

The Hon. Anthony North QC
Chair
Victorian Law Reform Commission
GPO Box 4637
Melbourne Vic 3001

3 May 2021

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Dear Chair,

Submission to the Victorian Law Reform Commission's inquiry into Improving the Response of the Justice System to Sexual Offences

I refer to the Victorian Law Reform Commission's inquiry into *Improving the Response of the Justice System to Sexual Offences*. Thank you for the opportunity to make a submission to this inquiry.

The Victorian Institute of Teaching (the **Institute**) is responsible for the registration and regulation of all teachers and early childhood teachers in Victoria. As part of its role, the Institute investigates and takes disciplinary action against teachers, early childhood teachers and other people who have permission to teach in Victorian schools and early childhood centres where there are allegations of misconduct, serious misconduct or lack of fitness to teach. The Institute has drawn on these experiences in making its submission.

The submission focuses on the criminal offence against grooming in section 49M of the Crimes Act 1958 (Vic). The Institute recommends that section 49M should be amended to make it an offence to:

- Groom a child aged 16 or 17 where the child is under the care, supervision and authority of the accused person.
- Groom a child under 16 years of age, or a child who is 16 or 17 years of age who is under the care, supervision and authority of the accused person, where there is an intent to facilitate the child engaging in a sexual relationship with the accused person or with another person once the child turns 18 years of age.

The submission includes case studies which illustrate the Institute's concerns about this conduct and its impact on the safety and wellbeing of children. The case studies are de-identified. However, I request that case study 1 is kept confidential because it is the subject of a current investigation by the Institute. I confirm that case studies 2,3 and 4 may be published.

If you require any further information, please contact Ms Elena Totino, Acting Director, Professional Conduct on [REDACTED]

Yours sincerely,

[REDACTED]

Peter Corcoran
Chief Executive Officer

IMPROVING THE RESPONSE OF THE JUSTICE SYSTEM TO SEXUAL OFFENCES

Submission by the Victorian Institute of Teaching

INTRODUCTION

1. This submission is made by the Victorian Institute of Teaching (the **Institute**) in response to the Victorian Law Reform Commission's (the **VLRC**) inquiry into *Improving the Response of the Justice System to Sexual Offences* (the **Inquiry**).
2. This submission is not an exhaustive response to the issues raised by the Inquiry but rather focuses on the criminal offence against grooming in section 49M of the *Crimes Act 1958* (Vic) (the **Crimes Act**).

About the Victorian Institute of Teaching

3. The Institute is the independent statutory authority that registers and regulates teachers and early childhood teachers in Victoria. The Institute operates pursuant to Part 2.6 of the *Education and Training Reform Act 2006* (Vic).
4. All teachers working in Victorian schools must be registered with the Institute as a teacher, provisionally registered teacher or have permission to teach. It is an offence for a person to work as a teacher in a Victorian school without being registered as a teacher or have permission to teach with the Institute.¹ It is also an offence for a person to represent or hold themselves out to be a teacher when they are not registered with the Institute.² It is also an offence for a person to employ or engage a person to work as a teacher in a school unless they are registered with the Institute.³
5. All early childhood teachers working in early childhood services in Victoria must be registered with the Institute as an early childhood teacher, or provisionally registered early childhood teacher to work as an early childhood teacher in an early childhood service. It is an offence for a person to claim to be, or hold themselves out to be a registered early childhood teacher if they are not registered with the Institute.⁴ It is also an offence for a person to employ or

¹ *Education and Training Reform Act 2006* 9Vic), section 2.6.56(1)

² *Education and Training Reform Act 2006* (Vic), section 2.6.58(1)

³ *Education and Training Reform Act 2006* (Vic), section 2.6.56(2)

⁴ *Education and Training Reform Act 2006* (Vic), section 2.6.58(1B)

engage a person to work as an early childhood teacher unless they are registered as an early childhood teacher with the Institute.⁵

6. When a person makes an application for registration as a teacher, early childhood teacher, or is seeking permission to teach, the Institute will assess whether that person is suitable to teach. Suitable to teach means whether the person is fit to teach and whether they are physically and mentally able to teach.⁶ Fitness to teach means whether the character, reputation and conduct of a person are such that the person should be allowed to teach in a school or in an early childhood service.⁷ The Institute must refuse an application for registration in certain circumstances – this includes when the person has been charged or found guilty of a category A offence.⁸ The Institute may refuse an application for registration in certain circumstances – this includes where the character of the applicant is such that it would not be in the public interest to allow them to teach in a school or in an early childhood service.⁹
7. Once a person is registered with the Institute, they may use their registration in lieu of obtaining a separate Working with Children clearance under the *Worker Screening Act 2020* (Vic) to engage in child related work (other than teaching).¹⁰
8. Once a person is registered with the Institute, the Institute also takes steps to ensure that they remain suitable to teach. As part of this function, the Institute conducts preliminary inquiries and investigations into complaints and notifications about the conduct, competence and fitness of those registered with the Institute.
9. The Institute has the following powers:
 - a. The Institute can suspend the registration of a person on an interim basis if it reasonably believes that the person poses an unacceptable risk of harm to children; and the suspension is necessary to protect children.¹¹
 - b. The Institute can commence an investigation.¹²
 - c. The Institute can enter into an agreement with the registered teacher to impose conditions on their registration, suspend their registration, or cancel their registration.¹³
 - d. The Institute may determine to conduct an informal or formal hearing.¹⁴

⁵ *Education and Training Reform Act 2006* 9Vic), section 2.6.56A

⁶ *Education and Training Reform Act 2006* (Vic), section 2.6.1

⁷ *Education and Training Reform Act 2006* (Vic), section 2.6.1

⁸ *Education and Training Reform Act 2006* (Vic), sections 2.6.9(1A)(a) (teachers) & 2.6.12D(1A)(a) (early childhood teachers)

⁹ *Education and Training Reform Act 2006* (Vic), sections 2.6.9(2)(a) (teachers) & 2.6.12D(2)(a) (early childhood teachers)

¹⁰ *Worker Screening Act 2020* (Vic), section 113

¹¹ *Education and Training Reform Act 2006* (Vic), section 2.6.28

¹² *Education and Training Reform Act 2006* (Vic), Division 11, Part 2.6

¹³ *Education and Training Reform Act 2006* 9Vic), Division 9A, Part 2.6

10. In exercising these powers, the Institute must consider the safety and wellbeing of children, including by taking into account community expectations.¹⁵

11. It may also have regard to The Victorian Teaching Profession's Code of Conduct which includes the following principle:

Principle 1.5 - Teachers are always in a professional relationship with their learners, whether at the education setting where they teach or not

Teachers hold a unique position of influence and trust that should not be violated and compromised. They exercise their responsibilities in ways that recognise there are limits or boundaries to their relationships with learners.

Teachers should consider how their decisions and actions may be perceived by others. Teachers should be aware of the specific vulnerabilities of learners when determining appropriate professional boundaries. The following examples outline some of those limits.

A professional relationship will be violated if a teacher

- *Has a sexual relationship with a learner*
- *Engages in sexual misconduct which includes behaviour, physical contact, speech or other communication of a sexual nature; inappropriate touching; grooming type behaviour; and voyeurism;*
- *Touches a learner without a valid reason*
- *Engages in communications with a learner beyond the boundaries of a professional relationship without a valid reason including via written / electronic / online means (including social media)*
- *Accepts gifts, which could be reasonably perceived as a being used to influence them, from learners or their parents / carers/ families*
- *Gives gifts to learners or their parents / carers / families that could be reasonably perceived as showing bias or favouritism.*

A professional relationship may be compromised if a teacher

- *Socialises with learners (including online and via social media) outside of a professional context*
- *Invites learners back to their home*
- *Has a sexualised relationship with a former learner within two years of the learner completing their senior secondary schooling or equivalent. In all circumstances, the learner must be at least 18 before a relationship commenced.¹⁶*

¹⁴ *Education and Training Reform Act 2006* (Vic), sections 2.6.34(1)(e) & 2.6.35

¹⁵ *Education and Training Reform Act 2006* (Vic), section 2.6.3(1A)

¹⁶ The Victorian Teaching Profession's Code of Conduct <https://www.vit.vic.edu.au/professional-responsibilities/conduct-and-ethics>

12. This submission draws on the Institute's practical experience of registering and regulating 137,000 teachers, early childhood teachers, and those with permission to teach in Victoria. In particular, it draws on its experiences of investigating and taking disciplinary action against those who are alleged to have engaged in grooming, sexual offending and sexual misconduct against children.

The current grooming offence

13. The Institute understands that the introduction of the current criminal offence of grooming a child under 16 years arose from the findings and recommendations made by the Family and Community Development Committee in its Betrayal of Trust Report published in November 2013 following its *Inquiry into The Handling of Child Abuse by Religious and Other Non-Government Organisations*.

14. The Betrayal of Trust Report highlighted that:

- a. There are a number of ways 'grooming' can occur including through the cultivation of friendship through personal contact with the child victim.
- b. The purpose of this 'grooming' conduct is to establish an emotional connection, to lower the child's inhibitions, and gain access to the child.
- c. It is a form of psychological manipulation that is very subtle, drawn out, calculated, controlling and premeditated.
- d. It is a way of establishing power, control and authority over the child.
- e. It seeks to isolate and silence the victim by fostering a sense of exclusivity in their relationship.
- f. It is targeted at children who are vulnerable or susceptible to being influenced due to their age, home circumstances, and emotional or psychological state. The offender seeks to fill a void in the child's life.
- g. It involves a breach of trust.
- h. The criminality of that conduct should be recognised as an offence.¹⁷

15. The Betrayal of Trust Report also highlighted the difficulty in drafting effective grooming legislation. It recognised that:

- a. Actions or conduct that may constitute grooming can sometimes appear innocent, even if inappropriate.

¹⁷ Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust – Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*, November 2013, Chapter 22

- b. It is the perpetrator’s intent that makes the conduct criminal in nature.
- c. It is necessary to consider the behaviour in the context and circumstances in which it occurs, in order to determine whether it is part of a pattern that reveals a criminal intent.¹⁸

16. The Victorian Government subsequently introduced the current grooming offence through the *Crimes Amendment (Grooming) Act 2014* (Vic), which commenced in Victoria on 9 April 2014. This amendment made grooming of a child under 16 an offence under section 49M of the Crimes Act. It states:

- (1) *A person (A) commits an offence if—*
 - (a) *A is 18 years of age or more; and*
 - (b) *A communicates, by words or conduct (whether or not a response is made to the communication), with—*
 - (i) *another person (B) who is a child under the age of 16 years; or*
 - (ii) *another person (C) under whose care, supervision or authority B is;*
 - and*
 - (c) *A intends that the communication facilitate B engaging or being involved in the commission of a sexual offence by A or by another person who is 18 years of age or more.*
- (2) *A person who commits an offence against subsection (1) is liable to level 5 imprisonment (10 years maximum).*

Victorian Institute of Teaching and ‘grooming’ conduct

17. The offence of grooming is relevant to the Institute in the following ways:

- a. A charge or finding of guilt for an offence under section 49M of the Crimes Act amounts to a category A offence.¹⁹
- b. If a person who has been charged or found guilty of a category A offence makes an application for registration with the Institute, the Institute must refuse their application.²⁰
- c. If a person is registered with the Institute and is subsequently charged with a category A offence, the Institute must suspend their registration.²¹
- d. If a person is registered with the Institute and is found guilty of a category A offence, the Institute must cancel their registration, and the person is disqualified

¹⁸ Parliament of Victoria, family and Community Development Committee, *Betrayal of Trust – Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*, November 2013, Chapter 22

¹⁹ *Education and Training Reform Act 2006* (Vic), section 1.1.3A

²⁰ *Education and Training Reform Act 2006* (Vic), sections 2.6.9(1A)(a) (teachers) & 2.6.12D(1A)(a) (early childhood teachers)

²¹ *Education and Training Reform Act 2006* (Vic), section 2.6.27(2)(a)

from teaching in Victoria and is not entitled to apply to the Institute for an indefinite period.²²

- e. If a person was charged with a category A offence, and the charge is subsequently withdrawn or struck out, or the person is acquitted, it amounts to category C conduct under the Act, and must still be considered as part of assessing whether the person is suitable to teach.
- f. If the person is making an application for registration with the Institute, and they have engaged in category C conduct, the Institute may refuse their application if:
 - i. The ability of the person to teach in a school or an early childhood service is likely to be affected because of the conduct engaged in; or
 - ii. It is not in the public interest to allow the person to teach in a school or an early childhood service because of the conduct engaged in.²³
- g. If the person is registered with the Institute, and has engaged in category C conduct, the Institute may conduct an investigation into this conduct.²⁴

18. Grooming type conduct that does not amount to the criminal offence of grooming is relevant to the Institute in the following ways:

- a. If a person is alleged to have engaged in grooming type conduct and makes an application for registration with the Institute, the Institute may refuse the application on the basis of a relevant discretionary ground such as their character.²⁵
- b. If a person is registered with the Institute and it is alleged that they have engaged in grooming type conduct, the Institute may:
 - i. Suspend their registration on an interim basis if it forms a reasonable belief that the person poses an unacceptable risk of harm to children, and the suspension of their registration is necessary to protect children.
 - ii. Conduct a preliminary inquiry into the alleged conduct.
 - iii. Conduct an investigation into the alleged conduct.

²² *Education and Training Reform Act 2006* (Vic), section 2.6.29(1)(a) & (3)(a)

²³ *Education and Training Reform Act 2006* (Vic), sections 2.6.9(2)c (teachers) & 2.6.12D(2)c (early childhood teachers)

²⁴ *Education and Training Reform Act 2006* (Vic), section 2.6.33(1)(c)

²⁵ *Education and Training Reform Act 2006* (Vic), sections 2.6.9(2)(a) & 2.6.12D(2)(a)

SUBMISSION

19. The current grooming offence has contributed to the safety and wellbeing of children under 16 years of age by making conduct that is deliberately intended to facilitate a person's sexual activity with the child illegal. This is appropriate and properly recognises the damage that such conduct causes to children and their families even in circumstances where no other sexual offence is committed against the child.
20. However, the Institute submits that the current grooming offence does not go far enough. The Institute recommends that the following amendments be made to section 49M of the *Crimes Act 1958*:
- a. The current grooming offence should be amended to make it an offence to groom a child aged 16 or 17 where the child is under the care, supervision and authority of the accused person.
 - b. The current grooming offence should also be amended to make it an offence to groom a child under 16 years of age, or a child who is 16 or 17 years of age who is under the care, supervision and authority of the accused person, where there is an intent to facilitate the child engaging in a sexual relationship with the accused person or with another person once the child turns 18 years of age.
21. The reason for these proposed amendments to the current grooming offence are discussed below.

The nature of the teacher student relationship

22. The relationship between teachers and their students involves an imbalance of power which places teachers in a unique position of trust and authority. In *Queensland College of Teachers v A Teacher*, it was observed that, "there is a public interest in ensuring that teachers retain a professional distance from their students and do not cross the boundary which is necessary for the maintenance of a good teacher/student relationship."²⁶ This is because "the teacher-student relationship is not equal. Teachers are in a unique position of trust, care, authority and influence in relation to their students, which means there is always an inherent power imbalance between teachers and students."²⁷
23. The power imbalance between teachers and their students takes time to dissipate after a student finishes secondary school. In *Queensland College of Teachers v FDA*,²⁸ it was observed that "the timing of the sexual relationship between [the Teacher] and the relevant student is important because there is a power imbalance that exists which takes time to dissipate as well as professional boundaries and standards expected of a teacher that extend beyond students

²⁶ [2011] QCAT 225 at [26].

²⁷ Teacher Registration Board of Western Australia, *Teacher-Student Professional Boundaries – A resource for WA Teachers*, Revised Edition, page 5.

²⁸ [2017] QCAT 224.

completion of secondary school.” The timing of a sexual relationship between a teacher and a former student may constitute a breach of their professional obligations in circumstances where the relationship began or was nurtured when the student was still in school.

24. The unique nature of the teacher/student relationship and the power imbalance that exists within it makes violation of this relationship by a teacher significantly damaging to a student’s emotional and psychological wellbeing. The Institute submits that this power imbalance and the unique position of trust occupied by teachers and other people in positions of care, supervision and authority over children necessitate extending the protection that the current grooming offence provides to children in the circumstances identified in paragraph 20.

Grooming behaviour with children aged between 16 – 17 years of age under care, supervision and authority

25. The Crimes Act currently protects children aged between 16-17 years of age from various conduct committed by someone who provides care, supervision and authority. These include the following offences:

- a. Sexual penetration of a child aged 16 or 17 who is under the accused person's care, supervision or authority.²⁹
- b. Sexual assault of a child aged 16 or 17 who is under the accused person's care, supervision or authority.³⁰
- c. Sexual activity in the presence of a child aged 16 or 17 who is under the accused person's care, supervision or authority.³¹
- d. Causing a child aged 16 or 17 under the accused person’s care, supervision or authority to be present during sexual activity.³²
- e. Encouraging a child aged 16 or 17 under the accused person’s care, supervision or authority to engage in, or be involved in, sexual activity.³³

26. It is reasonable to extend the grooming offence to this list of sexual offences so that it can address the power imbalance between the accused person and the child; and it can work to prevent the above mentioned offences from occurring.

²⁹ Crimes Act 1958 (Vic), s. 49C

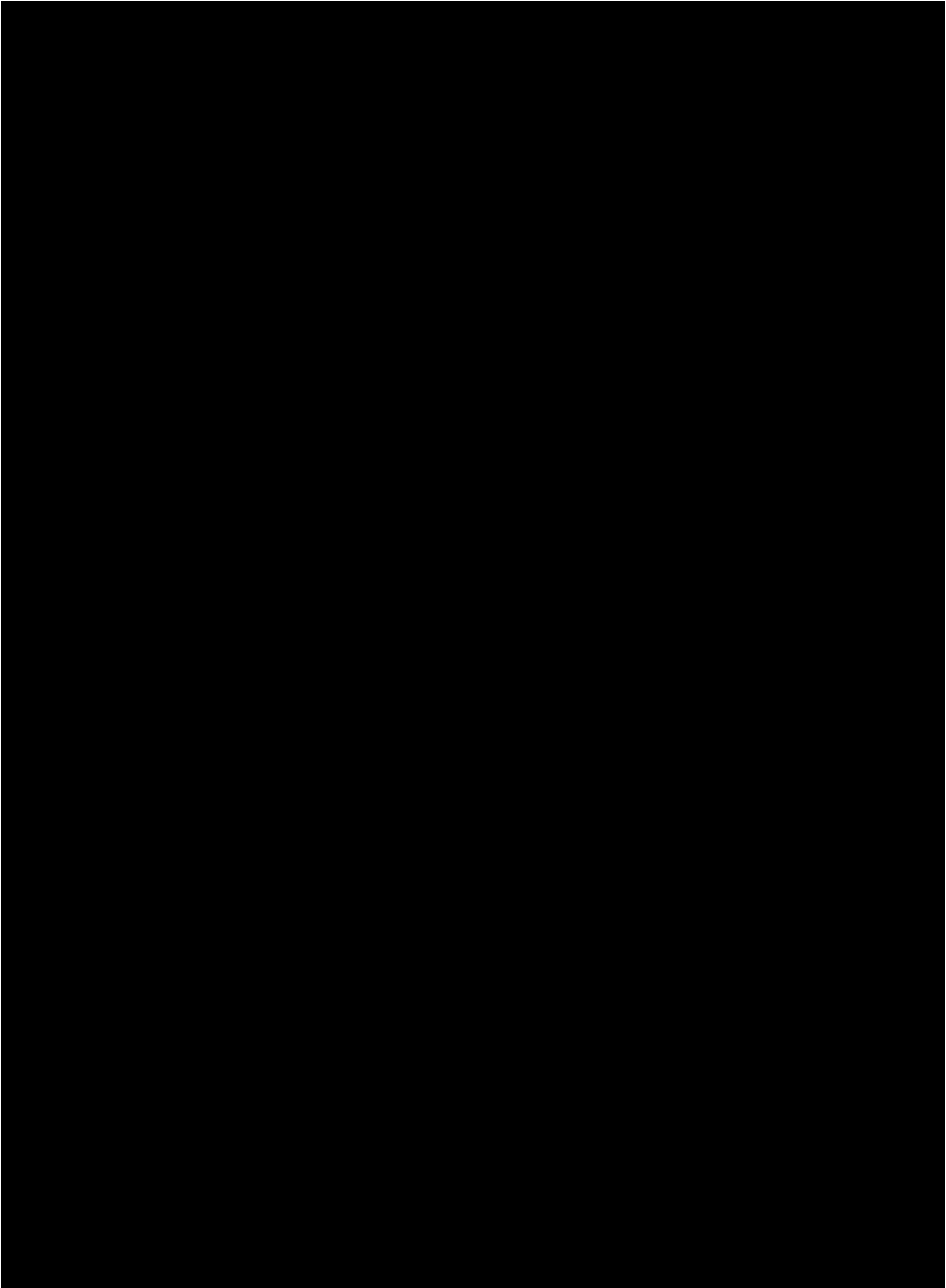
³⁰ Crimes Act 1958 (Vic), s. 49E

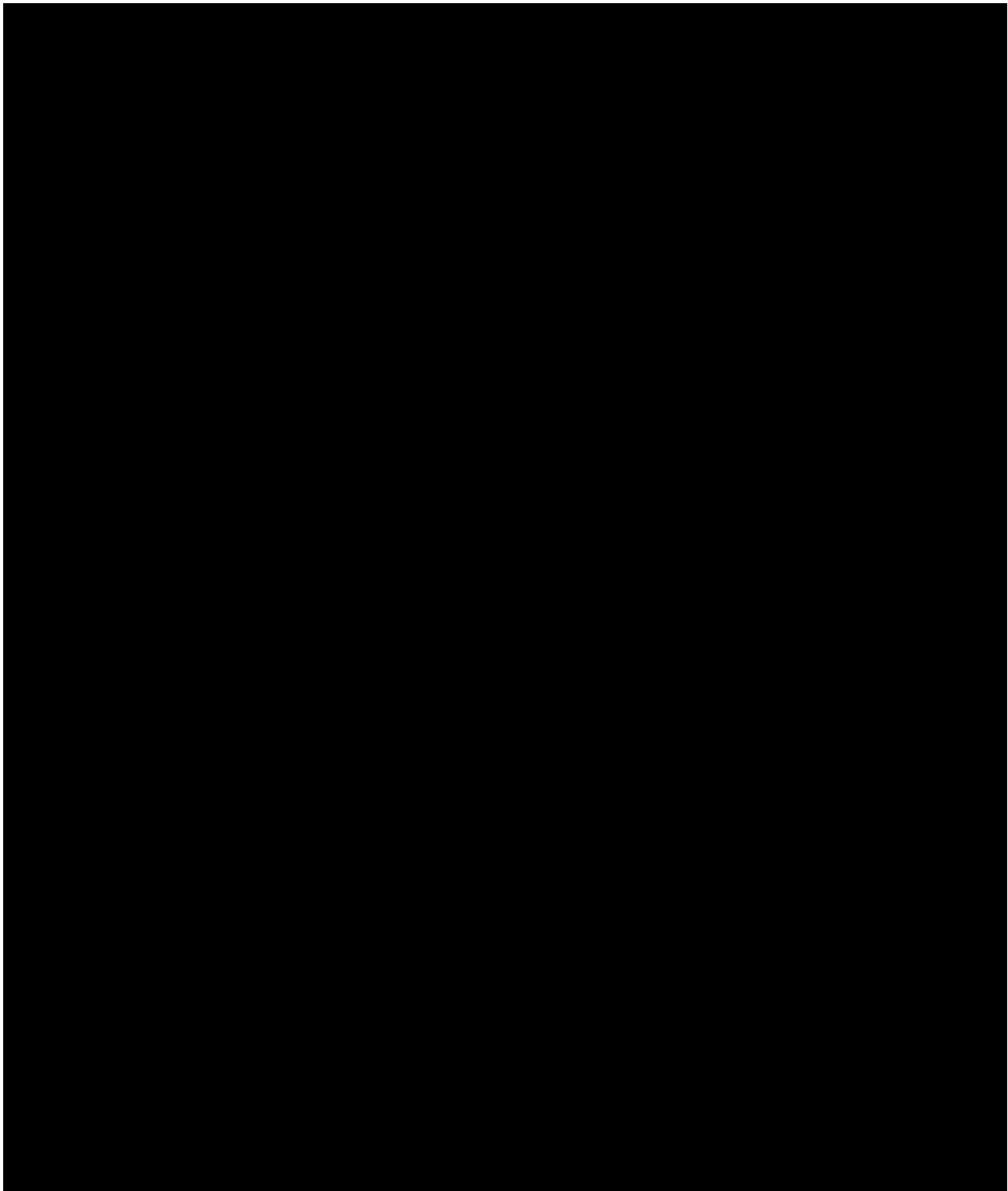
³¹ Crimes Act 1958 (Vic), s. 49G

³² Crimes Act 1958 (Vic), s. 49I

³³ Crimes Act 1958 (Vic), s. 49L

27. It would also potentially work to address and remedy cases such as the following:





[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Grooming for lawful sexual relationships

28. The Institute is also aware of situations in which adults groom children with the intention of propositioning the child, or commencing a sexual relationship with the child once they turn 18 years of age, and/or when they are no longer under the care, supervision and control of the adult.

29. This conduct has the same emotional and psychological impact on the child, and similarly takes advantage of the power imbalance between the adult and child. As such, the law in relation to grooming should be amended to also include scenarios such as the following:

[Redacted text block]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

CONCLUSION

30. As illustrated by the case studies, the children targeted for grooming by offenders are targeted because they have particular vulnerabilities identified by the offender. They may be shy and quiet, face bullying, feel isolated from their peers or have challenging home circumstances among other vulnerabilities.
31. The effect on children who are the targets of this behaviour is significant, and similar to those children who are victims of the criminal offence of grooming. The children may experience guilt, feel uncomfortable, lack a sense of safety and security, lose trust in adults, become isolated from their families and peers, experience a loss of self-esteem and experience other negative impacts on their emotional and psychological wellbeing. Secondary victims such as parents, guardians and siblings are similarly significantly negatively impacted.
32. In its current formulation, the grooming offence does not take into account the imbalance of power between children of 16 or 17 years of age and people who occupy positions of care, supervision and authority over these children.
33. The current grooming offence also allows for a situation where offenders are able to engage in grooming behaviours towards children as long as they do not pursue the sexual component of their relationship until the student turns 18.
34. The case studies provided above illustrate that would be offenders are aware of these gaps and exploit them when targeting children.
35. Given the significant impact that this conduct has on the safety and wellbeing of children, the Institute is of the view that it is appropriate to criminalise this conduct and recommends that the grooming offence be amended in accordance with the recommendations made in paragraph 20 of this submission.



Peter Corcoran
Chief Executive Officer

Date: 3 May 2021