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Submission to the Victorian Law Reform Commission

Improving the Response of the Justice System to Sexual Offences

1. The Victorian Law Reform Commission (**VLRC**) has been asked by the Victorian Government to make recommendations to improve the response of the justice system to sexual offences.

2. Liberty Victoria welcomes the opportunity to provide this submission to the VLRC. Thank you for granting an extension of time to make this submission.

About Liberty Victoria

3. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

4. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for both prosecution and the defence. More information on our organisation and activities can be found at: https://libertyvictoria.org.au.

5. The focus of our submissions and recommendations reflect our experience and expertise as outlined above. Some of the following is drawn from work undertaken by Liberty Victoria in response to previous inquiries and proposed legislative reforms.

6. This is a public submission and is not confidential.

Background and Grounding Principles

7. The VLRC recognises that:[1]

- Sexual harm is widespread and considerably under-reported;
- Sexual harm is gendered: women are more likely to experience sexual violence. Women and men also experience sexual harm in different contexts.
- There are different patterns of sexual harm. Sexual harm can overlap with other types of violence, such as family violence or child abuse.
- Some people and groups experience sexual harm at much higher rates than others.
- People's experiences of sexual harm and seeking justice are diverse. They can also be shaped by factors such as their culture, sexuality, gender, age, class, ability, religion and employment, including a combination of these factors.
- The historical context of dispossession, removal and trauma is an important part of Aboriginal people's experience of sexual harm.

[1] VLRC, Guide to the Issues Papers, 5 October 2020, 7 (citations omitted).

8. Liberty Victoria acknowledges and accepts those issues.

9. As we submitted to the VLRC Inquiry into the Role of Victims in the Criminal Trial Process, Liberty Victoria:

> … strongly supports the view that victims of crime should be treated with courtesy, respect and dignity throughout the criminal trial process. We similarly support the governing principles set out in the *Victims' Charter Act 2006* in relation to treatment of persons adversely affected by crime.[2]

10. It should also be noted Liberty Victoria supported the introduction of intermediaries to ensure that persons with cognitive impairments and children are afforded equal participation in the criminal trial process.[3]

11. Liberty Victoria has also supported appropriate directions on the law of consent and in particular consent-negativing circumstances.[4] Such directions are now reflected in Part 5, Division 1 of the *Jury Directions Act 2015* (Vic), together with s 36 of the *Crimes Act 1958* (Vic).

12. Liberty Victoria acknowledges that victim-survivors of sexual offending can suffer immeasurable and enduring harm in a manner that can never be adequately remedied by the justice system. Further, victims of sexual offending have suffered violations of their human rights as protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Charter***), including potentially the rights to freedom from torture and cruel, inhuman or degrading treatment (s 10), to freedom of movement (s 12), to privacy, family and home life (s 13(a)), to protection of families and children (s 17), and to liberty and security (s 21).

13. Those alleged of having committed criminal offences, including sexual offences, are entitled to the common law rights of the presumption of innocence and to have a

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[2] Liberty Victoria Submission to VLRC Inquiry into the Role of Victims in the Criminal Trial Process (Web Page, 26 April 2016), <https://libertyvictoria.org.au/sites/default/files/LibVicSub-Victims-of-Crime-Crim-Trial%20-VLRC-2016web.pdf>, [15].
[3] Ibid, [24]-[25].
[4] Liberty Victoria Submission: Review of Sexual Offences (Web Page, 17 January 2014), <https://libertyvictoria.org.au/sites/default/files/LV%20Subm%20Sexual%20Offences%20Jan%202014%20web.pdf>, [26]-[27].

contested hearing or a trial that is not unfair.[5] Such common law rights are now also protected and extended by the *Charter*, including the right to a fair hearing (s 24), and rights in criminal proceedings (s 25).[6]

14. In *Kracke v Mental Health Review Board*,[7] Bell J observed that the right to a fair hearing is not "…a mere procedural right standing apart from the general scheme of human rights protection. It is a fundamental principle of the rule of law", which is a "bedrock value" of the *Charter*.[8]

15. Liberty Victoria understands that, as is often the case in human rights discourse, there needs to be a proper and proportionate balance between competing rights in relation to the investigation and prosecution of alleged sexual offences.

16. However, given the consequences of a potentially innocent accused person being found guilty of sexual offending, including potential imprisonment, registration under the *Sex Offenders Registration Act 2004* (Vic) (***SORA***) and post-sentence detention or supervision under the *Serious Offenders Act 2018* (Vic) (***SOA***), it is vitally important that reforms to the law relating to sexual offences do not result in an increase in the potential for unfair trials and substantial miscarriages of justice.

The Need for Careful Reform

17. As we said in our 2014 submission to the Department of Justice Review of Sexual Offences:

> Liberty Victoria submits that care needs to be taken to ensure that the proposals for reform, no matter how well-intentioned, do not increase the risk of injustice. In that context, Liberty Victoria would advocate a very cautious and selective evolution of the criminal law …
>
> The past decades of reform to the law of sexual offences have demonstrated that adding ever greater complexity to an already very difficult jurisdiction can result in great injustice to accused persons, complainants, and less protection

[5] See *DPP v Mokbel* [2010] VSC 331, [161]-[163] (Whelan J).
[6] Ibid. See further *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 425 [40] (Warren CJ).
[7] (2009) 29 VAR 1.
[8] Ibid, 102 [460].

to the wider community through adding to the potential for judicial error and miscarriages of justice.

Liberty Victoria has a particular interest in the development of restorative justice measures that would improve access to just outcomes for complainants, offenders, and the wider community. To that end, we would value being consulted with regard to any proposals for law reform or with regard to any pilot project in that field.[9]

18. Often the criminal justice system is ill-equipped, even with the best endeavours of legislators, judicial officers and legal practitioners, to provide just outcomes that are fair to complainants and accused persons. Sexual offences cases are often fraught, regularly considering events having occurred a long time ago, in circumstances where there is often limited if any corroborative evidence, and where there is often a clear conflict in the evidence of the complainant and the accused person in circumstances where the fact-finder needs to be satisfied beyond reasonable doubt of the elements of the offence. In part, that is why other avenues such as restorative justice may provide the best outcome for both complainants and accused persons in some cases. The issue of restorative justice will be considered in more depth below.

Terminology

19. On occasion Liberty Victoria uses the term “complainant” in this submission. That means no disrespect to people who are victim-survivors. However, it is important to recognise that when a criminal allegation is made against a person, it is for the finder of fact (be it a jury or judicial officer) to determine whether the evidence of a complainant is accepted and whether an alleged offender is guilty of an offence. It is important not to subvert the proper role of the fact-finder in this regard. This is consistent with the language employed by the Court of Appeal, even in conviction appeals after a person has been convicted of an offence.

[9] Liberty Victoria Submission to the Department of Justice Review of Sexual Offences (Web Page, 17 January 2014), <https://libertyvictoria.org.au/sites/default/files/LV%20Subm%20Sexual%20Offences%20Jan%202014%20web.pdf>, [52]-[54].

20. As we submitted to the 2016 VLRC Inquiry into the Role of Victims in the Criminal Trial Process:

> It should be noted that in criminal proceedings that proceed to trial or contested hearing it is for a fact-finder, whether jury or magistrate, to determine whether a complainant is a victim. There is an increasing move towards describing complainants as victims or survivors prior to any such fact-finding process. While that is understandable, it inverts the presumption of innocence.[10]

Submission of the Criminal Bar Association

21. Liberty Victoria has had the considerable advantage of reading and considering the submission of the Criminal Bar Association (**CBA**).

22. We adopt the CBA's submission in relation to Issues Papers B, C and E, expect in one respect.

23. Liberty Victoria does not oppose the retention of judge-alone trials, a model first introduced in Victoria in response to the COVID-19 pandemic. However, Liberty Victoria only supports the retention of judge-alone trials where the accused's consent remains mandatory in order to proceed by judge-alone (as is presently the case). Further, Liberty Victoria only supports the retention of judge-alone trials provided that jury trials are properly resourced so there is no pressure on an accused person to proceed by judge-alone trial because there would otherwise be a significant delay to proceed to trial by jury. This is because in Liberty Victoria's submission, a choice between a judge-alone trial now and a jury trial in two years' time means there is no real choice for accused persons.

24. Retaining judge-alone trials would also have the advantage of comity with other jurisdictions, and there may be some matters (including some high-profile allegations of sexual offending where there has been saturating and adverse media

[10] Liberty Victoria Submission to VLRC Inquiry into the Role of Victims in the Criminal Trial Process (Web Page, 26 April 2016), <https://libertyvictoria.org.au/sites/default/files/LibVicSub-Victims-of-Crime-Crim-Trial%20-VLRC-2016web.pdf>, [10].

reporting) where an accused person may elect to proceed with a judge-alone trial[11] (noting this course can be opposed by the prosecution and determined by a judge).[12]

25. Liberty Victoria otherwise agrees with the CBA's submission and wishes to emphasise that practices have changed significantly with regard to how legal practitioners and judicial officers approach the hearing of allegations of sexual offences, including cross-examination of complainants. 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. Our experience is that the courts take the duty to protect witnesses very seriously and the stereotype of the barrister challenging a complainant through confusing and/or belittling cross-examination is very much the exception and not the rule.[13]

26. Liberty Victoria also wishes to emphasise the CBA submission that significant delays in the prosecution of sexual offences are often caused by a failure of timely disclosure by the Crown and/or delays with regard to the obtaining of expert evidence.[14]

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[11] See further Justice Phillip Priest, 'Trial by Judge Alone: Time for a Rethink?' (2020) 94 ALJ 110, 111:

> It must be acknowledged that there has been general satisfaction with jury verdicts over a great many years. The experience of most trial judges is that juries of old coped well with large drug trials, complex frauds, terrorism cases and underworld murders. Times, however, have changed. Lack of restraint by traditional news media, and the ubiquity of incensed, overwrought and uncontrolled comment in social media, pose significant challenges to the integrity of trial by jury in sex offences, drugs and other cases. In some cases, judicial direction simply will not be adequate to nullify the prejudice engendered by pretrial publicity (or ongoing prejudicial publication on social media).

[12] See further *Criminal Procedure Act 2009* (Vic), s 420D; *DPP v Combo (Application for trial by judge alone)* [2020] VCC 726, [37]-[66] (Chief Judge Kidd), adopted in *DPP v Wang (Ruling No 1)* [2020] VSC 438, [3] (Hollingworth J).

[13] Liberty Victoria Submission to VLRC Inquiry into the Role of Victims in the Criminal Trial Process (Web Page, 26 April 2016), <https://libertyvictoria.org.au/sites/default/files/LibVicSub-Victims-of-Crime-Crim-Trial%20-VLRC-2016web.pdf>, [12]-[13].

[14] In the judgment of *Roberts v The Queen* (2020) 60 VR 431 the Court of Appeal (Osborn and T Forrest JJA, and Taylor AJA) held at 444 [56]:

> It is now accepted that it is fundamental that there must be full disclosure in criminal trials. It is a 'golden rule'. The duty is to disclose all relevant material of help to an accused. It is owed to the court, not the accused. It is ongoing. It includes, where appropriate, an obligation to make

27. Liberty Victoria agrees with the CBA on other matters in its submission, including:

(1) its opposition to the creation of a specialist court for sexual offences;

(2) its opposition to professional jurors;

(3) the need for proper funding for sexual offence matters;

(4) its observation concerning the unfortunate reluctance of the Crown to discontinue weak prosecutions in sexual offences;

(5) the need to consider the impact of ground-rules hearings and intermediaries before introducing further reforms;

(6) the adequacy of current directions on consent and the criminal standard of proof after recent reforms;

(7) the need for special care before concluding that the conviction rate for sexual offences should be increased, including the need to have regard to the number of matters that are resolving after recent reforms; and

(8) the need to preserve the rights of appeal to protect against substantial miscarriages of justice.

28. Liberty Victoria makes some additional submissions on other topics below.

Issues Paper C – Defining Sexual Offences

29. As we said in our 2014 submission to the Department of Justice Review of Sexual Offences:

> Liberty Victoria submits that criminal offences, and particularly serious criminal offences, should as a matter of principle have a subjective fault element (and with regard to rape, more than the subjective fault element of intending to

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enquiries. *It is imposed upon the Crown in its broadest sense*. And a failure in its discharge can result in a miscarriage of justice.
(Emphasis added and citations omitted.)
At 446 [64] the Court concluded that "…the duty of disclosure is a significant element of a fair trial and a conspicuous aspect of the Crown's duty to ensure that the case against an accused is presented with fairness".

> engage in an act of sexual penetration). While there are exceptions to this principle in the criminal calendar, that is often in the circumstance of gross negligence, and not of itself a reason to further diminish the importance of subjective fault elements in the criminal law.[15]

30. Liberty Victoria strongly opposes the creation of a "lesser" offence of sexual assault that does not require a subjective mental element. The consequences of being found guilty of such an offence are severe, and an unintended consequence of such a lesser offence is that it may result in plea negotiations that depend on decisions made by prosecutors without adequate transparency.

31. Liberty Victoria is strongly opposed to the charging of multiple offences in the one charge, including the creation of "course of conduct" charges (now reflected in Schedule 1 of the *Criminal Procedure Act 2009* (Vic). We have noted the significant issues such charges create with regard to potential duplicity and the obfuscation of inconsistent verdicts.

32. As we submitted in the 2014 Department of Justice Review of Sexual Offences:

> Where there is inconsistency or irrationality in jury decision-making it is of the utmost importance that be made transparent so that injustices can be remedied. The price of conflating multiple events under a single count, and then not requiring a jury to be unanimous about which events occurred … is that it will invariably result in an obfuscation of jury decision-making. That will inevitably conceal injustice in some cases.[16]

33. Such charges also cause acute difficulties when it comes to determining the factual basis for sentencing, because it can be unclear which events constituting the "course of conduct" were accepted by members of the jury.

Issues Paper E – Tendency and Coincidence Evidence

34. Liberty Victoria has stated that it strongly opposes the Victorian Government's announced reforms to the law of tendency and coincidence evidence, which are

[15] Liberty Victoria Submission to the Department of Justice Review of Sexual Offences (Web Page, 17 January 2014), <https://libertyvictoria.org.au/sites/default/files/LV%20Subm%20Sexual%20Offences%20Jan%202014%20web.pdf>, [21].
[16] Ibid, [37]-[51].

intended to be based on the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW).[17]

35. As we have previously stated, if enacted in Victoria, those reforms would amongst other things:

    (1) Create a presumption of admissibility for certain categories of tendency evidence in proceedings involving child sexual offences;

    (2) Prohibit the Court, when considering the admissibility of such evidence, from having regard to whether such evidence may be the result of collusion, concoction or contamination; and

    (3) Lower the threshold for the admissibility of tendency and coincidence evidence in all cases, not just proceedings involving child sexual offences.

36. Liberty Victoria understands that the New South Wales legislation was motivated, in part, by the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

37. Liberty Victoria acknowledges the need to ensure that properly admissible evidence is placed before juries as fact-finders.

38. However, there is a real danger that by relaxing the threshold for admissibility of tendency and coincidence evidence, and indeed creating a presumption of admissibility in certain cases, that this may impact on the fair trial of accused persons and undermine the presumption of innocence. There is a genuine risk of innocent people being convicted of crimes they have not committed.

39. The Courts have long recognised the dangers posed by tendency evidence. By necessity, tendency evidence results in fact-finders considering events other than the circumstances of the given offence. There is a real danger that tendency evidence can lead to what has been described as “rank propensity” reasoning by

[17] Liberty Victoria Media Release, ‘Liberty Victoria Oppose Reforms to Tendency and Coincidence Evidence’ (Web Page, 3 March 2020), <https://libertyvictoria.org.au/content/media-release-liberty-victoria-oppose-reforms-tendency-and-coincidence-evidence>.

fact-finders, including juries. That kind of reasoning holds that because an accused person has engaged in certain criminal or other discreditable conduct in the past, he or she is the kind of person that would have committed the given offence before the Court. There are obvious dangers with that kind of reasoning, and by lowering the threshold for the admissibility of tendency and coincidence evidence, there is a real danger that innocent people will be convicted based on their past conduct rather than direct evidence concerning the offending conduct.

40. Liberty Victoria holds the position that the prosecution should retain its current onus, in all cases, to demonstrate why such tendency or coincidence evidence has significant probative value and is therefore admissible. There should not be categories of cases where such evidence is presumed to be admissible. It should not fall on the defence, at the first hurdle, to contend why such evidence is inadmissible. Further, Liberty Victoria notes that over the past three years there have been important judgments by the High Court that have clarified the admissibility of this kind of evidence and which have, in effect, made in less difficult for the prosecution to adduce such evidence in appropriate cases.[18] Those supporting such reforms should be required to demonstrate why such reforms are necessary in light of the recent jurisprudence of the High Court.

41. Further, Liberty Victoria submits that judicial officers should be entitled, when considering the admissibility of such evidence, to consider whether such evidence may be the result of collusion, concoction or contamination. In the High Court judgment of *R v Bauer*,[19] the Court held that there was a category of case where the risk of collusion, concoction or contamination was so great that it could affect the probative value of the evidence, namely in circumstances where it would not be open to the jury rationally to accept the evidence.[20] The reforms, if enacted, would appear to remove that exception. It is an important function of judicial officers, in appropriate cases, to consider whether such evidence should be placed before the

[18] See, eg, *R v Bauer* (2018) 266 CLR 56; *Hughes v The Queen* (2017) 263 CLR 338.
[19] (2018) 266 CLR 56.
[20] Ibid, 91-2 [69] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

jury at all. That is a key function of the role of the judicial officer, as gatekeeper, in ensuring a fair trial of an accused person.

42. Finally, Liberty Victoria notes that the proposed reforms would reduce the threshold of admissibility of tendency and coincidence evidence in all criminal cases, not just those proceedings involving child sexual offences. In short, the current requirement is that such evidence cannot be used against the accused unless the probative value of the evidence "substantially outweighs" any prejudicial effect it may have on the accused. The reforms, if enacted, would provide that such evidence is admissible if "the probative value of the evidence outweighs the danger of unfair prejudice to the defendant", removing the requirement that the probative value "substantially" outweigh the prejudicial effect. Given the dangers of this kind of evidence, and in particular propensity reasoning, Liberty Victoria favours the retention of the status quo as providing a proper balance between the admissibility of such evidence in appropriate cases and the right of an accused person to a fair trial.

Issues Paper F – People Who Have Committed Sexual Offences

Presumptive and Mandatory Sentencing

43. One significant matter as to why some sexual offence charges may not resolve at an early stage is that the given offence attracts a presumptive or mandatory sentence,[21] after the reforms introduced for some sexual offences by the *Sentencing*

[21] 'Presumptive sentencing' refers to criminal offences where there is a statutory presumption of a particular type and/or minimum length of sentence, subject to exceptions. This includes presumptive sentences of imprisonment with minimum non-parole periods subject to 'special reasons' exceptions. 'Mandatory sentencing' refers to criminal offences where a particular type of sentence and/or minimum length of sentence must be imposed and there are no exceptions. See Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2017) 43(1) *Monash University Law Review* 195, 203 nn 55-6.

(Community Correction Order) and Other Acts Amendment Act 2016 (Vic) and the *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic).

44. Liberty Victoria has a long history of strongly opposing presumptive and mandatory sentencing and the removal of the sentencing discretion of judicial officers.[22]

45. Liberty Victoria shares the Law Council of Australia's concerns that mandatory sentencing regimes:[23]

    (1) Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;

    (2) Are inconsistent with Australia's international obligations, particularly Australia's obligations with respect to the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (**ICCPR**); and the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR;

    (3) Increase economic costs to the community through higher incarceration rates;

    (4) Disproportionately affect vulnerable groups within the community, including Indigenous Australians and persons with a mental illness or intellectual disability;

    (5) Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;

    (6) Fail to deter crime;

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[22] See for example Liberty Victoria's Submission to the Sentencing Advisory Council's Sentencing Guidance Reference (Web Page, 8 February 2016), <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20%28SAC%20Submission%29%20Web%2020160208.pdf>. See also the introduction of 'Category 1' offences (which in almost all cases must receive immediate imprisonment) and 'Category 2' offences (where there is a strong presumption of immediate imprisonment) as introduced by the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic).

[23] Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (Discussion Paper, May 2014) 6-7, 20-35 <https://www.lawcouncil.asn.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>.

(7) Increase the likelihood of recidivism because prisoners are placed in a learning environment for crime whereby inhibiting rehabilitation prospects;

(8) Wrongly undermine the community's confidence in the judiciary and the criminal justice system as a whole; and

(9) Displace discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing.

46. Further, Liberty Victoria has observed:

> [W]hen faced with a mandatory minimum periods of imprisonment (whether with regard to the head sentence or non-parole period), accused persons are much less likely to plead guilty to offences. Accordingly, mandatory sentencing reforms are bound to see an increase in contested committals and trials which places further pressure on a Court system that is already strained and suffering from serious delays. Those delays also have a huge impact on complainants and their families and friends.[24]

47. Such pitfalls were demonstrated to be systemic in relation to the Commonwealth offences of aggravated people smuggling (which attracts a mandatory sentence of imprisonment),[25] and are likely to apply with equivalent force with regard to sexual offences that attract relevant presumptive and mandatory sentences.

48. That is not to dispute that, in many cases of serious sexual offending, immediate imprisonment is the only appropriate sentencing outcome. However, the significant restriction or, in some cases, complete removal of judicial sentencing discretion is likely to be a significant obstacle in some cases to the early resolution of sexual offences.

49. At the same time, the numbers of Victorian prisoners has greatly increased, which has placed significant pressure on the provision of education, rehabilitative services

[24] Liberty Victoria's Submission to the Sentencing Advisory Council's Sentencing Guidance Reference (Web Page, 8 February 2016), <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20%28SAC%20Submission%29%20Web%2020160208.pdf>, [43].

[25] Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36(2) *Melbourne University Law Review* 553, 555, 614.

and the availability of transitional housing.[26] Further expanding offences which attract presumptive or mandatory sentences will exacerbate these issues.

Rehabilitation and Reintegration

50. In her article 'Why Mandatory Sentencing Fails', Tania Wolff (now president of the Law Institute of Victoria) said:

> The Victorian Ombudsman's report into prisons in 2015 provided the following sobering statistics about our prison population:
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> - 75 per cent of male prisoners and 83 per cent of female prisoners report illicit drug use before going to prison
> - 40 per cent of prisoners have a mental health condition
> - 42 per cent of male prisoners and 33 per cent of female prisoners had a cognitive disability
> - 35 per cent of prisoners were homeless before their arrest
> - More than 50 per cent of prisoners were unemployed
> - More than 85 per cent of prisoners had not finished high school.
>
> The notion that the unwell, addicted and impaired will stop committing crimes without rehabilitation and therapeutic programs to deal with the underlying causes of offending is fanciful. It is well known that the motivation to satisfy a drug addiction outweighs the threat of punishment and its long-term consequences.
>
> In a growing number of jurisdictions internationally, including Texas, governments are directing resources away from prisons and towards rehabilitation programs for offenders and justice reinvestment initiatives.[27]

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[26] 'Victoria's Prison Population', *Sentencing Advisory Council* ('SAC') (Web Page) <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/victoria-prison-population>. See the table 'Number of People in Victoria's Prisons, 1871 to 2019'. As at 30 June 2019, Victoria's prison population was 8,101, compared to 4,352 in 2009 (an increase of 86.14% over the past decade). It should be noted that there has been a recent reduction in prisoner numbers due in part to the COVID-19 pandemic. As at 30 December 2020 there were 7,082 prisoners in Victorian prisons: 'Monthly Prisoner and Offender Statistics 2020-21', *Corrections Victoria* (Web Page), <https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics-2020-21>.

[27] Tania Wolff, 'Why Mandatory Sentencing Fails', *Law Institute Journal* (Web Page, 1 February 2018) <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/Jan-Feb-2018/Why-mandatory-sentencing-fails>. Wolff also observes:

> In Victoria, specialist courts and programs are addressing underlying reasons for the offending with treatment and support. The Drug Court, which has had significant success in terms of recidivism,

51. In Liberty Victoria's submission to the 2014 Ombudsman's Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria, we said, amongst other things:

> All Victorian prisoners should be offered access to the Transitional Assistance Program when they are nearing the end of their sentence. For prisoners who have more complex needs, there are Intensive Transitional Support Programs that provide both pre and post release case management support. There are three streams catering for the different needs of women, men, and Aboriginal and Torres Strait Islander people.[28]

52. This applies with equal force for prisoners who have served sentences for sexual offences. It is vital, and in the interest of the community, that such offenders are not only provided with education and rehabilitation services during their imprisonment, but are properly transitioned back into the community with adequate supports.

Post-Sentence Measures for Sexual Offending

I. Sex Offender Registration

53. It is the long-held position of Liberty Victoria that there are chronic problems with the registration regime under the *SORA.*

54. We have submitted there are at least three foundational problems with the current system of registration in Victoria:

    (a) The expanding number of registrants;

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psychosocial improvement and cost effectiveness since starting in 2002, and the Assessment and Referral Court, are a far more effective response to the revolving door nature of crime and punishment.
Mandatory penalties do not deter people from committing crime, address recidivism or provide consistency in sentencing. A 'one size fits all' approach to sentencing leads to unjust outcomes as offenders with unequal culpability and circumstances are sentenced to the same minimum sentence of imprisonment.
Ultimately, mandatory sentencing is a populist, simplistic reaction to complex problems which require a more sophisticated response.

[28] Liberty Victoria's submission to the 2014 Ombudsman's Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria, (Web Page, December 2014), <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-YLLR_Submission_Ombudsman_PrisonConsultation20141231.pdf>, [60].

(b) The absence of judicial discretion as to whether a person should be placed on the register; and

(c) The complexity of reporting obligations.[29]

55. For convenience we repeat those submissions below.

A. The Number of Registrants

56. The VLRC Report on Sex Offenders Registration of 2012 estimated that there would be 10,000 registrants by 2020. Liberty Victoria endorses the recommendation of the VLRC in that report that there is a need to "strengthen the scheme by sharpening its focus".

57. The register was originally intended to be a database of information on persons who posed a significant risk to the sexual safety of the community in order to prevent offending conduct (particularly against children). It has now effectively become an unwieldy warehouse of information that may in some circumstances assist with prosecution after a crime has occurred (although that depends on the self-reporting of registrants).

58. Accordingly, the register has shifted from a proactive to a reactive model.

B. Mandatory Registration

59. For many sexual offences registration under the *SORA* is mandatory. At present, if a person is found guilty or pleads guilty to a Schedule 1 or Schedule 2 offence under the *SORA*, then registration must occur (for a duration of 8 years, 15 years, or life depending on the number of offences and the circumstances).[30] There are now limited exceptions for a person who was 18 or 19 years of age at the time during the

[29] Liberty Victoria Submission on the Sex Offenders Registration Amendment Bill 2016 (Vic), (Web Page, 29 March 2016), <https://libertyvictoria.org.au/content/sex-offenders-registration-amendment-bill-2016>; Liberty Victoria Submission on the Sex Offenders Registration Amendment Bill 2017 (Vic), (Web Page, 31 May 2017), <https://libertyvictoria.org.au/sites/default/files/SexOffendersRegistrationAmend%28Misc%29Bill%202017%20final%20web310517.pdf>.
[30] *SORA,* s 34.

commission of a specified offence, who may apply for a "registration exemption order".[31]

60. That is problematic because there will be some circumstances where an offender does not pose a substantial risk to the sexual safety of the community or where the period of registration is disproportionate to the level of risk.

61. Persons who may be assessed as posing no real risk of predatory or escalating sexual offending should not be subject to mandatory registration. Such persons, once registered, not only face significant limitations to their liberty, privacy and freedom of movement, but are prevented from engaging in a wide range of child-related employment.[32] That is even so in circumstances where the relevant offending was not related to children.

62. Accordingly, mandatory registration may also provide a disincentive to the resolution of matters.

63. A consequence of being on the register is that it is unlawful to work, amongst other things, in schools, transport services, and various clubs, religious organisations, associations or movements that provide services to children.[33] This has a significant impact on the employability and social integration of those on the register, which has the tendency to further entrench disadvantage.

64. For those persons who pose no significant risk to the community, there is a real question as to whether the stigma of being on the register is actively counter-productive with regard to their rehabilitation.

65. This not only works a serious injustice to the person made subject to the order, but also results in an ever-expanding list of persons who are placed on the register. Liberty Victoria submits that, having regard to the difficult administrative task in managing and updating the database of registered persons, it is vital that persons

[31] Ibid, Part 2 Division 2.
[32] Ibid, s 68.
[33] Ibid, s 67.

who are registered as sex offenders are those who actually pose a significant risk of engaging in sexual offending.

66. The best way to protect the community and to ensure that only persons who are a real risk of reoffending be placed on the sex offenders register, and thus preserve the value of the register itself, is to preserve the discretion of judicial officers to refuse to make orders in appropriate cases.

67. Further, judicial officers should be empowered to set shorter registration periods than the three fixed periods under the Act of 8 years, 15 years, and life. This is because the limitation to the rights of those registered will only be proportionate if the period of registration is the minimum necessary in the circumstances.[34] There may well be examples of offenders acting in ways completely out of character, where the uncontradicted expert evidence is that the person does not pose a risk to the community, or only requires a very limited period of supervision.

68. Persons who are registered as sex offenders should have a statutory right of review. There should be set periods (perhaps once every two years from the date of the registration order) during which time an order must be reviewed, with the registered person at liberty to apply for leave to review an order due to new facts or circumstances or where it is in the interests of justice. This is similar to the system of review provided for detention and supervision orders under the *SOA*,[35] and would be a much better way of ensuring that the limitation to a person's human rights is proportionate, and that the register is focused upon those who pose a real risk to

[34] See further *ARM v Secretary to the Department of Justice* (2008) 29 VR 472 at 475 [13] (Maxwell P, Nettle and Weinberg JJA) with regard to the now repealed *Serious Sex Offenders Monitoring Act 2005* (Vic). See further *Nigro & Ors v Secretary to the Department of Justice* (2013) 41 VR 359 and *Owen Daniel (a pseudonym) v Secretary to the Department of Justice* (2015) 45 VR 266.
[35] *SOA*, Part 8.

the community. The current power of the Chief Commissioner to apply to suspend reporting requirements is inadequate.[36]

69. As held in *R (on the application of F (by his litigation friend F)) and another (FC) v Secretary of State for the Home Department*,[37] in the context of the equivalent British scheme, legislation that provides for mandatory registration needs be subject to review in order to be compliant with fundamental human rights standards. While that case concerned mandatory life registration with no right of review, it is also strongly arguable that the Act, by only allowing review of life registration in the Supreme Court of Victoria after 15 years,[38] constitutes a disproportionate limitation to the human rights of registered persons.

70. In its 2012 report, the VLRC called for the Courts to determine whether a person should be placed on the register in all circumstances (and thus remove mandatory registration), and that Part 5 of the *SORA*, concerning the prohibition on child-related employment, should be removed from that Act and integrated with the *Working with Children Act 2005* (Vic). Liberty Victoria strongly agrees with those recommendations.

C. Complexity of Reporting Conditions

71. Under the reforms to the *SORA* made by the *Sex Offenders Registration Amendment Act 2014* (Vic), registrants are now required to report almost all contact with children, even when supervised. "Contact" is defined as including physical contact, oral communication or written communication if engaged in for the purpose of forming a personal relationship with the child, whether or not such contact is supervised.[39]

72. That means that a registrant who, for example, has dinner at a friend's house and speaks with their friend's child at the dinner table which could be regarded as forming a "personal relationship" with the child is obliged to immediately notify the

[36] *SORA,* s 39A.
[37] [2010] UKSC 17.
[38] *SORA*, s 39(2).
[39] Ibid, s 4A.

register, even in circumstances where all contact was fully supervised. A failure to report is punishable by imprisonment.

73. Registrants have been regularly prosecuted for failing to comply with their reporting obligations. That has included a registrant being prosecuted for failing to disclose membership of a library, which was regarded by police as an organisation with a child membership and also an "Internet Service Provider". There was no allegation that the registrant had committed any inappropriate conduct whilst at the library – the alleged criminality was a failure to report and update the register.

74. Problematically, there are now so many reporting obligations on registrants, and the matters are of such complexity, that often the real issue is whether an informant wishes to pursue breach proceedings against a given registrant.

75. That is problematic because it creates a situation where different members of Victoria Police will have different standards as to whether a person should be breached, particularly for a "technical" breach. Accordingly, the increased complexity of reporting requirements has also increased the potentially arbitrary application of the breach provisions.

76. Further, individuals on the register who suffer from mental health issues that can affect their cognitive abilities or intellectual disabilities find it more difficult to understand their obligations due to the complexities of the regime.

II. Sex Offender Detention and Supervision

77. By way of background, because of the increased rate of incarceration of offenders, and the recent reforms to the parole regime, there is a real issue with a large number of offenders being released with little or no supervision on parole.[40] This will be compounded by the restrictions on the use of Community Correction Orders (CCOs)

[40] This is also a consequence of presumptive and mandatory sentencing; see further *Esmaili v The Queen* [2020] VSCA 63, [63] (Priest and Kyrou JJA).

introduced by the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic).

78. With regard to detention and supervision orders, Liberty Victoria has expressed its concern that:

> It must be remembered that these forms of detention and supervision orders take effect only after a person has completed a sentence of imprisonment imposed by an independent judicial officer, and where that sentence of imprisonment was found to be proportionate having regard to all sentencing considerations, including the risk of reoffending and the need for community protection. …
>
> It appears that these detention and supervision orders are in part intended to fulfil the function once intended by supervision on parole, including access to rehabilitative programs, but only after a proportionate sentence has expired.
>
> Imprisonment has a criminogenic effect, and that needs to be counteracted in the early stages of incarceration, not after a sentence of imprisonment has expired. It would be [a] much better use of public resources if greater funding was allocated to prisoners to undertake rehabilitative programs when they are serving their sentences, as opposed to the creation of an additional layer of post-sentence supervision.[41]

79. It is commonplace for persons residing at such "supervision" facilities (such as Corella Place opposite the Hopkins Correctional Centre in Ararat), who have served their sentences, to not be able to leave the facility without supervision, to have strict curfews, to not be allowed to work, and to be electronically tagged.

80. Notwithstanding the judgment of the High Court in *Fardon v Attorney-General for the State of Queensland*,[42] Liberty Victoria does not accept that such orders are not punitive in practical effect, at least in so far as offenders are concerned. As Brennan, Deane, Toohey and Gaudron JJ said in *Witham v Holloway*,[43] "[p]unishment is

[41] Liberty Victoria Comment on the Serious Offenders Bill 2018 (Vic), (Web Page, 21 May 2018), <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20Comment%20-%20Serious%20Offenders%20Bill%202018.pdf>, [4]-[7]
[42] (2004) 223 CLR 575.
[43] (1995) 183 CLR 525.

punishment, whether it is imposed in vindication or for remedial or coercive purposes".[44]

81. The reality of these types of orders, even with the paramount aim of community protection and secondary aim of rehabilitation, is that they constitute a form of post-sentence punishment.

82. Further, the assessment of risk is notoriously difficult. The Human Rights Committee of the United Nations in *Fardon v Australia*[45] and *Tillman v Australia*,[46] criticised the capacity for psychiatric experts to properly predict dangerousness:

> The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. [The legislative regime] on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender, which may or may not materialise.

83. For completeness, it should be noted that Liberty Victoria, for reasons expressed in previous submissions,[47] strongly opposes the mandatory imprisonment for 12 months for breaches of restrictive conditions for persons subject to such orders.

84. As we said in that submission, to include conduct against the "good order" of such facilities, and relatively minor offences such as assault, criminal damage and threats indicates that the regime is designed to try to ensure compliance from persons

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[44] Ibid, 534.
[45] (UNHRC, Communication No 1629/2007, 18 March 2010).
[46] (UNHRC, Communication No 1635/2007, 18 March 2010).
[47] Liberty Victoria Comment on the Serious Offenders Bill 2018 (Vic), (Web Page, 21 May 2018), <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20Comment%20-%20Serious%20Offenders%20Bill%202018.pdf>, [21]-[27].

subject to supervision orders in residential facilities rather than preventing more serious harm to members of the community.

85. Notably, this sees persons in such facilities subjected to harsher penalties for such conduct than those in prisons pursuant to s 53 of the *Corrections Act 1986* (Vic) and r 50 of the *Corrections Regulations 2009* (Vic).

86. There is significant scope for such provisions resulting in mandatory imprisonment to be misused by police or custodial officers.

Issues Paper G – Sexual Offences: Restorative and Alternative Justice Models

87. A list of questions raised by the Commission concerning Issues Paper G – Sexual Offences: Restorative and Alternative Justice Models have been published. Our submission will specifically respond to questions 1 and 2.

Question 1: Do you support adopting a restorative justice model for sexual offences? Why or why not?

88. The process of making a complaint and bringing a charge for a sexual offence through the criminal justice system is not designed to directly address the harm caused to a victim. Instead, the focus is properly on the accused person, providing a fair process and an opportunity to test the allegations made against them.

89. Restorative justice aims to improve victims' experiences of justice by considering their wellbeing and addressing specific needs, to improve victim access to justice by offering an alternative avenue for addressing harm, to support offenders in non-offending by increasing their insight into the impact of the harm caused, and to create healthy societies by strengthening social bonds.[48] It provides an opportunity for people who have been sexually harmed to explain the impact in their own words, without the constraints of the rules of evidence. Where restorative justice is 'done

[48] Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems following Child Sexual Abuse or Comparable Harms*, (Bolitho and Freeman, March 2016), 26.

well', it can go beyond what traditional responses can achieve.[49] As outlined above, Liberty Victoria has long supported the adoption of a restorative justice model for sexual offences to address and complement the necessary limitations of the adversarial criminal justice system, and to ensure better outcomes for all participants.

90. Professor Kathleen Daly of Griffith University has conducted extensive work in the field of innovative justice responses to sexual offending. Professor Daly's notion of 'victims' justice needs' identifies, in general terms, what people who have been sexually harmed want from the criminal justice system, namely: participation, voice, validation, vindication and offender accountability.[50] Whilst there has been significant, continual and effective reform to the area of sexual offences in Victoria, it is recognised that the traditional criminal justice system cannot meet all of these needs.

91. Liberty Victoria adopts Professor Daly's view, which is echoed by the RMIT Centre for Innovative Justice (**CIJ**), that "more constructive methods of responding to sexual offending need to be identified, methods which do not rely on increasing the criminalisation and stigmatisation of offenders but which respond more effectively to sexual assault".[51]

92. The adoption of a restorative justice processes that enhance and complement the conventional justice system, and which are better able to meet the justice needs of victims, address the rehabilitative needs of offenders and support endeavours to prevent future offending,[52] will improve access to just outcomes for victims, offenders and the wider community.

93. The value of restorative justice is widely acknowledged. As noted in Issues Paper G, the Royal Commission into Family Violence supported restorative justice for

[49] Jacqueline Larsen, Australian Institute of Criminology, *Restorative Justice in the Australian Criminal Justice System*, (vii).
[50] Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending - Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014), 9.
[51] Ibid, 10.
[52] Ibid, 13.

family violence, the CIJ supports its use for sexual offences and the VLRC has previously recommended introducing a staged restorative justice program, including for sexual offences in the later stages.

94. As noted above, Liberty Victoria has previously argued that 'cautious and selective evolution' of the criminal justice system was necessary to avoid adding greater complexity to an already difficult jurisdiction.[53] This 'slow and steady' approach was supported by the CIJ in their report, *Innovative Justice Responses to Sexual Offending*, which submits that rather than a certain type of offender or offending being more or less appropriate for sexual offence restorative justice, a phased approach would allow time for professional and services to develop the necessary skills and expertise to appropriately assess suitability for conferencing, whilst the criminal justice system, legal culture and the wider community also adapts to this significant change in process.[54]

95. Liberty Victoria does not advocate for the blanket exclusion of certain types of offenders or offences from restorative justice processes. Eligibility should be determined according to basic criteria that do not automatically exclude specific offences or categories of offenders, instead according to established best principles, such as voluntary participation. Each case must be assessed carefully on its own facts and the accused's personal circumstances to determine suitability. It is critical to the success of any restorative justice process that it be flexible, responsive and nuanced, and conducted by highly-trained and skilled personnel.

96. Research on the impact of restorative justice has contradicted claims that benefits for one party come at the expense of the other, and instead have been relatively consistent in reporting satisfaction among victims.[55] Any challenges involved in ensuring the safety of those who participate can be met with screening for suitability, careful preparation of all participants, a flexible and variable format that can respond

[53] Ibid, n 3.
[54] Ibid, 7-8.
[55] Ibid, n 2.

to the individual circumstances of each case, and ensuring that such processes only take place with a highly-skilled and experienced facilitator.

Question 2: If a restorative justice model is adopted, what should its features be?

97. Whilst the ability to access restorative justice processes should not interfere with an accused's right to trial, nor change or substitute the normal process of criminal justice, it should be available at any point before, during or after a criminal prosecution. Indeed, such a model should be available even where there is no criminal justice process.

98. Where such processes take place before a formal finding (including admission) of guilt, anything said or done throughout the process should be subject to a codified immunity and not admissible in any pending, current or future criminal or civil proceeding, except in some circumstances. A legislative example is found in s 127 of the *Criminal Procedure Act 2009* (Vic) in respect of committal case conferences:

> (3) Evidence of—
>
> (a) anything said or done in the course of a committal case conference; or
>
> (b) any document prepared solely for the purposes of a committal case conference—
>
> is not admissible in any proceeding before any court or tribunal or in any inquiry in which evidence is or may be given before any court or person acting judicially, unless—
>
> (c) all parties to the committal case conference agree to the giving of the evidence; or
>
> (d) the proceeding is a criminal proceeding for an offence alleged to have been committed during, or in connection with, the committal case conference.

99. Liberty Victoria acknowledges the concern raised that some within the community believe that a person responsible for sexual harm should not be incentivised to participate in restorative justice. However, in cases where there is a plea or finding of guilt, genuine engagement on the part of the offender should be a factor taken into account by the Court in any sentence to be imposed. This is consistent with the Youth Justice Group Conferencing program, which has successfully operated in the criminal jurisdiction of the Children's Court across Victoria since its formal introduction in 2006.

100. How participation is to be taken into account in sentencing should be determined on a case-by-case basis, however it may be relevant to an assessment of, amongst other things, remorse, willingness to facilitate the course of justice, prospects of rehabilitation and the weight to be afforded to specific deterrence. This is analogous to the approach in the Koori Court: see *Honeysett v The Queen*,[56] where Priest, Beach and Hargrave JJA said:

> In our view, in determining the weight to be attached to an offender's participation in a Koori Court sentencing conversation as a mitigating factor, a sentencing court should consider a range of factors, including:
>
> (1) The fact that participation in the process is a voluntary one, may be confronting to the offender, and will likely involve him or her being 'shamed'. As noted in *Morgan*, participation in the process may of itself be rehabilitative.
>
> (2) The fact that the offender is, rather than 'hiding behind counsel', taking the opportunity to personally:
>
> (a) demonstrate his or her remorse for the offending;
>
> (b) demonstrate insight into the reasons for, and the seriousness and effect of, the offending; and
>
> (c) express any intention to reform and how that will be done, including by participating in available rehabilitation programs.
>
> (3) The Court's assessment of the genuineness of the offender's statements during the sentencing conversation. That assessment should take account of all the information before the Court.

[56] (2018) 56 VR 375.

> Based on the sentencing Court's assessment of the quality and genuineness of the statements made by the offender, it is a matter for the individual judge to assess weight in the circumstances of the particular case. In fixing the sentence, it is the duty of the Court to impose just punishment adapted to all the circumstances of the case by reference to the permissible sentencing purposes of general and specific deterrence, any means by which rehabilitation of the offender be facilitated, denunciation of the offending, and the need to protect the community.[57]

101. Liberty Victoria acknowledges that the Koori Court has distinct cultural significance, and the notion of 'shaming' may not be appropriate in a restorative model for sexual offences. However, the other principles expounded by the Victorian Court of Appeal appear to have direct and helpful application.

102. Liberty Victoria strongly supports the establishment and use of an independent Commission to manage and run any restorative justice model adopted. In order for the outcome to be respected and viewed as fair and just, the process must be viewed by participants as neutral. Thus, established victim or offender program providers, such as Corrections Victoria, are not appropriate agencies to run such processes. Notwithstanding any benefits that may flow from building on existing programs, such as the informal restorative justice conferencing offered by SECASA,[58] Liberty Victoria favours the establishment of a wholly independent Commission to manage restorative justice in Victoria.

103. It is essential that participation by the person harmed and the offender should be voluntary and free from pressure of any kind, and that the person responsible for harm must accept responsibility at the outset to some degree. Liberty Victoria supports the adoption of the best practice principles for restorative justice in cases involving sexual harm outlined in Table 2 of Issues Paper G, namely:

- Voluntary participation—no one is obliged or pressured to participate;
- All participants are protected from further harm—their safety is ensured;

[57] Ibid, 389-90 [54]-[55].
[58] South Eastern Centre Against Sexual Assault and Family Violence, Victoria.

- The process centres on the needs and interests of the person harmed;
- The person responsible accepts responsibility at the outset, at least to some degree;
- Power imbalances are redressed. The dignity and equality of all participants is respected;
- The process is supported by appropriate resources and highly trained and skilled personnel, including people with specialist expertise in sexual harm;
- The process is flexible and responsive to diverse needs and experiences;
- A restorative justice outcome agreement is fair and reasonable, and the person responsible is able to carry it out;
- What is said and done during restorative justice is confidential, potentially with some exceptions such as where a participant indicates an intention to offend in the future [we would add an exception where the participation in such a process is led in plea hearings as evidence of matters such as remorse, specific deterrence, and willingness to facilitate the course of justice];
- Transparency: participants are fully informed about all aspects of the process and potential outcomes; de-identified results are publicised to contribute to continuous program improvement;
- The process is part of 'an integrated justice response'—it is not a stand-alone response; other criminal and civil justice options are available, as well as therapeutic treatment programs that the person responsible can be referred to as a condition of the restorative justice outcome agreement; and
- The process is supported by a legislative framework that sets out guiding principles, provides for implementation, and explains how restorative justice interacts with the criminal justice system and how restorative justice agreements will be monitored.

104. Whilst people harmed should be able to request restorative justice, it is critical that the accused person is not compelled or pressured to participate. Similarly, referrals from other sources including Victoria Police, the OPP or judicial officers, should not place any pressure on the person harmed nor the alleged offender.

105. A restorative justice model has the potential to have a long-lasting and wide-reaching impact on criminal justice in Victoria, and improving outcomes for victim-survivors. However, we would again submit that a cautious approach needs to be taken to ensure that the appropriate referral and assessment framework coupled with therapeutic treatment programs and appropriate legislative frameworks are implemented. The importance of uptake within the profession and wider community cannot be emphasised enough, and again this is something that can only be achieved with time.

Thank you for the opportunity to make this submission with regard to improving the response of the justice system to sexual offences.

If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Julia Kretzenbacher or Policy Committee Member Michael Stanton or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.