

Victorian Law Reform Commission (VLRC)

Improving the Response of the Justice System to Sexual Offences



Response to Issues Paper C

Defining Sexual Offences

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

Continual assessment of Victoria's sexual offences is necessary to ensure acts of sexual offending are easily identifiable, and reportable. The way sexual offences are defined in many cases pre-dates certain emergent offending behaviours and advancements in technology. Victoria Police would support reviewing the operation of existing sexual offences to ensure they are fit for purpose, are reflective of community expectations and encourage reporting by victim-survivors. Over time, anomalies have emerged regarding the categorisation of some sexual offences, and their consideration at sentencing.

For example, Victoria Police considers that setting sentences for child sexual abuse offences in accordance with sentencing standards at the time of sentencing would be in line with what victim-survivors and the community would reasonably expect, rather than what applied at the time of the offending (recognising that the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed). This is in line with recommendation 76 of the Royal Commission into Institutional Child Sexual Abuse.

Lesser offence to rape

Victoria Police notes that the New South Wales Law Reform Commission (NSWLRC) recently considered whether there should be a new offence, similar to rape, but with a lower maximum penalty in cases where it would be difficult to prove lack of consent.

It is Victoria Police's view that there is limited justification for seeking the establishment of such an offence in Victoria. As canvassed in **Issues Paper C, paragraph 10**, there may be a risk that such an offence may lead to unintended consequences where the criminal justice system relies on the lesser offence, on the basis it could provide a higher chance of successful prosecution. This outcome, should it eventuate, would not be in the interests of victim-survivors.

Challenges in contextualising the impact of certain offending behaviours on victim-survivors at prosecution

Victoria Police notes that at prosecution stage, there are some challenges that exist which can sometimes prevent the Court from being provided with relevant contextual information encompassing the true impact of an offender's behaviour on the victim-survivor. For example, where offending against one victim-survivor has involved making threats to that victim-survivor about a second (or prospective) victim, such as that non-compliance would lead to other sexual offences against a sibling or child of the first victim, this information, which is directly relevant to an offender's behaviour at the time of offending is often excluded, as charges specific to a further or prospective victim do not form part of the current prosecution. Having regard to this offending behaviour, there is merit in exploring opportunities for the Court to be availed of crucial contextual information when considering the impact of the offending behaviour on the victim-survivor.

Similarly, the offence of rape is often charged for offences against children who lack the statutory capacity to consent to sexual activity. Given these children, as a matter of law, are incapable of consenting, an offence containing consent as an element is not fit for purpose.

It is further noted that sexual penetration offences are preferable for penetration offences against children under the age of consent, however, the penalties for these offences should be commensurate with those of rape. The offence is appropriate as the focus remains on the alleged actions of the accused and not those of a child, whom the accused may argue engaged cooperatively with the commission of the offence. Despite this, it should be noted that sexual penetration offences are narrow in application; sexual assault is not always penetrative (e.g. sexual molestation) but can be equally as harmful.

Offences committed in multiple jurisdictions

Where offences are committed by an offender against the same victim-survivor in multiple jurisdictions, current process requires the accused to be tried and sentenced in one jurisdiction, prior to prosecution taking place in another jurisdiction. For example, where a victim-survivor is sexually offended against over a prolonged period in Victoria and driven to New South Wales and offended against again, upon release the offender is extradited to the second state to answer to those charges.

Dependent on the length of the custodial sentence imposed, the victim-survivor is then required to give evidence a second time, retraumatising the victim-survivor and their family.

There is merit in exploring procedural arrangements to avoid the re-traumatisation of victim-survivors, for example the ability for matters to be heard in one jurisdiction by the consent of all parties.

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

Victoria Police supports a communicative model of consent, however, notes there are ongoing challenges with how consent laws are interpreted and operate in practice.

In practice, there still often exists a requirement for a victim-survivor to demonstrate non-consent through active resistance. This is reflected in both brief authorisation and court processes, particularly cross-examination.

For example, instances where victim-survivors are observed via CCTV or through witnesses, to be engaging in other forms of decision making (such as using their mobile phone to call an Uber or ordering takeaway) can be used to challenge the credibility of a victim-survivor who reports they do not recall the sexual act and would never have consented to it occurring.

Anecdotal reports from members investigating and prosecuting sexual offences suggest that misconceptions about consent are causing victim-survivors to be re-traumatised, by forcing them to justify their ability to make other arbitrary decisions and contrasting this to how the victim-survivor claims they did not recall or consent to the alleged sexual offending.

While reforms such as the introduction of jury directions about consent (for example, that a person who is not consenting to a sexual act might not protest or physically resist the act) have aimed to mitigate this, it is apparent that misconceptions are still widely held and that this continues to be reflected in outcomes for sexual offences. Victoria Police notes that issues around consent continue to contribute significantly to the large number of 'not guilty' verdicts in sexual offence trials.

The fault element of reasonable belief in consent is often problematic for police to overcome, and its operation should be looked at as part of the judicial reform. This is a common reason and contributing factor for police in determining whether to authorise charges.

Like sexual offences themselves, continual assessment of the application of consent and supporting law (for example jury directions and the use of expert evidence at cross-examination) is necessary to help ensure that the intent of the communicative model of consent is realised in practice.

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

Victoria Police considers this to be a key policing area in need of legislative reform.

Victoria Police would be supportive of a formal legislative review of Victoria's sexual offences, to future-proof Victoria's technology-facilitated sexual offences. Central to any review should be to ensure that the significant impact image-based abuse has on victim-survivors is appropriately reflected in law.

Without reform, current laws will present increasing challenges for the criminal justice system as more sexual offenders use these platforms to facilitate their offending. The speed at which technology continues to evolve, the widespread popularity and uptake of online and encrypted platforms (such as certain dating apps and image sharing services) in combination with a lack of accountability for technology providers to engage in police investigations and retain data will, over time, continue to undermine the efforts of Victoria Police and the broader justice system to respond to this type of offending and victim-survivors' willingness to come forward.

With respect to accountability, reform is required to ensure that online services cannot profit from providing or facilitating the exchange and production of child abuse material. Currently, individuals behind such services (such as platform owners and company directors) can only be prosecuted where it can be proven they are also accessing child abuse material or encouraging others to do so. Victoria Police considers these limitations to be inadequate, and inconsistent with what the community would reasonably expect.

The ability of sexual offenders to avoid identification by police through the use of unregulated, third-party platforms also needs to be addressed. Responsibilities on these providers to support police investigations through the retention and provision of personal data are deficient, and the current process for police to receive information from these companies is inconsistent and presents obvious challenges to investigations.

Reform is necessary to ensure police can obtain required information from third party platforms in a timely manner and without impediment.

Consideration should be given to enforceable responsibilities on these providers to support police investigations, as occurs to support other forms of cybercrime investigations. For example, there are requirements placed on providers of gambling and betting platforms to verify the identity of account holders, and obligations for the retention and provision of personal and identifying information to police where there is evidence of criminal activity, such as money laundering, has occurred.

Noting the jurisdictional challenges often faced by law enforcement when parts of technology providers' services are being conducted or hosted overseas, Victoria Police would welcome consideration of a place-of-consumption approach, whereby statutory obligations are automatically imposed on all providers which choose to make their platforms available to Victorian consumers.

With this, requirements for providers to verify the identity of individuals creating profiles on these platforms, and to retain this information, would be both necessary and appropriate.

Image-based sexual abuse (IBSA)

IBSA, which can include the non-consensual taking, distribution or threats to distribute explicit images or footage of another person (also referred to as 'revenge porn') is an offending behaviour with devastating and long-lasting impacts on victim-survivors and their families.

Motivations for image-based abuse vary, noting that threatening to commit image-based abuse is a common means of maintaining coercive control over an individual, both in a family violence setting, and by offenders to discourage their victim-survivors from reporting sexual offending.

Victoria Police notes the Sentencing Advisory Council (SAC) recently released a report on *Sentencing Image-Based Sexual Abuse Offences in Victoria*. In this report, the SAC observed that IBSA offences are usually not recorded or sentenced unless they are associated with other offending and tend to receive low sentences relative to the harm it can cause.

In Victoria, offences for IBSA (contained in the *Summary Offences Act 1966* (SOA)) are:

- observation of genital or anal region (s.41A)
- visually capturing genital or anal region (s.41B)
- distribution of image of genital or anal region (s.41C)
- distribution of intimate image (s.41DA) and
- threat to distribute intimate image (s.41DB).

The summary nature of these offences in Victoria (unlike in most other Australian jurisdictions where IBSA offences are indictable) has implications on Victoria Police's search and arrest powers, limiting the investigative and enforcement abilities of police.

The potential evidentiary benefit lost in investigations due to the summary nature of these offences directly restricts police's ability to gather evidence necessary to lay charges, which Victoria Police notes has been attributed by the SAC to the attrition between recorded and sentenced offences.

Given the commonality of IBSA and its links to stalking, family violence, sexual offending and child sexual abuse, Victoria Police considers there to be merit in IBSA offences and their application be formally reviewed, to ensure police are sufficiently empowered to investigate and enforce these crimes.

Penalties for IBSA offences

Victoria Police notes that the maximum penalties for IBSA offences is low in comparison to other Australian jurisdictions. Given the level of harm associated with technology-enabled sexual offending, this misalignment is unlikely to be in line with what the community would reasonably expect.

Given that threatening to distribute intimate offences (s.41DB of the SOA) is common as a means for seeking to maintain coercive control over another person, including in a family violence context, penalties which do not align with the degree of harm the behaviour carries minimise the seriousness of such offending. Consideration should be given to IBSA offences being made indictable.

Further, Victoria Police is open to further consideration and consultation to IBSA offences becoming registerable offences under the *Sex Offenders Registration Act 2004* in appropriate circumstances; one example being when IBSA offences occur in serious contact sexual offending, and form part of an established pattern in an offenders' modus operandi.

Retention and secure storage of IBSA digital evidence

Victoria Police notes that in addition to being able to pursue charges for IBSA offences, it is also open to victim-survivors to pursue the matter through the civil penalties scheme administered by the eSafety Commissioner. Guided by the victim-survivor's wishes, the eSafety Commissioner pursues the removal of the offending material by seeking the assistance of websites, service providers, hosting services and end users. This important work can occur regardless of whether the identity of the original poster is known.

While removal of this content is considered a suitable outcome for some victim-survivors, Victoria Police notes that the removal of this content without available storage provisions to enable future retrieval, should a victim feel empowered to pursue a criminal justice response at a later date, can present significant challenges for later investigations, via the resulting loss of corroborative digital evidence.

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To ensure victim-survivors who decide to report offences to Victoria Police post the removal of this content are not disadvantaged in an investigation, there is merit in exploring possible mechanisms that would allow for the retention and secure storage of IBSA digital evidence.

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

As noted above, Victoria Police would be supportive of a formal legislative review of Victoria's sexual offences.

In addition to addressing both the potential unsuitability of IBSA offences to remain as summary offences, and the associated challenges that the summary nature of these offences presents to investigators and victim-survivors (discussed above), reform is necessary to future-proof Victoria's sexual offences against further rapid changes in technology, and to ensure victim-survivors are provided adequate statutory protections.

Importantly, any new offences, or changes to existing offences must not inadvertently give rise to further loopholes where foreseeable advancements in technology is likely.

Of note is the potential role that artificial intelligence, and the use of constructed images and video (often referred to as 'deep-fakes') will have in future sexual offending, as the prevalence of this technology increases, and its availability becomes more mainstream.

New offences that respond to specific and currently undefined offending behaviours would be of benefit to police and victim-survivors. These include 'stealthing' (the act of removing typically a male condom during intercourse without the consent or knowledge of the other party, and then continuing with what then becomes a non-consensual act), and 'flashing' (the act of sending of unsolicited sexual images).

While Victoria Police notes that **Issues Paper C** canvasses that both the above offending behaviours may be covered by existing offences, Victoria Police considers this a key area of sexual offending in need of reform. Consequently, Victoria Police sees merit in the establishment of a standalone offence for stealthing, considering the significant level of harm this behaviour inflicts on victim-survivors.

Victoria Police notes there is anecdotal evidence of stealthing being perpetrated in the contexts of male-to-male sexual assault, to force pregnancies (as a form of coercive control) and to deliberately transmit infectious diseases to another person. However, as stealthing is not defined in legislation or a specific offence, it is reasonable to expect that it is significantly underreported.

In considering a potential new offence for stealthing, detailed consideration would also need to be given to clearly establishing where the original consensual sexual act stops, and non-consensual sexual contact begins.

Victoria Police notes that the NSWLRC has previously proposed introducing, as a 'consent-negating' circumstance, that '[a] person who consents to a sexual activity being performed in a particular manner is not, by reason only of that fact, to be taken to consent to the sexual activity being performed in another manner'. A legislative example is provided, namely that 'a person who consents to sexual intercourse using a device that prevents transmission of sexually transmitted infections is not, by reason only of that fact, to be taken to consent to sexual intercourse without the use of that device'. This aims to ensure that stealthing is adequately covered by the criminal law.

Victoria Police would welcome the opportunity to participate in further detailed discussions on any proposal for new sexual offences, or changes to existing offences should the VLRC consider making recommending with respect to specific offences in its final report.