

Victorian Law Reform Commission (VLRC)

Improving the Response of the Justice System to Sexual Offences



Response to Issues Paper E

Sexual Offences: The Trial Process

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

Since the Royal Commission into Institutional Responses to Child Sexual Abuse, Victoria Police has delivered on key elements of its *Criminal Justice Report* to improve the process of making charge decisions. This includes enhanced policy and practice guidance for investigators, supervisors and prosecutors and providing access to the 'Ready Reckoner - Historical Sex Offences', a guidance document prepared by the Office of Public Prosecutions (OPP) to support identifying the correct charges for sexual offences as early as possible.

In addition, steps have been taken to confirm that current Victoria Police practices do not require police to charge based on the existence, or otherwise, of corroborative evidence. The specialist training delivered by Victoria Police in this area instructs police members to prepare cases for prosecution that are in the public interest and where there is a reasonable prospect of conviction.

Reasonable prospect of conviction

Victoria Police notes that the threshold for 'reasonable prospect of conviction' often presents challenges with victim-survivors' experience at various stages in the court and trial process.

Prosecution of sexual offences require more than just an arguable case, and each matters' prospect of success can shift as it progresses through various stages of the legal process. Matters do not rely solely on the credibility of the alleged victim-survivor and witnesses, and for an individual to be charged with sexual offences, police must be satisfied based on the evidence available that a charge can be prosecuted, noting that the burden of proof for crimes such as rape are intentionally high.

While uniformity in the application of the 'reasonable prospect' or 'merits' test would be beneficial in-principle, at a practical level, police and the OPP still require the discretion and autonomy to make this determination based on the relevant circumstances when making charge and prosecution decisions.

The disparity in opinion to whether a matter carries a reasonable prospect of conviction can at times be problematic for victim-survivors, due to decisions being made outside their control to not pursue or drop charges, or to discontinue a prosecution.

Due to informants' often hands-on relationship with victim-survivors and witnesses, informants are often required to manage the impacts of these decisions, and victim-survivors' sometimes dissatisfaction with their experience. Increased engagement with informants at the point at which such decisions are made, or are being considered, prior to the victim-survivor being advised would be beneficial to victim-survivors, who at times rely heavily on this relationship for support.

Where matters reach trial stage, victim-survivors often express dissatisfaction to police, in what they may view as lengthy or unjustifiable delays in matters proceeding to trial. Avoidable delays, such as defence seeking extensions to proceedings because of a failure to arrange psychiatric or other assessments in a timely manner, are known to cause frustration for victim-survivors and witnesses. When this occurs, victim-survivors become more vulnerable to withdrawing from the process, and risk being re-traumatised by the extended length of proceedings and an inability to have their matter finalised.

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

Victoria Police acknowledges the usefulness of ground rules hearings for investigators, as a tool for ensuring that victim-survivors have an easier time communicating while under cross-examination. While the benefit of these hearings is not directly measured or recorded, anecdotal feedback from police members with exposure to these arrangements indicates that the intermediary program, and ground rules hearings in sexual offences cases are positively regarded.

In many cases, the establishment of ground rules provides modest improvements to the experience of victim-survivors and witnesses in what is understandably a confronting process. These arrangements also assist in establishing an open dialogue with witnesses, providing evidentiary benefit in proceedings.

As discussed in response to **Issues Paper B**, Victoria Police notes that currently, the range of offences for which an intermediary can be utilised under the pilot is narrower than the range of offences for which a Video Audio Recording of Evidence (VARE) statement can be used under the *Criminal Procedures Act 2009*.

Noting this, Victoria Police would support the Victorian Law Reform Commission considering the merits, and implications, of extending provisions under the *Criminal Procedure Act* which define the circumstances in which intermediaries and ground rules hearings may be used to improve the experience of victim-survivors. This could include consideration of expanding their application to a broader range of offences to ensure that children can access this service, regardless of the exact nature of the offending.

Victoria Police would support consideration being given to the expansion of the intermediary program to include the whole suite of offences that meet the criteria for the taking of a VARE statement. This would allow for consistent practice and application of alternative arrangements.

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

Victoria Police notes that the remote witness facility arrangements are favourable in many matters, particularly where there is involvement from the Witness Assistance Service. However, consideration should be given to protecting the dignity of victim-survivors in a court setting by ensuring the layout and design of court facilities does not provide the opportunity for victim-survivors and witnesses to be approached or confronted by their accused's supporters.

This issue presents acute challenges in regional or smaller court locations, and Victoria Police supports ongoing consideration being given to ensuring, as best as possible, that the remote facilities are located separately to the proceedings. Without such arrangements, the ability of victim-survivors and witnesses to provide evidence without fear of seeing or being confronted by supporters of the accused, may be undermined.

4. How well are jury directions for sexual offence trials working? How can they be improved?

Victoria Police acknowledges the value of jury directions in sexual offence trials and is supportive of continued enhancements to the jury directions process that would assist jurors in better understanding the nature of sexual offending, and support best practice.

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In particular, Victoria Police sees merit in the use of jury directions as a means for providing jurors with an understanding of the individual and cultural factors which can often contribute to a delay in the reporting of sexual offences by many victim-survivors. This may be in addition to directions being limited to just the relevance of delays on the complainant's credibility, and commonality of such delays.

Opportunities exist to also improve the scope and delivery of such directions and ensure that directions given to jurors do not rely on technical or legal jargon; a common example being the use of terminology directly from legislation to explain consent.

Significant procedural benefits could be achieved from enhancing the use of jury directions in sexual offence trials, by ensuring jury directions are delivered in simpler language, with the opportunity for jurors to ask questions.

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

Victoria Police notes that practical challenges can often arise with respect to tendency and coincidence evidence, noting that when this evidence is relied upon, trials have the potential to be split, which can be particularly traumatising for victim-survivors.

This process can also result in less successful prosecutions, as the full extent and context of the offending is not presented to the court. In this context, it can also be difficult to ensure previous complainants will give evidence, as often they are being put through the justice system for an extended period, creating the potential for further re-traumatisation of victim-survivors and their families.

Victoria Police considers there to be potential merits to exploring improvements to this process, one example being to allow prosecutors to rely upon court transcripts and the evidence contained in the original brief in a similar way to appeals. Such a process would assist in making it easier to lead tendency and coincidence evidence, provide evidentiary benefit to proceedings and be in victim-survivors' interests.

Opportunities may also be available to achieve improvements to the cross-examination process, to better support victim-survivors. Leading questions continue to make up a significant component of cross-examination questions, constraining victim-survivor responses and preventing victim-survivors from providing the required elaborative responses.

Previous reforms have successfully addressed some aspects of cross-examination, such as asking about complainant's sexual history. However, focus is now required on analysing and improving the function of cross-examination to ensure it is not designed to compromise the reliability of the complainant's testimony by virtue of more protracted questioning.

Victoria Police also notes that the ability for the accused to view the VARE prior to proceedings should be reconsidered, noting that in many cases, it would be considered both inappropriate, and inconsistent with what the community would reasonably expect that in the absence of supervision, a person accused of committing sexual offences against a child would then be allowed to view a recording of that child, unmonitored.

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

Victoria Police understands that delays associated with the appeals process can have a significant impact on victim-survivors' mental health, trauma recovery and general level of satisfaction with the court process. Consideration should be given to ensuring, as best as possible, that appeals are heard with limited delay and adhere to strict timelines to minimise the impact on victim-survivors. Victim-survivors should be well supported during this process.

Notably, appeals can often still result in a lower sentence than what victim-survivors consider satisfactory. This is compounded by the fact that, in general terms, sentences handed down for sexual offences are often lower than what the community would reasonably expect.

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

Nil response.

8. **What are other issues with the trial process for sexual offences, and how should they be addressed?**

Refer to responses to **Issues Paper E, Questions 4 and 5** (above).