County Court of Victoria

Response to VLRC Issues Papers – Improving the Response of the Justice System to Sexual Offences

1. Summary

The Court supports the Victorian Law Reform Commission's (VLRC) review of Victoria's laws and procedures relating to sexual offences. The following submission is divided into sections covering issues raised in the VLRC issues papers – Improving the Response of the Justice System to Sexual Offences, namely:

- Barriers to sexual offence matters progressing to findings of guilt
- Improving the experience of complainants in sexual offence proceedings
- Restorative justice
- Other issues

The Court considers that within these sections there are opportunities to improve the response of the justice system to sexual offences.

2. Barriers to sexual offence matters progressing to a finding of guilt

Resolution rates and conviction rates are comparatively lower in sexual offence cases. One reason for lower conviction rates in sexual offence matters is that juries are less likely to convict in matters where the complaint's evidence is unsupported by independent evidence. These are described as 'word on word' cases. It can be difficult for a jury to be satisfied beyond reasonable doubt in such cases.

Separately, resolution rates for sexual offence charges are comparatively lower because of the significant social stigma that such charges carry. Accused face the prospect of admitting to conduct which can have significant and long-lasting social consequences. This includes the personal shame of admitting to the offending, and external factors like social isolation, sexual offender registers, and personal safety implications.

The Court considers that these two factors, juries being less likely to convict in word on word cases and accused being less likely to plead guilty due to social stigma, are

inherent qualities of sexual offence cases. The standard of proof, beyond reasonable doubt, is a high bar for cases that are more likely to involve 'word on word' evidence. The Court recognises that the standard of proof is not a feature that can be altered. Further, social stigma, while capable of evolving over time, is difficult to address with any sort of immediacy. Nonetheless, the Court does consider that restorative justice approaches could play a role in addressing these factors.

Other, sometimes overlapping, barriers to sexual offence matters progressing to a finding of guilt include; historically held perceptions by practitioners; misconceptions in relation to sexual offending; deficiencies in the investigative process which can sometimes lead to misconceived or discriminatory attitudes of police; the law pertaining to the admission of evidence in criminal trials, and delays in matters progressing through the justice system.

The Court considers that there are four main issues that could assist in reducing these other barriers to sexual offence matters progressing to a finding of guilt, namely:

- Cultural change
- Expert evidence
- Jury Directions
- Improvement of VARES

Cultural change

The criminal justice system has over recent decades matured in its understanding of sexual harm and attitudes towards complainants in sexual offending matters. There is of course always a need to continually improve the understanding of such matters. Continual and expanded training and education around sexual harm can assist with this, not only for those within the legal profession, but also the broader community. This will result in greater sensitivity from direct participants in the trial process, and from indirect participants, such as the media.

Cultural change within the legal profession

One way to achieve cultural change is through leadership. The legal profession currently has access to a variety of educational services. Judges and practitioners alike participate in various CPD events and seminars. This is consistent with the VLRC's recommendations in its final report on sexual offences in 2004.[1] The Court supports continued education through both the Judicial College of Victoria, and other key stakeholders such as the Law Institute of Victoria, and the Office of Public Prosecutions. These agencies are well placed to reach out to the broader profession and effect cultural change.

In particular, the Court supports the funding of additional education and training for judges that sit on sexual offence cases. For example, in the United Kingdom the Judicial College regularly conducts a three-day course entitled the Serious Sexual Offence Seminar.[2]

Similarly, New Zealand provides extensive and regular training to its judiciary in relation to sexual offence matters via Te Kura Kaiwhakawā / the Institute of Judicial Studies (Te Kura). When New Zealand's Sexual Violence Court Pilot was launched in 2017 and 2018, all judges involved in the pilot attended a three-day training program. Since the commencement of the Sexual Violence Court Pilot, Te Kura has also delivered an annual two to three-day program on Managing sexual violence trials / Communicating with vulnerable witnesses and defendants. This is one of Te Kura's core curriculum programmes and is attended by all District Court judges within their first three years on the bench. In addition, this year Te Kura is running a series of "common room sessions" for District Court and Senior Courts judges on rape myths as barriers to fair trial process.

The Court is aware that the VLRC is also consulting with the Judicial College of Victoria in relation to this reference, and that the Judicial College of Victoria has provided detailed information about available events and resources for the judiciary pertaining

[1] Victorian Law Reform Commission, Sexual Offences (Report No 5, July 2004), pp. xxiv-xxv.
[2] JUSTICE (UK), Prosecuting Sexual Offences (Report, 2019) 60–1, pp. 60-61.

to sexual offence matters. The Court wishes to highlight that this training is of a very high standard and extremely valuable to the County Court.

The conduct of sexual offence trials is highly specialised and complex. They also form a significant bulk of the trial work conducted by judges of this Court. As such, the Court supports further consultation on how increased sexual offence training for judges can be achieved.

Cultural change within law enforcement

Cultural change in a law enforcement context is also important. The Court supports the continued and expanded education of Victoria Police members, in particular those who are tasked with investigating and interviewing victims of sexual offences. As the point of entry to the justice system for most victims of sexual offending, members of Victoria Police are central to effective and supportive engagement with victims. Continued and expanded education of Victoria Police members regarding sexual offending could also improve the quality of evidence that is gathered.

Cultural change within the community

Cultural change within the community is challenging, and the Court notes from the issues papers that cultural change within the broader community does not form part of the consultation with the Court. As such, the Court will not comment on this aspect.

The Court notes that expanded and continued education across all sectors will require adequate resourcing. Ensuring that training is more available, more comprehensive and more regular, necessarily carries an increased cost.

Cultural change can also be achieved through the increased and improved utilisation of expert evidence and jury directions. These are discussed below in greater detail.

Expert evidence

Expert witnesses in criminal proceedings assist in addressing misconceptions about sexual offending. More regular use of expert witnesses could help address cultural change. The use of more expert witnesses in sexual offence matters could also inform

the advice that defence counsel provides to an accused, which could lead to more matters resolving.

One option to increase the use of expert witnesses is by establishing a bipartisan expert panel to streamline the process of using expert witnesses in sexual offence trials. The expert panel, consisting of psychologists with specialised knowledge and experience in sexual offences, could prepare a generalised report or submission on certain well-known misconceptions. These expert opinions would be available to the court and practitioners. Further, an expert witness from the panel could be called on at short notice to give evidence in relation to how these misconceptions apply to a particular sexual offence proceeding.

To ensure impartiality of expert witnesses, the statements could relate to non-controversial evidence about sexual offending, that has large research behind it. Ideally, such evidence might be admitted in the long term via signed notices to admit evidence - without the need to call the witness at all.

The statements addressing misconceptions could cover issues similar to those found in the Australian Institute of Family Studies report - Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners.[3] Specifically:

- Ease of reporting and difficulty of defending
- Delayed reporting
- Offender relationship
- Injury
- Resistance
- Misunderstanding memory
- False allegations
- Alcohol
- Corroboration
- “Counter-intuitive” continued relationship following offending
- Emotion during report
- Gender of victims/offenders

[3] Australian Institute of Family Studies, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners*, Commissioned report, September 2017.

- Disability
- Age of victim
- Child victims

The admission of such statements as evidence would not negate an accused arguing that the statement does not apply to their situation.

The Court acknowledges that jury directions are also capable of addressing common misconceptions and are discussed below. However, an expert panel is able to be more quickly and more flexibly applied to sexual offence proceedings. The amendments or creation of jury directions can be a lengthy process.

Jury directions

Improving and streamlining jury directions is another way to achieve cultural change in sexual offence trials. Jury directions can impact social change through the way prosecutors and investigators carry out the trial or investigation. They can also impact the advice given by defence practitioners to their client, as well as inform the jury of common misconceptions, which are then brought back into the community following the trial. Finally, they may well be referred to by media reporting on a particular trial.

The Court considers that recent changes to jury directions have improved the fair administration of justice in sexual offence trials. Currently, several County Court judges sit on the Jury Directions Advisory Group (JDAG) which provides expert advice to the Department of Justice in relation to reforms to jury directions. This group can and do regularly meet to discuss and propose reforms to jury directions in Victoria.

While ultimately a matter for advice and discussion through JDAG, and also a question of policy for Government on whether to proceed with the reform, the Court wishes to highlight the following areas below in which jury directions could be looked at further.

The Court also wishes to note that in addition to specific jury directions addressing misconceptions, language used in connection with sexual offences is also important in steering cultural change. For example, it might be argued that the term “complaint” carries harmful connotations and would be better described as “disclosure”.

Incorporating neutral language into jury directions would further assist in bringing about positive cultural change.

Communicative model of consent direction

Directions in relation to the how the court describes Victoria's communicative model of consent may be capable of improvement. In sexual offence cases the issue of resistance is a common misconception, one that is directly addressed in directions to a jury.[4] Despite the existence of these directions, there is still scope for the complainant to be cross-examined in relation to their actions, or lack of actions. Whether these directions can be strengthened or clarified is an important and evolving question.

Cross-examination direction

Jury directions in relation to certain types of questioning may also be appropriate. In the Court's experience, cross examination of witnesses can involve questions that are designed to sow doubt, despite carrying little forensic insight.

For example, questions to complainants regarding what may be theoretically possible are designed to elicit a concession that anything is indeed possible. While the complainant making such a concession may be reasonable, it can be highlighted to sow doubt about the complainant's account of the events. It may be possible to formulate a direction which deals with the weight jurors can give to responses by witnesses about what is theoretically possible, rather than what is actually possible. Such a direction could possibly be extended to expert witnesses as well.

Another common problematic aspect of cross-examination in sexual offence cases is indecorous questioning of complainants. Whilst 'improper' questions are prohibited under the *Evidence Act 2008,*[5] such question are often still asked by counsel.

[4] Jury Directions Act 2015, section 46(3)(c).
[5] *Evidence Act 2008,* sections 41 and 55

The acquittals of Craig McLachlan for charges of indecent assault provide a recent example. After delivering her verdict, Magistrate Wallington raised concerns about the way defence counsel questioned the four complainants during the hearing:

> "On the issue of cross-examination, the court was not assisted in its task by questions put by defence counsel Mr Littlemore such as the length of the average female labia majora, or whether a complainant was proud of her figure or other troubling and outdated stereotypes of sexual assault victims," she said.

Where such questions are asked in a trial, the jury will have heard the question, whether it is answered by the witness or not. This raises the question of what the jury should be told in this situation. Standard practice is for the judge to tell the jury to disregard the question and any answer given.

It is noted that section 7 of the *Jury Directions Act 2015* requires a judge to correct any statement or suggestion by counsel that is prohibited by that Act. This may cover suggestions such as: there is one typical response to being sexually assaulted; people who are not consenting would physically resist; a complainant is less reliable because they delayed in making a complaint.

The Court considers that a similar requirement for ‘correction’ may be appropriate in the context of improper and irrelevant questions more generally. The correction could take the form of a jury direction requiring the judge to do more than simply tell the jury to disregard the question. To ensure the integrity and fairness of the trial, the judge could be required to explain why the question is improper or has no relevance to the matters in issue.

Domestic violence direction

Jury directions in relation to a complainant who stays with an abusive partner may also be utilised to address common misconceptions about sexual offending and domestic violence.

Section 60 of the *Juries Directions Act 2015* currently provides that a trial judge can give a direction that it is not uncommon for a person who has been subjected to family violence to stay with an abusive partner, or to leave and then return to the partner.

However, this direction is limited to proceedings in which self-defence or duress in the context of family violence is in issue.[6]

Removing the requirement for self-defence or duress to be in issue before such a direction can be provided, would increase the opportunity to address the misconception about complainants staying with an abusive partner.

Directions to disregard certain evidence

The Court considers that caution should be adopted when considering strong directions to a jury to disregard certain evidence simply because it is linked to a misconception. For example, despite it being a misconception that delayed reporting can impact the reliability of the complaint, there may be certain cases where delayed reporting is capable of impacting on the assessment of reasonable doubt. Such determinations should be left to a jury, balancing the facts with the directions of law they are given.

Improvement of VAREs

One way to address the issue of complainants being caught off guard in cross-examination by questions relating to delay in complaint or why there was a lack of resistance, would be for it to be common practice for such questions to be asked in VAREs or during the course of their statement being taken.

This would remove the element of surprise of a complainant being asked such questions in the witness box, when they are under pressure and often unable respond with a considered or full answer.

3. Improving the experience of complainants in sexual offence proceedings

The support provided to complainants in sexual offence proceedings has significantly improved in recent years. This has led to better quality evidence being provided by

[6] *Juries Directions Act 2015*, section 55.

witnesses, which benefits not only the complainant, but others involved in the criminal justice process and the community as a whole.

In seeking improvements to the supports available for complainants, the Court recognises that providing evidence in sexual offence cases can be an inherently traumatic and difficult experience. The Court considers that there are opportunities to further improve the experience of complainants in such proceedings in the following areas:

- Intermediary Pilot Program
- Specialisation and accreditation of practitioners
- Subpoenas relating to complainants
- Emergency case management
- Remote witness facilities
- Introductory remarks from judges to complainants

Intermediary Pilot Program

The Intermediary Pilot Program (IPP) introduced in 2018 has been successful and is currently funded until June 2021. It has enabled complainants with complex needs to receive better support and assisted practitioners to ask more appropriate questions. This has resulted in complainants being able to provide their best evidence. In some instances, it has meant complainants have provided evidence when they might not have otherwise done so.

The Court supports the IPP being extended and expanded to operate in all County Court locations. The Court notes this would require additional resources, especially having regard to the fact that the majority of matters that proceed to trial in the County Court relate to sexual offence charges.

There is also the possibility of expanding the operation of the IPP to include all vulnerable adults who are complainants in matters involving charges of sexual offending. While this approach does have the support of some judges within the Court, such a significant expansion of the scheme would require broader and more detailed consultation within the Court. This proposal would also require greater allocation of

resources. Several County Court judges also support further investigation of the merits of the UK's independent sexual advisor approach.

Subpoenaing of intermediary notes

The Court notes that some judges have encountered issues in relation to intermediary notes being subpoenaed. In one case, this resulted in lengthy pre-trial argument, involving VGSO as a party, regarding the competency and compellability of intermediaries. Ultimately, the decision in that matter was that the issue raised by defence in relation to the intermediaries did not have a legitimate forensic purpose. Namely, that the intermediary corrupted or tainted the evidence of the complainant through their actions during the recording of the VARE.

In oral argument, both the prosecution and VGSO conceded that there may be cases of impropriety by an intermediary that would result in an intermediary being cross-examined regarding the exercise of their roles. The Court acknowledged that this could be a possibility, albeit in unusual or exceptional circumstances.

As this matter is still ongoing, the judgment is not suitable for publication. However, the Court will endeavour to provide any judgment, with appropriate redactions, once proceedings have concluded.

Intermediary case examples

The Court would like to provide examples of when intermediaries have assisted complainants to give their evidence as effectively as possible.

Case 1

Kate*, an adult with an intellectual disability, gave evidence during a court case from a remote witness room with the assistance of an Intermediary.

Kate was highly anxious about the court process. The intermediary conducted a formal assessment that suggested Kate presented as a shy person who wanted to please others and that she demonstrated a literal interpretation of spoken language and concrete thinking. The Intermediary was able to assist Kate when she gave her evidence, including through:

- implementing strategies to help her regulate her emotional state
- indicating to the court when she needed to take a break

- providing visual reminders of her response options when she became unsure, such as 'I don't understand', 'can you repeat the question', 'I don't know' or 'I don't remember'.

The assessment also assisted Counsel to structure questions in simple and concrete terms so they could be readily understood by Kate. While she found giving evidence stressful, Kate was pleased that she had given her evidence and reported she felt she had done a good job with the assistance of an Intermediary.

* Name has been changed to protect identity

Case 2

Jason* was an 18 year old who had been diagnosed with a mild intellectual disability and moderate-severe language disorder [redacted]. [redacted] Jason also had a history of polysubstance abuse [redacted] as well as significant anxiety. Jason lived in rural Victoria with few supports and was extremely anxious about travelling outside of his community.

[redacted]

The Intermediary travelled to the country to assess Jason in person. During the assessment Jason covered his head with his jumper and hid behind his sibling, unable to engage. Eventually Jason answered some simple closed questions and stated that he did not want to enter the building, and so the informal assessment took place in a carpark. Jason left after 15 minutes. The Intermediary organised to meet with Jason a second time, to gather some more information and attempt to develop rapport. Jason was able to remain in that assessment for a little over 15 minutes before leaving. During the assessment Jason was highly anxious and largely monosyllabic in his responses to questions.

An assessment report was prepared, and discussed at the Ground Rules Hearing, where all recommendations were accepted by the Judge. The Ground Rules for Jason's Special Hearing included:

- giving evidence later in the morning consistent with his sleep cycle
- he was able to wear a hood that covered his face and to face away from the camera
- questions were to be very simple requiring only short responses of 1-3 words
- he was offered breaks every 15 minutes
- provision was made for him to use visual aids or for the Intermediary to communicate his answers if needed
- a visual timeline was developed to help orient him when answering questions, and the duration of questioning was limited to 1 hour or less

Jason was able to give his evidence clearly, with little need for Intermediary intervention and left the remote witness facility exclaiming "I did it!"

*Name has been changed to protect identity

Specialisation and accreditation

Specialisation of judges

The Court opposes the creation of a specialist sexual offence court *per se*. This is because the issue of judicial burnout looms large and it is important that the workload of sexual offence matters is shared amongst all judges. This is particularly important in a jurisdiction like the County Court, where sexual offence matters make up the bulk of trial work.

It does support the provision of continual and intensive training to its judiciary regarding sexual offending and the harm it causes. The Court recognises that regular training of judges can assist in ensuring consistent and tailored support for complainants, while maintaining procedural fairness for accused.

Judges in the County Court who sit in the Criminal Division are necessarily experienced in sexual offence trials. These types of cases often involve challenging evidentiary rulings, complex issues in dispute, and distressing subject matter. The more frequently a judge is engaging with these issues, the more effective and efficient they become at conducting sexual offence trials.

The Court notes that it is also important for such specialised training to be provided to appellate judges. Appellate judges frequently hear appeals that concern the exercise of a discretion in sexual offence trials, and it is therefore also important for appellate judges to receive appropriate training.

Specialisation of practitioners

The requirement of specialisation and accreditation of practitioners practising in indictable sexual offence matters, would improve the efficiency and integrity of proceedings and consequently the experience of complainants.

One way to introduce a specialisation and accreditation scheme for practitioners would be to include it as part of the Indictable Crime Certificate (ICC) program. This would

increase the number of practitioners that would then have appropriate training for sexual offence matters. Noting however, that it would be preferable if all practitioners working in indictable sexual offence matters were required to undergo specialisation and accreditation, and not only the practitioners who undertake the ICC program. To ensure that practitioners working in indictable sexual offence matters continue to stay abreast of current issues and law relating to sexual offence matters, such specialisation and accreditation could be required to be renewed every three years.

Should a specialisation and accreditation scheme be introduced for practitioners, the issue of reducing the number of available counsel would need to be considered. And similar to judicial specialisation, the impact of burnout. A thorough consultation with the profession would need to be conducted prior to the introduction of such a reform.

Judge alone trials

The question of whether criminal liability is to be determined by a jury or by a judge alone is ultimately a policy matter for Government. However, the Court seriously questions the merits of any trial by judge alone proposal. In short:

- The value of the jury system is well established;
- Criminal trials inherently involve questions of fact and value judgment which are generally better suited to the wider community;
- Juries bring into the jury room the collective experience and wisdom of 12 individuals. It is generally better that the consideration of the facts and the assessment of the credibility of witnesses be carried out by a group of individuals rather than one individual judge. As the High Court observed in *AK v Western Australia*:[7]

> *It cannot be easy to obtain unanimity or a high majority amongst quite a large number of decision-makers reflecting the diversity of the sections of the community they belong to, the diversity of human personality and the diversity of human experience. The process must tend to generate its own discipline — cause a careful scrutiny of the evidence, a dilution and sloughing away of*

[7] [2008] 232 CLR 438, 477-8 at [103].

individual prejudices, a pooling and sharing of human experience, a solemnity of decision-making.

- In contrast to a jury verdict (which is a shared decision by 12 anonymous members of the community) judge alone trials personalise verdicts to individual judges. This can result in placing significant pressure on the judge making the decision;
- Judge alone trials can also lead to delays of justice due to the time it takes to do judgment writing;
- The publication of a judgment that may impugn the reliability or credibility of a complainant could further compound the negative impact of an acquittal for a complainant;
- The system of trial by jury has evolved over hundreds of years. It ought not to be fundamentally altered unless there is clear evidence demonstrating a compelling need to do so. The Court has seen no such evidence;
- It is true that one advantage of a trial by judge alone is the requirement of the judge to provide written reasons articulating the pathway to verdict. By contrast, a jury is only required to deliver its verdict of guilty or not guilty. Nevertheless, it is the experience of the law that the reasoning of the jury is readily exposed by the trial record of the evidence and arguments advanced by counsel. All trial rulings and decisions on the part of the trial judge are also available. There is no evidence that appellate oversight would be more effective in judge alone trials simply due to the availability of the written judgment.

Should the commission explore the possibility of trials by judge alone further, the Court would appreciate the opportunity to provide further submissions.

Professional jurors

The Court does not support a model of semi-professional jurors as considered by the New Zealand Law Commission. The jury system relies on the common experience of the community, and to rely on specialised jurors has the potential to create a second class of justice for sexual offences.

Subpoenas relating to complainants

The Court notes that the ability to subpoena sensitive material of complainants can lead to an abuse of process that is invasive of the complainant's privacy. For example, there is no formal capacity for a complainant to object to a subpoena if it is asking for their bank records or any information from a third party about them that the complainant might reasonably regard as private. However, requiring the complainant to be notified might assist in making the process fairer.

Given that complainants are not parties, the question of whether they should be given access to means of independent legal advice and representation if they wish to argue against such material being provided, should be considered as well.

Emergency Case management

The recent implementation of Emergency Case Management hearings, due to the COVID-19 pandemic, has particularly benefited the conduct of sexual offence proceedings - including those requiring special hearings. Emergency Case Management has reduced delays in matters and meant special hearings can proceed more efficiently, improving the experience for all involved.

The Court recognises that Emergency Case Management is resource intensive, however its costs can arguably be justified by the time and resources such hearings save in delays.

As outlined in its submission to the VLRC on committal reform:

> The Court is piloting a redesign of its listing processes in the criminal division. This process includes a redesign of the way matters progress through pre-trial, with a much earlier focus on case conferencing matters that are capable of resolution, or require further clarification of the issues. Further, the appointment of judicial registrars and division lawyers is designed to assist in a more hands on approach. Finally, judicial registrars could preside over pre-trial cross-examination, thereby streamlining the pre-trial process, and reducing resource demands.

In order for the judiciary to engage in the 'active case management' that is required to facilitate appropriate and timely disclosure, it is necessary that they receive legal professional support in the process and to shift this administrative work onto the legal professional case managers, namely division lawyers.

The Court considers that combining this new approach to earlier case management with reform to committals would provide an opportunity to extensively streamline criminal trial procedure. With matters arriving in the trial court sooner, the Court intends that matters that are capable of resolving are intensively case managed and expedited.

This approach of early case management would be an effective tool to ensure that sexual offence trials are managed expeditiously, and the time to trial is reduced, while also maximising the prospects of early resolution.

Remote witness facilities

The Court supports expanding the availability of remote witness facilities for vulnerable witnesses, especially in sexual offence proceedings. They offer complainants support and security during their experience of giving evidence.

During the COVID-19 pandemic the clarity and ease with which witnesses can appear remotely has also been highlighted.

The Court considers that more flexibility in how victims can give their evidence could be considered. For example, currently if a complainant wishes to give their evidence without being in the presence of the accused, it is the complainant who is removed from the courtroom, to appear by video link from a remote facility. However, for some complainants this may result in them feeling disconnected from the trial process and the jury.

Reform could be considered to allow, where appropriate, for the accused to observe the trial remotely for the duration of the complainant's evidence, if the complainant wishes to give evidence live in the courtroom.

Introductory remarks from judges to complainants

Judges often make introductory remarks to complainants before the complainant gives their evidence in order to 'settle' them and assist them to feel comfortable in the court room. The Court endorses this practice.

Giving evidence is a daunting and stressful experience. No matter how well a complainant is conferenced in the lead up to a trial, it is inevitable that some complainants will feel like an outsider upon entering the court room. The judge speaking to the complainant and introducing the process in broad terms is a simple way to acknowledge the complainant's humanity and the important role that they possess in the process.

Legislative reform to require judges to undertake this practice may not be appropriate, however a suggested script being inserted into the Judicial College of Victoria Criminal Charge Book could be an effective way to encourage judges to adopt the practice.

The suggested script could cover matters such as:

- the role of the judge;
- the role of the prosecutor and defence counsel;
- the role of the jury;
- the supports available to the complainant;
- the fact that the complainant can request breaks if needed.

Committal reform

Recent reforms to committals for sexual offence matters still need to be analysed to assess whether there has been any measurable benefit in terms of efficiency. Specifically, with regards to the prohibition of a committal hearing in cases where a complainant for a sexual offence charge is a child or a person with a cognitive impairment.[8]

[8] *Criminal Procedure Act 2009*, s 123.

Unfortunately, due to the COVID-19 pandemic any assessment of the data will not provide any reliable insights into the effectiveness of these reforms.

4. Restorative justice

The Court welcomes the fact that restorative justice models are to be investigated by the Commission.

The Court can see the potential for restorative justice principles to play a role in relation to sexual offence matters in some instances, particularly when such matters relate to historical offending and the victim is primarily seeking acknowledgment of past wrongs. However, it is a complex question at what stage, and in what way and by whom, a restorative justice model should be implemented.

One specific issue that requires examination is the notion of unequal justice. That is, the benefit that an accused person is entitled to in sentence may depend upon the victim in the particular matter being willing to participate in restorative justice. For example, accused A and accused B might both be willing to participate in restorative justice, however only accused A is able to actually participate, and therefore derive the benefit in sentencing, because the victim in accused B's matter is not willing to participate in restorative justice. How this situation can be reconciled is an important question.

The Court will only be in a position to constructively comment upon any restorative justice approach once some models have been more clearly developed by the Commission. The Court would welcome the opportunity to be further consulted once the Commission has established a framework for the application of restorative justice.

Aboriginal justice

The Court notes that Koori Court, which encompasses some restorative justice features, does not hear sexual offences. Further consultation with the Aboriginal and Torres Strait Islander community should be considered in exploring whether Koori Court should hear sexual offence matters, as any reform needs to be community lead.

5. Other issues

Early intervention

The Court considers that the most effective way of addressing sexual offending is by early intervention before the criminal justice system is engaged. Courts are ultimately intervening at the acute end matters. At this stage the avenues for reducing sexual offending are limited.

Issues Paper F refers to two early intervention programs, *Stop it Now!* and *Prevention Project Dunkelfeld*. Whilst recognising early intervention is a matter of policy for Government, the Court supports the exploration of similar programs being implemented in Victoria.

Rehabilitation

A major issue with rehabilitation and reintegration of sexual offenders is the delay in treatment, particularly when a person is sentenced to a community correction order. These delays create a number of compounding issues for the Court, the community, as well as victims and offenders. They reduce the efficacy of treatment and rehabilitation conditions and can increase the risk of recidivism.

Separately, there is often the issue of a lack of suitable treatment options available for sex offenders with extremely complex needs. This leads to an inability to address rehabilitation needs of offenders and in some instances, an uplift in the overall sentence imposed in order to protect the community.

The need for timely and appropriate rehabilitation is particularly high when mental illness is present. The Court discussed this issue in its submission to the Royal Commission into Victoria's Mental Health System:

> Post-sentence supervision
>
> The creation of post-sentence supervision, in the form of the now repealed *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* and the

current *Serious Offenders Act 2018 (Vic)*, created a risk management and rehabilitative regime that was entirely unique to the justice system.

This regime is not designed to be punitive in nature. Its guiding principles are the identification and management of risk, the protection of the community, and the targeted rehabilitation of offenders. Due to the nature and seriousness of the offending, and the risks of reoffending, a significant cohort of people subject to post-sentence supervision live with mental illness.

Post-sentence supervision must be viewed in its context. Offenders who come within the scheme will have served a significant term of imprisonment. As a result, they are likely to exhibit a greater level of institutionalisation which can exacerbate any associated mental health issues.

As a result, there are significant challenges in rehabilitating, reintegrating, protecting, and reducing the risk of reoffending for this cohort of potentially particularly vulnerable (and high risk) offenders.

In the Court's experience, post-sentence supervision orders are often complicated by a lack of appropriate housing, treatment and supports (including case management) in the community, and the often highly complex needs of the offenders.

Case study

AE was a male in his mid-20s who had been diagnosed with a mild intellectual disability, personality disorders, past drug and alcohol abuse, and paedophilia. He also had a long history of living within various institutions, as well as frequent acts of self-harm. In [redacted], AE received [redacted] years' imprisonment for offences of [redacted] as well as a [redacted]-year residential treatment order. The Court acknowledged that the offending was motivated in part by a desire to be remanded in custody and due to the significant levels of anxiety in living independently.

The County Court cancelled the Residential Treatment Order after several months due to AE's needs being too complex to facilitate his compliance. AE was resentenced to [redacted] years imprisonment, with a non-parole period of [redacted]

In [redacted] AE was placed on an interim supervision order, with a requirement that he reside [redacted]. Within days AE had attempted an overdose on medication, and later had absconded from [redacted] as well as making a bomb threat against the facility.

The Court found that AE's behaviour was caused by the combination of his intellectual disability and personality disorder that resulted in low frustration tolerance and poor emotional regulation. AE's frustration at residing at [redacted] and the negative interactions with other residents there, resulted in him exhibiting problematic behaviours that were designed to sabotage his ability to remain in that setting.

This behaviour persisted with a cycle of short periods of imprisonment arising from breaches of the supervision order, followed by a return to [redacted]. The County Court heard expert evidence regarding the lack of appropriate supports available at [redacted] to address and support AE's complex coalescence of needs.

This cycle ended in late 2018 due to the death of AE from self-harm in [redacted]

This case study shows that a person with a complex interaction of mental health issues can be severely disadvantaged as a result of a lack of appropriate mental health supports in the community, [redacted]. Where a person is unable to cope with the requirements of a Residential Treatment Order, it is unsurprising that the strict requirements of a Serious Sex Offender Supervision Order is likely to also encounter significant difficulties.

The Court also considers its ability to protect the identity of persons subject to supervision orders is critical to the protection of people with mental illness.

Recommendation 14 of the Vincent Review into the *Open Court Act 2013* proposed the restriction of suppression orders concealing the identity of persons subject supervision orders under the *Serious Offenders (Detention and Supervision) Act 2009*. Due to the prevalence of concomitant mental health issues arising in people undergoing supervision orders, the Court is often in possession of expert medical evidence that the successful rehabilitation of offenders relies heavily on their ability to avoid further social isolation as a result of harassment or discrimination in the community.

The Court considers that the imposition of suppression orders to protect the identity of persons undergoing post-sentence supervision, particularly where mental health issues exist, is entirely connected to the paramount consideration of the safety and protection of the community.

Historical course of conduct offences

In determining what conduct constitutes a 'sexual offence' there are issues in relation to course of conduct offences that span several years. Such conduct might have numerous legislative schemes that apply to it, which gives rise to complications in providing jury directions.

It can also be difficult to identify a specific occasion on a course of conduct charge. Which can make it difficult to progress a matter to a finding of guilty.

New offences

The Court recognises that the legislation of criminal offences is a matter of policy for Government. However, the Court notes that new offences may be required to include conduct that has not been covered by existing laws.

New offences might include the creation of "deepfakes", and also the criminalisation of depositing semen in items of clothing (without theft).

The law in Victoria in relation to stealthing, the removal of a condom without consent, is not clear. Such conduct might fall under a charge of procuring sexual act by fraud[9] or rape on the basis that there is no consent.

The Court notes that in its report *Consent in relation to sexual offences,* the NSW Law Reform Commission recommended stealthing should be a criminal offence.[10] Having a standalone offence for such conduct would remove uncertainty around the unlawfulness of stealthing and may increase the reporting of such offending.

Judicial discretion regarding the Sex offenders register

Whilst recognising that this reference may not be the appropriate avenue to raise the need for a review of the sex offender registration scheme and its efficacy, some judges are of the opinion that such a review would be timely. This is given the comprehensive, and more individually targeted provisions of the new *Serious Offenders Act 2018* and *Worker Screening Act 2020*.

Some judges have concerns with the sex offenders register scheme in relation to its application to young offenders and their rehabilitation. Specifically, in relation to the mandatory registration of a young person for life, which has a significant impact on their rehabilitation and life prospects.

Currently persons can make an application for a registration exemption order - if they were 18 or 19 during the commission of the offence.[11] Some judges are of the view that there should be a discretion when it comes to placing a person on the sex offenders register, rather than requiring the person to make an application. Further that the circumstances in which such a discretion applies could be extended beyond when a person is 19 years of age. This is based on the notion and evidence that supports that many individuals do not reach their full maturity until mid to late twenties.

As mentioned at the beginning of this paper, the prospect of an accused admitting to conduct and then being placed on the sex offenders register, often for significant

[9] *Crimes Acts 1958 (Vic)*, section 45.
[10] NSW Law Reform Commission, *Consent in relation to sexual offences,* Report 148 (2020), p 68.
[11] Sex Offenders Registration Act 2004, sections 11A and 11B.

periods of time, can contribute to sexual offence charges not progressing to a plea of guilty. If there was discretion in general to the placing of an accused on the sex offender register, it might result in more guilty pleas. Further, some judges are of the opinion that there should be the ability to expunge the registration of certain individuals who have previously been registered.