151</sup> Ibid 14.

<sup>152</sup> Ibid 15.

<sup>153</sup> RMIT Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (2020) 38.

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assault victims would benefit from a dedicated and specialist ‘single point of contact’.

Sexual Assault Liaison or Independent Sexual Violence Adviser roles would enhance victims’ information and participatory rights, as provided for under the Victims’ Charter. The availability of an impartial third party who is able to provide victims with advice regarding the criminal justice process and their rights under the Victims’ Charter would encourage a more genuine participatory role for victims of crime as envisaged by the VLRC’s 2016 report *Victims of Crime in the Criminal Trial Process*.

Sexual Assault Liaison or Independent Sexual Violence Adviser roles could assist with encouraging compliance with victim consultation obligations under the Victims’ Charter, ensuring agencies consult with victims in a meaningful and respectful way. This could include ensuring a victim is provided with sufficient time and information (in an accessible way) to consider their participatory rights, for example, during plea processes.

Although Sexual Assault Liaison or Independent Sexual Violence Adviser roles would not be a victim’s legal representative, they would be able to provide victims with general advice about their rights and entitlements during key stages of the criminal justice process, as well as refer victims to independent legal advice where it is considered necessary to protect a victim’s rights and entitlements.

Careful consideration would need to be given to the role’s scope (ensuring it does not duplicate existing services) and its location. For example, these roles could form part of the suite of victims’ services operated by the Department of Justice and Community Safety,<sup>154</sup> or be funded as part of existing community-based specialist sexual assault services, such as the Centres Against Sexual Assault.

**Recommendation 14: The Victorian Government should establish and fund a dedicated sexual assault liaison service to provide victims of sexual assault a single point of contact during the criminal justice process and their recovery journey.**

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<sup>154</sup> Integration with government-administered victim support services was suggested by Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Research Report 27 (Australian Institute of Family Studies, 2014) 62.

## 11.4. Police culture, training and education

Police are the 'gatekeepers' to the criminal justice system.<sup>155</sup> Like the general population, police 'are not immune to the misconceptions found in the broader community regarding sexual assault, including problematic gendered scripts and victim-blaming attitudes.'<sup>156</sup> Research has found that police bias 'shares an uncanny resemblance to the public stereotype and myths of how rapes occur'.<sup>157</sup>

These misconceptions impact on the ways in which victims of sexual assault are treated when they report a crime, the way in which a complaint is handled and the likelihood of police authorising a sexual assault case to proceed. For example, police expectations about how survivors 'should look and act' have directly affected victims' first contacts with police and contributed to case attrition.<sup>158</sup>

When victims are met with blame or disbelief, trauma symptoms are exacerbated and victims are less likely to participate in the formal criminal justice process.<sup>159</sup>

A recent ABC news investigation, which elevated the voices of victims of sexual assault, suggested problematic police attitudes towards sexual assault still exist:<sup>160</sup>

*Sandra<sup>161</sup> was gang-raped in 2016 by a group of men she met in a nightclub while out with some friends and her adult son in a coastal town in eastern Victoria. She says Victoria Police detectives treated her with suspicion and disbelief throughout the nine-month investigation.*

*On the night of the assault, the 48-year-old recalls being given one drink by the men and dancing with two of them before telling her son that she was going home. Her next memory is of waking up in a motel room, being "violently ill", vomiting and urinating on herself, and being used "like a rag doll" by a group of up to five men.*

<sup>155</sup> Franklin et al, 'Police Perceptions of Crime Victim Behaviours: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors' Trauma Responses' (2020) 66 (8) *Crime & Delinquency* 1055, 1059.

<sup>156</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Research Report 27 (Australian Institute of Family Studies, 2014) 58.

<sup>157</sup> Elli Darwinkel, Martine Powell and Patrick Tidmarsh, 'Improve Police Officers' Perceptions of Sexual Offending Through Intensive Training' (2013) 40 (8) *Criminal Justice and Behaviour* 895, 896

<sup>158</sup> Franklin et al, 'Police Perceptions of Crime Victim Behaviours: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors' Trauma Responses' (2020) 66 (8) *Crime & Delinquency* 1055, 1056-1057.

<sup>159</sup> Ibid.

<sup>160</sup> Inga Ting, Nathanael Scott and Alex Palmer, 'Rough justice: How police are failing survivors of sexual assault' *ABC News (online)* 3 February 2020 <<https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364?nw=0>>

<sup>161</sup> Not real name.

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*She reported the attack six days later. The detective assigned to her case told her she “looked fine” and “because I’d remembered so much detail of the night, in her opinion [that] means I wasn’t drugged, just drunk,” Sandra says.*

Deferral to myths and misconceptions are directly linked to a lack of specialised knowledge and education on how trauma manifests.<sup>162</sup> Conversely, police specialisation results in improved practice in sexual assault matters.<sup>163</sup> Intensive classroom-based training on the dynamics of sexual offending alter police responses to sexual assault complaints and increase the likelihood of police case authorisation.<sup>164</sup> Police who have undergone intensive class-room training make fewer negative comments in relation to a victims’ behaviour as well perceived evidentiary barriers in a case.<sup>165</sup>

Appropriate police responses mitigate trauma and encourage victim engagement with the criminal justice process.<sup>166</sup> For this reason, victims of sexual assault should have access to a specialised police response grounded in contemporary understandings of sexual assault dynamics and the impacts of trauma from the first point of contact.

As outlined above, the specialist response provided for by an MDC should be universally available to victims of sexual assault in Victoria. Victims of crime should not receive different outcomes based on their postcode. If specialist responses, such as MDCs, provide victims with a safer space to seek help and report crime,<sup>167</sup> these responses should be available to all victims of crime.

In addition, there should continue to be an ongoing focus on embedding cultural change in Victoria Police, particularly with respect to addressing gender equality and sexual harassment in the workplace. Research undertaken by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in 2015 found many

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<sup>162</sup> Franklin et al, ‘Police Perceptions of Crime Victim Behaviours: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors’ Trauma Responses’ (2020) 66 (8) *Crime & Delinquency* 1055, 1057.

<sup>163</sup> Patrick Tidmarsh, *Training Sexual Crime Investigators to get the “Whole Story”* (2016) (PhD Thesis, Deakin University, 2016) 17.

<sup>164</sup> Elli Darwinkel, Martine Powell and Patrick Tidmarsh, ‘Improve Police Officers’ Perceptions of Sexual Offending Through Intensive Training’ (2013) 40 (8) *Criminal Justice and Behaviour* 895, 904; Franklin et al, ‘Police Perceptions of Crime Victim Behaviours: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors’ Trauma Responses’ (2020) 66 (8) *Crime & Delinquency* 1055, 1074.

<sup>165</sup> Elli Darwinkel, Martine Powell and Patrick Tidmarsh, ‘Improve Police Officers’ Perceptions of Sexual Offending Through Intensive Training’ (2013) 40 (8) *Criminal Justice and Behaviour* 895, 904-905.

<sup>166</sup> Franklin et al, ‘Police Perceptions of Crime Victim Behaviours: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors’ Trauma Responses’ (2020) 66 (8) *Crime & Delinquency* 1055, 1057.

<sup>167</sup> Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 225; Department of Justice & Regulation and Victoria Police, *Victorian Government Response to Royal Commission: Current Approaches to policing in child sexual abuse matters* (2015) 13.

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of Victoria Police's female employees were experiencing sexual discrimination and harassment at work.<sup>168</sup> Just as these types of behaviours in our community can be directly linked to violence against women,<sup>169</sup> these types of behaviours in Victoria Police directly impact the way in which victims of sexual assault experience the justice system.

Victoria Police has a critical role in responding to gender-based violence against women. There must continue to be a sustained effort to embed cultural change and address gender equity and sexual harassment.

VEOHRC has monitored Victoria Police's progress towards gender equality and their responses to sexual harassment in the workplace since 2015. Victoria Police engaged VEOHRC to complete an independent review into sex discrimination and sexual harassment, not only to address workplace safety, but because 'Victoria Police knew that addressing workplace harm in its own organisation would also improve its response to gendered violence in the community'.<sup>170</sup>

In its final report in 2019, VEOHRC found that 'Victoria Police is transforming into a modern policing organisation that is disrupting its deeply entrenched culture of systemic discrimination and high tolerance for gendered harm'. At the same time, VEOHRC also acknowledged that 'transformative change will require time, steadfast commitment and enduring leadership'.<sup>171</sup> VEOHRC made 16 new recommendations to help embed gender equality across Victoria Police by 2030 and also provided Victoria Police with a 10-year outcome monitoring framework to assess its progress towards gender equality. It is important this work continues to be a priority for Victoria Police if responses to sexual assault are to be improved.

## **11.5. Specialised court responses**

As noted in VLRC *Issues Paper B*, in Victoria, most courts have specialist lists to deal with sexual offences. The County Court of Victoria, Magistrates' Court of

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<sup>168</sup> Victorian Human Rights and Equal Opportunity Commission, *Independent Review of Victoria Police* <[www.humanrights.vic.gov.au/legal-and-policy/research-reviews-and-investigations/police-review/](http://www.humanrights.vic.gov.au/legal-and-policy/research-reviews-and-investigations/police-review/)>

<sup>169</sup> Victorian Government, *Free from violence: Victoria's strategy to prevent family violence and all forms of violence against women* (2017) iii.

<sup>170</sup> Victorian Human Rights and Equal Opportunity Commission, *Independent Review of Victoria Police* <[www.humanrights.vic.gov.au/legal-and-policy/research-reviews-and-investigations/police-review/](http://www.humanrights.vic.gov.au/legal-and-policy/research-reviews-and-investigations/police-review/)>

<sup>171</sup> Victorian Human Rights and Equal Opportunity Commission, *Independent Review Into Sex Discrimination and Sexual Harassment including Predatory Behaviour in Victoria Police: Phase 3 audit and review* (Executive Summary, 2019) 3.

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Victoria and Children's Court<sup>172</sup> have Sexual Offences Lists.<sup>173</sup> This means that courts specialise within their overall structure.<sup>174</sup>

The County Court describes the primary function of the Sexual Offences List as 'pre-trial management'. Specialist judges manage matters relating to trial duration, resolution prospects, filing of documentation, bail variations, applications to adjourn pleas by consent, filing of indictments and filing of notices of discontinuance.<sup>175</sup>

While such specialised pre-trial management no doubt benefits victims of crime by reducing delays and streamlining pre-trial procedures, it is not clear whether specialist lists more specifically assist victims of sexual assault during the trial process.

Significant progress has been made to alter court infrastructure to accommodate the features and dynamics of family violence through specialist and dedicated family violence courts. Specialist family violence courts have been designed with victims' wellbeing and safety in mind, providing separate court entrances for victim-survivors, safe waiting spaces and interview rooms, remote witness facilities, child-friendly spaces and culturally safe spaces. Court staff undertake specialised professional development to ensure they meet the needs of victim-survivors and other court users.

In New Zealand, the Sexual Violence Court Pilot was found to have reduced the risk of secondary victimisation through the justice process for victims of sexual assault.<sup>176</sup> Features of the Sexual Violence Court Pilot included:<sup>177</sup>

- designated case managers proactively managing files
- earlier allocation of cases and earlier trial scheduling

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<sup>172</sup> Magistrates' Court of Victoria, *Practice Direction No. 2 of 2015 Sexual Offences List Suburban Magistrates' Courts Summary Offences Involving Child Complainants* (4 February 2015).

<sup>173</sup> County Court of Victoria, *Sexual Offences List* (2020) <<https://www.countycourt.vic.gov.au/going-court/criminal-division/criminal-division-court-lists/sexual-offences-list>> See also Victorian Government *Criminal Justice Report (2017)* (2019) <<https://www.vic.gov.au/victorian-government-annual-report-2018-royal-commission-institutional-responses-child-sexual-abuse/criminal-justice-report-2017>>

<sup>174</sup> Professor Patrick Parkinson AM, 'Specialist Prosecution Units and Courts: A Review of the Literature' (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, March 2016) 8.

<sup>175</sup> County Court of Victoria, *Sexual Offences List* (2020) <<https://www.countycourt.vic.gov.au/going-court/criminal-division/criminal-division-court-lists/sexual-offences-list>>

<sup>176</sup> Gravitas Research and Strategy Limited (for the Minister of Justice), *Evaluation of the Sexual Violence Court Pilot* (2019) 3.

<sup>177</sup> Ibid 3.

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- courtrooms prioritised for pilot cases
  - increased communication between stakeholder organisations involved in pilot cases
  - greater use of alternative modes of evidence
  - close attention to application of the guidelines to cross-examinations
  - use of separate court entrances and secure waiting spaces
  - communication assistants
  - pre-trial meetings with the presiding judge
  - pre-trial court education visits
  - assistance from independent victims' advocates and support from a Sexual Violence Victim Advisor operating within the court

Building on the experience of specialist family violence courts in Victoria, and learnings from New Zealand's Sexual Violence Court Pilot, specialised court responses should be introduced in Victoria.

**Recommendation 15: The Victorian Government should introduce specialised court responses for sexual offences to provide for:**

- **specially trained and dedicated court staff**
- **mandatory judicial education for judicial officers presiding over sexual assault cases**
- **victim-centric court environments, including safe entries and exits and safe waiting areas.**

## 12. Cultural change and education within the legal profession

### 12.1. Victims' experiences of cross-examination

While the Victims' Charter Act requires victims to be 'treated with courtesy, respect and dignity' by investigatory, prosecuting and victims' services agencies,<sup>178</sup> this Victims' Charter right does not extend to a victims' experience in court more broadly.

While many victims of crime understand the need to test evidence in open court and for an accused to receive a fair trial, they also experience the court process to be unnecessarily demeaning, disrespectful, intimidating and re-traumatising. Research has confirmed that victims subject to cross-examination feel humiliated, distressed, confused, bullied, intimidated, harassed, patronised and embarrassed.<sup>179</sup>

There is legislation aimed at protecting witnesses from improper questions or questioning. Witnesses are to be protected from questioning that:<sup>180</sup>

- is misleading or confusing
- is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
- is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
- has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

<sup>178</sup> Victims' Charter Act 2006 (Vic) s6.

<sup>179</sup> Natalia Antolak-Saper and Hannah MacPherson, 'Vulnerable Witnesses and Victoria's Intermediary Pilot Program' (2019) 43 *Criminal Law Journal* 325, 326.

<sup>180</sup> Evidence Act 2008 (Vic) s41(3).

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However, research suggests victims are still regularly subjected to aggressive cross-examination tactics to ‘test “the credibility and the veracity of the witness” and to elicit probative evidence’.<sup>181</sup>

One victim who recently spoke to the media anonymously felt that during the committal hearing, the defence lawyer was trying to get her to ‘break’ by ‘exploring what tactics would work on her’.<sup>182</sup>

Research also suggests rape myths continue to be relied upon by defence counsel to undermine witness credibility.<sup>183</sup> In a recent high-profile sexual assault case heard in the Magistrates’ Court, the Magistrate was critical of defence counsel’s questioning of the four female complainants:<sup>184</sup>

*On the issue of cross-examination, the court was not assisted in its task by questions put by defence counsel Mr Littlemore QC such as the length of the average female labia majora, or whether a complainant was proud of her figure or other troubling and outdated stereotypes of sexual assault victims...Times have changed....It was perturbing that defence appeared unfamiliar with section 41 of the Evidence Act which prohibits such inappropriate questions...I was not assisted by the lines of questioning by defence that called into question the reputations of the complainants, sexual or otherwise, the poses they struck in photographs on social media, or their appearance or what they were wearing.*

Many victims report that the ‘sexual assault trial is an ordeal, sometimes described as bad or worse than the original abuse, a place where the complainant’s behaviour is on trial.’<sup>185</sup> Victims of sexual offences in particular have indicated that

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<sup>181</sup> Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 6.

<sup>182</sup> Nicole Precel, Rachael Dexter and Eleanor Marsh, ‘Are we failing victims of sexual violence?’ *The Age*, 13 September 2019 <[www.theage.com.au/interactive/2019/are-we-failing-victims-of-sexual-violence/](http://www.theage.com.au/interactive/2019/are-we-failing-victims-of-sexual-violence/)>

<sup>183</sup> Olivia Smith and Tina Skinner, ‘How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials,’ *Social & Legal Studies* (2017) Vol 26(4), 441-466. See, eg, Jacqueline Horan and Jane Goodman-Delahunty, ‘Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned’ (2020) 43 (2) *UNSW Law Journal* 707, 716-717; Patrick Tidmarsh and Gemma Hamilton, Australian Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020); Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020), 9; Jane Goodman-Delahunty, et al ‘What Australian Jurors Know and Do Not Know about Evidence of Child Sexual Abuse’ (2017) 41 (2) *Criminal Law Journal* 86-103.

<sup>184</sup> Elise Kinsella ‘Magistrate critical of “troubling” and “outdated” questions from Craig McLachlan’s lawyer to female complainants’ *ABC News* (online), 16 December 2020 <<https://www.abc.net.au/news/2020-12-16/magistrate-criticises-craig-mclachlan-lawyer-over-questioning/12985916>>

<sup>185</sup> Annie Cossins ‘Why her behaviour is still on trial: the absence of context in the modernisation of the substantive law on consent’ (2019) 42 (2) *UNSW Law Journal* 462-499, 462.

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they are more upset and stressed by cross-examination than anything else that happens in relation to their cases.<sup>186</sup>

Victorian Centres Against Sexual Assault have drawn attention to victims being:

- questioned about aspects of their sexual history<sup>187</sup>
- questioned about their alcohol consumption<sup>188</sup>
- subjected to lengthy cross-examinations involving repeated questions which the victim has already answered<sup>189</sup>
- placed under undue stress by lengthy periods of cross-examination which results in deliberate attempts and increased opportunity to discredit and marginalise their legitimate testimony<sup>190</sup>
- subjected to cold and offensive treatment during evidentiary processes<sup>191</sup>
- forced by defence counsel's closed questioning to agree to an insulting premise or to a premise apparently contradicting their previous testimony without an opportunity to provide answers beyond 'yes' or 'no' to provide context.<sup>192</sup>

The VLRC's 2016 report *Victims of Crime in the Criminal Trial Process* found that many victims felt the judicial officer presiding over their case did nothing, or too little, to protect their legitimate interests.<sup>193</sup> It was suggested that in some cases, judges have permitted 'practices that further humiliate and traumatised victims, as well as wasting time.'<sup>194</sup>

The VLRC was told by the Law Institute of Victoria, the Victorian Bar and Criminal Bar Association that improper questioning of witnesses was rare and that judicial

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<sup>186</sup> Hamlyn, B. et al. 2004. *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses*. Home Office Research Study 283, London, in Samantha Fairclough and Imogen Jones, 'The Victim in Court' in Walklate, Sandra (ed) *Handbook of victims and victimology* (Second edition) (2018), 211-228, 215.

<sup>187</sup> Northern Centre Against Sexual Assault (NCASA), Submission No 34 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (28 October 2015) 3.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Loddon Campaspe Centre Against Sexual Assault, Submission No 30 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (20 October 2015) 1.

<sup>191</sup> Ibid 2.

<sup>192</sup> Ibid 5.

<sup>193</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 34.

<sup>194</sup> Ibid 45.

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officers are adequately enforcing existing protections.<sup>195</sup> In contrast, victims, victim support workers, legal professionals and some members of the judiciary told the VLRC that judicial intervention is not always adequate and improper questioning still occurs.<sup>196</sup> The VLRC concluded there was ‘clearly a gap between what victims and the legal profession consider appropriate questioning’.<sup>197</sup>

As noted by Loddon Campaspe Centre Against Sexual Assault in their submission to the VLRC’s *Victims of Crime in the Criminal Trial Process*: ‘There is a great deal of discretion for judges in which words or which lines of questioning they can find objectionable. Frequently judges do not intervene to protect the witness from unfair, unreasonable and offensive lines of questioning, even though judges do already have the power to intervene.’<sup>198</sup>

An active and interventionist judicial officer is fundamental to protecting victims of sexual assault in the courtroom. As noted by Loddon Campaspe Centre Against Sexual Assault, judges already have the power to intervene<sup>199</sup> but victims’ experiences of protection against unfair, unreasonable and offensive lines of questioning are variable. It is clear that further work is required to protect victims of sexual assault from such traumatic and distressing cross-examination. The justice system should ensure witnesses do not feel harassed, bullied or intimidated, and that the trial process facilitates the most reliable evidence from witnesses.<sup>200</sup>

A comprehensive, professional development program should be mandatory for all judicial officers presiding over sexual assault matters. Such training should feature victim-survivors voices and their lived experience of the trial process. This education program should also elevate the voices of specialist support workers and advocates who can expertly highlight the ways in which appropriate judicial recognition and intervention can radically alter a victim’s perceptions of ‘justice’.

Mandatory training for all judges designated to preside over sexual assault cases in New Zealand’s Sexual Violence Court Pilot was found to have high rates of participant satisfaction. An evaluation of the pilot found that ‘despite having

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<sup>195</sup> Ibid 96.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Loddon Campaspe Centre Against Sexual Assault, Submission No 30 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (15 October 2016) 7.

<sup>199</sup> Ibid.

<sup>200</sup> Natalia Antolak-Saper and Hannah MacPherson, ‘Vulnerable Witnesses and Victoria’s Intermediary Pilot Program’ (2019) 43 *Criminal Law Journal* 325, 327.

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presided over sexual violence cases for many years, this was [judicial officers'] first insight into the perspectives of complainants'.<sup>201</sup>

This education should continue the important work of the Judicial College of Victoria in increasing competency in victim-centric court craft.<sup>202</sup> As previously suggested by the VLRC, judicial education should focus on:

- evidence-related provisions designed to protect victims, including how to ensure such measures are enforced consistently
- how to determine whether questioning is improper or inappropriate and how to intervene when this occurs.

It is possible that mandatory judicial education for judicial officers presiding over sexual assault cases may be best enabled through the creation of a dedicated specialist sexual assault court, as discussed above. The legislation establishing the specialist court could mandate minimum training and experience for judicial appointments, similar to the appointment of Magistrates to the Family Violence Court Division who must have 'relevant knowledge and experience' in relation to family violence.<sup>203</sup> It is also vital training and education is part of an ongoing professional development program.

**Recommendation 16: A comprehensive, mandatory professional development program should be introduced for all judicial officers presiding over sexual assault matters. The program should feature:**

- **victim-survivor voices and their lived experience of the criminal justice system**
- **the views and experiences of specialist support workers and advocates**
- **in depth guidance in relation to all legislative provisions designed to protect victims, specifically protections relating to giving evidence**
- **practical exploration of how to determine whether defence counsel questioning is improper or**

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<sup>201</sup> Gravitas Research and Strategy Limited (for the Minister of Justice), *Evaluation of the Sexual Violence Court Pilot* (2019) 14.

<sup>202</sup> See, for example, Judicial College of Victoria, Victims of Crime in the Courtroom <[www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom](http://www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom)>

<sup>203</sup> *Magistrates' Court Act 1989* (Vic) s41A.

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**inappropriate, and how to intervene when this occurs.**

## 12.2. Victims' treatment by prosecutors and defence counsel

As victims of sexual assault do not have their own legal representation, they are reliant on prosecutors enforcing legislative protections against unlawful or inappropriate questioning by defence counsel. However, evidence suggests not all prosecutors adopt interventionist approaches during the cross-examination of a victim of sexual assault.<sup>204</sup>

A recent sexual assault case in Victoria also suggests prosecutors are not immune to deferring to myths and misconceptions relating to sexual assault. Comments made in this case illustrate the broader cultural issues that must be addressed in the legal profession. In this case, the prosecutor stated:<sup>205</sup>

*She's [the alleged victim] exposed herself and made herself vulnerable, unwisely and of course, boys will always be boys. That's an ancient truth which she may well have forgotten. Boys will always be boys. And she's exposed herself to that...*

It is troubling that 'an experienced prosecutor'<sup>206</sup> has referred to a victim of alleged sexual assault as 'making herself vulnerable', being 'unwise' and 'expos[ing] herself to that', as well as appearing to further promulgate outdated notions of gendered sexual behaviour with the phrase 'boys will always be boys'. If prosecutors hold such beliefs to be true or are willing to tender them in support of a prosecution case, it does not engender confidence that a prosecutor would recognise inappropriate questioning by defence counsel—or object to that questioning to protect a victim of sexual assault during cross-examination.

As outlined above, research suggests victims are still regularly subjected to aggressive cross-examination tactics<sup>207</sup> and that rape myths continue to be relied upon by defence counsel.<sup>208</sup> Without active intervention by the prosecutor or judicial officer, victims are still being subjected to:

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<sup>204</sup> Loddon Campaspe Centre Against Sexual Assault, Submission No 30 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (20 October 2015) 8.

<sup>205</sup> *Hubbard v The Queen* [2020] VSCA 303.

<sup>206</sup> The Supreme Court of Appeal noted the experience of the prosecutor in their judgment.

<sup>207</sup> Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 6.

<sup>208</sup> Olivia Smith and Tina Skinner, 'How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials,' *Social & Legal Studies* (2017) Vol 26(4), 441-466. See, eg, Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43 (2) *UNSW Law Journal* 707, 716-717; Patrick Tidmarsh and Gemma Hamilton, Australian

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- lengthy cross-examinations involving repeated questions which the victim has already answered<sup>209</sup>
  - undue stress by lengthy periods of cross-examination which results in deliberate attempts and increased opportunity to discredit and marginalise victims' legitimate testimony<sup>210</sup>
  - cold and offensive treatment during evidentiary processes<sup>211</sup>
  - a constant barrage of accusations with little space to answer<sup>212</sup>
  - answer yes or no to, without the opportunity to provide context.<sup>213</sup>

Research by the Australian Institute of Family Studies has suggested an 'educational gap' for some defence practitioners in relation to sexual offence reforms and the necessary cultural change, specifically, with respect to vigorous cross-examination.<sup>214</sup>

## **12.3. Addressing problematic attitudes and practices in the legal profession**

### **12.3.1. Training and education**

The 2019 report, *Sexism and Gender Inequality in the Victorian Legal and Justice Sector* found evidence of 'attitudes that excuse, trivialise or condone violence against women.' Respondents to the survey remarked that members of the judiciary, barristers and lawyers sometimes downplayed family violence or colluded with perpetrators in court. Respondents also described victim-blaming

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Institute of Criminology, *Misconceptions of sexual crimes against adult victims: Barriers to Justice* (No. 611, November 2020); Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020), 9; Jane Goodman-Delahunty, et al 'What Australian Jurors Know and Do Not Know about Evidence of Child Sexual Abuse' (2017) 41 (2) *Criminal Law Journal* 86-103.

<sup>209</sup> Northern Centre Against Sexual Assault (NCASA), Submission No 34 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (28 October 2015) 1.

<sup>210</sup> Loddon Campaspe Centre Against Sexual Assault, Submission No 30 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (20 October 2015) 1.

<sup>211</sup> Ibid 2

<sup>212</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Research Report 27 (Australian Institute of Family Studies, 2014) 13.

<sup>213</sup> Loddon Campaspe Centre Against Sexual Assault, Submission No 30 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (20 October 2015) 5

<sup>214</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Research Report 27 (Australian Institute of Family Studies, 2014) 50.

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attitudes and hearing ‘jokes’ involving sexual assault.<sup>215</sup> This report highlights the continued need to focus on broader cultural change within the legal profession, including addressing gender equality and problematic views about violence against women.<sup>216</sup>

Just as these types of views held by members of our community can be directly linked to violence against women,<sup>217</sup> these types of views held by members of our legal sector directly impact the way in which victims of sexual assault experience their interactions with the justice system.

The VLRC’s 2016 report *Victims of Crime in the Criminal Trial Process* highlighted the ongoing concerns of victims of crime (and their support workers) in relation to problematic attitudes towards victims of crime in the courtroom.

While the VLRC’s report was not limited to victims of sexual assault, it highlighted the need to improve the attitudes and understanding of those within the criminal justice system to victimisation, trauma and the ways in which the justice system can cause additional harm to victims of crime. The VLRC noted that ‘almost all of the comments made to the Commission about the need for cultural change through education and training were directed at lawyers, judges and magistrates.’<sup>218</sup>

This is consistent with previous research relating solely to sexual assault, which emphasised the need for those involved in the criminal justice process, including prosecutors, defence practitioners and members of the judiciary to undertake further education in relation to:<sup>219</sup>

- the nature and extent of sexual assault in society
- problematic misconceptions regarding sexual assault

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<sup>215</sup> Women’s Legal Service Victoria, *Sexism and Gender Inequality in the Victorian Legal and Justice Sector (Phase One Discussion Paper, 2019)* 18.

<sup>216</sup> This will also be the focus of the current Review of Sexual Harassment in Victorian Courts which was initiated jointly by the Victorian Government, the Chief Justice of the Supreme Court of Victoria and Chair of the Courts Council, the Hon Anne Ferguson. See Review of Sexual Harassment in Victorian Courts, Context and scope (2020) <[www.shreview.courts.vic.gov.au/about-the-review/](http://www.shreview.courts.vic.gov.au/about-the-review/)>.

<sup>217</sup> Victorian Government, *Free from violence: Victoria’s strategy to prevent family violence and all forms of violence against women* (2017) iii.

<sup>218</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 49.

<sup>219</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Research Report 27 (Australian Institute of Family Studies, 2014) vii.

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- the contexts in which sexual assault occurs and the varying relationships between victims and offenders
  - the psychological and social effects of sexual assault on victims
  - the ongoing effects of sexual assault on victims, specifically as this relates to their ability to engage with the criminal justice process.

The VLRC has previously recognised the need for all legal professionals to undergo training to improve victims' experience of the criminal trial process: 'Training and education about victims should be directed towards everyone within the criminal justice system, in particular judicial officers, defence and prosecution lawyers.'<sup>220</sup>

The VLRC suggested legal professionals should undergo training and education in relation to:<sup>221</sup>

- understanding the origins of, and addressing, problematic attitudes towards victims of sexual assault and family violence
- evidence-related provisions designed to protect victims, to ensure such measures are enforced consistently
- how to test victims' evidence in an appropriate manner
- how to determine whether questioning is improper or inappropriate and how to intervene when this occurs.

Similarly, the Royal Commission into Institutional Child Sexual Abuse recommended that state and territory governments 'support and encourage the judiciary, public prosecutors, public defenders, legal aid and the private Bar to implement regular training and education programs for the judiciary and the legal profession in relation to understanding child sexual abuse and current social science research in relation to child sexual abuse'.<sup>222</sup>

The Royal Commission into Institutional Child Sexual Abuse recommended that the relevant state education bodies be 'adequately funded to provide leadership in making relevant information and training available in the most effective forms to the judiciary and, where relevant, the broader legal profession so that they

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<sup>220</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 48.

<sup>221</sup> Ibid 48-79.

<sup>222</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report Recommendations (2017) 111.

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understand and keep up to date with current social science research that is relevant to understanding child sexual abuse.'

There is a need for a continued focus on requiring legal professionals, including judicial officers, to undergo training to improve attitudes and understanding of victimisation, trauma and the ways in which the justice system can cause additional harm to victims of crime. Due to the various bodies and organisations across Victoria responsible for regulating and educating legal professionals and the judiciary, including universities, professional associations/bodies and statutory entities, this is a complex task. There may need to be a range of approaches to education and training focusing on different professionals.

To the maximum extent possible, collaborative work should be undertaken by responsible bodies, including the Law Institute of Victoria, Judicial College of Victoria, Victorian Bar, Criminal Bar Association, Victorian Legal Services Board and Commissioner, Victoria Legal Aid and the Director of Public Prosecutions, to improving victim-centric legal practice. Possible approaches to training and education may include:

- in-depth training programs on victim-related court craft for judges
- trauma-informed and victims' rights training for prosecutors and defence barristers (run collaboratively by professional bodies/organisations that contribute towards Continuing Professional Development (CPD) requirements)
- specialist accreditation in victim-related legal practice
- enhancing victim-related content in undergraduate and post-graduate legal degrees, including incorporating information into mandatory units such as criminal law procedure.

**Recommendation 17: That the VLRC determine how relevant legal bodies across Victoria can implement training and education for judicial officers, defence and prosecution lawyers in relation to:**

- **the rights and experiences of victims of crime during the criminal trial process**
- **addressing problematic attitudes towards specific kinds of crime, including family violence and sexual assault**

- ways in which victims' evidence can be tested in an appropriate manner in sexual assault cases while reducing the risk of secondary victimisation, in line with the objectives of the *Victims' Charter Act 2016 (Vic)*
- appropriate prosecutorial and judicial intervention to protect victims from inappropriate questions or questioning.

## 13. Evidence and procedure

### 13.1. Extending the intermediary program

Funding has recently been provided in the Victorian State Budget for the continuation of the Intermediaries Pilot Program (IPP). The IPP provides specialist communication assistance to victims and witnesses in sexual or homicide offences if they have a cognitive impairment or are under 18 years of age.<sup>223</sup>

An intermediary assists the court by facilitating communication in the court room and providing input during ground rules hearings.<sup>224</sup> The intermediary can advise on the appropriate formulation of questions for the witness and can intervene during questioning to ensure that cross-examination is trauma-informed and appropriate.<sup>225</sup>

It is now understood that the techniques used by counsel during cross-examination, such as putting propositions to the witness to force 'yes/no' answers and asking questions in an unpredictable sequence, 'prevent vulnerable witnesses

<sup>223</sup> Criminal Procedure Act 2009 (Vic), s389A. Natalia Antolak-Saper and Hannah MacPherson, 'Vulnerable Witnesses and Victoria's Intermediary Pilot Program' (2019) 43 *Criminal Law Journal* 325, 330.

<sup>224</sup> A ground rules hearing aims to ensure questions are appropriate and tailored to a victim's needs. See Judicial College of Victoria, *Ground Rules Hearings* (2019) <<https://www.judicialcollege.vic.edu.au/resources/working-child-and-vulnerable-witnesses-courtroom>> <<https://www.judicialcollege.vic.edu.au/resources/working-child-and-vulnerable-witnesses-courtroom>>

<sup>225</sup> The Judicial College of Victoria has provided best practice videos for Ground Rules Hearings with and without an intermediary. See Judicial College of Victoria, *Ground Rules Hearings* (2019) <<https://www.judicialcollege.vic.edu.au/resources/working-child-and-vulnerable-witnesses-courtroom>>

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from giving “full, accurate and coherent” evidence because questions are often too complex or confusing, and at times, counsel can be intimidating’.<sup>226</sup>

While it is now accepted that the questioning techniques used by counsel during cross-examination affect young victim-survivors and victim-survivors with disability from giving ‘full, accurate and coherent’ evidence, this same proposition could be extended to a broader cohort of victim-survivors in sexual assault cases. Trauma can affect cognition, resulting in alternations to cognitive processes such as memory, attention, planning and problem-solving.<sup>227</sup> For this reason, any victim-survivor of sexual assault who is likely to experience distress, confusion and secondary trauma while being cross-examined should have access to the safety and structure of the intermediary program.

One of the benefits of the intermediary program is the culture shift it engenders within the legal professional. It requires legal counsel to become more skilled at simplifying their questions and adapting their practices to the needs of the witness through the use of ground rules hearings.<sup>228</sup>

Academics contend that there are no fair trial issues with the use of intermediaries: ‘The role of the intermediary is not to convince a jury either way as to the credibility of the witness, but merely to ensure that they are questioned in a forensically safe way so as to preserve the accuracy and reliability of their evidence.’<sup>229</sup>

The extension of the pilot program in Victoria suggests intermediaries have not undermined the adversarial process. Accordingly, there should be no barriers to extending its use to any victim-survivor of sexual assault who is likely to experience distress, confusion and secondary trauma while being cross-examined.

Consistent with the VLRC’s previous recommendation in its final report *Committals*, the *Criminal Procedure Act 2009* (Vic) should be amended to allow for an intermediary to be appointed following an application by a party or on the court’s own motion.<sup>230</sup> This should include victim-survivors in sexual assault matters where a trauma-response might impact on a victim-survivor’s ability to

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<sup>226</sup> Natalia Antolak-Saper and Hannah MacPherson, ‘Vulnerable Witnesses and Victoria’s Intermediary Pilot Program’ (2019) 43 *Criminal Law Journal* 325, 326.

<sup>227</sup> Jasmeet P. Hayes, Michael B. VanElzakker and Lisa M Shin, ‘Emotion and Cognitive Interactions in PTSD: a review of neurocognitive and neuroimaging studies’ (2012) 6 *Frontiers in Integrative Neuroscience* 1, 1.

<sup>228</sup> Natalia Antolak-Saper and Hannah MacPherson, ‘Vulnerable Witnesses and Victoria’s Intermediary Pilot Program’ (2019) 43 *Criminal Law Journal* 325, 335.

<sup>229</sup> Ibid 336.

<sup>230</sup> Victorian Law Reform Commission, *Committals* (Report, March 2020) xxi.

provide evidence. The criteria of ‘protected victim’, as discussed further below, might provide appropriate guidance and criteria.

**Recommendation 18: The intermediary program should be extended to any victim-survivor of sexual assault who is likely to experience distress, confusion and secondary trauma while being cross-examined.**

## 13.2. Special protections and alternative arrangements for victim-witnesses

### 13.2.1. Special protections for giving evidence

Special protections<sup>231</sup> for certain victim-witnesses include:

- using audio-visual recordings (VARE) of the victim’s statement to police as evidence-in-chief
- cross-examining the victim at a special hearing
- prohibiting the victim’s cross-examination at a committal hearing for child victims and victims with a cognitive impairment in sexual offence cases.<sup>232</sup>

Research has previously suggested special protections could be made available for all victims of sexual offences.<sup>233</sup> The VLRC in its 2016 report, *Victims of Crime in the Criminal Trial Process*, did not recommend that all victim-witnesses in sexual assault cases be automatically eligible for special protections. However, the VLRC did determine that victims’ eligibility for special protections should be triggered by a finding that a person is a ‘protected victim’—that is, a person who is likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.<sup>234</sup>

In making this recommendation, the VLRC noted it would have significant practice implications for police, prosecutions and the courts. Legislating for special protections for a broader cohort of victims would require police to implement audio-visual recording (VARE) in more cases. It would require more special hearings for cross-examination and would prohibit a larger number of victims

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<sup>231</sup> ‘Special protections’ was the term the VLRC used in its 2016 report, Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016).

<sup>232</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 197.

<sup>233</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Research Report 27 (Australian Institute of Family Studies, 2014) 63.

<sup>234</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 203.

from being cross-examined at committal hearings. The VLRC also noted that prosecutors would need to have an expanded role in assessing whether a victim may be eligible for special protections and applying to the court for these protections to be put in place.

Consistent with the VLRC's previous recommendation, victims' eligibility for special protections should be triggered by a finding that a person is a 'protected victim'—that is, a person who is likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.<sup>235</sup> Should the recommendation above relating to extending the availability of the intermediary program be adopted, consideration would need to be given to circumstances where special protections might be sufficient, versus where the use of an intermediary is required.

This is an area where independent legal representation for victims of sexual assault could be of particular benefit. Should an independent legal representative be available early in the process, a victim's entitlement to special protections and the intermediary program could be established early.

**Recommendation 19: A victim's eligibility for special protections should be triggered by a finding that a person is a 'protected victim'. The law should provide for the use of an intermediary and/or special protections as necessary to protect sexual assault victims from trauma and distress while giving evidence.**

### 13.2.2. Alternative arrangements for giving evidence

The legislative provisions regarding alternative arrangements for victims of sexual assault are comprehensive. They require the court to direct that alternative arrangements, such as the use of remote witness facilities and the use of screens to remove the accused from the direct line of vision of the complainant, be made available in sexual offence matters unless the victim does not wish for these arrangements to be used.<sup>236</sup>

Nonetheless, the Victims of Crime Commissioner's office has been told of cases where victims' rights to alternative arrangements may not have been upheld. The VLRC, in its 2016 report, *Victims of Crime in the Criminal Trial Process* confirmed it

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<sup>235</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 203. This could be following an application by a party or on the court's own motion.

<sup>236</sup> *Criminal Procedure Act 2009* (Vic) s359 – 365.

was not able to access data on how consistently alternative arrangements were put in place for victims.<sup>237</sup>

In addition, despite the positive effects of access to alternative arrangements for many victims, research has suggested that alternative arrangements may unfairly exclude victims from the criminal trial process. There have been suggestions that the accused should be removed from the court for a victim-survivor's testimony, with audio-visual technology facilitating the accused's viewing of evidence.<sup>238</sup> This idea was raised again in the 2020 book, *Witness: An investigation into the brutal costs of seeking justice*, by investigative journalist Louise Milligan.<sup>239</sup>

In light of the data limitations and lack of evaluation in relation to alternative arrangements, there should be a comprehensive evaluation of the law and procedure relating to alternative arrangements for giving evidence.

**Recommendation 20: There should be a comprehensive evaluation of the law and procedure relating to alternative arrangements for giving evidence including:**

- **the frequency/rate of their use and how victims' views are sought during the process**
- **whether alternative arrangements are achieving their purpose in protecting witnesses from trauma and distress, including victim/witness consultation on their experiences of using alternative arrangements**
- **whether it would be appropriate, having regard to an accused's right to a fair trial, to remove the accused from the court, with audio-visual technology facilitating the accused's viewing of the complainant's evidence**
- **whether there are other alternative arrangements that could be introduced to minimise trauma to victim witnesses while giving evidence.**

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<sup>237</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 80.

<sup>238</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Research Report 27 (Australian Institute of Family Studies, 2014) 50.

<sup>239</sup> Louise Milligan, *Witness* (Hachette Australia, 2020) 362.

### 13.3. Protection from cross-examination on sexual history

Under the *Criminal Procedure Act 2009* (Vic), the complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or non-consensual) of the complainant (other than those to which the charge relates), without the leave of the court.<sup>240</sup>

The VLRC previously suggested that applications to cross-examine victims on sexual activities ‘are rarely made, and cross-examination in relation to sexual activities occurs infrequently’.<sup>241</sup> Notwithstanding this, as advocated by the former Victims of Crime Commissioner, Mr Greg Davies in his submission to the VLRC’s *Victims of Crime in the Criminal Trial Process*, victims should have the opportunity to be heard in relation to applications to lead evidence about their sexual history. This right should be provided for through legislative change to the *Criminal Procedure Act 2009* (Vic) and the independent legal representation scheme proposed above should assist victims to uphold this right.

**Recommendation 21: Victims should be provided with the opportunity to be heard in relation to applications to lead evidence about their sexual history and have independent legal representation to do so.**

### 13.4. Protection of confidential medical or counselling records

In sexual offence cases, victims can seek leave to appear and make submissions in response to applications to access confidential medical or counselling records. As outlined above, research suggests that not all victims in sexual assault cases are being advised of their right to seek leave to appear in court in response to an application to subpoena, access or use confidential medical or counselling records.<sup>242</sup> Few victims engage their own lawyers to participate in these applications.<sup>243</sup>

Victims should have the right to a dedicated and specialist legal representative to represent their rights and interests at key stages of the criminal justice process, including in relation to applications to subpoena, access or use confidential medical or counselling records.

In 2016, the VLRC also recommended giving victims the right to be heard automatically in relation to applications to access confidential medical or

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<sup>240</sup> *Criminal Procedure Act 2009* (Vic) s.342.

<sup>241</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 98.

<sup>242</sup> Ibid 109.

<sup>243</sup> Ibid 143.

counselling records, and to give evidence about the harm in affidavit form.<sup>244</sup> The VLRC also recommended that the court should be satisfied that the victim was made aware of their right to be heard.<sup>245</sup>

**Recommendation 22: Consistent with VLRC recommendation 25 in the report *Victims of Crime in the Criminal Trial Process, Division 2A of Part 2 of the Evidence (Miscellaneous Provisions) Act 1958 (Vic)* should be amended to:**

- **require the prosecution to notify the victim of their right to appear and the availability of legal assistance in relation to an application to subpoena, access and use their confidential communications**
- **require the court to be satisfied that the victim is aware of the application and has had an opportunity to obtain legal advice**
- **prohibit the court from waiving the notice requirements except where the victim cannot be located after reasonable attempts or the victim has provided informed consent to the waiver**
- **provide victims with standing to appear**
- **permit victims to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted.**

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<sup>244</sup> Currently the legislation only enables 'the protected confider' to appear and make submissions only with the leave of the court: *Evidence (Miscellaneous Provisions) Act 1958 (Vic)* s32(c)(2)(5).

<sup>245</sup> Recommendation 25: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 147.

## 14. Other aspects of the criminal law

Due to the high-level nature of some issues explored in the VLRC's Issues Papers, the VLRC should consider whether further consultation is required with key stakeholders in relation to any proposed reforms to some of the more substantive areas of law. As also noted at 2.1, some areas of the law may merit their own stand-alone inquiry or review, as has occurred in the area of the laws of consent in New South Wales and Queensland.

Some high-level observations and comments are provided below.

### 14.1. Jury trials

Juries are intended to represent a broad cross-section of the community, bringing 'the values, standards and expectations of our community into the courtroom.'<sup>246</sup> They are a central feature of Victoria's justice system.<sup>247</sup> However, the prevalence of stereotypes and myths surrounding sexual assault mean that some members of the community may hold views in relation to sexual assault that may be out of step with current standards relating to sexual assault. This has led to suggestions that jury trials should be replaced with judge-alone trials.

For example, academic Wendy Larcombe contends that judge-alone trials would 'ensure decision-making [is] based on legally relevant factors and evidence', suggesting the following advantages:<sup>248</sup>

- transparency of published (written) reasons for decisions
- reduction in complexity of trials by eliminating jury directions
- enabling prosecution and defence counsel to focus on testing evidence, rather than on jury persuasion.

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<sup>246</sup> Juries Victoria, *What is jury service?* (2020) Juries Victoria <[www.juriesvictoria.vic.gov.au](http://www.juriesvictoria.vic.gov.au)>

<sup>247</sup> Victorian Law Reform Commission, *Inclusive Juries – Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, 2020) 4.

<sup>248</sup> Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Rony Levy et al (ed), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017), 149.

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As with other members of the community, judges are not immune to applying outdated attitudes and assumptions in sexual assault cases,<sup>249</sup> as demonstrated by recent analysis of judge-alone decision making in a recent high profile New South Wales case.<sup>250</sup>

*Judge Tupman's reasons for decision disclosed that the judge relied upon erroneous but common sexual assault myths that genuine victims of sexual assault will say 'stop' or 'no' and will attempt to escape or fight back.*

Recent Victorian cases have demonstrated that juries have the capacity to place appropriate weight on a complainant's evidence and reject outdated myths and misconceptions in relation to sexual assault. In fact, there have been recent sexual assault cases where juries have found an accused guilty of sexual assault, but this has been overturned on appeal by judge-alone appeals.

There is no evidence to suggest judge-only trials in Victoria would necessarily result in lower acquittal rates in sexual assault cases. In New South Wales, the average acquittal rate for judge only trials in sexual assault cases over the past five years was slightly higher than jury trials (55.1 per cent versus 51.1 per cent).<sup>251</sup>

As the decisions in *Pell v The Queen*,<sup>252</sup> (Victorian Supreme Court of Appeal) and *Pell v The Queen*,<sup>253</sup> (High Court of Australia) illustrate, individual judges can have different views of the same evidence in sexual assault cases.

Given juries are a central feature of Victoria's justice system, there should be compelling evidence for departing from this approach in sexual assault cases specifically. Without comprehensive analysis of a sample of Victorian cases indicating significant concerns about juror decision making, it is not possible to definitively determine that judge-alone trials would lower the attrition rate in sexual offence cases in Victoria.

At the same time, any reforms that can improve jury education and comprehension, such as provision of guidance or reference materials before and

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<sup>249</sup> Wendy Larcombe et al, 'I think it's Rape and I think He Would be Found Not Guilty: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25 (5) Social and Legal Studies 611, 615.

<sup>250</sup> Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43 (2) *UNSW Law Journal* 707, 708 – 710.

<sup>251</sup> Based on data from June 2015 - June 2020: Email from NSW Bureau of Crime and Statistics Research to Victims of Crime Commissioner's Office, 23 December 2020.

<sup>252</sup> [2019] VSCA 186.

<sup>253</sup> *Pell v The Queen* [2020] HCA 12.

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during the trial should be explored. As suggested in *Issues Paper B*, this might take the form of video briefings for jurors on various aspects of sexual harm.

## **14.2. Jury directions**

Significant reforms have been implemented in Victoria to streamline and simplify jury directions. Research suggests this has led to a reduction in successful appeals based on errors in directions and a much shorter summing up time.<sup>254</sup> At the same time, other research suggests reforms to jury directions may only have made modest improvements.<sup>255</sup>

It is important to have a comprehensive understanding of the current application of jury directions in sexual assault cases, specifically in relation to timing and language of directions. Academic research has confirmed that jury directions delivered at the conclusion of a trial ‘come too late to disrupt rape myths’<sup>256</sup> and that the intent of jury directions to disrupt such myths are ‘better met if the directions are implemented in early judicial decision-making.’<sup>257</sup> It is not clear, without further case analysis, whether recent jury direction reforms are working to disrupt rape myths.

Further analysis is required in relation to the implementation of recent jury direction reforms in Victoria. The VLRC should consider whether further consultation is required with key stakeholders following consideration of submissions from key stakeholders.

## **14.3. Elements of sexual offences—consent**

The way in which the law relating to consent operates is fundamental to the ‘success’ (or not) of the justice system’s response to sexual assault. As noted by Wendy Larcombe et al, ‘competing and evolving conceptualizations of sexual consent are likely to remain central to disputed accounts of sexual assault’.<sup>258</sup>

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<sup>254</sup> Chris Maxwell and Greg Byrne, ‘Making trials work for juries: pathways to simplification’ (2020) 11 *Criminal Law Review* 1034, 1047.

<sup>255</sup> Jonathan Clough et al, ‘The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension’ (2018) 42 *Criminal Law Journal* 278, 297.

<sup>256</sup> Emma Henderson and Kirsty Duncanson, ‘A little judicial direction: can the use of jury directions challenge traditional consent narratives in rape trials’ (2016) 39 (2) *UNSW Law Journal* 750–778, 750.

<sup>257</sup> Ibid 751.

<sup>258</sup> Wendy Larcombe et al, ‘I think it’s Rape and I think He Would be Found Not Guilty: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law’ (2016) 25 (5) *Social and Legal Studies* 611, 622.

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Recent reforms have focused on legislating ‘communicative’ consent and integrating objective fault elements in sexual assault—that is, requiring a person to ‘reasonably’ believe the other person was consenting.

In Victoria, this objective fault standard is represented by the last element of the law relating to rape:

- A person (A) intentionally sexually penetrates another person (B)
- B does not consent to the penetration, and
- **A does not reasonably believe that B consents to the penetration.**

When Victoria introduced this new definition of rape in 2015, it was said to facilitate a ‘communicative model of consent’.<sup>259</sup> Communicative models of consent were intended to ‘shift attention away from the victim and onto the perpetrator’.<sup>260</sup> However, the law in Victoria does not require a person to take specific steps to ensure the other person is consenting.<sup>261</sup> Academics Rachael Burgin and Asher Flynn explain it as follows:<sup>262</sup>

*...there is no requirement that reasonable belief is based on any steps the perpetrator took to ensure the victim consented, undermining the goal of shifting focus toward the perpetrator’s actions in committing the offense. Accordingly, this definition does not provide protection to victims, nor does it place responsibility on perpetrators to prove they took steps to ensure the other party consented to sex, as would be expected of a truly affirmative standard.*

Burgin and Flynn conclude that Victorian rape law is not achieving an affirmative consent standard because it does not mandate a person seeking sexual activity to ‘take steps’ to ascertain consent.<sup>263</sup>

Similar issues have been raised by Wendy Larcombe et al’s research, which has examined the views of professionals working in the sexual assault sector in relation to reasonable belief in consent. Participants in Larcombe et al’s study suggested

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<sup>259</sup> Department of Justice and Regulation (Criminal Law Review), Victoria’s New Sexual Offence Laws: An Introduction (2015) 12.

<sup>260</sup> Rachael Burgin and Asher Flynn, ‘Women’s Behaviour as Implied Consent: Male “Reasonableness” in Victorian Rape Law’ (2019) 00 (0) Criminology and Criminal Justice 1, 17.

<sup>261</sup> Although, any steps that an accused took to find out whether the other person consented to the act will be relevant to considerations of whether there was a reasonable belief on the part of the accused that the victim was consenting. See Crimes Act 1958 (Vic) s36A(2).

<sup>262</sup> Rachael Burgin and Asher Flynn, ‘Women’s Behaviour as Implied Consent: Male “Reasonableness” in Victorian Rape Law’ (2019) 00 (0) Criminology and Criminal Justice 1, 4.

<sup>263</sup> Ibid 3.

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Victoria's articulation of rape 'all hinges on what the perpetrator believes' and 'defines rape according to the perpetrator rather than the victim'.

In Larcombe et al's study, the definition of rape:<sup>264</sup>

*was perceived in almost all of the research's focus groups as placing the onus on the alleged victim to communicate refusal of consent. As one participant stated: 'the way that it's going to play out is that the victim again is going to be asked to prove that she or he was very clear in stating that they didn't want sexual intercourse'.*

Participants in Larcombe et al's study 'complained that no actions were legally required of A to find out at the time whether B was consenting and later, if accused of rape, there was no requirement for A to explain why he/she might have reasonably believed in consent'.<sup>265</sup>

Consent is a complex area of law. In New South Wales and Queensland, the law relating to consent was the subject of stand-alone reviews by their respective law reform commissions. The VLRC's *Issues Paper C* sets out the law in relation to consent in Victoria and seeks feedback on the strengths and weaknesses of the communicative consent model however, without in depth analysis of the current interpretation of this aspect of the law, it is difficult to ascertain the true extent of the problem in Victoria. It is possible that the 2015 reforms, as Burgin and Flynn contend, have not resulted in the establishment of an affirmative consent standard because the law does not mandate a person seeking sex to 'take steps' to ascertain consent.

If this is the case, consideration could be given to alternative formulations of rape. For example, Larcombe et al suggest 'alternative formulations of rape that focus on the perpetrator's actions, rather than his/her belief in consent and the grounds for such a belief' suggesting these formulations 'may set clearer standards for sexual conduct'.<sup>266</sup> As part of their review of the law of consent, the NSW Law Reform Commission considered whether the law could clarify that the accused's belief in consent would not be considered reasonable if they did not take steps to determine consent.<sup>267</sup> Some submissions to that review asserted that such an approach would require the accused to point to the actions they took to

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<sup>264</sup> Wendy Larcombe et al, 'I think it's Rape and I think He Would be Found Not Guilty: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25 (5) Social and Legal Studies 611, 618.

<sup>265</sup> Wendy Larcombe et al, 'I think it's Rape and I think He Would be Found Not Guilty: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25 (5) Social and Legal Studies 611, 623.

<sup>266</sup> Ibid.

<sup>267</sup> New South Wales Law Reform Commission, *Consent in relation to sexual offences* (Consultation Paper, 2018) 81.

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determine whether the other party was consenting, thereby diverting the focus from the complainant's actions to the accused.<sup>268</sup>

Without comprehensive case analysis, particularly in relation to cases concerning events after 2015,<sup>269</sup> it is difficult to assess whether the law in relation to consent requires amendment. Accordingly, the VLRC should consider, in formulating their options and recommendations in this area, whether further consultation is required with key stakeholders following consideration of submissions relating to this matter.

#### **14.4. Tendency and coincidence evidence**

The Royal Commission into Institutional Child Sexual Abuse made several recommendations relating to the admissibility of tendency and coincidence evidence. The Victorian Government has noted that 'Tendency and coincidence evidence can link different complainants, allowing their cases to be heard together and bolstering their credibility. Permitting the use of this evidence in more cases is expected to increase the number of successful prosecutions for child sexual offending.'<sup>270</sup>

The Council of Attorneys-General agreed in 2019 to implement a Model Bill to reform the Uniform Evidence Law in relation to tendency and coincidence evidence in criminal proceedings. The Model Bill was developed through consultation with judicial, legal and other stakeholders across jurisdictions.

The Model Bill aims to increase the admissibility of tendency evidence in child sexual offence prosecutions by introducing:<sup>271</sup>

- a rebuttable presumption that tendency evidence of an accused person's sexual interest in children has significant probative value, and
- guidance on considering that presumption.

The Victorian Government should proceed with its intentions to implement the Model Bill in 2021.

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<sup>268</sup> Ibid 82.

<sup>269</sup> Reforms commenced in 2015. Any cases concerning events prior to 2015 must be determined in line with the laws in force at that time.

<sup>270</sup> Victorian Government *Criminal Justice Report (2017)* (2019) <<https://www.vic.gov.au/victorian-government-annual-report-2018-royal-commission-institutional-responses-child-sexual-abuse/criminal-justice-report-2017>>

<sup>271</sup> Ibid.

## **14.5. Committals**

I reiterate the comments made in my previous submission to the VLRC in relation to committals. In summary that:

- case management processes would provide for a more trauma-informed response to victims
- Victoria should abolish the test for committal
- there be a presumption against victims and witnesses having to give evidence twice during a criminal proceeding
- there be a prohibition on cross-examination of complainants in sexual or family violence offences at committal.

As stated in my previous submission to the VLRC in relation to committals, many of the procedural reforms introduced in Victoria and other jurisdictions in recent decades have been aimed at reducing secondary victimisation however, numerous elements of the current committals process risk secondary victimisation and trauma for the victims (and witnesses) required to participate in them, particularly victims of sexual assault.

## **14.6. Appeals**

VLRC *Issues Paper E* outlines the appeal process in Victoria. It suggests that there may be evidence that reforms to jury directions have led to fewer appeals based on errors in directions.<sup>272</sup> The *Issues Paper* does not outline the frequency of, and reasons for, appeals in sexual assault cases.

Further analysis is required to comprehensively assess the frequency of, and reasons for, appeals in sexual assault cases. This is particularly important given the complexity of some elements of sexual assault offences, including the construction of ‘reasonable belief’ in consent as it pertains to matters of consent, as outlined above.

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<sup>272</sup> Victorian Law Reform Commission, *Issues Paper E: Sexual Offences: The Trial Process* (2020) 9.

## **Appendix A: Summary of recommendations**

**Recommendation 1:** That the Victorian Government develop a Victorian strategy to prevent and respond to sexual assault which:

- outlines the government's key prevention and response priority areas, including implementation of recommendations arising from the VLRC's review
- identifies the data, research and evaluation gaps in relation to sexual assault, and implements strategies to address them to ensure progress can be measured over time
- provides a structure and framework for key initiatives to be monitored and evaluated through a model of across-system governance
- articulates what 'success' would look like in Victoria's response to sexual assault to guide a continued focus over time.

**Recommendation 2:** That sexual assault laws, policies and practice be reviewed by the VLRC according to the extent to which it is trauma-informed, including whether it:

- realises the impact of trauma and recognises the signs of trauma
- actively seeks to reduce re-traumatization
- emphasises physical, psychological, and emotional safety for victims
- provides victims with voice and choice, including different ways to engage to minimise harm
- creates opportunities for victims to rebuild a sense of control and empowerment
- recognises that trauma may impact victims' engagement with the process
- is responsive to victims' diversity

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- promotes trust and transparency in process and decision making.

**Recommendation 3:** To ensure all victims of crime, including victims of sexual assault, have access to a strengthened victim support and financial assistance scheme, the Victorian Government should establish and fund:

- the enhanced victim support service model outlined in Strengthening Victoria's Victim Support System: Victim Services Review
- the full rollout of a new Financial Assistance Scheme, incorporating all recommendations of the VLRC's review to enhance access and equity for victims of crime.

All current, and future victims' services, including the new Financial Assistance Scheme, should be prescribed agencies under the Victims of Crime Commissioner Regulations 2020, to enable appropriate oversight and compliance with Victims' Charter obligations.

**Recommendation 4:** Alternative reporting options should be available for victims of sexual assault. These alternative reporting pathways should:

- be victim-friendly and well publicised
- accommodate victim diversity, including diversity in language, culture, gender and sexual identity
- allow victims to elect how much information they provide and whether they consent to further contact by an appropriately trained and skilled support worker.

**Recommendation 5:** Alternative ways of collecting evidence and interviewing victims should be explored, including:

- providing victims with the opportunity to complete a 'self-administered interview' (SAI) or participate in a 'written-response interview protocol' (WRIP)
- integrating anonymous and confidential reporting options with SAI/WRIP techniques to save victims from having to repeat their story
- how alternative ways of collecting evidence can accommodate victim diversity, including diversity in language and culture.

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**Recommendation 6:** The Victorian government should commence a comprehensive consultation process with victim-survivors to seek a range of views on establishing a pilot program providing alternative justice options in sexual assault matters.

**Recommendation 7:** The Victorian government should undertake a comprehensive review of existing restorative justice programs in Victoria to:

- ensure best practice in restorative justice is shared across the justice and service system
- ensure victims' voices and experiences of restorative justice are at the centre of learnings and evaluations of existing programs
- ensure programs respond to victim diversity, including diversity in language, culture, gender and sexual identity.
- explore whether these programs should continue to exist as stand-alone programs, or whether a more consolidated, centralised and streamlined approach should be developed providing victims with a central contact point and a clearer sense of pathways to various programs.

**Recommendation 8:** Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) should be amended to recognise the rights of victims in the criminal trial process as articulated in the Victims' Charter.

**Recommendation 9:** Section 9B(2)(b) of the Victims' Charter should be removed so that a victim's right to be consulted under the Victims' Charter at key stages of the prosecution process is an unrestricted entitlement and must be accommodated by the criminal trial process.

**Recommendation 10:** The Victorian Government should introduce a Victims' Right to Review scheme underpinned by new rights contained in the Victims' Charter Act enabling independent review of police and prosecution decisions after internal review options are exhausted.

**Recommendation 11:** The Victorian Government should establish a publicly funded victims' legal advice service that:

- provides tailored legal information and advice delivered by specialist legal professionals using a trauma-informed and culturally safe approach

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- is well publicised and immediately ‘visible’ to members of the community as the pathway to specialist victims’ advice
  - has accessible entry-points across Victoria, including regional areas.

**Recommendation 12:** Victims of sexual assault should have the right to an independent legal representative to represent their rights and interests at key stages of the criminal justice process including in relation to:

- applications to subpoena, access or use confidential medical or counselling records
- applications to be cross-examined on, or admit evidence about, the sexual activities of the complainant
- access and eligibility for the intermediary scheme, special protections and alternative arrangements for giving evidence.

Consideration should also be given to whether it would be appropriate for victims to have independent legal representation during cross-examination, as occurs in Denmark, to uphold protections under the *Evidence Act 2008 (Vic)* in relation to inappropriate questions or questioning.

**Recommendation 13:** The Multidisciplinary Centres (MDC) model should be expanded to additional areas across Victoria to ensure a consistent approach for all victims of sexual assault across the state.

**Recommendation 14:** The Victorian Government should establish and fund a dedicated sexual assault liaison service to provide victims of sexual assault a single point of contact during the criminal justice process and their recovery journey.

**Recommendation 15:** The Victorian Government should introduce specialised court responses for sexual offences to provide for:

- specially trained and dedicated court staff
- mandatory judicial education for judicial officers presiding over sexual assault cases
- victim-centric court environments, including safe entries and exits and safe waiting areas.

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**Recommendation 16:** A comprehensive, mandatory professional development program should be introduced for all judicial officers presiding over sexual assault matters. The program should feature:

- victim-survivor voices and their lived experience of the criminal justice system
- the views and experiences of specialist support workers and advocates
- in depth guidance in relation to all legislative provisions designed to protect victims, specifically protections relating to giving evidence
- practical exploration of how to determine whether defence counsel questioning is improper or inappropriate, and how to intervene when this occurs.

**Recommendation 17:** That the VLRC determine how relevant legal bodies across Victoria can implement training and education for judicial officers, defence and prosecution lawyers in relation to:

- the rights and experiences of victims of crime during the criminal trial process
- addressing problematic attitudes towards specific kinds of crime, including family violence and sexual assault
- ways in which victims' evidence can be tested in an appropriate manner in sexual assault cases while reducing the risk of secondary victimisation, in line with the objectives of the *Victims' Charter Act 2016 (Vic)*
- appropriate prosecutorial and judicial intervention to protect victims from inappropriate questions or questioning.

**Recommendation 18:** The intermediary program should be extended to any victim-survivor of sexual assault who is likely to experience distress, confusion and secondary trauma while being cross-examined.

**Recommendation 19:** A victim's eligibility for special protections should be triggered by a finding that a person is a 'protected victim'. The law should provide for the use of an intermediary and/or special protections as necessary to protect sexual assault victims from trauma and distress while giving evidence.

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**Recommendation 20:** There should be a comprehensive evaluation of the law and procedure relating to alternative arrangements for giving evidence including:

- the frequency/rate of their use and how victims' views are sought during the process
- whether alternative arrangements are achieving their purpose in protecting witnesses from trauma and distress, including victim/witness consultation on their experiences of using alternative arrangements
- whether it would be appropriate, having regard to an accused's right to a fair trial, to remove the accused from the court, with audio-visual technology facilitating the accused's viewing of the complainant's evidence
- whether there are other alternative arrangements that could be introduced to minimise trauma to victim witnesses while giving evidence.

**Recommendation 21:** Victims should be provided with the opportunity to be heard in relation to applications to lead evidence about their sexual history and have independent legal representation to do so.

**Recommendation 22:** Consistent with VLRC recommendation 25 in the report *Victims of Crime in the Criminal Trial Process*, Division 2A of Part 2 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should be amended to:

- require the prosecution to notify the victim of their right to appear and the availability of legal assistance in relation to an application to subpoena, access and use their confidential communications
- require the court to be satisfied that the victim is aware of the application and has had an opportunity to obtain legal advice
- prohibit the court from waiving the notice requirements except where the victim cannot be located after reasonable attempts or the victim has provided informed consent to the waiver
- provide victims with standing to appear
- permit victims to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted.



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