Submission to the Victorian Law Reform Commission

Examination into Improving the Response of the justice system to Sexual Offences

A. INTRODUCTION

1. The Criminal Bar Association ("CBA") welcomes the invitation from the Victorian Law Reform Commission ("the Commission") to provide submissions on the Commission's Issues Papers on this topic. Our written submission is intended to assist the Commission with its review and recommendations.

2. The CBA is the peak body for Victorian barristers practising in criminal law. We represent criminal barristers who prosecute and defend criminal prosecutions and those who have a mixed practice. Our members comprise almost one quarter of all Victorian barristers. We are involved in the continuing legal education scheme of the Victorian Bar, prepare and contribute to submissions on law and policy reform, issue press releases and meet regularly with the judiciary, government and others involved in criminal justice.

3. Members of the CBA appear in criminal cases of all types, in Victoria and across all States and Territories of the Commonwealth. Such appearances involve all facets of criminal law, both State and Federal, indictable and summary. Our members are very familiar with how the justice system deals with sexual offences.

B. CONSULTATION PROCESS

4. The CBA was one body the Commission sought to consult with, concerning its examination into improving the response of the justice system to sexual offences.

5. The Commission has published eight short issues papers which deal with its examination of this topic.

6. During the consultation process the Commission sought to speak with the CBA specifically concerning:

   a. Issues Paper B – Key Issues in the Criminal Justice System; and
   b. Issues Paper E – The Trial Process.

7. Prior to the consultation between the Commission and the CBA, the Commission indicated that the particular areas where they sought input from the CBA included:

   a. Current court room practice in sexual offences;
   b. Opportunities for greater specialisation in sexual offences;
   c. The role of jury and jury directions in sexual offence trials;
   d. The causes of delay; and
   e. Opportunities to improve the law and procedure (eg sexual offences, evidence rules, special procedures).

8. On 2 December 2020, the CBA consulted with the Commission. The CBA welcomed and appreciated the chance to be involved in this process.

9. Following from that consultation, the CBA will focus on making submissions in the areas referred to above.

10. We will additionally make some brief comments on Issues Paper C – Defining Sexual Offences, as this in another area where our members have substantial experience.

C. ISSUES PAPER B - KEY ISSUES IN THE CRIMINAL JUSTICE SYSTEM

11. A list of specific questions raised by the Commission concerning Issues Paper B have been published. The CBA will address each of these questions individually.

i) Is there a need to improve attitudes towards victim survivors or the understanding of sexual harm within the criminal justice system? If so, how?

12. There is always a need to continue improving attitudes towards victim survivors and enhancing the understanding of sexual harm caused by sexual offending.

13. While recognising the need to keep improving such attitudes and knowledge, the CBA believes significant inroads have been made in these areas over the last 20 years, driven by significant and continual reforms to the area of sexual offences in Victoria.

14. The CBA adopts paragraph 3 of Issues Paper B which states:

> There have been many reforms to improve the response of the criminal justice system to sexual harm. These have tried to address key issues such as:
>
> - improving the understanding of sexual harm and attitudes to people who have been harmed;
> - reducing delay;
> - improving support for people who have experienced sexual harm.

15. One suggestion the Commission is considering is 'providing more information to jurors (for example, video briefings for jurors on the context and patterns of sexual harm).' If this was done, without any other information, it may unbalance the adversarial nature of a jury trial to determine whether sexual offences have occurred. If such a video as outlined above was shown to jurors, there may be a need for a corresponding video warning jurors that not all complainants tell the truth. Whatever reforms are introduced, they must be balanced.

16. It should be noted that the jury already may receive significant directions on consent pursuant to s 46 of the *Jury Directions Act 2015* (Vic) ('*JDA*').[1] That includes informing the jury:

> (a) that a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act;

[1] These directions are also relevant to judge-alone trials (*Criminal Procedure Act 2009* (Vic), s 420ZF) and summary hearings (J*ury Directions Act 2015* (Vic), s 4A).

(b) that where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place;
(c) that experience shows that—

(i) there are many different circumstances in which people do not consent to a sexual act; and
(ii) people who do not consent to a sexual act may not be physically injured or subjected to violence, or threatened with physical injury or violence;

(d) that experience shows that—

(i) people may react differently to a sexual act to which they did not consent and that there is no typical, proper or normal response; and
(ii) people who do not consent to a sexual act may not protest or physically resist the act;

(e) that experience shows that people who do not consent to a sexual act with a particular person on one occasion, may have on one or more other occasions engaged in or been involved in consensual sexual activity—

(i) with that person or another person; or
(ii) of the same kind or a different kind.

17. Further, the jury may be directed in accordance with s 36 of the *Crimes Act 1958* (Vic) whereby 'consent means free agreement', and that the circumstances in which a person does not consent include:

(a) the person submits to the act because of force or the fear of force, whether to that person or someone else;
(b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;
(c) the person submits to the act because the person is unlawfully detained;
(d) the person is asleep or unconscious;

(e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act; and

(f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

18. These directions are comprehensive any may be given at the request of the prosecution.[2] That includes, pursuant to s 46(4)(b) of the *JDA*, that if the jury is satisfied beyond reasonable doubt that a circumstance referred to in section 36 of the *Crimes Act 1958* existed in relation to a person, the jury must find that the person did not consent to the act.

19. In should be emphasised that the old style approach to defending sexual offences at trial, which was objectionable, is gone. That was an approach which blamed the complainant, attacked their sexual history and sought to make the complainant look promiscuous. Such an approach is long gone and can no longer occur, as the law simply does not permit it.

20. Section 41 of the *Evidence Act 2008* (Vic) provides that a court must disallow questioning that is misleading or confusing; unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; belittling, insulting or otherwise inappropriate; or has no basis other than a stereotype. That practical experience of CBA members is that judicial officers simply will not countenance that type of questioning.

21. Further, access to confidential communications is greatly restricted (*Evidence (Miscellaneous Provisions) Act 1958* (Vic), Division 2A of Part II), and there is a presumption against the adducing of sexual history evidence and a prohibition against it being used to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates (*CPA*, ss 342-3).

22. There has been a cultural shift in the Bar over the past decade due to the cumulative effect of reforms in this area over many years.

[2] See also the *JDA* s 47 regarding directions on reasonable belief in consent.

23. Further, even if aspects of the old-style approach persist with a small minority, these are not effective because of the change in community attitudes. Juries are far more aware of the complex responses of victims to sexual abuse due to improved community education, the directions referred to above, and the Royal Commission into Institutional Responses of Child Sexual Abuse. To take a belittling or harassing approach to cross-examination is not only disallowed by judicial officers, it is terrible advocacy.

ii) Do you support introducing a specialist court for sexual offences? Why or why not?

24. The CBA does not support a specialist court for sexual offences.

25. There is no need for a specialist stand-alone court for sexual offences to be tried. This area of the criminal law should not be fragmented from other criminal prosecutions in the courts.

26. Further, sexual offences are often tried with other non-sexual criminal offences, so to separate types of offending will be artificial as often both types of offences will be heard in a joint trial.

27. Victoria does have a 'de facto' specialist trial court for sexual offences being the County Court. While the criminal jurisdiction of the County Court does not exclusively hear sexual offence cases, a significant proportion of its workload involves hearing pleas, contested trials and supervision order applications which deal with sexual offences.

28. Further, because of the complexity of this field, with constant reforms over the past decade, Judges of the County Court, and members of the Bar, do have specialist expertise in dealing with sexual offences given the regularity with which they hear those matters.

29. In addition, both the Magistrates and County Courts have specialised 'Sex Offence Lists' where Magistrates and Judges experienced in hearing sexual offence matters preside.

30. Separating sexual offences matters may lead to greater inefficiency within the system. If a specialist judge suddenly becomes unavailable to hear a trial, and there are no other specialist judges available, that trial will undoubtedly be delayed. Where all judges are able to hear all matters, there is a reduced likelihood of delay in such circumstances. Specialist courts end up creating (intentionally or otherwise) specialist advocates, particularly prosecutors. As with judges, if there is an unavailability of a specialist prosecutor, this again would result delay. Delay here would be compounded by the fact that, unlike a judge, the new specialist prosecutor would need appropriate time to prepare for a trial. These issues would be particularly burdensome on circuit matters, where even greater delay would be likely.

31. Sex offence work is confronting. Although specialisation does not need to be an 'all in' proposition, a specialist court may have issues both in attracting judges and advocates, as well as retaining them. As has been well documented in relation to sex offence (and particularly child sex offence) investigators, there are a number of health and safety issues that arise out of specialisation, such as 'burn out' and vicarious trauma. A fear that 'burn out' or vicarious trauma may occur – issues that can be career limiting, if not career ending – may be enough to dissuade people from involvement.

32. The CBA does not support a further fragmentation of the courts.

iii) If you support introducing a specialist court for sexual offences, what features should it have?

33. Not applicable – see above.

iv) Do you support changing the role or nature of the jury in trials for sexual offences? Why or why not?

34. The CBA is, and has always been, a strong advocate for the effectiveness, fairness and accuracy of juries in determining all serious criminal charges. That is the jury system in its current form.

35. There will of course be occasions where a jury verdict is overturned on appeal, but certain high-profile cases notwithstanding, this is uncommon. The principles with regard to purportedly unsafe convictions and inconsistent verdicts place significant weight on the role of the jury as the fact-finder. It is important to remember that verdicts from judge alone trials, in other States which provide for such trials, are also on occasion overturned on appeal. No system is perfect. Further, the appeals process provides an important safeguard to protect against miscarriages of justice.

36. Also, it must be recognised that as the law regarding sexual offences is changed and made more complex, then the likelihood of appeals increases, as judicial officers and advocates make potential errors and new areas of the law are tested.

37. The jury system is a tried and tested method for fairly determining charges brought against accused persons.

38. In the last 12 months emergency laws were introduced to allow for judge alone trials for a limited period in response to COVID-19. The CBA will be seeking that this measure does not become permanent.

39. The CBA's view is that the role or nature of the jury should not change in trials for sexual offences. There is no reason why the role or nature of the jury should differ from other trials that do not involve sexual offences.

40. The suggestion that professional jurors could be used in sexual offence trials is a matter that the CBA strongly opposes. There is a real likelihood that such 'professional jurors' may have a bias in favour of complainants which would undermine the fundamental importance of having an impartial and representative jury from the community without agendas or preconceived ideas about sexual offences. If lay jurors can be trusted to make decisions in other difficult, complex and potentially prejudicial cases, such as in terrorism matters and cases involving extreme violence,

they should be trusted to be able to properly understand and apply the law relating to sexual offences.

v) How well are reforms working to avoid delays in the criminal justice process, and what other reforms could address delay?

41. Reforms introduced over the last 20 years have addressed, as best the criminal justice system can, delays that are inherently a part of the criminal justice system.

42. Changes introduced in recent years have demanded that priority be given to sexual offence charges that are proceeding to trial. Cross-examination at committal has been greatly limited. Further, the County Court gives sexual offence trials priority listings.

43. Delay in the efficient determination of sexual offences, like all serious criminal charges, has been adversely effected by COVID-19. The time it takes to redress the backlog caused by COVID-19 is difficult to predict. With a small number of exceptions, all trials ceased in late March 2020. A limited number of trials were conducted in late 2020 and a similar number are currently being conducted. The system is working at a substantially reduced capacity.

44. COVID-19 adds to 'ordinary' or 'usual' delays in the movement of all prosecutions from investigation to verdict.

45. The ability to make inroads into these 'ordinary' delays are dependent entirely on resources and funding being provided to *all areas* of the criminal justice system. There is limited use in increasing funding for police and prosecution services, without a corresponding increase in Victoria Legal Aid ('VLA') funding which deals with the vast majority of sexual offences that come before the County Court.

46. A key factor in delay, especially in meeting specific legislative time-lines for sexual offences, is the thoroughness of the police investigation and proper disclosure. The CBA refers to and repeats the recent submissions it made on these issues in the Commission's examination into committals. The experience of our members is that

prosecutorial non-disclosure is a significant cause of delay and unfairness to both accused persons and complainants.

vi) How well are support programs for people who have experienced sexual harm working? How can they be improved?

47. This is not an area that the CBA has significant experience or expertise with, and in those circumstances no answer is provided to this question.

vii) What other issues affect the criminal justice process as a whole, and what should be done to address them?

48. A critical issue in having sexual offence trials run properly by the defence, and therefore avoiding unnecessary applications for leave to appeal against conviction and/or sentence, is proper funding.

49. Sexual offence trials are arguably the most difficult criminal trials to run – both from the prosecution and defence perspective. They are complex, demanding and emotionally stressful. It should be noted that often defence practitioners have limited opportunities to debrief and to engage in counselling.

50. The vast bulk of sexual offence trials that run in the County Court are funded by VLA. It is important to consider the demographic, in terms of counsel who appear in these matters. It is often younger, less experienced barristers in the early stages of their trial careers as barristers.

51. Experience shows that most criminal barristers, who do defence work, stop running VLA sex trials after a period of time. This happens because:

- They are not adequately funded;
- There is a lack of support available to counsel – because there is limited funding for instructing solicitors;
- Counsel often have to confer with the client without an instructor;
- The trial is often conducted without an instructor in court assisting defence counsel;

- These trials are frequently re-briefed close in time to the trial date;
- The clients are often difficult; and
- The legal issues are substantial because of all the rules that apply to sex offence trials.

D. ISSUES PAPER E - THE TRIAL PROCESS

52. A list of specific questions, raised by the Commission, concerning Issues Paper E have been published. The CBA will address each of these questions individually.

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

53. This is a matter properly for the Director of Public Prosecutions, Commonwealth Director of Public Prosecutions and police agencies to answer.

54. One observation the CBA would make, especially as it relates to conviction rates, is there is a reluctance generally to withdraw or discontinue weak prosecutions for sexual offences. It seems that there is a view taken among prosecution bodies that they will let a jury decide to acquit someone rather than cease a prosecution for a sexual offence. That is regrettable in so far as, where the prosecution case is very weak, the consequence of proceeding to trial is that the complainant and other witnesses are forced to give evidence in circumstances where the likelihood of conviction is very low.

ii) How well are ground rules hearings for sexual offence cases working? How can they be improved?

55. The use of ground rules hearings in Victoria is still relatively new. The CBA does not recommend any changes to the system at the moment as more time is needed to evaluate the overall effectiveness of the current system.

56. In general terms, the CBA is of the view that the ground rules hearings are operating as intended and making it easier for complainants in those matters to give evidence.

iii) How well are special procedures and alternative arrangements for giving evidence in sexual offence cases working? How can they be improved?

57. The CBA is of the view the special procedures and alternative arrangements for giving evidence are operating as intended and again make it easier for complainants to give evidence and reduce substantially the likelihood one complainant will have to give evidence multiple times.

58. No changes should be made at this time.

iv) How well are jury directions for sexual offence trials working? How can they be improved?

59. As outlined above, the introduction of the *JDA* made significant reforms to directions given to juries in sexual offence trials.

60. There is no need to further reform or amend the changes introduced by this Act.

61. One suggestion the Commission is considering is whether juries should be directed that a doubt based on a misconception cannot be a reasonable doubt. Such a direction would likely confuse a jury and lead a jury to ask further questions about what that means. Juries are given significant directions that they should:

- Only decide the case based on the evidence;
- Push to one side any prejudices or bias they have;
- Not to speculate about matters that are not the subject of evidence before them.

62. A direction about ‘misconceptions’ is unlikely to be helpful.

63. Further, the *JDA* already provides for directions on "beyond reasonable doubt". That includes the judicial officer being able to direct the jury pursuant to s 64 of the *JDA*, if questioned, that "it is almost impossible to prove anything with absolute certainty when reconstructing past events" and the prosecution does not have to do so, and "a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility".

v) Is there a need to change any laws on evidence or procedure for sexual offences? If so, what should be changed?

64. There is no need for further changes at this time. The CBA submits that further time should be allowed to see how the many changes made over recent years take effect.

65. If the system is continually making major changes, it is difficult to see what effect specific changes have on the system as whole. Further, as noted above, this may create more, not less, appeals.

66. Changes introduced by legislation take time to have a practical effect on criminal charges before the courts. Commencement dates for new legislation often only apply to charges after that commencement date. It can therefore take between 4 - 5 years to see whether changes are actually having their intended effect. This is because trials involving those new provisions will only come before the higher courts 12 – 24 months after those provisions have come into force.

67. One area where the CBA urges caution is that reforms in the area of sexual offences should not be designed with the primary hope or intention of increasing conviction rates. This would be to pre-judge the general credibility or veracity of complainants in general. Conviction of the guilty is an important public policy end, however this should not pursued at the cost of increased unfair convictions.

68. Further, seeking to reform the system with the goal of increasing conviction rates in sexual offences should only be done after research has been undertaken into what the conviction rates actually reveal. For example, during the consultation process the Commission stated that recent reforms had not increased the conviction rates for sexual offences and the conviction rate for sexual offences was lower than for other

crimes. We understand the Commission does not currently have more information about what these statistics actually reveal.

69. These statistics, without more, are not helpful. In the period when these statistics where obtained it is necessary to consider:

a) Whether more or less sexual offences trials were running in this period than previously? That is, as a percentage of all sexual offence cases, were more cases resolving into pleas of guilty (noting it has been an aim of previous reforms to have appropriate cases resolve and resolve earlier in the court process)?

b) Whether more or less sexual offences trials were running as compared to non-sexual offence trials (that is, as a percentage of all sexual offence prosecutions compared to non-sexual offence prosecutions)?

70. If, for example, only 20% of sexual offence prosecutions in the County Court were proceeding to trial in the relevant period, it may be that these were trials where there was a reasonably arguable defence and that affects an assessment of the conviction rate. Conversely, if 80% of sexual offence prosecutions in the County Court were proceeding to trial, that may lead more support to the need to reconsider previous changes.

vi) What are some of the challenges with the appeals process for sexual offence cases? How can these be addressed?

71. The best way to address challenges with appeals is to ensure trials are run fairly at first instance – taking into consideration the rights of both complainants and people accused of sexual offending.

72. The availability of a convicted person seeking leave to appeal against conviction and/or sentence is a vital safeguard to remedy miscarriages of justice and should not be changed.

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

73. The Children's Court deals with sexual offences in an appropriate way. No specific reform in that regard is required.

74. However, there are differences in how police prosecutors deal with sexual offence cases in different Children's Court venues across the state. The disparity is more pronounced than the ordinary and expected differences in prosecutorial attitudes from venue to venue in the adult jurisdiction. As a base example, this includes prosecutors opposing the adjournment of criminal proceedings where Therapeutic Treatment Orders have been made, despite the operation of s 352 of the *Children Youth and Families Act 2006* ('CYFA').

75. These issues could perhaps be remedied through training in how the prosecution of children exhibiting sexually abusive behaviour and children accused of sexual offences fits within the treatment and sentencing provisions of the CYFA. This would be a matter for the Specialist Children's Court Prosecution Unit at Victoria Police to consider.

viii) What are other issues with the trial process for sexual offences, and how should they be addressed?

76. Please see above at paragraphs [41] – [46].

E. ISSUES PAPER C – DEFINING SEXUAL OFFENCES

77. The CBA believes that it can provide some input in relation to Issues Paper C.

78. A list of specific questions, raised by the Commission, concerning Issues Paper C have been published. The CBA will address each of these questions individually.

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

79. The CBA repeats its general position set out above, that the changes that have occurred in recent years should not be further amended until sufficient time is given to assess how those reforms have impacted on the criminal justice system.

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

80. The CBA submts that it it is working as intended and should not be further amended.

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

81. There may be a need to introduce a new offences to deal with situations, as they arise, to keep pace with technology. This is an ongoing matter for Parliament to consider.

iv) Are new offences or changes to offences needed to address existing or emerging forms of sexual harm? If so, what new offences or changes?

82. The CBA does not believe this is necessary at the current time.

v) Other issues.

83. The early resolution of sexual offence charges is often affected by the provisions of *Sex Offender Registration Act 2004* (Vic).

84. This Act often applies in situations that seem perverse, and where judicial officers have no discretion. This often provide impediments to matters resolving. That is because accused persons do not want to be on the register, especially in circumstances when the offending seems situational and it is highly unlikely that the accused will offend in the future. Being placed on the Register is not only a significant invasion of privacy and potentially exposes the person to criminal offences for alleged breach, but there is a prohibition on child-related employment (even in circumstances where the given offending has no nexus with a child).

85. The CBA notes that the VLRC Report on Sex Offenders Registration of 2012 estimated that there would be 10,000 registrants by 2020. The CBA endorses the recommendation of the VLRC that there is a need to "strengthen the scheme by sharpening its focus". This should result in judicial officers having discretion as to whether a person is placed on the register. This is likely to assist in the resolution of some matters, to the advantage of the offender, complainants and the community.

F. CONCLUSION

86. Over the last 30 years, there have been important and substantial reforms to trials involving sexual offences. These reflect a proper concern about the experience of the complainant, making it easier – for example – for complainants to give evidence without harming the rights of the accused.

87. However, the CBA is concerned that it is increasingly difficult for people accused of serious sex offences to defend themselves. The CBA questions whether there is a need for further reforms, at least until the recent tranche of reforms can be properly assessed. Given that key issues have been substantially addressed through a range of reform processes, does the system need further reform? The CBA submits that it does not. Trials are now run very differently and they have changed for the better, but there is not a need for further reform at this stage.

88. Sentences for sexual offences over the last 20 to 30 years have significantly increased. While it is undoubtedly correct that convicted sex offenders should be sentenced to significant terms of imprisonment, it is equally important that those accused of serious sexual offending, who risk lengthy prison terms, have the ability to robustly defend themselves.

89. The difficult issue is that no system is going to make it easy for a complainant, in sexual offence trial, to give evidence. But it is fundamental that if people are going to be charged with a serious sexual crimes, they need to be able to defend themselves.

90. The CBA is happy to assist the Commission in any way it can with its future work on this matter.

91. If you have any questions or wish to clarify anything within the CBA's submissions please contact Jason Gullaci or Jarrod Williams.

Criminal Bar Association

21 January 2021