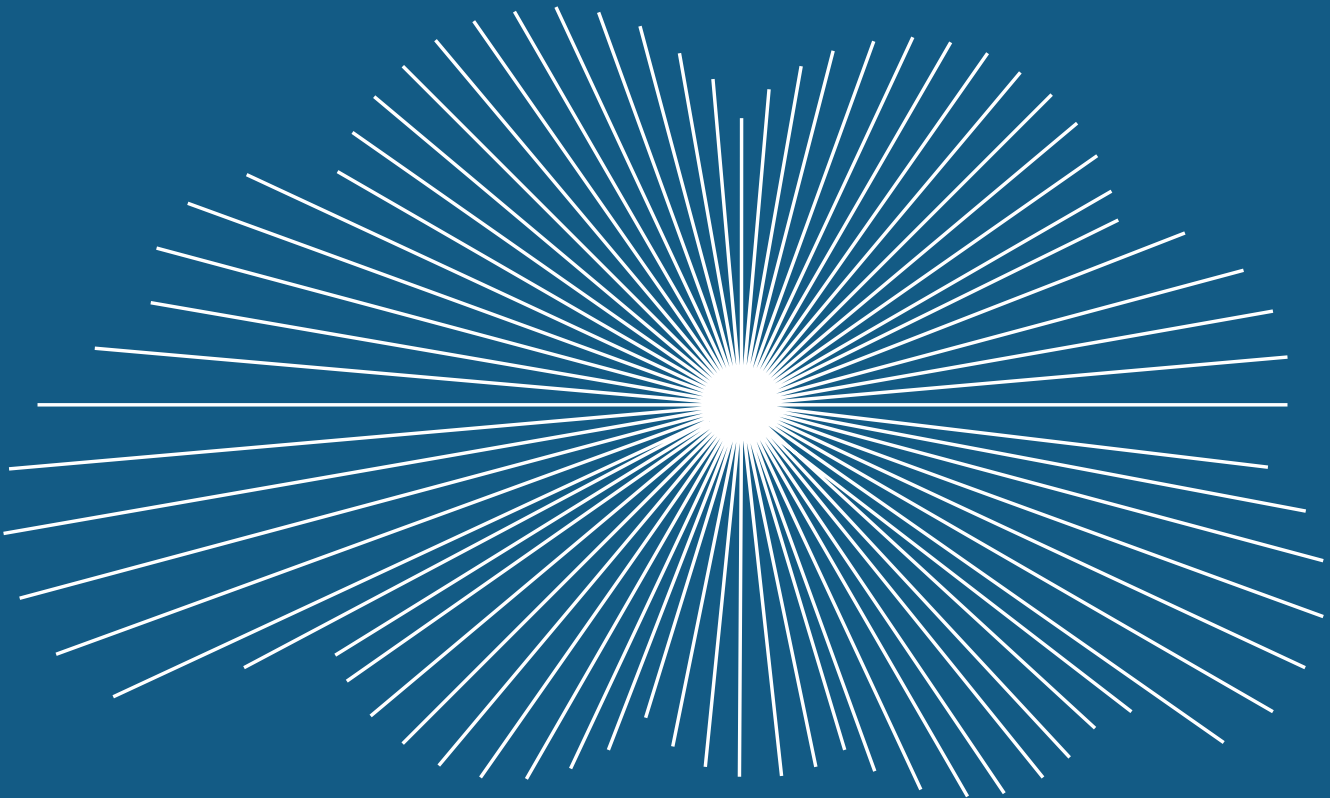




Victorian
Law Reform
Commission

Improving the Response of the Justice System to Sexual Offences

ISSUES PAPERS A-H OCTOBER 2020





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Improving the Response of the Justice System to Sexual Offences:

Guide to Our Issues Papers



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Improving the Response of the Justice System to Sexual Offences: Guide to Our Issues Papers

- 1 The Victorian Law Reform Commission has been asked to make recommendations to improve the response of the justice system to sexual harm. We will review the laws in Victoria about rape, sexual assault and other adult and child sexual offences, and consider how those laws work in practice.
- 2 We want to hear your views. You can help us understand what works well now, and what can be improved.
- 3 We are interested in hearing from anyone who has professional or personal experience in this area, and anyone who has ideas for reform.
- 4 This paper gives an overview of the things we are interested in and how we plan to approach them. It will also guide you through our issues papers, and inform you how you can share your views.

Our focus

- 5 The most important things we are looking at are set out in our terms of reference (see box). They are given to us by the Attorney-General of Victoria.
- 6 We have been asked to focus on:
 - barriers to reporting sexual offences: what prevents people from reporting sexual harm
 - why reports of sexual harm may not proceed through the justice system
 - how to reduce the trauma of victim survivors in the justice system
 - how to improve data collection and reporting
 - the best ways of responding to sexual offences—including alternatives to the justice system
 - how to build on previous reforms.
- 7 All of these things are discussed in the eight issues papers. See Table 1 for a guide to what topics are covered in each paper.

8 There are some themes that cut across our issues papers:

- **Access to justice:** It is more difficult for some people and groups to access the justice system. They might find it harder than others to report their experience, to be heard and believed, and to obtain a just outcome. This might be because they did not realise what happened to them was a crime, or they have been treated unfairly by the justice system in the past. It could be because our justice system is still based on the experiences of some groups, but not others. We are interested in reforms and supports that could give everyone access to justice.
- **Diverse needs and experiences:** Our community is diverse and so are people's experiences of sexual harm. Some groups experience sexual harm at much higher rates than others, such as Aboriginal women, women with disabilities and young people. People's experiences of sexual harm might be shaped by factors such as their culture, sexuality, gender, age and employment.¹ We are interested in how the justice system could respond better to these diverse needs and experiences.
- **Past reforms:** We hope to build on sexual offences reforms, and other inquiries, from the last 20 years.²
- **A range of justice options:** We have been asked to consider a range of responses to sexual harm, including the criminal justice system, civil proceedings (where a person takes another person or institution to court) and new alternative models. We are interested in how these options might work together.³ (The terms of reference in the box provide details of what we are asked to consider.)

9 We recognise that stopping sexual harm before it happens (primary prevention) is important.⁴ However, in this inquiry our main focus is on how the justice system deals with sexual harm after it happens. We only discuss primary prevention when it relates to the justice system.

Our terms of reference

The Victorian Law Reform Commission (VLRC) is asked to review and report on Victoria's laws relating to rape, sexual assault and associated adult and child sexual offences (sexual offences). The review should identify opportunities to embed and build upon previous reforms, identify the barriers to reporting and resolving sexual offences, and make recommendations to improve the justice system's response.

In undertaking this review, the VLRC should consider legislation, policy and other factors including:

- The impact of the changes that have been implemented since the VLRC last reported on Sexual Offences (2004), Evidence (2006), Jury Directions (2009) and Victims of Crime in the Criminal Trial Process (2016).
- Best practice approaches in other Australian and international jurisdictions for responding to sexual offences, with a view to identifying further opportunities for improvement in Victoria.
- The Victorian Royal Commission into Family Violence Report (2016) in so far as it relates to sexual offences within intimate partner relationships.
- The impact, if any, of technological advancements on the nature of sexual offending.
- Data and trends around the reporting of sexual offences, investigations, prosecution and conviction rates across Victoria, and any opportunities to improve data collection and reporting practices.

- Actual or perceived barriers which contribute to the low reporting of sexual offences, and the high attrition throughout the formal legal process of those who do report, including:
 - reasons why victim survivors of sexual offences may choose not to report the event to police, or pursue a formal complaint;
 - reasons why complaints that are reported do not progress to charges;
 - reasons why charges do not proceed to trial; and
 - reasons why convictions may be difficult to achieve.
- Whether Australian or international best practice suggests opportunities to address these real or perceived barriers, including through consideration of alternative mechanisms or processes to receive and resolve sexual offence complaints that are consistent with victim survivors' interests and the interests of justice.
- The process and procedure for reporting, investigating and prosecuting sexual offences, and whether there are alternative models which would improve the resolution of sexual offences for victim survivors.
- The effectiveness of the 2014 reforms to the elements of sexual offences.
- The application of sexual offences to children.
- Whether the rules for giving evidence, directions given to juries and the time taken to resolve cases are meeting public expectations, and how this affects complainants.
- How criminal prosecutions for sexual offences may interact with processes outside the system for resolving complaints, such as workplace or educational institution investigations, and in particular the findings of the Australian Human Rights Commission in its National Workplace Sexual Harassment Inquiry.
- Best practice for supporting sexual offence complainants and witnesses in the justice system more broadly, including:
 - How complainants give evidence in other contexts including in civil proceedings such as defamation and civil claims against institutions; and
 - Any other matter that the VLRC considers necessary to reduce the trauma experienced by complainants and improve efficiency in the criminal justice system, while also ensuring fair trial rights.

The VLRC is asked to recommend any changes which could further reduce the trauma experienced by complainants and witnesses and improve the ability of the justice system to respond to sexual offences. In making such recommendations, the VLRC should also be cognisant of the need to uphold procedural fairness and other fundamental rights for accused people, consistent with the Charter of Human Rights and Responsibilities Act 2006.

The VLRC is asked to provide its final report to the Attorney-General by 31 August 2021.

How to tell us your views

- 10 We will hear from people in three ways:
- 1) an online form (for some groups)
 - 2) submissions (written responses to our issues papers or terms of reference)
 - 3) formal consultations.
- We explain these processes below.
- 11 If you or someone you know has experienced sexual harm, or the justice system's response to that harm, and you would like to give feedback in another way, please contact us. We will arrange another way for you to share your views.
- 12 Please note that we do not provide legal advice. If you need help with a legal issue, you can contact [Victoria Legal Aid](#), a [community legal centre](#) or a solicitor.
- 13 You may find it difficult or upsetting to discuss experiences of sexual harm and seeking justice. We encourage you to seek support [from the services on this list of support services](#).

Giving feedback online

- 14 We have tried to make it easier for people who have experienced sexual harm, or helped someone who has, to give us feedback through a short online form at the website of [Engage Victoria](#).
- 15 If you also want to provide feedback to the questions in our issues papers, you can:
- make a submission (see below)
 - provide your answers to issues paper questions using the online feedback form.
- 16 We will not publish anyone's individual responses to the online feedback form. We will publish a summary of responses that will not identify anyone.

Making a submission

- 17 You can tell us your views by sending us a submission. A submission is a written response to this inquiry. Our issues papers ask a range of questions on different topics.
- 18 You can answer as many questions as you like, or you can respond to our terms of reference more generally without using the questions. You can respond to one issues paper or more than one. You can read all the questions from all the issues papers by [downloading the question list](#).
- 19 There is no standard format for submissions, but we prefer them to be in writing.
- 20 If you need assistance, you can make a submission verbally to one of the Commission staff. Please contact us if you need an interpreter or other assistance.
- 21 Many organisations and people may have already made submissions to similar inquiries. If you do not have enough time to respond to this inquiry, you can send us any relevant submission you have made before and let us know which parts of that submission remain relevant.

Important details about making a submission

- 22 When you make a submission, you must tell us if you want your submission to be public or confidential. If you do not tell us you want your submission to be confidential, we will treat it as public. That means that we may refer to it in our reports, upload it to our website and make it available to the public to read in our offices.
- 23 Your submission should include your name or organisation. If it does not have a name attached, it may be difficult for us to use the information. You can ask us not to publish your name in our report, but otherwise we will publish your name in our list of submissions, subject to any laws that apply.
- 24 Please make your submission by 23 December 2020. You can make your submission by:
- Sending your submission by email: law.reform@lawreform.vic.gov.au
 - Sending your submission by mail: GPO Box 4637, Melbourne Vic 3001
 - Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call).

Formal consultations

- 25 We will speak with people who have experienced sexual harm, making contact through interested organisations. We will also meet with people who support or advocate for people who have experienced sexual harm.
- 26 We intend to speak to people who have been responsible for sexual harm.
- 27 We will meet with people and organisations who respond to sexual harm, such as judges, government departments, police and lawyers.

A guide to our issues papers

- 28 Our eight issues papers focus on different aspects of the justice system's response to sexual offences. See Table 1.
- 29 These papers ask for feedback. They only provide background information that is relevant to the questions. They do not represent our final views on the matters raised.
- 30 Our final report will have a more detailed discussion of these topics, including community feedback, our research and our recommendations.

Table 1: List of issues paper topics

Issues paper	Main topics
A. Working Together to Respond to Sexual Offences: Systems	<ul style="list-style-type: none"> • pathways to justice • relationships in the system (including with family violence and child protection systems) • relationships with other systems and services • governance and outcomes • data, research and evaluation.
B. Sexual Offences: Key Issues in the Criminal Justice System	<ul style="list-style-type: none"> • attitudes of people in the criminal justice system and their understanding of sexual harm • specialist sexual offence courts • alternatives to jury trials • delay • support for people who have experienced sexual harm.
C. Defining Sexual Offences	<ul style="list-style-type: none"> • sexual offences (including technology-facilitated sexual offences) • consent • new sexual offences.
D. Sexual Offences: Report to Charge	<ul style="list-style-type: none"> • the investigation process • alternative options for reporting.
E. Sexual Offences: The Trial Process	<ul style="list-style-type: none"> • charging and prosecuting decisions • pre-trial procedures • special procedures and alternative arrangements for giving evidence • jury directions, evidence law and procedure • appeals • the Children’s Court.
F. People Who Have Committed Sexual Offences	<ul style="list-style-type: none"> • diverse needs • rehabilitation and reintegration • post-sentence detention and supervision • sex offender registration • early intervention and diversion • children and young people engaging in harmful sexual behaviour.
G. Sexual Offences: Restorative and Alternative Justice Models	<ul style="list-style-type: none"> • restorative justice • inquisitorial models • being heard, or truth telling • Aboriginal justice models.
H. Sexual Offences: Civil Law and Other Non-Criminal Responses	<ul style="list-style-type: none"> • civil liability • responding to sexual harassment • the Victims of Crime Assistance Tribunal • redress schemes • regulatory regimes.

Our approach

- 31 We recognise that:
- Sexual harm is widespread and considerably under-reported.⁵
 - Sexual harm is gendered: women are more likely to experience sexual violence. Women and men also experience sexual harm in different contexts.
 - There are different patterns of sexual harm. Sexual harm can overlap with other types of violence, such as family violence or child abuse.
 - Some people and groups experience sexual harm at much higher rates than others.
 - People's experiences of sexual harm and seeking justice are diverse. They can also be shaped by factors such as their culture, sexuality, gender, age, class, ability, religion and employment, including a combination of these factors.
 - The historical context of dispossession, removal and trauma is an important part of Aboriginal people's experience of sexual harm.⁶
- 32 In the box below, we explain some key terms that we use in our issues papers.
- 33 We understand that the best terms to use can change and people often disagree about the right terms to use. If you have views on the terms that we are using, please tell us in your online feedback or submission.

Terms used

Sexual offences: A sexual offence is a sexual harm that is against the law. Some sexual offences in Victorian law include rape (sexual penetration without consent) and sexual assault (sexual touching without consent).⁷

Sexual harm: We use this term to refer to all sexual activity that happens without consent.⁸ We use this term instead of 'sexual violence' to recognise that it can be difficult for some people to identify their experience of sexual harm as violence. This is because social understandings of violence have not always included sexual harm.

However, we use 'sexual assault' instead of 'sexual harm' in the paper and online form for people who have experienced sexual harm. This is because 'sexual assault' may be more familiar to them.

People who have experienced sexual harm: We mainly refer to people who have experienced sexual harm. This is to recognise that sexual harm is an experience, rather than who someone is. It also recognises people who have experienced sexual harm do not have one shared identity. We sometimes refer to people who have experienced sexual harm as victim survivors (a term that recognises their resilience as well as their victimisation) or as complainants (which is a legal term).⁹

People who have committed a sexual offence: We refer to 'a person who has committed or been convicted of a sexual offence' rather than 'sex offenders'. This recognises that sexual offending is a problem of someone's behaviour, rather than of who they are. This is not meant to downplay the seriousness of sexual offences, which are among the most serious crimes in our community. We also refer to people who have been charged, but not convicted, as 'the accused'. In other contexts, such as restorative justice, we discuss people who are responsible for sexual harm.

Justice system, or the criminal justice system: The whole system that responds to criminal behaviour and reports of criminal behaviour. It includes the police, prosecuting agencies, the courts, defence lawyers and correctional services.

What we will do with your responses

- 34 We will publish public submissions on our website, unless they include comments that are offensive or defamatory, or are outside the scope of the review. However:
- we will remove personal addresses and contact details
 - we will remove the name of the person making the submission if the person has experienced sexual harm (as the law limits our publication of their names)
 - we may remove information that might identify someone (in submissions that discuss specific cases or the personal circumstances of people).
- 35 Confidential submissions are not made available to the public and are not referred to in our reports. However, if someone requests a submission under the *Freedom of Information Act 1982* (Vic), the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.ovic.vic.gov.au.
- 36 The views in the submissions are those of the people or organisations who submit them. Their publication does not mean that the Commission accepts or agrees with those views.
- 37 We archive hard copies of submissions and send them to the Public Record Office Victoria.

Our process from here

- 38 We will consider all the responses we receive together with our own research. We will write a report for the Victorian Government including our recommendations on what should be done. This report is due by **31 August 2021**. Within 14 sitting days of receiving our report, the Government must put it before the Victorian Parliament. It is up to the Victorian Government to decide what it will do in response to our report, and the role of the Victorian Parliament is to change any laws.
- 39 To help us prepare the issues papers we spoke informally with people and organisations including judges, staff of government departments, lawyers, academics and those who support or advocate for people who experience sexual harm. We are grateful for their assistance.

Endnotes

- 1 See also Victorian Government and Family Safety Victoria, *Everybody Matters: Inclusion and Equity Statement* (Policy, December 2018) 2–5 <<http://www.vic.gov.au/everybody-matters-inclusion-and-equity-statement>>.
- 2 These include: Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>; *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; *The Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) <<https://www.childabuseroyalcommission.gov.au/final-report>>; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016); Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) <<https://www.lawreform.vic.gov.au/all-projects/sex-offenders-registration>>; Victorian Law Reform Commission, *Jury Directions* (Report No 17, 29 July 2009) <<https://www.lawreform.vic.gov.au/all-projects/jury-directions>>; Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
- 3 On the importance of a range of justice options for people who have experienced sexual harm, see Kathleen Daly, 'Reconceptualizing Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge, 2014) 378, 381; see also Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 9 <<https://cij.org.au/research-projects/sexual-offences/>>.
- 4 Commonwealth of Australia, *Fourth Action Plan—National Plan to Reduce Violence against Women and Their Children 2010-2022* (Policy, 2019) Priority 1, 19 <<https://www.dss.gov.au/women-publications-articles-reducing-violence/fourth-action-plan>>.
- 5 See also the *Criminal Procedure Act 2009* (Vic) s 338.
- 6 Department of Health and Human Services (Vic), *Dhelk Dja: Safe Our Way—Strong Culture, Strong Peoples, Strong Families* (Agreement, October 2018) 24 <<http://www.vic.gov.au/dhelk-dja-partnership-aboriginal-communities-address-family-violence>>.
- 7 For specific definitions, see *Crimes Act 1958* (Vic) Pt 1 sub-div 8A. Our issues paper C discusses the different sexual offences that we focus on.
- 8 This is based on the Victorian Government's definition of 'sexual violence': Victorian Government, *Free from Violence: Victoria's Strategy to Prevent Family Violence and All Forms of Violence against Women* (Policy, 2017) 58 <<http://www.vic.gov.au/free-violence-victorias-strategy-prevent-family-violence>>.
- 9 Notably, in Victoria, legislation and support services provided to people who have experienced sexual harm use the terminology of 'victims', including the *Victims of Crime Assistance Act 1996* (Vic); *Victims' Charter Act 2006* (Vic).

Issues Paper A

Working Together to Respond to Sexual Offences: Systems



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Issues Paper A

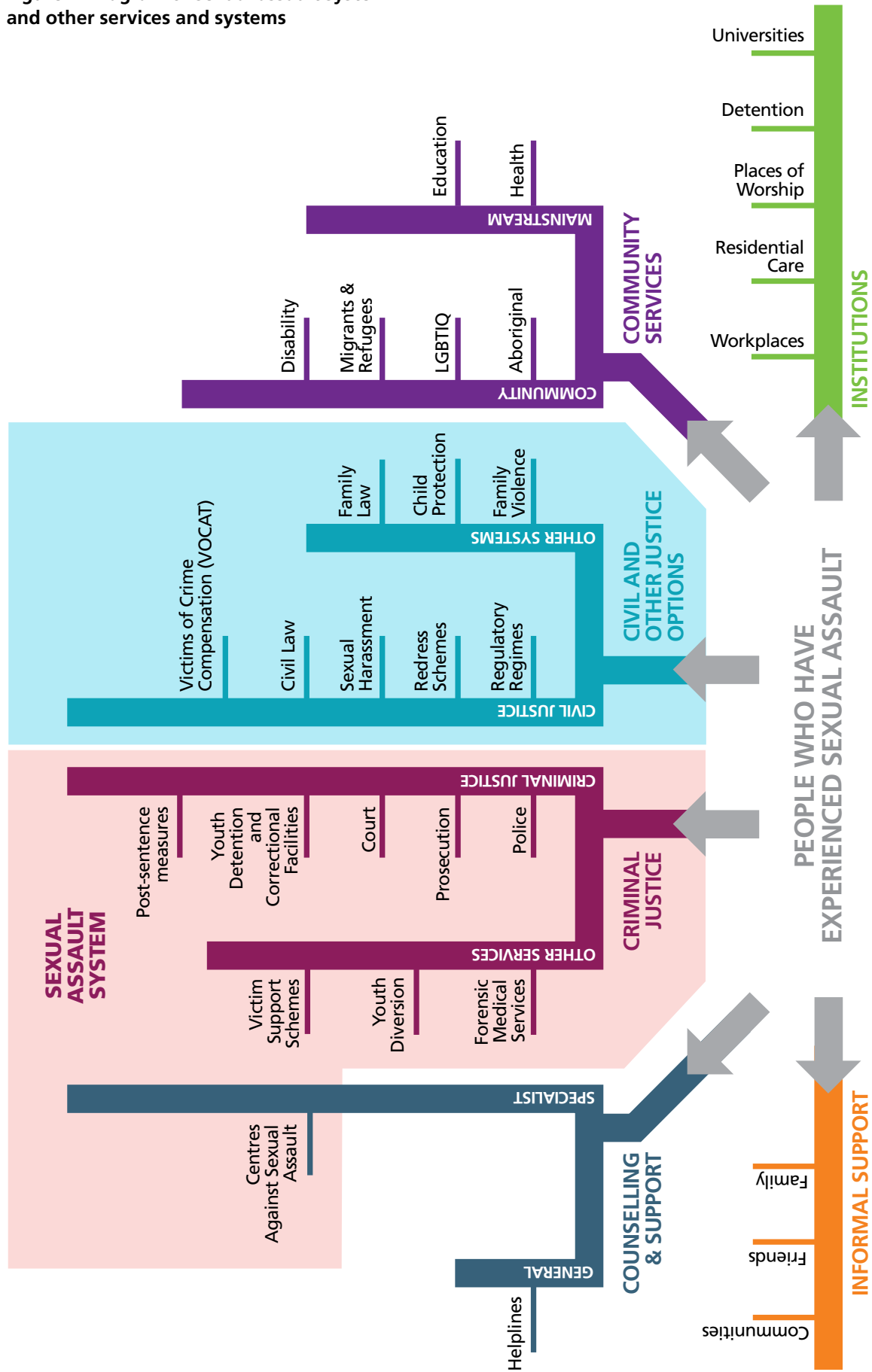
Working Together to Respond to Sexual Offences: Systems

Introduction

- 1 This paper is for people whose work involves responding to sexual harm, within and beyond the 'sexual assault system':
 - sexual assault counsellors
 - forensic medical staff
 - family violence and child protection workers
 - staff in the criminal justice system who work with people who have experienced or are responsible for sexual harm.
- 2 We also encourage people who have experienced sexual harm, and those who have supported them, to answer any questions in this paper that interest them.
- 3 People who have experienced sexual harm often need to deal with different organisations. In this paper we ask how these organisations can best work together to improve the response of the justice system to sexual harm.
- 4 In this paper, we use the term 'sexual assault system' to refer to those organisations that specialise in responding to sexual harm, including sexual assault counselling services and those involved in the criminal justice response to sexual offences (see Figure 1: Diagram of sexual assault system and other services and systems). We also ask if there are ways to improve the sexual assault system, including:
 - if there are gaps in the system
 - by improving relationships within the system
 - through stronger governance and shared outcomes
 - by improving data, research and evaluation across a range of services and critical points in the system.

Issues Paper A is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

Figure 1: Diagram of sexual assault system and other services and systems



Pathways to justice: the role of support and services

- 5 Most people who experience sexual harm do not go straight to the police. They often try to get support first.
- 6 This support may be informal (for example, friends or peer support groups). Formal supports include helplines, specialised sexual assault services, health services, and community services.
- 7 These supports and services are often the first place where someone may learn or think about the justice system. However, there are barriers to people getting the support they need so they can make the decision that is right for them.
- 8 We want to hear how to make it easier for people to get the support they need so that they can decide whether to report the sexual harm. This includes making sure that they get current information on how the criminal justice system will respond.
- 9 We also want to know how to improve support for those who may face greater barriers, such as people with disability or those from culturally and linguistically diverse communities.

Question

- 1 What would make it easier for people who have been sexually harmed to get the supports and services they need, so they can decide whether to report the sexual harm?

You might think about:

- how and what information is given to people about how the criminal justice system works, including changes that have improved the system
- if there are any gaps in supports or services (for example, is there a need for Aboriginal-led sexual assault investigation units, or specialist sexual assault services for some people, such as male victim survivors?)
- how to improve capacity to meet demand
- any programs or pilots we can learn from.

Working together

Collaboration within the sexual assault system

- 10 For decades, there has been a strong push towards services collaborating more when responding to family violence and sexual harm. This has included the promotion of multi-agency or integrated responses. These aim to improve relationships and skills within the sexual assault system, making it easier for those experiencing harm to deal with different services.¹
- 11 Such approaches can have their own challenges, including:
- Agencies may not have equal power or resources.
 - Different agencies have different goals (for example, the goal of addressing the needs of those who have experienced sexual harm compared to the goal of holding a person to account for the crime).
 - Agencies have different perspectives and disciplines.
 - Agencies have to communicate across organisations and need to consider what information can and should be shared.
 - Agencies may lose their specialist focus or the flexibility to respond to the needs and experiences of particular groups, such as people with a disability.²
- 12 The sexual assault system in Victoria includes several collaborative approaches, including:
- multi-disciplinary centres (discussed in Issues Paper D) which co-locate key services
 - the Therapeutic Treatment Board (discussed in Issues Paper F)
 - protocols that set out how organisations will work together, such as Victoria Police’s Code of Practice (discussed in Issues Paper D)³
 - multi agency panels that manage plans for serious sex offenders (discussed in Issues Paper F).
- 13 We want to hear about your experience of these and other collaborative approaches. We also want to know if there are any lessons we can draw from them to improve the response of the justice system to sexual harm—for example, by improving support for people to report to police.

Question

- 2 How can collaboration within the sexual assault system be improved, so that the justice system responds effectively to sexual harm?

You might think about:

- if referrals and coordination between services work well in practice
- if there are ways to build on these approaches
- if there are other multi-agency responses we should learn from.

Family violence

- 14 Sexual assault services often need to work with family violence services. Their relationship is affected by reforms flowing from the 2016 Royal Commission into Family Violence.
- 15 For example, guidelines are being developed for the relationship between sexual assault services and new one-stop family violence hubs (Orange Doors).⁴ Sexual assault services are also part of reforms to improve information sharing and risk assessment.⁵
- 16 The Royal Commission also recommended joint training between family violence and sexual assault services. In the longer term, it recommended a review to examine whether the two sectors could be fully integrated.⁶
- 17 This review will be conducted after the full Orange Door program has been rolled out. A technical advisory group is currently mapping the relationships between sexual assault and family violence services.⁷
- 18 There are already some integrated approaches that combine sexual assault and family violence services.⁸ Victoria Police have begun co-locating specialist family violence investigators in some multi-disciplinary centres. There is a pilot co-located family violence service at one of these centres.⁹
- 19 We want to hear how the relationship between sexual assault services and family violence services could be improved, so that the justice system responds effectively to sexual harm. For example, we want to know if reforms have improved how family violence services identify and refer cases of sexual harm, and if there are ways to improve the prosecution of sexual offences in cases of family violence.

Question

- 3 How can the relationship between family violence services and the sexual assault system be improved, so that the justice system responds effectively to sexual harm?

You might think about:

- if referrals and coordination between services work well in practice
- your experiences with combined or co-located services
- the opportunities and challenges of further integration.

Child protection

- 20 In Victoria, the relationship between Child Protection (part of the Department of Health and Human Services) and Victoria Police in investigating sexual abuse is governed by a protocol. This sets out when each organisation should notify the other about cases, how they coordinate joint investigations, and when they should consult with other agencies.¹⁰
- 21 Although the protocol requires the organisations to coordinate joint investigations, each investigation has different thresholds for evidence and risk. Each investigation has different purposes and may involve different courts. These differences can create challenges.
- 22 There are other collaborative approaches used in child protection, including multi-disciplinary centres, the Therapeutic Treatment Board, and an enhanced response model for child sexual exploitation.¹¹

- 23 We want to hear how to improve the relationship between child protection and the sexual assault system, so that the justice system responds effectively to sexual harm. For example, we want to know if joint investigations are working well, and if further collaboration can improve the response of the justice system.

Question

- 4 How can the relationship between Child Protection and the sexual assault system be improved, so that the justice system responds effectively to sexual harm?

You might think about:

- the different thresholds and legal processes in the two systems
- models in other jurisdictions (for example, the Joint Investigation and Response Team in New South Wales or the Child Advocacy Centres in Western Australia)
- opportunities for greater joint planning or governance and accountability.

Working with other services and systems

- 24 People who experience sexual harm often need to deal with a range of services and systems to address their needs (see Figure 1: Diagram of sexual assault system and other services and systems). For example, they might deal with:
- the health system, including mental health services, drug and alcohol services, GPs and hospitals
 - institutions, such as schools, universities, workplaces, out-of-home care, youth detention or adult correctional facilities, or sporting and recreational groups
 - services specific to groups (for example, settlement services for refugees, disability services, or Aboriginal controlled organisations)
 - housing services (if they need to leave their housing because of the sexual harm)
 - the family law system (if there is a family law dispute related to the sexual harm).
- 25 These services and systems can support someone to enter, and stay engaged with, the sexual assault system. For example, these other services and systems can provide a path to the sexual assault system or other ways of seeking justice (see Issues Paper H). They also provide other services that can support someone to seek justice, such as housing or health services.
- 26 We want to hear if there are ways to improve how other services and systems work with the sexual assault system.

Question

- 5 How can we improve how other services and systems work with the sexual assault system, so that people are supported to seek justice?

You might think about:

- how these services and systems identify or respond to sexual harm
- how well these services and systems work with the sexual assault system (for example, are referrals to sexual harm services or the police happening when they should be?)
- any gaps between services or systems
- any programs or pilots that we can learn from.

Governance and outcomes

- 27 The effectiveness of the sexual assault system depends on strong relationships between parts of the system, and shared goals. Policies and strategies therefore often include governance structures and a way to measure the performance of a system against shared outcomes.
- 28 Victoria's Free from Violence strategy addresses family violence and violence against women, including sexual violence. However, its action plan and outcomes framework focus on family violence.¹² Victoria does not have a strategy dedicated to sexual violence, unlike some other states.
- 29 Many policy frameworks also set out a governance structure that seeks to ensure agencies communicate with each other and are accountable to each other across the sexual assault system. This is intended to ensure that communities affected by violence are partners in reform.¹³

Queensland's Prevent. Support. Believe framework

On 15 October 2019, the Queensland Government launched its sexual violence prevention framework, Prevent. Support. Believe. This followed a year of community forums, surveys, focus groups and roundtable meetings. The framework sets out a shared vision, priorities, and outcomes. It adopts Queensland's existing governance framework for family violence. A whole-of-government action plan is being developed and is intended to be released in 2020.¹⁴

- 30 We want to hear if there is a need for a clearer governance structure or for shared outcomes to improve the response of the justice system to sexual harm in Victoria and, if so, how to achieve this.

Question

6 Is there a need for a stronger focus on governance or shared outcomes in the response of the justice system to sexual harm? If so, what should this look like?

You might think about:

- if there is a need to strengthen governance structures within the sexual assault system
- if there should be a shared framework for measuring the effectiveness of family violence and sexual assault policy
- if there should be other measures to improve accountability across the system.

Data, research and evaluation

31 To improve the justice system's response to sexual harm, we need to understand why and how sexual harm occurs and what works in responding to it. Improving the evidence base has therefore been a focus of many reform efforts.¹⁵

32 For example, Victoria has recently developed a framework to help services collect more consistent data about family violence.¹⁶ Victoria is also developing a portal which publishes information from these services.¹⁷

33 We want to know what other improvements to data, research and evaluation are needed. For example, the Victorian Law Reform Commission has already identified the need for more data and research on:

- people who are responsible for sexual harm¹⁸
- some forms of violence, including cultural practices that may amount to sexual harm such as forced marriage¹⁹
- the policing and prosecution of sexual harm.²⁰

34 We also want to hear about how to improve our understanding of the effectiveness of the criminal justice system. For example, a recent Victorian report found gaps in the data that mean we do not fully understand how sexual offence cases progress through the criminal justice system.²¹ Similar reports in New Zealand and the United Kingdom provide more detail about why cases might not progress.²²

Question

7 What are the opportunities for, and benefits of, improving data, research and evaluation in relation to sexual offending?

You might think about:

- what data or research would help identify or address barriers to reporting
- what data or research would help improve the response of the criminal justice system to sexual offences
- current limitations on data, research and evaluation and how to address these.

Other issues

35 We want to hear how well you think the sexual assault system in Victoria works now, and what other ideas you have about how to improve the system.

Question

8 How well does the sexual assault system work? How would you improve it?

Endnotes

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Issues Paper B

Sexual Offences: Key Issues in the Criminal Justice System



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Issues Paper B

Sexual Offences: Key Issues in the Criminal Justice System

Introduction

- 1 This paper is for:
 - people who work in, or have experience of, the criminal justice system in relation to sexual harm
 - counsellors, intermediaries, and others who support or work with those who have experienced sexual harm
 - researchers and others interested in the subject.
- 2 We also encourage people who have experienced sexual harm, and those who have supported them, to answer any questions in this paper that interest them.
- 3 There have been many reforms to improve the response of the criminal justice system to sexual harm. These have tried to address key issues such as:
 - improving the understanding of sexual harm and attitudes to people who have been harmed
 - reducing delay
 - improving support for people who have experienced sexual harm.
- 4 In this paper, the Victorian Law Reform Commission asks how well the criminal justice system is responding to sexual harm, and what else should be done about these key issues. We also ask for your views on specialist courts and alternatives to jury trials.

Issues Paper B is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

Attitudes and understanding

- 5 In 2004, in an inquiry into sexual offences, we made recommendations to improve attitudes to people who have experienced sexual harm and the understanding of sexual harm in the criminal justice system.¹ Recommendations included:
- further education and training
 - specialised roles for police and the prosecution
 - allowing expert evidence in trials about the context and patterns of sexual harm
 - jury directions to counter misconceptions about sexual offences.
- 6 The recommendations, and other important work on sexual offences, led to reforms that aimed to ensure people in the system dealt with sexual harm in the right way. For example, training and guidance was developed for police, to counter misconceptions about sexual harm.²
- 7 There have been signs of positive change since the reforms. A 2011 evaluation found a change in culture of those within the criminal justice system. The experience of victim survivors in the criminal justice system had also improved.³
- 8 But more may still need to be done. For example, some research suggests that expert evidence could be used more often in sexual offence trials in Australia.⁴
- 9 We want to hear if there is still a need to improve the attitudes and understanding of those within the criminal justice system and, if so, how.
- 10 Other possible reforms might include:
- requiring judges who sit on sexual offence cases to have training, as happens in the United Kingdom⁵ (this could also apply to lawyers)
 - providing more information to jurors (for example, video briefings for jurors on the context and patterns of sexual harm)
 - making training more available, more comprehensive or more regular.
- 11 We discuss next other possible reforms, including introducing a specialist sexual offences court and alternatives to jury trials.
- 12 Jury directions are discussed in Issues Paper E.

Question

- 1 Is there a need to improve attitudes towards victim survivors or the understanding of sexual harm within the criminal justice system? If so, how?
- You might think about:*
- how to improve the attitudes and knowledge of jurors
 - how to improve the attitudes and knowledge of police, lawyers and judges, including in appeal courts.

A specialist sexual offences court

- 13 In Victoria, most courts have specialist lists to deal with sexual offences. Another possible reform would be to create a specialist court that deals only with sexual offences and has its own rules and procedures.⁶
- 14 New Zealand recently piloted a specialist sexual offences court.⁷ Such a court has also been established in South Africa.

New Zealand specialist sexual offences pilot

The key features of this pilot were:

- judges and prosecution and defence lawyers were trained about sexual harm and the experience of complainants in court
- court processes were based on best practice guidelines for sexual offence cases
- case managers proactively dealt with potential issues of delay.⁸

An evaluation in 2019 found that there was widespread support for a national rollout of the pilot. It found that cases progressed more quickly, with fewer adjournments and a decrease of 134 days in the average time that cases took.

It also found that the quality of case review hearings and trials had improved, with judges intervening more often to prevent unacceptable questioning of witnesses. Better case management also led to more and earlier guilty pleas. The evaluation noted that the quality and role of the case managers was critical to the success of the pilot.

However, there were concerns about workload pressures for judges and counsel because of the preparation needed for case review hearings. The evaluation also identified 'burn out' among staff as a risk.⁹

- 15 Specialist courts are related to 'problem-solving courts', which aim to address the underlying problems of people who commit offences.

New York Sex Offense Court

The New York Sex Offense Court is a problem-solving court. The key features of the court are:

- a dedicated judge to handle each case
- judicial monitoring of people convicted of sexual offences
- collaboration with probation and parole agencies
- training of judges and non-legal staff
- sex offender treatment programs
- access to services for people who have experienced sexual harm.¹⁰

The benefits of this court are said to be less trauma for people who have experienced sexual harm (because of better case management) and positive effects on people who have been convicted of a sexual offence.¹¹

We are not aware of any evaluations of this court.

- 16 A specialist court could be staffed by trained judges, lawyers and others providing support. This could improve decision making through specialisation, and be more efficient.¹²
- 17 However, there are challenges with specialist courts. It may be hard to keep or attract judges to such a court because of its subject matter, and it may reduce the flexibility of courts to manage their cases.¹³

Questions

- 2 Do you support introducing a specialist court for sexual offences? Why or why not?
- 3 If you support introducing a specialist court for sexual offences, what features should it have?

You might think about:

- the value of a specialist court compared to specialist lists
- the features of a specialist court
- how to address the challenges of attracting and keeping judges.

Alternatives to jury trials

- 18 Research on jury trials for sexual offences raises two areas of concern. Jurors bring their own attitudes and understanding about sexual harm into the courtroom. This may include common misconceptions about sexual harm.¹⁴ Some studies suggest that jurors are more influenced by their own attitudes about rape than by the evidence presented at trial.¹⁵
- 19 Another concern is that the presence of a jury may be harmful for complainants.¹⁶ It can be difficult to give evidence in front of a group of people, especially in small communities where the complainant and jurors might cross paths.¹⁷ The need to persuade a jury may also lead to more intense questioning of the complainant than is needed to test the evidence.¹⁸
- 20 Two alternatives to jury trials have been suggested: professional jurors (see box) or trial by judge alone.

Professional jurors

The New Zealand Law Commission (NZLC) considered a model of semi-professional or professional jurors for sexual offences. In this model, a panel of a judge and jurors would decide the case. The jurors would have an understanding of sexual harm, either because of their work experience or because they had been trained to sit on sexual offence trials.

The model the NZLC considered was based on models in Austria, Germany and Denmark where judges sat with lay jurors on criminal cases.

The jurors would sit together with the judge on the bench. They would also receive a copy of the case dossier before trial. They would deliberate together. The NZLC noted that the jurors' role could be to advise the judge, or they could have independent voting power, as was the case in Germany.

The NZLC concluded there was value in giving the decision-making function in sexual offence trials to a body other than a jury. They recommended that the issue be considered as part of the evaluation of the specialist sexual offence court (discussed above).¹⁹

- 21 The NZLC also considered judge-alone trials as an alternative. Recently in Victoria, judge-alone trials were introduced for a six-month period due to coronavirus (COVID-19) restrictions.²⁰ However, this option has not been used often.²¹
- 22 Judge-alone trials could avoid the concern that jurors bring misconceptions about sexual harm, and could reduce the risk of appeals based on errors in jury directions. They might also be more efficient.²² Publishing reasons for decisions would make the process transparent. This could strengthen the confidence of the community and professionals in the outcomes of the trial.²³ The process may also be fairer to the accused, by reducing the influence of stereotypes.²⁴
- 23 On the other hand, juries are an important feature of the criminal justice system. They represent the community and their values. They are a check on potential abuses of power. Removing juries could undermine trust in the criminal justice system,²⁵ and the right to a fair trial.²⁶ There is also research that indicates that jurors take their task seriously and any misconceptions they bring are moderated by the jury process.²⁷
- 24 We want to hear your ideas about the strengths and weaknesses of jury trials for sexual offences, and if you support other decision-making models.

Question

- 4 Do you support changing the role or nature of the jury in trials for sexual offences? Why or why not?

You might think about:

- ways of educating juries in sexual offence cases
- the strengths and weaknesses of the model considered in New Zealand
- why judge-alone trials have not been used often.

Delay

- 25 In our Sexual Offences inquiry in 2004, a key issue was the effect of delay on complainants. Delay makes it difficult for complainants to move on with their lives and is likely to affect the quality of their evidence.
- 26 Some delay cannot be avoided. However, the Commission found there were delays that could be avoided, especially in the time taken to get the results of DNA tests and during the committal process.²⁸
- 27 There are some challenges in getting a full picture of how quickly cases progress through the justice system, due to data limitations (see Issues Paper A).²⁹ Sexual offences, however, typically take much longer than other cases to be resolved.³⁰
- 28 Reforms have tried to address delay for sexual offences, including by:
- providing shorter time frames for committal proceedings³¹
 - improving case management and establishing specialist lists³²
 - setting time limits for starting trials.³³
- 29 We have also recently made recommendations to reduce pre-trial delay during the committals process.³⁴ These recommendations have not yet been implemented.
- 30 We want to hear if there are still delays that can be avoided or reduced, and if so how.

Question

- 5 How well are reforms working to avoid delays in the criminal justice process, and what other reforms could address delay?

You might think about:

- where you still see delays
- if certain cases, such as those with child complainants, should be given higher priority
- the timeframes you think are achievable or appropriate.

Support for people who have experienced sexual harm

31 In Victoria there are support programs for victims of crime (see Table 1). Some of these give priority to people who have experienced sexual harm. There are special rules for complainants, such as for giving evidence. These are discussed in Issues Paper E.

Table 1: Supports for victims of crime and people who have experienced sexual harm

Program	Target group	About the service
Intermediaries	Children (under the age of 18) or any person with a cognitive impairment.	An intermediary is an officer of the court who helps the court to communicate in the best way with the complainant. ³⁵ This pilot scheme was funded until June 2020. ³⁶
Child Witness Service	Children (under the age of 18)	This service prepares complainants and witnesses for their role, including by familiarising them with the court process and staff, supporting them and their family, and referring them to community agencies.
Victims Support Agency, Department of Justice and Community Safety	Eligible victims	The agency runs the Victims of Crime Helpline and funds the Victims Assistance Program across the state to support victims, including through counselling and referrals to other services.
Victims and Witness Assistance Service, Office of Public Prosecutions	Adult victims, with priority to victims in sexual offence and family violence matters, and others who need more support.	This service supports victims through the process of giving evidence, including by giving them information about how courts work and providing practical support.
Court Network	Victims, accused persons, witnesses and their families and friends	Trained volunteers provide information, support and referral within courts across Melbourne and regional Victoria.
Translation and interpretation services	All victims	Victorian courts provide translation and professional interpreter services on request.

32 We recently recommended extending the intermediaries scheme to all witnesses with communication difficulties.³⁷ In another recent inquiry, we recommended a pilot legal service for victims of violent serious crimes.³⁸ The service would advise victims on their rights during a legal process, such as how to respond to applications for confidential medical or counselling records.³⁹ These recommendations have not yet been implemented.

33 Another model would be a program that advocates for people who have experienced sexual harm and helps them navigate their way through the legal process. The United Kingdom has a program of this kind (see box).

- 34 We want to hear how well existing programs support people who have experienced sexual harm, and how this support can be improved. We are interested in hearing how well support services respond to the diverse needs of people who have experienced sexual harm, including those who face greater barriers in accessing justice.
- 35 We also want your views on any challenges these programs are currently facing. For example, in the intermediary pilot scheme, intermediary notes have become the subject of litigation.

Independent Sexual Violence Advisors in the United Kingdom

A person who has experienced sexual harm can get support from an advisor before reporting the harm to the police, and this support extends after the court process. The advisor's role is broad, and includes advocating, educating, liaising and supporting people who have experienced sexual harm.⁴⁰ For example, advisors can liaise with police, and deal with housing issues.

Advisors empower a person to make informed decisions about what to do. They address issues that could cause people who have experienced sexual harm to disengage from support services during the criminal justice process. They also support people in communicating with their families and mending relationships.⁴¹

Question

- 6 How well are support programs for people who have experienced sexual harm working? How can they be improved?

You might think about:

- the intermediary pilot scheme
- witness support services
- the availability of inclusive support, such as translation and interpreter services
- new initiatives, such as an independent sexual harm advisor.

Other issues

- 36 We want to hear if there are other key issues that affect the criminal justice process as a whole, and what should be done to address them. Issues specific to stages of the criminal justice process are discussed in Issues Papers C–E.

Question

- 7 What other issues affect the criminal justice process as a whole, and what should be done to address them?

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- 25 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) <<https://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases?id=1270>>.
- 26 Law Council of Australia, *Principles on Jury Trials in the Context of COVID -19* (Report, May 2020) <<https://www.lawcouncil.asn.au/publicassets/741662d2-74ac-ea11-9434-005056be13b5/Principles%20on%20Jury%20Trials%20in%20the%20Context%20of%20COVID%20-19.pdf>>.
- 27 Law Commission (New Zealand), *Alternative Pre-Trial and Trial Processes: Possible Reforms* (Issues Paper No 30, 14 February 2012) 23 <<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP30.pdf>>.
- 28 Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) 135 [2.89] <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
- 29 For a discussion generally on tracking delays in criminal matters in Victoria, see Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) ch 3 <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 30 The median duration for sexual offences to be resolved in cases in Australia where defendants were proven guilty was 31.6 weeks in 2018–19, with homicide and related offences being the only category that took longer: Australian Bureau of Statistics, *Criminal Courts, Australia, 2018-19* (Catalogue No 4513.0, 28 February 2019) Table 11 <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02018-19?OpenDocument>>. The publicly available data does not break down the duration for states and territories.
- 31 *Criminal Procedure Act 2009* (Vic) s 126.
- 32 County Court of Victoria, *Practice Note No PNCR 1-2015: County Court Criminal Division*, 13 November 2018 <<https://www.countycourt.vic.gov.au/files/documents/2018-08/county-court-criminal-division-practice-note-pncr-1-2015-01072017.pdf>>.
- 33 *Criminal Procedure Act 2009* (Vic) s 212. Note that time limits for starting trials were in place before the *Criminal Procedure Act 2009* (Vic).
- 34 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 35 *Criminal Procedure Act 2009* (Vic) s 389f.
- 36 Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, 14 June 2019 (Ben Carroll, Minister for Victim Support) <https://www.parliament.vic.gov.au/images/stories/committees/paec/2019-20_Budget_Estimates/Transcripts_and_tabled_docs/2019-20_BEH_Victim_Support_Verified_Transcript.pdf>.
- 37 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) Recommendation 47, 133–135 [11.105]–[11.114] <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 38 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 126 [6.117–6.119].
- 39 Ibid 122.
- 40 Marianne Hester and Sarah-Jane Lilley, 'More than Support to Court: Rape Victims and Specialist Sexual Violence Services' (2018) 24(3) *International Review of Victimology* 313, 321–2.
- 41 Ibid 323–4.

Issues Paper C

Defining Sexual Offences



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Issues Paper C

Defining Sexual Offences

Introduction

- 1 This paper is for:
 - people who work in, or have experience of, the criminal justice system in relation to sexual harm
 - counsellors, intermediaries, and others who support or work with those who have experienced sexual harm
 - researchers and others interested in the subject.
- 2 We also encourage people who have experienced sexual harm, and those who have supported them, to answer any questions in this paper that interest them.
- 3 In this paper, we ask if any changes need to be made to sexual offences under Victorian law. We also ask if there are other kinds of sexual harm that should be reflected in new offences, including emerging kinds of sexual harm.

Issues Paper C is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

What are sexual offences?

- 4 Sexual offences make it a crime to commit various kinds of sexual harm, such as to touch someone sexually or sexually penetrate them without consent. In this paper, we use the term 'sexual offence' to describe a sexual harm that is criminalised under an offence. The main sexual offences in Victoria are set out in Table 1.
- 5 These offences may occur in broader contexts of violence and abuse. They can occur as part of family violence or sexual exploitation.¹
- 6 People may commit sexual offences together with other state or federal offences (for example, forced marriage, female genital cutting or stalking).²
- 7 Sexual offences can be 'indictable' (serious crimes mostly tried in the County Court of Victoria) or 'summary' (less serious crimes mostly tried in the Magistrates' Court of Victoria).³ Most indictable sexual offences can be heard and determined summarily in the Magistrates' Court, except offences such as rape and sexual penetration of children.⁴

Table 1: Sexual offences in Victoria

Category	Key offences	Description
Rape, sexual assault and associated sexual offences ⁵	Rape, sexual assault, assault with intent to commit a sexual offence, threats to commit a sexual offence.	Rape is non-consensual sexual penetration and is the most serious offence. Sexual assault involves non-consensual sexual touching.
Sexual offences against children ⁶	Sexual penetration of a child, grooming a child for sexual conduct, persistent sexual abuse of a child. It is also an offence for an adult who reasonably believes another adult has committed a sexual offence against a child to fail to report to police. ⁷	Maximum penalties are heavier for offences against children under 12 years. ⁸ Children under the age of 16 cannot consent to sexual activity. ⁹ There are exceptions and defences where the child is over 12 and under 16 years old and consents, and the accused is up to two years older than the child. ¹⁰ If a child aged 16 or 17 consents, an offence may still be committed if the child is in the care, supervision or authority of the accused. ¹¹
Child exploitation material ¹²	Possession of child exploitation material. Federal offences may also apply where this type of material is distributed online or through telecommunication services. ¹³	Also known as 'child abuse material' or 'child pornography'. ¹⁴ Material depicts or describes sexual situations or activities involving a child or a person implied to be a child, which reasonable people would regard as being offensive in the circumstances. ¹⁵
Sexual offences against people with a cognitive impairment or mental illness ¹⁶	Sexual penetration, sexual assault, sexual activity in the presence of a person with a cognitive impairment or mental illness.	Offences committed by a person or worker who provides treatment or support services. Consent is not a relevant factor.
Other sexual offences	Incest, sexual servitude, summary sexual offences. ¹⁷	Summary offences include sexual exposure in public spaces and image-based abuse offences. ¹⁸

- 8 Rape covers all sexual penetration without consent. The maximum sentence for rape is 25 years' imprisonment.¹⁹ In recent years people have been imprisoned most commonly for between four to under five years.²⁰
- 9 The New South Wales Law Reform Commission recently considered if there should be another offence with a lower maximum penalty.²¹ This offence could be used in cases where it may be hard to secure a conviction otherwise, because it would be hard to prove a lack of consent.
- 10 An offence with a lower maximum penalty may lead to more convictions, encourage guilty pleas and improve complainants' satisfaction with outcomes. However, it may also be seen as reducing the seriousness of the sexual harm, and may discourage the prosecution of rape.²²
- 11 There has been recent review and reform of many sexual offences in Victoria.²³ Some of these changes did not include transitional provisions,²⁴ which can make settling on charges difficult.
- 12 We want to hear if other changes are needed to sexual offences, and if so, what changes.

Question

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

You might think about:

- the elements of sexual offences
- the relationship between different sexual offences
- how the offences work in practice.

Communicative consent model and reasonable belief in consent

- 13 A key question in most sexual offences involving adult complainants is whether the complainant consented to sex. The *Crimes Act 1958 (Vic)* states that the aim of the laws is 'to uphold the fundamental right of every person to make decisions about [their] sexual behaviour and to choose not to engage in sexual activity'.²⁵
- 14 In Victoria the prosecution must prove:
 - that the complainant did not consent to the sexual act
 - that the accused did not reasonably believe in consent (the 'fault element').²⁶
- 15 Victoria's laws are based on a model of 'communicative consent'.²⁷ This requires that consensual sex should 'only take place where there has been communication and agreement between the parties'.²⁸

- 16 This model is reflected in:
- the definition of consent as ‘free agreement’²⁹
 - circumstances in the law that ‘negate’ consent (for example, there is no consent if a person did not say or do anything to indicate consent)³⁰
 - 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)³¹
 - the requirement that the accused did not reasonably believe in consent³² for some offences, such as rape and sexual assault.
- 17 The prosecution can prove that the accused did not reasonably believe in consent if they can prove that:
- the accused believed that the complainant was not consenting
 - the accused did not believe the complainant was consenting (including if the accused gave no thought as to whether the complainant was consenting)
 - any belief in consent was not reasonable in the circumstances, which could include taking into account if the accused took steps to find out if the person consented.³³
- 18 It is not a defence in Victoria that a person held an honest but mistaken belief that a person was consenting.³⁴
- 19 It has been suggested that Victoria’s model will result in ‘modest if any improvements’,³⁵ or does not go far enough because it does not require a person to ‘take steps’ to ensure consent.³⁶
- 20 The Queensland Law Reform Commission recently reviewed consent laws and the excuse of mistake of fact, and did not recommend adopting a model of communicative consent.³⁷ The New South Wales Law Reform Commission also explored adopting a communicative consent model.³⁸
- 21 We want to hear if there is any need to improve the law of consent in Victoria.

Question

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

You might think about:

- the strengths and weaknesses of the communicative consent model
- cases that have been affected by the requirement of reasonable belief in consent.

Technology-facilitated sexual offences

- 22 New technology makes it easier to commit sexual offences and has made new forms of sexual harm possible.³⁹
- 23 One common example is ‘image-based abuse’. This involves sharing and distributing intimate images without consent. Image-based abuse comes in forms commonly described as ‘revenge pornography’,⁴⁰ ‘upskirting’⁴¹ and ‘deepfake’⁴² pornography. Such abuse can occur in contexts such as family violence, sexual harassment, cyber-bullying and sextortion.⁴³
- 24 In Victoria, it is a crime to intentionally distribute, or threaten to distribute,⁴⁴ intimate images to another without consent if it is contrary to community standards of acceptable conduct.⁴⁵ It is also an offence to intentionally record the genital or anal region of another person, and distribute these images.⁴⁶
- 25 It is a federal offence to make available or disseminate ‘private sexual material’ through a carriage service.⁴⁷ The federal eSafety Commissioner can issue fines or a removal notice if intimate images are posted online without consent.⁴⁸ If this happens repeatedly, this can be a special aggravated offence.⁴⁹
- 26 We want to hear how well technology-facilitated sexual offences are working, and if any improvements are needed.

Question

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

You might think about:

- the elements of these sexual offences, such as image-based abuse offences
- the relationship between different sexual offences
- how these offences work in practice.

Are other sexual offences needed?

- 27 There may be other forms of sexual harm that should be recognised to bring the law in line with what the community expects and prevent such harm from happening. We discuss two examples below, but there may be other sexual harms that you would like to see become a crime.

Sending unsolicited sexual images

- 28 Social media and instant messaging can allow a person to send sexual images to someone else who has not asked for them or may not even know the other person. For example, someone can share an image of an erect penis (a ‘dick pic’)⁵⁰ through Apple’s AirDrop technology to someone nearby. This is sometimes called ‘cyberflashing’.⁵¹
- 29 This has been described as a form of image-based abuse and sexual harassment.⁵² People receiving these images can find them intrusive and feel shocked and embarrassed.⁵³ Research from the United Kingdom shows that this is a common experience for women.⁵⁴

- 30 This kind of sexual harm is not a specific crime but could be prosecuted under offences such as ‘committing sexual activity directed at another person’⁵⁵ or the federal offence of ‘using a carriage service to menace, harass or cause offence’.⁵⁶

Non-consensual condom removal

- 31 Removing a condom without consent during sex (sometimes referred to as ‘stealthing’ or ‘protection deception’) has been described as a violation of consent.⁵⁷ It can also be a form of ‘birth control sabotage’ (also known as ‘contraceptive control’ or ‘reproductive coercion’).⁵⁸
- 32 Such behaviour can cause emotional distress, trauma and other significant harm. For example, infections and viruses may be transmitted, and it may cause an unintended pregnancy.⁵⁹ Recent research suggests this sexual harm is commonly experienced but not often reported. People who work in the sex industry are more likely to experience this behaviour.⁶⁰
- 33 This sexual harm is not specifically defined as an offence in Victoria.⁶¹ However, people have been charged for this behaviour under offences such as rape, sexual assault, and ‘procuring a sexual activity by fraud’.⁶²
- 34 The Queensland Law Reform Commission found that there was value in considering this as an offence, but it recommended that such behaviour should not mean that there was no consent in cases of rape or sexual assault.⁶³ The New South Wales Law Reform Commission considered whether to recognise this sexual harm in legislation.⁶⁴
- 35 We want to hear if there should be any new sexual offences or changes to existing offences to address other forms of sexual harm, including emerging forms of harm.

Question

- 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?

You might think about:

- other kinds of sexual harm that we have not addressed in this paper
- how a specific offence could improve the reporting or prosecuting of such behaviour
- how a specific offence could improve the understanding of such behaviour, including any trends.

Endnotes

- 1 See eg, *Family Violence Protection Act 2008* (Vic) s 5; *Crimes Act 1958* (Vic) s 37A(b).
- 2 See *Criminal Code Act 1995* (Cth) ss 270.7A–B; *Crimes Act 1958* (Vic) ss 21A, 32.
- 3 *Magistrates' Court Act 1991* (Vic) s 25; *County Court Act 1958* (Vic) s 36A.
- 4 *Criminal Procedure Act 2009* (Vic) s 28 specifies that the following indictable offences may be heard and determined summarily, unless the contrary intention appears in the Act or other legislation or subordinate instruments: level 5 or level 6 offences; offences punishable by level 5 or level 6 imprisonment, fine or both; offences punishable by a term of imprisonment of not more than 10 years, a fine of not more than 1200 penalty units or both; or offences listed in schedule 2 of the Act. Such offences can only be heard summarily if the Magistrates' Court considers that it is appropriate to hear and determine the charge summarily and the accused consents to a summary hearing: *Criminal Procedure Act 2009* (Vic) s 29.
- 5 *Crimes Act 1958* (Vic) pt 1, sub-div 8A.
- 6 *Ibid* pt 1, sub-div 8B.
- 7 *Ibid* s 327.
- 8 See eg, *ibid* s 49A(2).
- 9 See eg, *ibid* s 49B.
- 10 See eg, *ibid* s 49U–V.
- 11 See eg, *ibid* ss 49C, 49E.
- 12 *Ibid* pt 1, sub-div 8D.
- 13 See eg, *Criminal Code Act 1995* (Cth) ss 474.22, 474.22A, 474.23.
- 14 The term 'child pornography' is not a preferred descriptor of this behaviour as the word 'pornography' treats child exploitation material as a 'legitimate subgenre of adult pornography': Jeremy Prichard and Caroline Spiranic, University of Tasmania, *Child Exploitation Material in the Context of Institutional Child Sexual Abuse* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, September 2014) 8 [1.0].
- 15 *Crimes Act 1958* (Vic) s 51A ("child abuse material").
- 16 *Ibid* pt 1, sub-div 8E.
- 17 *Summary Offences Act 1966* (Vic) s 19, div 4A; see eg, *Crimes Act 1958* (Vic) pt 1, sub-divs 8C, 8F.
- 18 *Summary Offences Act 1966* (Vic) s 19, div 4A.
- 19 *Crimes Act 1958* (Vic) s 38(2).
- 20 This covers sentences between 2013–14 to 2017–18: Sentencing Advisory Council (Vic), *Sentencing Trends in the Higher Courts of Victoria 2013–14 to 2017–18* (Sentencing Snapshot No 230, May 2019) 3 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Snapshot_230_Rape_May_2019.pdf>. Rape committed on or after 1 February 2018 is subject to a standard sentence of 10 years: *Crimes Act 1958* (Vic) s 38(3).
- 21 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) 76–7 [5.60]–[5.67], Question 5.6 <www.lawreform.justice.nsw.gov.au>.
- 22 See Law Reform Commission of Ireland, *Knowledge or Belief Concerning Consent in Rape Law* (Report No 122-2019, November 2019) 91–2 [4.1]–[4.8], Recommendation 4.01 <<https://www.lawreform.ie>>; Legal Aid NSW, Submission No CO33 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (February 2019) 10–11 <<https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Submissions/CO33.pdf>>; Victorian Law Reform Commission, *Sexual Offences* (Interim Report, June 2003) 340 n 740 <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-interim-report>>.
- 23 See Department of Justice (Vic), *Review of Sexual Offences* (Consultation Paper, September 2013) <<http://www.justice.vic.gov.au/review-of-sexual-offences-consultation-paper>>; Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>; Criminal Law Review, Department of Justice and Regulation (Vic), *Crimes Amendment (Sexual Offences) Act 2016: An Introduction* (Report, June 2017) <https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/40/4b9b996e6/crimes_amendment_sexual_offences_act_2016%2B_an_introduction.pdf>; *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic); *Crimes Amendment (Sexual Offences) Act 2016* (Vic).
- 24 Judicial College of Victoria, '7.3.1.1 Consent and Reasonable Belief in Consent (From 1/7/15)', *Victorian Criminal Charge Book* (Online Manual, 19 March 2018) [15] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/56177.htm>>.
- 25 *Crimes Act 1958* (Vic) s 37A(a).
- 26 *Ibid* s 38(1)(b)–(c).
- 27 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 12–13 [6.3] <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>. This communicative model has its origins in Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
- 28 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 13 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.
- 29 *Crimes Act 1958* (Vic) s 36(1).
- 30 *Ibid* s 36(2).
- 31 See eg, *Jury Directions Act 2015* (Vic) s 46(3)(d)(ii). Jury directions are outlined in Issues Paper B.
- 32 *Crimes Act 1958* (Vic) s 38(1)(c).
- 33 *Ibid* s 36A(2); Judicial College of Victoria, '7.3.1.1 Consent and Reasonable Belief in Consent (From 1/7/15)', *Victorian Criminal Charge Book* (Online Manual, 19 March 2018) [52] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/56177.htm>>.
- 34 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 13 [7] <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.
- 35 Wendy Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria—What Do Stakeholders Think?' (2015) 15(2) *QUT Law Review* 30, 49.
- 36 See Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *The British Journal of Criminology* 296, 3–4; Wendy Larcombe et al, "'I Think It's Rape and I Think He Would Be Found Not Guilty': Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social & Legal Studies* 611, 623; Wendy Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria—What Do Stakeholders Think?' (2015) 15(2) *QUT Law Review* 30, 49. Indeed the Department of Justice and Regulation (as it was known then) explains that the relevant reform 'does not, strictly speaking, impose a legal duty on a person initiating sexual contact to take active steps to ascertain whether the other person consents. Nonetheless, a failure to do so will be a factor that the jury can take into account in assessing any subsequent belief that the other person was consenting': Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 17 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.
- 37 See Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) v [28]–[32].
- 38 See New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Draft Proposals, October 2019) 7 [4.2]–[4.3], Proposal 4.1 <https://www.lawreform.justice.nsw.gov.au/443/Pages/lrc/lrc_current_projects/Consent/Consent.aspx>.
- 39 See generally Nicole Bluett-Boyd et al, Australian Institute of Family Studies (Cth), *The Role of Emerging Communication Technologies in Experiences of Sexual Violence: A New Legal Frontier?* (Research Report No 23, February 2013) <<https://aifs.gov.au/publications/role-emerging-communication-technologies-experience>>.
- 40 The term 'revenge pornography' has been critiqued for a number of reasons including that it 'focuses attention on the content of the image, rather than on the abusive actions of perpetrators': Nicola Henry, Asher Flynn and Anastasia Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (Criminology Research Advisory Council Report No CRG 08/15-16, 2019) 13 <https://researchmgt.monash.edu/ws/portalfiles/portal/264678641/08_1516_FinalReport.pdf>.

- 41 This is where an image up a person's skirt is taken, distributed or threatened to be distributed, without their permission. Another similar
behaviour is known as 'downblousing' where these non-consensual images relate to the person's cleavage: Ibid 36.
- 42 This is where technology is used to digitally alter images showing a person's face superimposed or 'stitched' on a pornographic image.
This is also known as 'morph porn': Ibid 14.
- 43 See generally Hadeel Al-Alosi, 'Cyber-Violence: Digital Abuse in the Context of Domestic Violence' (2017) 40(4) *UNSW Law Journal* 1573;
Office of the eSafety Commissioner (Cth), *Image-Based Abuse National Survey* (Summary Report, 2017) 14 <<https://www.esafety.gov.au/sites/default/files/2019-07/Image-based-abuse-national-survey-summary-report-2017.pdf>>; 'Sextortion Trends and Challenges—Position
Statement', *eSafety Commissioner* (Web Page, 4 August 2020) <<https://www.esafety.gov.au/about-us/tech-trends-and-challenges/sextortion>>.
- 44 *Summary Offences Act 1966* (Vic) ss 41DA–41DB.
- 45 Community standards of acceptable conduct includes standards of conduct having regard to the following: the nature and content of the
image; the circumstances in which the image was captured; the circumstances in which the image was distributed; the age, intellectual
capacity, vulnerability or other relevant circumstances of a person depicted in the image; and the degree to which the distribution of the
image affects the privacy of a person depicted in the image: Ibid s 40 ('community standards of acceptable conduct').
- 46 Ibid ss 41B–41C.
- 47 *Criminal Code Act 1995* (Cth) s 474.17A(1). This is an aggravated version of the underlying offence of using a carriage service to menace,
harass or cause offence under s 474.17(1). Private sexual material is material that depicts a person over 18 engaged in a sexual pose or
sexual activity, or sexual organs or the anal region, in circumstances that a reasonable person would regard is giving rise to an expectation
of privacy: s 473.1 ('private sexual material').
- 48 *Enhancing Online Safety Act 2015* (Cth) pt 5A.
- 49 *Criminal Code Act 1995* (Cth) s 474.17A(4).
- 50 See Morten Birk Hansen Mandau, "'Directly in Your Face": A Qualitative Study on the Sending and Receiving of Unsolicited "Dick Pics"
among Young Adults' (2020) 24(1) *Sexuality & Culture* 72; Susanna Paasonen, Ben Light and Kylie Jarrett, 'The Dick Pic: Harassment,
Curation, and Desire' (2019) 5(2) *Social Media + Society*; Matthew Smith, 'Four in Ten Female Millennials Have Been Sent an Unsolicited
Penis Photo', *YouGov (UK)* (Web Page) <<https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic>>.
- 51 Asher Flynn, 'Cyberflashing Isn't Playful, It's Image-Based Sexual Abuse', *Monash Lens* (Blog Post, 6 September 2019) <<https://lens.monash.edu/@politics-society/2019/09/06/1376441?slug=cyberflashing-the-latest-form-of-digital-sexual-harassment>>; See also Gian
De Poloni and Kate Leaver, 'Cyber Flashing Is the New iPhone Safety Threat as AirDrop Used to Share Porn, Explicit Content', *ABC News*
(online, 12 May 2019) <<https://www.abc.net.au/news/2019-05-12/cyber-flashing-porn-sent-to-iphones-using-airdrop/11092974>>; Nicole
Prezel, 'Ursula Didn't Know What Cyber Flashing Was until the Day at the Museum', *The Sydney Morning Herald* (online, 20 June 2019)
<<https://www.smh.com.au/national/ursula-didn-t-know-what-cyber-flashing-was-until-the-day-at-the-museum-20190512-p51mm6.html>>.
This behaviour is different to 'sexting', which is the consensual sharing of nude 'selfies' or other sexual images.
- 52 Asher Flynn, 'Cyberflashing Isn't Playful, It's Image-Based Sexual Abuse', *Monash Lens* (Blog Post, 6 September 2019)
<<https://lens.monash.edu/@politics-society/2019/09/06/1376441?slug=cyberflashing-the-latest-form-of-digital-sexual-harassment>>;
Susanna Paasonen, Ben Light and Kylie Jarrett, 'The Dick Pic: Harassment, Curation, and Desire' (2019) 5(2) *Social Media + Society* 2–3.
Morten Birk Hansen Mandau, "'Directly in Your Face": A Qualitative Study on the Sending and Receiving of Unsolicited "Dick Pics" among
Young Adults' (2020) 24(1) *Sexuality & Culture* 72, 75, 79; Susanna Paasonen, Ben Light and Kylie Jarrett, 'The Dick Pic: Harassment,
Curation, and Desire' (2019) 5(2) *Social Media + Society* 3.
- 53 Matthew Smith, 'Four in Ten Female Millennials Have Been Sent an Unsolicited Penis Photo', *YouGov (UK)* (Web Page) <<https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic>>.
- 54 *Crimes Act 1958* (Vic) s 48.
- 55 *Criminal Code Act 1995* (Cth) s 474.17. Offences relating to child sexual abuse or child exploitation material could also apply where a child
is involved in an incident.
- 56 Alexandra Brodsky, "'Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32(2) *Columbia Journal
of Gender and Law* 183, 185; Rosie Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in
Melbourne, Australia' (2018) 14(12) *PLOS ONE* e0213316, 11.
- 57 Alexandra Brodsky, "'Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32(2) *Columbia Journal of
Gender and Law* 183, 184 n 6.
- 58 Brianna Chesser and April Zahra, 'Stealthling: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217, 220; Rosie Latimer
et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018) 14(12) *PLOS ONE*
e0213316, 7.
- 59 Rosie Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018)
14(12) *PLOS ONE* e0213316, 11–13. Latimer et al state that victim-survivors may also be less inclined to identify their experience as a form
of sexual violence due to 'real rape' myths and as a way to avoid the distress that may be experienced by labelling oneself a victim of
crime: 13.
- 60 Brianna Chesser and April Zahra, 'Stealthling: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217, 219.
- 61 In Victoria a person has been charged with rape and sexual assault for non-consensual condom removal. The case has not yet been tried
in court. See: *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532; In another Victorian incident, a person was charged and
convicted of procuring a sexual activity by fraud: *Crimes Act 1958* (Vic) s 45; *DPP v Dren* [2020] CCA 61.
- 62 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) 144 [6.142]–
[6.143]. Legal experts and commentators have also made suggestions for further clarification of the law in this area; for example by
introducing a specific offence or tort for non-consensual condom removal, or establishing non-consensual condom removal as a consent-
negating circumstance. For a more detailed discussion of the issues and possible reforms in this area, including international approaches
see: Melissa Marie Blanco, 'Sex Trend or Sexual Assault: The Dangers of Stealthling and the Concept of Conditional Consent Comments'
(2018) 123(1) *Penn State Law Review* 217; Alexandra Brodsky, "'Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom
Removal' (2017) 32(2) *Columbia Journal of Gender and Law* 183; Andrew Dyer, 'Mistakes That Negate Apparent Consent' (2018) 43(3)
Criminal Law Journal 159; Brianna Chesser and April Zahra, 'Stealthling: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal
Justice* 217.
- 63 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Draft Proposals, October 2019) 11 [5.11]–[5.13],
Proposal 5.6 <https://www.lawreform.justice.nsw.gov.au:443/Pages/lrc/lrc_current_projects/Consent/Consent.aspx>.

Issues Paper D

Sexual Offences: Report to Charge



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Issues Paper D

Sexual Offences: Report to Charge

Introduction

- 1 This paper is for:
 - people who work in, or have experience of, sexual offence investigations
 - counsellors, intermediaries, and others who support or work with those who have experienced sexual harm
 - researchers and others interested in the subject.
- 2 We also encourage people who have experienced sexual harm, and those who have supported them, to answer any questions in this paper that interest them.
- 3 People who experience sexual harm often take their first step towards a criminal justice response by making a report to Victoria Police. In this paper, we discuss how police in Victoria respond to and investigate reports of sexual harm.
- 4 We ask how well police investigations of sexual offences are working and how to improve them. We would also like to know if people who experience sexual harm should have options to report in alternative ways.

Issues Paper D is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

Specialist approach to investigating sexual offences

- 5 Victoria Police's approach to investigating sexual offences has been reformed in important ways over time.¹
- 6 Victoria Police now has teams of specialist investigators who respond to sexual harm and child abuse reports (Sexual Offence and Child Abuse Investigation Teams (SOCITs)). In some places, people harmed can access police and the key services and supports they need in 'one stop shops' called Multidisciplinary Centres (MDCs).² We discuss SOCITs and MDCs further below.
- 7 Victoria Police also has a taskforce that investigates historical child sexual abuse in institutions such as churches (the SANO taskforce).³

- 8 Evaluations have shown the benefits of this specialist approach by police:
- ‘victim-centric’ responses have led to better interactions between people harmed and police
 - police attitudes and practices have changed because of better training
 - there is better continuity of care.⁴

Table 1: Examples of how Victoria Police is required to put the person harmed at the centre of an investigation⁵

Feature	Description
Making support available	Police are required to connect people who have experienced sexual harm with support and services.
Giving people who have reported a crime enough information	Police are required to provide the person who reported the sexual harm with information throughout the investigation process. They should explain the process and the main decisions, such as the decision to discontinue an investigation. They should provide copies of material, such as transcripts from visual and audio recorded evidence (VARE).
Supporting decision making and control over the process	People who have reported sexual harm are given some ability to ‘move at their own pace’; for example, only giving formal statements when they are ready. If they decide to withdraw their complaint, the police are required to respect this.

Sexual Offence and Child Abuse Investigation Teams (SOCITs)

- 9 SOCITs aim to follow a ‘victim-led process’ when investigating sexual offences, giving priority to the safety and wellbeing of people who have experienced sexual harm.⁶ There are 28 SOCIT sites around Victoria.⁷
- 10 SOCIT investigators are qualified as detectives and complete specialist sexual offence training. This training is a single four-week course. It covers topics such as the nature and context of sexual offending and specialist interviewing techniques.⁸

Multidisciplinary Centres (MDCs)

- 11 The agencies in MDCs work together with the aim of having a ‘victim-centric, integrated and holistic response’ to sexual assault, child abuse and, in some locations, family violence.⁹
- 12 MDCs have SOCITs,¹⁰ counsellors from Centres Against Sexual Assault (CASAs), officers from the Victorian Institute of Forensic Medicine, child protection staff from the Victorian Department of Health and Human Services and community health nurses. Some MDCs have a Family Violence Investigation Unit and response services.¹¹
- 13 MDCs are located away from police stations. Police officers do not wear uniforms and the buildings have discreet signs.¹² People who use the centres have safe access to services and facilities, including private counselling and clinic rooms, forensic medical suites and evidence recording facilities.¹³
- 14 We also discuss MDCs in Issues Paper A.

Question

- 1 How well are Sexual Offence and Child Abuse Investigation Teams (SOCITs) and Multidisciplinary Centres (MDCs) working? How can they be improved?

You might think about:

- the diverse needs and experiences of people who have experienced sexual harm
- the range of available services in MDCs.

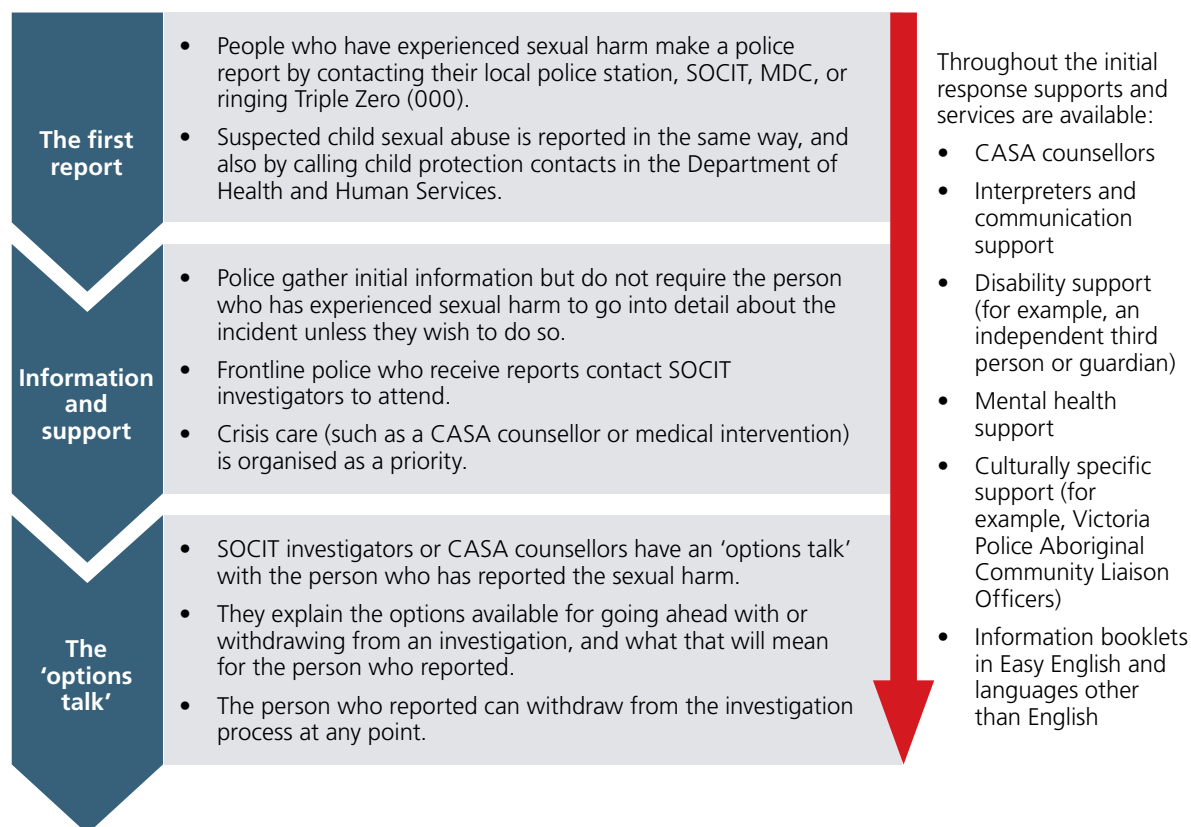
The investigation process

- 15 The investigation process is guided by the Victoria Police Manual¹⁴ and internal codes of practice and conduct.¹⁵ We set out below how Victoria Police is required to respond to and investigate reports of sexual harm.

The initial police response

- 16 Figure 1 summarises how police should respond when sexual harm is first reported. The focus is on the welfare of the person reporting the sexual harm and giving them control over what happens next.

Figure 1: Initial police response to reports of sexual harm¹⁶



Forensic medical examination

- 17 A forensic medical examination is a way of collecting evidence from the body of the person harmed. The person's consent is required to carry out an examination.¹⁷
- 18 Forensic medical examiners from the Victorian Institute of Forensic Medicine carry out these examinations. They may be carried out at the nearest hospital's crisis care unit¹⁸ or MDC. If the person harmed is in a nursing home or aged care facility, the examination takes place there.¹⁹
- 19 SOCIT investigators may also give the person harmed a forensic self-sampling kit called an 'early evidence kit'. This may be used if the person harmed wants to do things that may damage physical evidence, such as showering or urinating. It does not replace a forensic medical examination.²⁰

Taking a formal statement

- 20 Victoria Police are required to take formal statements in private settings and to ask questions in a clear and sensitive manner.
- 21 If the person harmed is a child or has a cognitive impairment, the statement is taken in the form of visual and audio recorded evidence (VARE). This is usually done by an appropriately trained Victoria Police officer.²¹
- 22 At some SOCIT sites, an intermediary can advise on the communication needs of the complainant before a VARE is taken.²² If the complainant is a child, the child's parent or guardian, or an independent person, needs to be present during the interview. If the complainant has a cognitive impairment, an Independent Third Party (ITP) must be present.²³
- 23 We discuss the use of VAREs in criminal trials in Issues Paper E.

Ongoing investigation and outcome

- 24 The investigation may involve interviewing the accused, talking to witnesses and analysing evidence collected from the scene. An investigation may result in the police filing charges against the accused, or the investigation may be discontinued.

Filing charges

- 25 If SOCIT investigators have identified the accused, they decide whether to charge the person. There needs to be enough evidence to support each charge and a reasonable prospect of conviction.²⁴
- 26 In some cases, police may ask the Director of Public Prosecutions (DPP) for advice, where the case is complex or could raise policy issues.²⁵
- 27 The DPP can change these charges during its prosecution. We discuss the role of the DPP and accountability for charging and prosecuting decisions in Issues Paper E.
- 28 Police can also prosecute many indictable sexual offences summarily in the Magistrates' Court, without the DPP being involved.²⁶ The maximum sentences that the Magistrates' Court can order in these cases are lower than those available in higher courts.²⁷

Discontinuing an investigation

- 29 SOCIT investigators may decide to discontinue an investigation because:
- they cannot identify the person responsible for the sexual harm
 - they do not have enough evidence to charge the accused
 - they do not have enough evidence for a criminal prosecution.
- 30 When this happens, the person harmed should be informed at once. Police are required to explain why they decided to discontinue the investigation. These decisions are overseen by a manager.²⁸

Questions

- 2 What other issues need to be addressed to improve the experience of the police investigation process for adults who have been sexually harmed? How can they be addressed?
- You might think about:*
- the initial police response and communication with the person harmed
 - how formal statements are taken.
- 3 What other issues need to be addressed to improve the experience of the police investigation process for children who have been sexually harmed? How can they be addressed?
- You might think about:*
- the initial police response and communication with the child who has been harmed (or their parent or guardian)
 - how formal statements are taken.
- 4 What other issues need to be addressed during the investigation process to support successful criminal prosecutions in sexual offence cases? How can they be addressed?
- You might think about:*
- the quality of statements taken by police officers
 - the collection of physical evidence, including forensic evidence
 - decisions about and accountability for filing charges or discontinuing investigations
 - the extent to which the views of the person harmed are taken into account when making decisions.

Should there be other ways to report?

- 31 People who experience sexual harm may find it difficult to tell police what happened. They may want to tell someone else, or find more information about what to do next, without going to the police. They may not want to go to a police station.
- 32 Other ways of reporting, using technology, have been developed by universities, sexual assault services and law enforcement agencies.²⁹ Table 2 lists some of these options in Australia and the United States.
- 33 These options could encourage more people to report sexual harm.³⁰ For example, people facing additional barriers to reporting—such as people who work in the sex industry, people from regional and rural locations and young people—might prefer to use them. These ways of reporting could also provide more information about available options. They could allow the person harmed to ask someone such as a counsellor or SOCIT investigator to contact them or see them at a safe location. They could also give police better intelligence for their investigations.

Table 2: Examples of technology-based alternative reporting options

Name	Description	Main features
Callisto ³¹	An online tool for anonymously reporting sexual assault on college campuses and in some workplaces. Elker is another example of a technology-based anonymous reporting tool. ³² Some Australian universities and colleges also have anonymous reporting avenues for sexual harm. ³³	<ul style="list-style-type: none"> anonymous reporting user-friendly interface presenting the options available, including talking to a friend, speaking to a therapist, or not telling anyone option available for legal advice collects data to identify repeat offenders.
Sexual Assault Report Anonymously (SARA) ³⁴	An online help-seeking tool for sexual assault and harassment created and administered by the South Eastern Centre Against Sexual Assault. It provided an alternative to making a formal report to police. SARA is no longer available.	<ul style="list-style-type: none"> anonymous reporting people who experienced sexual harm could report details of an incident and request contact from a counsellor data used for police intelligence gathering.
Alternative Reporting Options (ARO) ³⁵	The Queensland Police Service allows people who have experienced sexual harm to access Alternative Reporting Options instead of making a formal report to police. The New South Wales Police Force has a similar alternative reporting option known as Sexual Assault Reporting Option (SARO). ³⁶	<ul style="list-style-type: none"> anonymous reporting people harmed fill in a Sexual Crime Survey Form online used for police intelligence gathering and investigations.

- 34 A person who uses alternative reporting options may also report the matter to the police and pursue a criminal justice response. Information given through alternative reporting options might be available as evidence in prosecutions.³⁷

Questions

- 5 Do you support access to alternative ways of reporting sexual harm? Why or why not?
- 6 If you support alternative ways of reporting sexual harm, what features should they have?

You might think about:

- the barriers people face in reporting sexual harm
- the diverse needs and experiences of people who have experienced sexual harm
- the implications for investigations and prosecutions
- possible features such as reporting anonymously, access to information about options, asking for support, and accessibility features.

Endnotes

- 1 Many changes arose from recommendations in our 2004 review of Sexual Offences. See Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
- 2 MDCs were piloted in 2007 at two sites, and there are seven MDC sites; the last established in 2018: Victoria Police, *Multidisciplinary Centres (MDCs)* (Information Sheet, 16 October 2017) 1 <https://msau-mdvs.org.au/wp-content/uploads/2019/04/MDC_Information_Sheet.pdf>.
- 3 'Sexual Offences and Child Abuse', *Victoria Police* (Web Page, 21 April 2020) <<http://www.police.vic.gov.au/sexual-offences>>.
- 4 See generally Martine B Powell, 'Victims' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2013) 14(3) *Police Practice and Research* 228; Martine B Powell and Rebecca Wright, 'Professionals' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2012) 23(3) *Current Issues in Criminal Justice* 333; Success Works, Department of Justice (Vic), *Sexual Assault Reform Strategy* (Final Evaluation Report, 2011) <<https://trove.nla.gov.au/version/169811763>>.
- 5 See generally Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.
- 6 'Sexual Offences and Child Abuse Investigation Teams', *Victoria Police* (Web Page, 31 July 2020) <<https://www.police.vic.gov.au/sexual-offences-and-child-abuse-investigation-teams#contact>>.
- 7 Ibid.
- 8 Patrick Tidmarsh, 'Training Sexual Crime Investigators to Get the "Whole Story"' (PhD Thesis, Deakin University, 2016) 24–5 <<http://dro.deakin.edu.au/eserv/DU:30102808/tidmarsh-training-2017.pdf>>; Patrick Tidmarsh, Gemma Hamilton and Stefanie J Sharman, 'Changing Police Officers' Attitudes in Sexual Offense Cases: A 12-Month Follow-up Study' (2020) 47(9) *Criminal Justice and Behavior* 1176, 1178–1180.
- 9 Victoria Police, *Multidisciplinary Centres (MDCs)* (Information Sheet, 16 October 2017) 1 <https://msau-mdvs.org.au/wp-content/uploads/2019/04/MDC_Information_Sheet.pdf>.
- 10 In some locations.
- 11 'Sexual Offences and Child Abuse Investigation Teams', *Victoria Police* (Web Page, 31 July 2020) <<https://www.police.vic.gov.au/sexual-offences-and-child-abuse-investigation-teams#contact>>. The relationship between family violence and sexual assault in this context is outlined further in Issues Paper A.
- 12 Ibid.
- 13 Ibid.
- 14 The Victoria Police Manual is made under the *Victoria Police Act 2013* (Vic) s 60.
- 15 *Victoria Police Act 2013* (Vic); Victoria Police is also bound to act in accordance with relevant legislation such as the *Criminal Procedure Act 2009* (Vic) and *Victims' Charter Act 2006* (Vic).
- 16 See generally Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.
- 17 Ibid 22 [7.3.1].
- 18 Crisis care units are usually found in emergency departments of local hospitals.
- 19 Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 17 [6.1.5] <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.
- 20 The early evidence kit consists of a urine jar to detect any alcohol or drugs; gauze/wipes for the person harmed to self-wipe areas that have been touched and a mouth swab for the person harmed to collect fluids from their mouth: Ibid 23 [7.3.4].
- 21 *Criminal Procedure Regulations 2009* (Vic) r 5; if the statement is to be taken by way of a VARE statement and the police investigator is not conducting the interview, the investigator should be present and/or perform the role of Interview Monitor: Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 26 [7.4.5] <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.
- 22 Victoria Police is included in the Intermediary Pilot Program, which is managed by the Department of Justice and Community Safety. An intermediary's role is to assess the communication needs of a vulnerable witness and provide practical strategies and recommendations on how to best communicate with the witness so they can understand the questions and provide their best evidence: County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide No 1/2018, 28 June 2018) 12 [23] <https://www.judicialcollege.vic.edu.au/sites/default/files/2019-07/Multi%20jurisdictional%20Court%20Guide%20for%20the%20IPP_0.pdf>. The role of intermediaries is discussed in more detail in Issues Paper B.
- 23 An ITP helps to facilitate communication and provide support to the person harmed. An ITP may be a relative or friend, or an ITP trained and authorised by the Office of the Public Advocate: Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 24 [7.4.2] <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.
- 24 Patrick Tidmarsh, 'Training Sexual Crime Investigators to Get the "Whole Story"' (PhD Thesis, Deakin University, 2016) 10 [1.5.2] <<http://dro.deakin.edu.au/eserv/DU:30102808/tidmarsh-training-2017.pdf>>.
- 25 Department of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Policy, 17 September 2020) 22 [64] <<https://www.opp.vic.gov.au/Resources/Policy-of-the-Director-of-Public-Prosecutions-for-/Policy-of-the-Director-of-Public-Prosecutions-for/>>.
- 26 *Criminal Procedure Act 2009* (Vic) ss 28–9.
- 27 These limits are two years imprisonment for a single offence; five years imprisonment for multiple offences and/or fines of up to 500 penalty units for individuals: *Sentencing Act 1991* (Vic) ss 112A, 113, 113B.
- 28 Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (Policy, 2016) 26 [7.4.6], 27 [7.5.4] <<https://content.police.vic.gov.au/sites/default/files/2019-01/Code-of-Practice-for-the-Investigation-of-Sexual-Crime-%282016%29.pdf>>.
- 29 Georgina Heydon and Anastasia Powell, 'Written-Response Interview Protocols: An Innovative Approach to Confidential Reporting and Victim Interviewing in Sexual Assault Investigations' (2018) 28(6) *Policing and Society* 631, 634–6.
- 30 Ibid 642–3.
- 31 'Technology to Combat Sexual Assault', *Callisto* (Web Page, 2020) <<https://mycallisto.org/>>.
- 32 'Access Realtime, Honest Comments from People in Your Organisation', *Elker for Reporting* (Web Page, 2020) <<https://elker.com/services/reporting/>>.
- 33 See, eg, 'How to Report Sexual Misconduct', *Australian National University* (Web Page) <<https://www.anu.edu.au/students/health-safety-wellbeing/violence-sexual-assault-support/how-to-report-sexual-misconduct>>.
- 34 SARA was available as a website and as an app. SARA could be accessed at www.sara.org.au: CASA Forum, *Annual Report 2017–18* (Report, 2018) 26–7 <<https://www.casa.org.au/assets/Documents/CASA-Forum-Annual-Report-2017-2018.pdf>>; Debbie Cuthbertson, 'Technology Helps Identify Serial Sexual Harassers', *The Age* (online, 17 February 2018) <<https://www.theage.com.au/national/victoria/technology-helps-identify-serial-sexual-harassers-20180214-p4z0ak.html>>.
- 35 'Alternative Reporting Options', *Queensland Police Service* (Web Page, 20 March 2020) <<https://www.police.qld.gov.au/units/victims-of-crime/adult-sexual-assault/alternative-reporting-options>>.
- 36 'Sexual Assault Reporting Option (Online Questionnaire)', *New South Wales Police Force* (Web Page) <https://www.police.nsw.gov.au/crime/sex_crimes/adult_sexual_assault/sexual_assault_categories/saro>.
- 37 See also Georgina Heydon and Anastasia Powell, 'Written-Response Interview Protocols: An Innovative Approach to Confidential Reporting and Victim Interviewing in Sexual Assault Investigations' (2018) 28(6) *Policing and Society* 631, 641.

Issues Paper E

Sexual Offences: The Trial Process



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Issues Paper E

Sexual Offences: The Trial Process

- 1 This paper is for:
 - people who work in, or have experience of, the criminal justice system in relation to sexual harm
 - counsellors, intermediaries, and others who support or work with those who have experienced sexual harm
 - researchers and others interested in the subject.¹
- 2 We also encourage people who have experienced sexual harm, and those who have supported them, to answer any questions in this paper that interest them.
- 3 The criminal trial plays a key role in responding to sexual harm. It is a public forum to test evidence and can hold someone to account and denounce their actions.
- 4 However, it can be a traumatic experience for complainants. The trial process can also reflect common misconceptions about sexual harm. These concerns have been the focus of many reforms of the trial process.
- 5 In this paper we ask about how effective these reforms have been, and if there are ways to improve the trial process further. This paper focuses on:
 - charging decisions
 - ground rules hearings
 - special procedures and alternative arrangements for giving evidence
 - aspects of laws relating to the trial process, such as jury directions and the protection of complainant records
 - appeals
 - the Children’s Court.
- 6 The paper does not discuss every aspect of the criminal trial. For example, it does not discuss summary trials, jury empanelment, plea procedures, evidence of previous convictions, victim impact statements or sentencing. However, you can address any of these in your answer to the final question.

Issues Paper E is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

A note about committals

- 7 The Victorian Law Reform Commission recently completed an inquiry into committal proceedings.² The Commission recommended measures to reduce delay due to committal proceedings. These include abolishing the test for committal and improving charging and disclosure by requiring the Office of Public Prosecutions to be involved earlier in indictable matters.
- 8 Another concern was that cross-examination at committals traumatised complainants. Complainants who are children or have a cognitive impairment cannot be cross-examined during committals for sexual offence cases. While the Commission did not recommend extending this to adults in proceedings for sexual offences, it recommended other measures to reduce trauma, such as requiring magistrates to consider the need to minimise trauma when deciding whether to grant leave to cross-examine.³ These reforms have not yet been implemented.

Charging and prosecution decisions

- 9 In past inquiries, the Commission heard concerns from victims about decisions to drop charges and end cases.⁴ In its 2020 report, *Committals*, the Commission recommended reforms to charging decisions.⁵
- 10 The Commission made related recommendations in its 2016 report, *The Role of Victims of Crime in the Criminal Trial Process*. While it supported a scheme for review similar to that used in the United Kingdom, it did not consider that it was practical for Victoria to adopt this reform alone.⁶ Instead, it recommended giving victims the right to apply for an internal review of the decision.⁷
- 11 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that each Australian Director of Public Prosecutions adopt a ‘formalised internal complaints mechanism’ for victims who want a review of key decisions, such as decisions to end a prosecution or not prosecute at all.⁸
- 12 Under the policy of the Director of Public Prosecutions for Victoria (DPP), charges must have a reasonable prospect of conviction.⁹ Before making a decision to discontinue a case, prosecutors must ask victims for their views. Different senior prosecutors and the DPP then review decisions to discontinue. Victims must be asked if they want anything to be taken into account in the review. If the case is discontinued, the victim must be informed before the court is told about the decision.¹⁰
- 13 We want to hear if charging and prosecution decisions continue to be an issue and, if so, what should be done to address these.

Question

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

You might think about:

- how well the internal review process is working
- if the views of the person harmed are sufficiently taken into account when making decisions
- the threshold of ‘reasonable prospect of conviction’ and how decisions are made.

Ground rules hearings

- 14 A ground rules hearing is a pre-trial procedure for some offences, including sexual offences. In Victoria, it is available only for witnesses, other than the accused, who are children or people with a cognitive impairment.¹¹
- 15 A ground rules hearing must be held in all cases where an intermediary has been appointed by the court. (Intermediaries who assist with communication between the complainant and the court are discussed in Issues Paper B). The hearing involves a discussion between the prosecution, the defence, the court and, where relevant, an intermediary.¹²
- 16 Its aim is to ensure that witnesses are treated fairly and that 'communication is as complete, coherent, and accurate as possible'.¹³ At the hearing, the Court may make directions about:
 - how witnesses are questioned
 - what questions are allowed
 - how long the questioning can go on
 - if aids can be used to help communicate a question or an answer.¹⁴
- 17 We want to hear if ground rules hearings are working well, and if they should happen in other cases. For example, in the Australian Capital Territory, they are available in criminal proceedings for other groups of people who may face communication difficulties, and for those accused of offences.¹⁵

Question

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

You might think about:

- how criminal proceedings were conducted before ground rules hearings
- if ground rules hearings should be extended to other groups of people.

Special procedures and alternative arrangements for giving evidence

- 18 Giving evidence about sexual offences and being questioned about that evidence can be traumatic for complainants. This can affect the quality of the evidence they give.¹⁶
- 19 The law therefore allows them to give evidence in other ways (alternative arrangements) and, for children or people with a cognitive impairment, provides special procedures for giving their evidence. This section discusses these special procedures and arrangements.

Special procedures

- 20 Children or people with a cognitive impairment can have their police statement recorded (discussed in Issues Paper D). The visual and audio recording of evidence (VARE) can then be used as their evidence-in-chief during trial¹⁷ and in any new trial or appeal.¹⁸
- 21 This protects them from having to give evidence in court and repeat their story. However, they may still be cross-examined during trial.

- 22 Because the VARE is a tool for both investigation and evidence, there can be challenges in using it as evidence. The use of leading questions, for example, may mean it is not admitted as evidence.¹⁹ To provide quality evidence police need to be skilled in interviewing for a VARE.²⁰ Courts need to recognise the dual purposes of the VARE when considering whether to admit it as evidence.²¹
- 23 The VARE is played in a special hearing that is recorded.²² After the VARE is played, the complainant is cross-examined and re-examined in a remote facility. This is linked by closed-circuit television to the courtroom, where the accused and defence lawyer sit.²³
- 24 The recording of the special hearing is played for the jury as the whole of the complainant's evidence at trial.²⁴ It is also played in any retrial or related civil proceeding.²⁵ The court can only grant leave for further examination of the complainant in limited circumstances.²⁶
- 25 Other people may benefit from these special procedures. The Royal Commission into Institutional Responses to Child Sexual Abuse considered their benefits for adult victim survivors of child sex abuse.²⁷ In the Australian Capital Territory, special hearings can be used by complainants who are 'vulnerable adults'. This includes people who are likely to 'suffer severe emotional trauma', or 'be intimidated or distressed'.²⁸
- 26 The Commission considered this issue in 2016. In its report, *The Role of Victims of Crime in the Criminal Trial Process*, it recommended extending special procedures to 'protected victims', defined in a similar way as in the Australian Capital Territory.²⁹ This has not yet been implemented into law in Victoria.
- 27 In its 2020 report, *Committals*, the Commission recommended a formal evaluation of special hearings and these reforms.³⁰

Alternative arrangements for giving evidence

- 28 Adult complainants can give evidence in other ways, including:
- outside the courtroom via closed-circuit television
 - using screens to remove the accused from their direct line of vision
 - allowing a support person to sit with them as they give evidence
 - restricting who can be in court while they give evidence.³¹
- 29 A recording of the complainant's evidence at trial may be played in any retrial or appeal, instead of making the complainant give evidence again.³²
- 30 We want to hear how well these special procedures and alternative arrangements are working, and how they should be improved.

Question

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

You might think about:

- other people who would benefit from special procedures or alternative arrangements
- other ways to reduce trauma for complainants.

Laws about the trial process

31 This section discusses some laws relating to the trial process and reforms to those laws to improve the understanding of sexual harm and how complainants are treated in criminal proceedings.

Jury directions

32 In a trial, the judge gives directions to a jury to help them understand the law before they reach a verdict.³³ The Commission’s inquiry into jury directions and other important work led to new laws to improve jury directions.³⁴

33 The *Jury Directions Act 2015* (Vic) requires a judge:

- to give jury directions that are required by the Act
- to give a jury other directions in the Act if they have been requested, unless there are good reasons for not doing so
- to not give a jury any other directions that have not been requested, unless there are substantial and compelling reasons to do so.³⁵

34 Some jury directions are designed to counter common misconceptions about sexual harm (see Table 1).

Table 1: Summary of jury directions relevant in sexual offence trials

Type of direction	Description	Process	When the direction is given
Corrective directions	Corrects certain statements or suggestions, ³⁶ including statements about the reliability of children ³⁷ or complainants as a class ³⁸	Given by judge if statement made	Not specified
Direction on consent and reasonable belief in consent	Explains consent and reasonable belief in consent (for example, that people who do not consent may not be physically injured) ³⁹	Made on request by parties ⁴⁰	After the close of evidence
Direction on delay and credibility	Explains relevance of delay on the credibility of the complainant, ⁴¹ including that delay is common	Given by judge if particular criteria are met	May be given before evidence
Other directions related to credibility or reliability	Explains relevance of differences in the complainant’s account (for example, that differences are common) ⁴² or explains the language and cognitive skills of child witnesses ⁴³	Given by judge if particular criteria are met ⁴⁴	May be given before evidence

The Sexual Violence Legislation Bill (NZ)

New Zealand is considering laws that would require judges to give any direction they consider is needed to address misconceptions about sexual harm.⁴⁵ For example, a judge could direct a jury on the prevalence or features of false complaints, the relevance of the complainant drinking alcohol, and the seriousness of sexual harm committed by family members.⁴⁶

- 35 We are interested in how well the laws on jury directions are working in practice and what should be improved.

Question

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

You might think about:

- how much discretion judges should have in giving jury directions
- the timing or frequency of directions⁴⁷
- if other directions are needed (for example, should the jury be directed that a doubt based on a misconception cannot be a 'reasonable doubt'?).⁴⁸

Complainant's sexual history

- 36 Reforms to sexual offence trials have restricted some evidence and questioning, such as:
- pre-trial cross-examination of complainants who were children or had a cognitive impairment at the beginning of proceedings⁴⁹
 - improper questioning, including questioning based solely on stereotypes.⁵⁰
- 37 The law imposes restrictions on questioning complainants, and introducing evidence, about their sexual history:
- no questions or evidence are allowed about 'the general reputation of the complainant with respect to chastity'⁵¹
 - leave of the court is required to cross-examine a complainant about their sexual activity⁵²
 - a complainant's sexual history cannot be admitted to suggest that the complainant is more likely to have consented to the sexual activity.⁵³
- 38 We want to hear how the process of questioning complainants in criminal proceedings works in practice, and what else should be done to improve this part of the proceedings.

Joint trials and tendency and coincidence evidence

- 39 Evidence of other allegations of sexual harm against an accused may be admissible in a trial as tendency and coincidence evidence.
- 40 Where more than one complainant alleges they have been harmed by an accused, the prosecution can ask for a joint trial of all the charges. Whether this is allowed often depends on the 'cross-admissibility' of the tendency and coincidence evidence. If the evidence is cross-admissible, allegations from one complainant can be supported by the evidence of other complainants.
- 41 In Victoria, there is a presumption in favour of joint trials for sexual offence cases.⁵⁴ The presumption is not rebutted because evidence on one charge is inadmissible on another charge.⁵⁵ However, in practice, separate trials may be ordered more often than they need to be.⁵⁶
- 42 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that laws be changed to make it easier to admit tendency and coincidence evidence in trials and joint trials.⁵⁷
- 43 The reasons for the recommendations included:
- Tendency and coincidence evidence is highly relevant, without a significant risk of unfair prejudice to the accused.⁵⁸
 - Joint trials are less traumatising for complainants because they can feel supported by other complainants.⁵⁹
- 44 In response to the recommendations, the Council of Attorneys-General agreed to implement a Model Bill that would change the test on tendency and coincidence evidence in the Uniform Evidence Law.⁶⁰ New South Wales has already implemented this change in its laws,⁶¹ but Victoria has not.
- 45 We want to hear about:
- the scope of the Model Bill (for example, it applies only to child sexual offences)
 - how decisions on joining or separating trials are made in practice
 - if more reforms are needed, other than implementing the Model Bill, to encourage the joinder of trials in Victoria
 - if more trials could be joined in a way consistent with the right to a fair trial, whether or not the evidence of different complainants is cross-admissible in a trial.

Protection of records

- 46 An accused can collect information from the complainant through a court order to give evidence or hand over documents (subpoena). In our initial research, we heard that these orders can be a burden on complainants.
- 47 There are laws that protect a victim's confidential medical or counselling records (confidential communications). These can only be accessed or used in criminal proceedings by an accused with leave (permission) of the court.⁶² The court can only grant leave if the value of the records substantially outweighs the public interest in preserving their confidentiality and protecting the complainant from harm.⁶³
- 48 In 2016 the Commission recommended giving victims the right to be heard automatically if any such application was made, and to give evidence about the harm in affidavit form.⁶⁴ It also recommended funding a legal service to provide independent advice to victims about such applications, based on a similar service in NSW.⁶⁵ These recommendations have not yet been implemented.

- 49 The issues that have been identified with similar legislation in New South Wales⁶⁶ include:
- In practice, the defence routinely does not apply for leave or give notice to those affected.⁶⁷
 - A subpoena that is issued without leave of the court, or without notice, can still be valid,⁶⁸ undermining the purpose of the protection.⁶⁹
 - Courts order disclosure of evidence too readily.⁷⁰
 - The scope of protection is unclear,⁷¹ including whether it protects counselling records unrelated to the offending⁷² or records made by child protection workers investigating the case.⁷³
 - The defence faces difficulty in any such applications in the absence of being able to examine the records, especially when large numbers of documents are required.⁷⁴
- 50 We want to know if any changes are needed to practice or procedure, regarding the protection of records.

Question

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

You might think about:

- how judges apply the laws in practice
- what prevents joint trials from happening where there are multiple complainants
- if some trial processes continue to be traumatic for complainants and what could be done about this.

Appeals

- 51 An offender can appeal their conviction or sentence to a higher court.⁷⁵ Appeals can correct legal errors or miscarriages of justice. However, an appeal can prolong the trial process and prevent complainants from moving on with their lives.⁷⁶ Appeals and any retrials may also involve further delays.⁷⁷ The issue of delay is discussed in Issues Paper B.
- 52 Complainants are generally only required to give evidence at trial. Appeal judges have access to the trial transcript and evidence before the trial, including victim impact statements and VAREs.⁷⁸ Recent reforms that are yet to commence mean that the County Court will no longer rehear cases on appeal, and will make decisions based on the evidence and materials that were before the trial court.⁷⁹
- 53 Appeals from the County Court or Supreme Court of Victoria are only available by leave of the Victorian Court of Appeal.⁸⁰ Special leave is required for appeals to the High Court of Australia.⁸¹
- 54 The Court of Appeal may dismiss an appeal, acquit the accused or order a re-trial.⁸² If the Court of Appeal orders a re-trial, the DPP decides whether to proceed with a new trial.⁸³
- 55 It has been suggested that reforms to jury directions have led to fewer appeals based on errors in directions or failures to give directions.⁸⁴
- 56 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that states should monitor the number, type and success rate of appeals in child sexual abuse prosecutions, and the issues raised, to identify areas of the law in need of reform.⁸⁵

Question

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

You might think about:

- the frequency of, and reasons for, appeals in sexual offence cases
- if there are any delays that can be avoided in the appeals process.

The Children's Court

57 The Children's Court of Victoria deals with criminal offences by children.⁸⁶

58 For children engaging in harmful sexual behaviour, the Children's Court can adjourn the matter and instead:

- refer the child to attend the Children's Court Clinic, staffed by clinical psychologists and psychiatrists, for assessment, treatment and counselling⁸⁷
- make a Therapeutic Treatment Order, which if completed may result in the withdrawal of charges (see Issues Paper F).⁸⁸

59 The strong focus of the Children's Court is to promote the rehabilitation of young offenders.⁸⁹ This is different to the approach in other courts.

Question

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

You might think about:

- how well it responds to the diverse needs and experiences of those involved
- if any of its approaches should be adopted by other Victorian courts.

Other issues

60 We want to hear if there are other key issues about the trial process, and what should be done to address them.

Question

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

Endnotes

- 1 We invite people who have experienced sexual harm and who have participated in a criminal trial process as the complainant to respond to our online form. There is also an issues paper for people who have experienced sexual assault.
- 2 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 3 Ibid.
- 4 Ibid; See, eg, Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).
- 5 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) <<https://www.lawreform.vic.gov.au/all-projects/committals>> xviii–xix, Recommendations 15–23.
- 6 See Crown Prosecution Service (UK), *Victims' Right to Review (VRR)* (Leaflet, 2014) <https://www.cps.gov.uk/sites/default/files/documents/publications/VRR_leaflet.pdf>.
- 7 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 70–3 [4.165]–[4.190], Recommendation 10.
- 8 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) pts III–VI, 405–8 [21.6], Recommendation 41 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 9 See Office of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Policy, 17 September 2020) 2 [2] <<https://www.opp.vic.gov.au/Resources/Policy-of-the-Director-of-Public-Prosecutions-for-Victoria>>.
- 10 Office of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Policy, 17 September 2020) 10 [29] <<https://www.opp.vic.gov.au/Resources/Policy-of-the-Director-of-Public-Prosecutions-for-Victoria>>.
- 11 Director of Public Prosecutions (Vic), *Discontinuance Review Framework* (March 2019) [6]–[10] <<https://www.opp.vic.gov.au/Home/Resources/Discontinuance-Review-Framework>>.
- 12 *Criminal Procedure Act 2009* (Vic) s 389A.
- 13 Ibid s 389B(3); County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide No 1/2018, 28 June 2018) 12 <https://www.judicialcollege.vic.edu.au/sites/default/files/2019-07/Multi%20jurisdictional%20Court%20Guide%20for%20the%20IPP_0.pdf>.
- 14 County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (Guide No 1/2018, 28 June 2018) 2 [8] <https://www.judicialcollege.vic.edu.au/sites/default/files/2019-07/Multi%20jurisdictional%20Court%20Guide%20for%20the%20IPP_0.pdf>; Judicial College of Victoria, *A Ground Rules Hearing in Action: A Best Practice Video for Judicial Officers and Practitioners* (Flyer, 2019) <<https://www.vicbar.com.au/sites/default/files/Ground%20Rules%20Hearing%20Flyer.pdf>>; *Criminal Procedure Act 2009* (Vic) pt 8.2A. Ground Rules Hearings may also be held in a range of other cases, including those involving family violence offences: s 389A.
- 15 *Criminal Procedure Act 2009* (Vic) s 389E; Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 27 <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 16 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ch 1A–B; ACT Human Rights Commission, *Intermediary Program* (Procedural Guidance Manual, February 2020) <<https://hrc.act.gov.au/wp-content/uploads/2020/05/1.-ACT-Intermediary-Procedural-Guidance-Manual-FEBRUARY-2020.pdf>>.
- 17 Terese Henning, 'Obtaining the Best Evidence from Witnesses with Complex Communication Needs' (Conference Paper, Disability Justice Plan Symposium, 19 November 2015) <https://www.agd.sa.gov.au/sites/default/files/djp_symposium_paper_henning.pdf?v=1490676499>.
- 18 *Criminal Procedure Act 2009* (Vic) pt 8.2A div 5. These indictable offences such as assault, family violence matters, and certain common or aggravated assaulted under the *Summary Offences Act 1966* (Vic) ss 23–4. See generally Judicial College of Victoria, '13.5.1 VARE Procedure', *Victorian Criminal Proceedings Manual* (Online Manual, November 2019) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27695.htm>>.
- 19 *Criminal Procedure Act 2009* (Vic) s 379.
- 20 See generally Judicial College of Victoria, '13.5.1 VARE Procedure', *Victorian Criminal Proceedings Manual* (Online Manual, November 2019) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27695.htm>>.
- 21 Mark R Keibell and Nina J Westera, 'Promoting Pre-Recorded Complainant Evidence in Rape Trials: Psychological and Practice Perspectives' (2011) 35(6) *Criminal Law Journal* 376, 384.
- 22 See generally Judicial College of Victoria, '13.5.1 VARE Procedure', *Victorian Criminal Proceedings Manual* (Online Manual, November 2019) [37] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27695.htm>>.
- 23 *Criminal Procedure Act 2009* (Vic) s 370.1; Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 27 <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 24 *Criminal Procedure Act 2009* (Vic) ss 367–8, 370, 372, 374.
- 25 Ibid s 374.
- 26 Ibid ss 367–8, 370, 372, 374.
- 27 Ibid s 376.
- 28 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Consultation Paper, September 2016) 383 <<http://www.childabuseroyalcommission.gov.au/policy-and-research/out-of-home-care/consultation-paper>>.
- 29 *Evidence Act (Miscellaneous Provisions) Act 1991* (ACT) s 42.
- 30 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 213, Recommendations 37–8.
- 31 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 129, [11.78]–[11.81], Recommendation 44 <<https://www.lawreform.vic.gov.au/all-projects/committals>>.
- 32 *Criminal Procedure Act 2009* (Vic) ss 359–60.
- 33 Ibid ss 378–9.
- 34 Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, March 2015) x <<https://www.justice.vic.gov.au/jury-directions-reports>>.
- 35 Victorian Law Reform Commission, *Jury Directions* (Report No 17, 29 July 2009) <<https://www.lawreform.vic.gov.au/all-projects/jury-directions>>.
- 36 *Jury Directions Act 2015* (Vic) ss 15–16.
- 37 Ibid s 7.
- 38 Ibid s 33.
- 39 Ibid s 51.
- 40 Ibid ss 46–47.
- 41 Ibid s 46(1), 47(1).
- 42 Ibid s 52(1).
- 43 Ibid s 54D(2).
- 44 Ibid s 44N(4).
- 45 Ibid s 44N(1), 54D(1).
- 46 Sexual Violence Legislation Bill 2019 (NZ) s 16.
- 47 Ibid.
- 48 See, eg, the direction on consent and reasonable belief in consent: *Jury Directions Act 2015* (Vic) ss 12, 46.
- 49 Olivia Smith and Tina Skinner, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26(4) *Social & Legal Studies* 441, 460. The Commission's preliminary research also suggests that the warning about honest but erroneous memory in cases where there is a long delay in complaint may not be consistent with social science research.
- 50 *Criminal Procedure Act 2009* (Vic) 123.
- 51 *Evidence Act 2008* (Vic) s 41.
- 52 *Criminal Procedure Act 2009* (Vic) s 341.

- 52 Ibid s 342.
53 Ibid s 343.
54 Ibid s 194.
55 Ibid s 194(3).
56 'Victorian Government Response to the Royal Commission into Institutional Child Sexual Abuse', *Department of Justice and Community Safety (Vic)* (Web Page, 11 July 2018) <<https://www.vic.gov.au/victorian-government-response-royal-commission-institutional-responses-child-sexual-abuse>>.
- 57 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 634 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 58 Ibid 639.
59 Ibid 634.
60 Council of Attorneys-General, 'Communiqué' (Media Release, 29 November 2019) <<https://www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communication-November-2019.pdf>>.
- 61 *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW).
62 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt II div 2A. These provisions were introduced in response to the recommendations of the Victorian Law Reform Commission: Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) Recommendations 76–86 <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
- 63 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D.
64 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) Recommendation 25. It also recommended requiring the prosecution to notify victims of their right to appear and the availability of legal assistance, and that the court must be satisfied that the victim was aware of these rights, and limiting the circumstances in which the required notice to the victim could be waived.
- 65 Ibid Recommendation 23. A similar service has since been established in Queensland: Legal Affairs and Community Safety Committee, Parliament of Queensland, *Victims of Crime Assistance and Other Legislation Amendment Bill 2016* (Report No 49, February 2017) <<https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T229.pdf>>.
- 66 *Criminal Procedure Act 1986* (NSW) s 298. These provisions are commonly referred to as the 'sexual assault counselling privilege'.
67 Catherine Gleeson, 'Striking a Balance: The Proper Operation of the Sexual Assault Communication Provisions' (Autumn 2013) *Bar News: The Journal of the NSW Bar Association* 66, 68.
68 It was held by the NSW Criminal Court of Appeal that it was open to the court to treat this as a procedural irregularity: *KS v Veitch (No 2)* [2012] 84 NSWCCA 266; (2012) 84 NSWLR 172.
69 Catherine Gleeson, 'Striking a Balance: The Proper Operation of the Sexual Assault Communication Provisions' (Autumn 2013) *Bar News: The Journal of the NSW Bar Association* 66, 68–69.
70 An example was the order for disclosure that was successfully appealed in *KS v Veitch (No 2)* [2012] 84 NSWCCA 266; (2012) 84 NSWLR 172, 189–90 [75]–[79].
71 Ian Nash, 'Use of the Sexual Assault Communications Privilege in Sexual Assault Trials' (2015) 27(3) *Judicial Officers Bulletin* 21, 20–25.
72 The NSW Court of Criminal Appeal has held that such records are included, but noted that the drafting could be improved if that was the intention: *KS v Veitch (No 2)* [2012] 84 NSWCCA 266; (2012) 84 NSWLR 172, 191 [86].
73 The NSW Criminal Court of Appeal has ruled that the privilege does not extend to such records, unless the records derive from counselling communications: *ER v Khan* [2015] NSWCCA 230; (2015) 254 A Crim R 1.
74 Ian Nash, 'Use of the Sexual Assault Communications Privilege in Sexual Assault Trials' (2015) 27(3) *Judicial Officers Bulletin* 21, 26.
75 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(4).
76 See *Royal Commission into Institutional Responses to Child Sexual Abuse*, (Criminal Justice Report, August 2017) vols VII-X, 332-333 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
77 See generally *ibid* pts VII-X, ch 32.
78 *Criminal Procedure Act 2009* (Vic) s 368(4).
79 *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic).
80 Seeking leave of the court means asking for the court's permission.
81 *Judiciary Act 1903* (Cth) s 35; *Australian Constitution* s 73. The grounds of appeal in the High Court are: a question of law of public importance; a question of law requiring final resolution of the state of the law; consideration of the matter is in the interests of the administration of justice: *Judiciary Act 1903* (Cth) s 35A.
82 *Criminal Procedure Act 2009* (Vic) s 277.
83 Judicial College of Victoria, '20.4.1.9 Orders on a Successful Appeal', *Victorian Criminal Proceedings Manual* (Online Manual, 31 August 2020) [10] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27876.htm>>.
84 Greg Byrne and Chris Maxwell, 'Putting Jurors First: Legislative Simplification of Jury Directions' (2019) 43 *Criminal Law Journal* 180, 196–197.
85 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) pts VII-X, 355, Recommendation 82 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
86 The definition of a child for this purpose is those over the age of 10 and under the age of 18: *Children, Youth and Families Act 2005* (Vic) s 3. The other Division of the Children's Court is the Family Division which hears applications relating to the protection and care of children and young persons at risk, and applications for intervention orders.
87 'Children's Court Clinic', *Children's Court Victoria* (Web Page, 18 April 2013) <<https://www.childrenscourt.vic.gov.au/legal/research-materials/court-operation>>; *Children, Youth and Families Act 2005* (Vic) s 546.
88 *Children, Youth and Families Act 2005* (Vic) s 248; Children's Court of Victoria, *Innovative Approaches of the Children's Court of Victoria to Sexual Offending and Abuse* (Report, 2012) 7 <<https://www.childrenscourt.vic.gov.au/sites/default/files/INNOVATIVE%20APPROACHES%20OF%20THE%20COURT%20REGARDING%20SEXUAL%20OFFENDING.pdf>>.
89 Children's Court of Victoria, *Statement of Priorities 2019-21* (Policy, 2019) 5 <https://www.childrenscourt.vic.gov.au/sites/default/files/Statement%20of%20priorities_CCV.pdf>.

Issues Paper F

People Who Have Committed Sexual Offences



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Issues Paper F

People Who Have Committed Sexual Offences

Introduction

- 1 This paper is for:
 - people who work in, or have experience of, the criminal justice system in relation to sexual offences
 - people who support or work with those who are responsible for sexual harm, such as in reintegration or behaviour change programs
 - researchers and others interested in the subject.
- 2 This paper is also for people who have committed a sexual offence, and those who have supported them informally. You can also give the Commission feedback in another way by contacting us ([see the Guide to our issues papers](#)).
- 3 We also encourage people who have experienced sexual harm, and those who have supported them, to answer any questions in this paper that interest them.

In this paper, we mostly refer to ‘a person who has committed or been convicted of a sexual offence’, instead of using ‘sex offenders’. This recognises that sexual offending is a problem of someone’s behaviour, rather than of who they are. This is not meant to downplay the seriousness of sexual offences, which are among the most serious crimes in our community.

- 4 Victoria’s response to sexual offending behaviour focuses on:
 - holding people who have committed offences accountable and denouncing the harm
 - rehabilitating and reintegrating people who have committed sexual offences
 - protecting the community from further harm.
- 5 In this paper, we ask if these aims are being met, and if not, how to improve our system to achieve them. We also ask how early intervention and diversion can be used for adults, and children and young people, engaging in harmful sexual behaviour.

Issues Paper F is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

Diverse needs

- 6 People commit sexual offences in different ways and contexts. Sexual offences can be committed by family, strangers, and those in positions of power (for example, in workplaces or in aged care homes).
- 7 People who commit sexual offences are diverse in their behaviour and characteristics.¹ Some people may be more likely to reoffend than others.² Some have complex needs and require mental health, substance abuse and housing support.³
- 8 Interventions for people who have committed sexual offences must be responsive to their diverse needs and experiences. For example, specialised responses may be needed for Aboriginal people, people with disability, and people from culturally and linguistically diverse communities.⁴
- 9 We want to hear if interventions are accessible to people who have committed sexual offences, and respond to their diverse needs and contexts.

Question

- 1 Do responses to sexual offending sufficiently address the diverse needs of different people who have committed sexual offences? If not, what more is needed?

You might think about:

- any gaps in interventions
- any programs or pilots we can learn from.

Responding to offending behaviour

- 10 At both national and state levels, there is a move towards improving responses to those who commit sexual offences.⁵ This goes beyond holding a person accountable and denouncing their crime. It includes rehabilitating and reintegrating them, and measures that apply after a person's sentence (post-sentence measures) for protection of the community. There is an increasing interest in early intervention and diversion.
- 11 This section discusses these three approaches in relation to adults. The next section discusses children and young people.

Rehabilitation

- 12 Rehabilitation is a goal of the correctional system.
- 13 Treatment programs focused on sexual offending are one form of rehabilitation. People in prison and in the community can take part in these programs.
- 14 While such programs are widely used, there continues to be discussion about how effective they are and who they are effective for. For example, there is debate about the impact of treatment on people who are considered to be at a low risk of reoffending.⁶
- 15 It is also unclear which program features, such as their timing or length, are most effective. However, it appears that treatment programs are most successful when they are made to fit the needs of individuals.⁷

Reintegration

- 16 The correctional system aims to support people who have been in prison to reintegrate into the community. This can occur before they are released from prison, as part of their parole or after release.
- 17 To reintegrate into the community successfully, a person will need a range of supports, such as housing and employment. They can also benefit from supportive networks (see box).⁸
- 18 In Victoria, programs are available for people convicted of serious sex offences as well as other groups such as Aboriginal people and young people. These can help people get transitional housing, connect them to treatment programs, provide cultural mentoring and educate and train them before their release.⁹ Other programs for those who have committed sexual offences have been trialled elsewhere in Australia.
- 19 However, the stigma of sexual offending may make it harder for people to reintegrate successfully. Post-sentence measures (discussed next) may also make this harder.¹⁰

Circles of Support and Accountability

Circles of Support and Accountability involve two levels of support for those released from prison. An immediate circle of trained volunteers stays in touch regularly with the released person, provides them with support and monitors their progress. This circle is supported by a second tier of health, justice and other professionals.

Evaluations suggest that these circles can prevent some reoffending and support people to reintegrate into the community successfully.¹¹

- 20 In Victoria, Support and Awareness Groups draw on a person's established relationships to support their progress.¹²
- 21 We want to hear how well measures to rehabilitate or reintegrate people are working, and what improvements can be made.

Question

- 2 How well are rehabilitation or reintegration measures for people who have committed sexual offences working? How can they be improved?

You might think about:

- barriers to successful reintegration
- how well these measures respond to complex needs.

Post-sentence measures for sexual offending

- 22 The law allows for restrictions or conditions for some people who have committed certain sexual offences after they have finished their sentence. These exceptional measures are designed to protect the community from people who are considered to be at risk of serious reoffending.¹³
- 23 This section discusses three such measures:
- post-sentence detention
 - post-sentence supervision
 - sex offender registration.

Post-sentence detention and supervision

- 24 A person convicted of a serious sexual offence can be kept in prison, or subject to supervision, beyond the term of their original sentence if it is found before they are released that there is an 'unacceptable risk' they will reoffend.¹⁴ These measures are used relatively rarely.¹⁵
- 25 The Post Sentence Authority, an independent body, manages this regime. Its main aim is to protect the community, with rehabilitation and treatment a secondary aim.¹⁶
- 26 Those kept in prison after their original sentence are meant to be housed in separate facilities and managed differently to others in prison.¹⁷ Supervision orders may include requirements such as taking part in intensive treatment, living in a particular place, or being monitored electronically. A multi-agency panel provides intensive case management for those subject to this post-sentence regime (see Issues Paper A for questions on multi-agency approaches).¹⁸

Sex offender registration

- 27 Victoria has a register of sex offenders. The purposes of the register are to prevent people from reoffending, make it easier for a prosecution if someone reoffends, and protect children from people who have been convicted of child sexual offences.¹⁹ The register is not public, but there is a parliamentary inquiry considering if it should be.²⁰
- 28 Anyone who has committed certain sexual offences against a child must be placed on the register when they are released into the community. A court can order other people convicted of sexual offences, including against adults, to be placed on the list.²¹ In these cases the court considers factors such as the risk of sexual reoffending, the circumstances of the case and the burden of the reporting and other requirements.²²
- 29 A person on the register must report key personal details to the police, such as their contact information, internet provider and profiles, employment, and contact with children. A registered adult is required to report for at least eight years and can be required to report for the rest of their life. It is a serious offence to fail to report.²³
- 30 If someone was 18 or 19 years old at the time of the offence, they can be given an exemption from registration under certain conditions. The Chief Commissioner of Police can apply for the suspension of the registered person's reporting obligations.²⁴
- 31 The Victorian Law Reform Commission reviewed issues relating to the register in 2012. Only some of its recommendations have been implemented.²⁵
- 32 We want to hear if post-sentence measures are working well, and what should be improved.

Question

- 3 How well are post-sentence detention and supervision, and sex offender registration working? How can they be improved?

You might think about:

- the effectiveness of these measures
- how they affect rehabilitation and reintegration
- their administration in practice.²⁶

Early intervention and diversion

- 33 Most people who are responsible for sexual harm never enter the criminal justice system. There may be other ways to respond to this group, such as through school-based and community education programs that aim to change public attitudes (primary prevention).

Early intervention

- 34 Another response is through early intervention programs. These allow someone to refer themselves, or be referred, to a helpline or treatment program before they commit a sexual offence.
- 35 There are different models in different countries (see box).²⁷

Stop it Now!

Stop it Now! is an early intervention program for child sexual abuse in the United Kingdom and elsewhere. There is a confidential helpline and a website for those worried about offending or concerned about others' offending, as well as professionals.

Callers are given information and support, a plan to help ensure they do not offend, and referrals to specialist services for ongoing support. The program also includes primary prevention programs. In 2019, a scoping study in Victoria recommended establishing a four-year pilot for a national *Stop it Now!* service.²⁸

Prevention Project Dunkelfeld

Prevention Project Dunkelfeld is a German early intervention program for child sexual abuse and the consumption of child abuse material. The project offers voluntary and confidential face-to-face treatment for people who are worried about their sexual interest in children (as Germany does not have mandatory reporting laws). It provides year-long medical and psychological support to prevent sexual offending behaviour.²⁹

- 36 Evaluations indicate that these programs are used by people who have not offended or been reported to the police.³⁰ The use of the German program suggests that people are also open to attending treatment.³¹ People using Stop it Now! have reported better skills in identifying risky activities and protecting against them.³² Studies have further indicated an increasing demand for these services.³³
- 37 Such programs would need to be aligned with mandatory reporting laws, as they are in the United Kingdom.³⁴ They would also need to respond to community attitudes towards child sexual offending.³⁵

Diversion programs

- 38 Victoria runs diversion programs for young people engaging in harmful sexual behaviour (discussed later). These divert someone alleged to have committed an offence to a treatment program. There have been diversion programs for adults in other places (see box).

Cedar Cottage

One program in New South Wales, the Cedar Cottage Pre-Trial Diversion Program, was used by parents who admitted they were guilty of sexual offences against their children. It provided support to those harmed by the sexual offending and a lengthy treatment program for the parent. Although evaluations indicated that it significantly reduced sexual reoffending by people considered to be 'low-risk offenders',³⁶ the program ended in 2014.

- 39 Early intervention and diversion programs share some features with restorative justice (see Issues Paper G). If successful, a trial may not be necessary and these programs can encourage people to take responsibility for their actions (including for unreported harms).³⁷ However, the interests of people who have been harmed should also inform the use and design of these programs.³⁸
- 40 There are other programs for men who use violence against their family, such as men's behaviour change programs. These may also respond to sexual harm, although it is unclear if they are effective.³⁹
- 41 We are interested in your views about the role that early intervention and diversion programs should play in addressing sexual harm, including in a family violence context.

Questions

- 4 Is there a role for early intervention or diversion programs for adults responsible for sexual harm? Why or why not?
- 5 If you support early intervention or diversion programs for adults responsible for sexual harm, what should be the features of the program?

You might think about:

- if these programs make it more likely a person will take responsibility for their behaviour or reduce sexual offending
- the models or programs that are most effective.

Children and young people engaging in harmful sexual behaviour

- 42 Harmful sexual behaviour by young people is different to sexual offending by adults.⁴⁰ For example, harmful sexual behaviour does not indicate that the young person will offend as an adult.⁴¹ Such behaviour may be found in the context of experiences of family violence, child neglect and sometimes sexual or other assault.⁴²
- 43 Harmful sexual behaviour by children and young people makes up a large part of child sexual abuse. Some studies estimate that siblings are responsible for up to 40 per cent of child sexual abuse.⁴³
- 44 In Victoria, a mostly therapeutic response is taken to this behaviour. Children engaging in harmful sexual behaviour can be referred to Sexually Abusive Behaviour Treatment Services.⁴⁴ These programs are available for children up to 18 years of age.⁴⁵ The child or their family can contact the service or be referred by an organisation (such as a school or child protection agency).⁴⁶
- 45 They can also be required to get treatment through a Therapeutic Treatment Order made by the Children’s Court.⁴⁷ These can also be used to divert their case from the criminal justice system before they are charged or once a case is in the Children’s Court.⁴⁸ The Children’s Court is discussed in Issues Paper E.
- 46 If the case is in the Children’s Court, the court suspends the case during treatment. If the child completes the program, the court discontinues the case.⁴⁹ Young people convicted of a sexual offence also have to take part in a treatment program.⁵⁰
- 47 We want to hear if these programs are working well, and how they can be improved. We also want to know whether other programs, such as restorative justice conferencing, are needed.

Question

- 6 What is working well in responding to harmful sexual behaviour in children? What improvements can be made?

You might think about:

- if these programs respond to diverse needs and experiences⁵¹
- opportunities for earlier intervention, before sexual harm has occurred.⁵²

Other views

- 48 We want to hear your views on other issues about how Victoria responds to sexual offending. For example, we would be interested in how to respond to less serious offending, or how to respond to offending while someone is in prison.

Question

- 7 What other issues need to be addressed to improve Victoria’s approach to sexual offending?

Endnotes

- 1 See, eg, Erin Mackay et al, Australia's National Research Organisation for Women's Safety, *Perpetrator Interventions in Australia: Part One—Literature Review* (ANROWS State of Knowledge Paper, November 2015) 37 <<https://www.anrows.org.au/publication/perpetrator-interventions-in-australia/>>; Antonia Quadara et al, Australian Institute of Family Studies (Cth), *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, June 2015) 9–20 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse/>>; *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) part VIII, 363 <<https://www.childabuseroyalcommission.gov.au/criminal-justice/>>.
- 2 Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) xii [18–19].
- 3 Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (Report, November 2015) 135 [5.1] <<https://www.justice.vic.gov.au/justice-system/corrections-prisons-and-parole/review-of-post-sentence-supervision-scheme-for/>>.
- 4 On the general need for perpetrator interventions to respond to diverse needs and experiences, see Australia's National Research Organisation for Women's Safety, *Improving Accountability: The Role of Perpetrator Intervention Systems—Key Findings and Future Directions* (Research to Policy and Practice Paper No 20/2020, June 2020) 9 <<https://www.anrows.org.au/publication/improving-accountability-the-role-of-perpetrator-intervention-systems-key-findings-and-future-directions/>>; *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 3, 278–280 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
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- 6 See, eg, Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (Report, November 2015) x, 138 [5.20], 160 [5.106–107] <<https://www.justice.vic.gov.au/justice-system/corrections-prisons-and-parole/review-of-post-sentence-supervision-scheme-for/>>; Andrew Day et al, 'The Intensity and Timing of Sex Offender Treatment' (2019) 31(4) *Sexual Abuse* 397, 397; R Karl Hanson, 'Treating Sexual Offenders: How Did We Get Here and Where Are We Headed?' (2014) 20(1) *Journal of Sexual Aggression* 3, 5–6; Erin Mackay et al, Australia's National Research Organisation for Women's Safety, *Perpetrator Interventions in Australia: Part One—Literature Review* (ANROWS State of Knowledge Paper, November 2015) 41–2 <<https://www.anrows.org.au/publication/perpetrator-interventions-in-australia/>>; Martin Schmucker and Friedrich Lösel, 'The Effects of Sexual Offender Treatment on Recidivism: An International Meta-Analysis of Sound Quality Evaluations' (2015) 11(4) *Journal of Experimental Criminology* 597, 617, 622.
- 7 Andrew Day et al, 'The Intensity and Timing of Sex Offender Treatment' (2019) 31(4) *Sexual Abuse* 397, 404–5, 397–8.
- 8 Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (Report, November 2015) 175 [5.183] <<https://www.justice.vic.gov.au/justice-system/corrections-prisons-and-parole/review-of-post-sentence-supervision-scheme-for/>>; Elena Campbell, Centre for Innovative Justice, RMIT University, *Integrating the Indefensible—What Role Should the Community Play?* (Issues Paper, December 2017) 6 <<https://cij.org.au/research-projects/integrating-the-indefensible-what-role-should-the-community-play/>>.
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- 10 Kelly Richards, Jodi Death and Kieran McCartan, *Community-Based Approaches to Sexual Offender Reintegration* (ANROWS Research Report No 7, March 2020) 41 <<https://www.anrows.org.au/project/community-based-approaches-to-sexual-offender-reintegration/>>; Elena Campbell, Centre for Innovative Justice, RMIT University, *Integrating the Indefensible—What Role Should the Community Play?* (Issues Paper, December 2017) 6 <<https://cij.org.au/research-projects/integrating-the-indefensible-what-role-should-the-community-play/>>.
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- 12 Jamie Walvisch, Kelly Richards and Lorana Bartels, '3 Ways to Help Sex Offenders Safely Reintegrate Back into the Community', *The Conversation* (Web Page, 3 September 2019) <<https://theconversation.com/3-ways-to-help-sex-offenders-safely-reintegrate-back-into-the-community-121977>>.
- 13 *Serious Offenders Act 2018* (Vic) s 1(a); Victorian Auditor-General's Office, *Managing Registered Sex Offenders* (Independent Assurance Report, 28 August 2019) 7 <<https://audit.vic.gov.au/report/managing-registered-sex-offenders/>>.
- 14 *Serious Offenders Act 2018* (Vic) s 14 (regarding a supervision order) and s 63–4 (regarding a detention order). The focus is on whether the person is at risk of committing a 'serious' sexual or violent offence. 'Serious sex offences' are set out in *ibid* Schedule 1. There are also general provisions (applying to sexual and non-sexual offenders) that enable the indefinite detention of a person. This is a sentencing option available if the court is satisfied that someone is a 'serious danger' to society: *Sentencing Act 1997* (Vic) ss 18A–18B.
- 15 On 30 June 2019, three people were detained, 126 people were under a supervision order and 5 people under an interim supervision order: Post Sentence Authority, *Annual Report 2018-19* (Report, October 2019) 42, 44 <<http://www.postsentenceauthority.vic.gov.au/about-us/the-post-sentence-authoritys-2018-19-annual-report>>.
- 16 *Serious Offenders Act 2018* (Vic) s 1.
- 17 *Ibid* ss 255(1), (2).
- 18 Post Sentence Authority, *Annual Report 2018-19* (Report, October 2019) 15, 24, 44, 48 <<http://www.postsentenceauthority.vic.gov.au/about-us/the-post-sentence-authoritys-2018-19-annual-report>>. The Post Sentence Authority notes that most people on supervision orders live in residential accommodation managed by Corrections Victoria, such as Rivergum Residential Treatment Centre but that they can live outside the corrections system: *ibid* 15.
- 19 *Sex Offenders Registration Act 2004* (Vic) s 1. See also 'Sex Offender Registration Statistics', *Victoria Police* (Web Page, 23 August 2020) <<https://www.police.vic.gov.au/sex-offender-register-statistics/>>.
- 20 'Inquiry into Management of Child Sex Offender Information', *Parliament of Victoria* (Web Page, 25 August 2020) <<https://www.parliament.vic.gov.au/lsic-lc/article/4323>>.
- 21 See *Sex Offenders Registration Act 2004* (Vic) ss 6(1), 7 sch 1–2, 11. There are a few limited exceptions: *ibid* s 6(2A)–(2B) and s 6(4)–(6).
- 22 Judicial College of Victoria, *Sex Offenders Registration Act 2004* (Guide, 13 February 2019) 6–7 <<https://www.judicialcollege.vic.edu.au/sites/default/files/2019-07/Sex%20Offenders%20Registration%20Act%20Guide.pdf>>.
- 23 *Sex Offenders Registration Act 2004* (Vic) ss 14, 16–17 (on details to report); ss 34–5 (on duration of order for adults and children); s 46 (on failure to report).
- 24 *Ibid* ss 11A–11B, 39A. The Chief Commissioner also has powers to suspend a person's reporting obligations for a shorter period (of less than five years): *ibid* 32, 45A.
- 25 'Sex Offenders Registration', *Victorian Law Reform Commission* (Web Page, 2 September 2020) <<https://www.lawreform.vic.gov.au/all-projects/sex-offenders-registration/>>; Victorian Law Reform Commission, *Sex Offenders Registration* (Report No 23, April 2012) <<https://www.lawreform.vic.gov.au/all-projects/sex-offenders-registration/>>.
- 26 On their administration, see Victorian Auditor-General's Office, *Managing Registered Sex Offenders* (Independent Assurance Report, 28 August 2019) <<https://audit.vic.gov.au/report/managing-registered-sex-offenders/>>.

- 27 Jesuit Social Services, *Stop It Now! A Scoping Study on Implementation in Australia* (Report, January 2019) 31 <<https://jss.org.au/wp-content/uploads/2019/07/Stop-It-Now.pdf>>.
- 28 Ibid 4–8, 16, 19. *Stop it Now!* did exist in Bundaberg, Queensland, but it has been discontinued: Ibid 16.
- 29 Klaus M Beier, 'Proactive Strategies to Prevent Child Sexual Abuse and the Use of Child Abuse Images: The German Dunkelfeld-Project for Adults (PPD) and Juveniles (PPJ)' in Elizabeth L Jeglic and Cynthia Calkins (eds), *Sexual Violence* (Springer International Publishing, 2016) 249, 257–261. There is an associated online treatment program available outside Germany: Institute of Sexology and Sexual Medicine at the Charité—Universitätsmedizin Berlin, 'Troubled Desire', *Troubled Desire* (Web Page, 22 September 2020) <<https://troubled-desire.com/en/>>.
- 30 Klaus M Beier et al, 'Encouraging Self-Identified Pedophiles and Hebephiles to Seek Professional Help: First Results of the Prevention Project Dunkelfeld (PPD)' (2009) 33 *Child Abuse & Neglect* 545, 548; Joan Van Horn et al, 'Stop It Now! A Pilot Study into the Limits and Benefits of a Free Helpline Preventing Child Sexual Abuse' (2015) 24(8) *Journal of Child Sexual Abuse* 853, 861 (in relation to the Dutch program particularly); Jesuit Social Services, *Stop It Now! A Scoping Study on Implementation in Australia* (Report, January 2019) 21 <<https://jss.org.au/wp-content/uploads/2019/07/Stop-It-Now.pdf>>.
- 31 Klaus M Beier et al, 'The German Dunkelfeld Project: A Pilot Study to Prevent Child Sexual Abuse and the Use of Child Abusive Images' (2015) 12(2) *The Journal of Sexual Medicine* 529, 538. In relation to treatment related to Stop it Now!, see Joan Van Horn et al, 'Stop It Now! A Pilot Study into the Limits and Benefits of a Free Helpline Preventing Child Sexual Abuse' (2015) 24(8) *Journal of Child Sexual Abuse* 853, 858, 865.
- 32 Ashley Brown et al, *Call to Keep Children Safe from Sexual Abuse: A Study of the Use and Effects of the Stop It Now! UK and Ireland Helpline* (NatCen Social Research Report, June 2014) 5, 65 <https://www.stopitnow.org.uk/wp-content/uploads/2020/01/stop_it_now_evaluation_uk_findings.pdf>; Joan Van Horn et al, 'Stop It Now! A Pilot Study into the Limits and Benefits of a Free Helpline Preventing Child Sexual Abuse' (2015) 24(8) *Journal of Child Sexual Abuse* 853, 864–5.
- 33 Jesuit Social Services, *Stop It Now! A Scoping Study on Implementation in Australia* (Report, January 2019) 21 <<https://jss.org.au/wp-content/uploads/2019/07/Stop-It-Now.pdf>>.
- 34 Ibid 8, 31.
- 35 On child sexual abuse as an issue that sparks intense community responses: Gemma McKibbin and Cathy Humphreys, 'Future Directions in Child Sexual Abuse Prevention: An Australian Perspective' (2020) 105 *Child Abuse & Neglect* 1, 1–2.
- 36 Jane Goodman-Delahunty, *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes* (Report, 2009) 5, 8, 9 <https://www.researchgate.net/publication/298788143_The_NSW_Pre-trial_Diversion_of_Offenders_Child_Sexual_Assault_Program_An_evaluation_of_treatment_outcomes>. The participant could be a biological parent, step-parent or de-facto spouse. The full name of the program was the New South Wales Pre-Trial Diversion of Offenders (Child Sexual Assault) Program. See also Jane Goodman-Delahunty and Kate O'Brien, Australian Institute of Criminology (Cth), *Parental Sexual Offending: Managing Risk through Diversion* (Trends and Issues in Crime and Criminal Justice Report No 482, September 2014) <<https://aic.gov.au/publications/tandi/tandi482>>.
- 37 Jane Goodman-Delahunty, *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes* (Report, 2009) 10 <https://www.researchgate.net/publication/298788143_The_NSW_Pre-trial_Diversion_of_Offenders_Child_Sexual_Assault_Program_An_evaluation_of_treatment_outcomes>.
- 38 In relation to reintegration, see Kelly Richards, Jodi Death and Kieran McCartan, *Community-Based Approaches to Sexual Offender Reintegration* (ANROWS Research Report No 7, March 2020) 104, 11 <<https://www.anrows.org.au/project/community-based-approaches-to-sexual-offender-reintegration/>>.
- 39 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 3, 273–4 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>. However, recent research focuses on how to best assess and improve programs: Andrew Day et al, *Evaluation Readiness, Program Quality and Outcomes in Men's Behaviour Change Programs* (ANROWS Research Report No 1, April 2019) <<https://www.anrows.org.au/publication/evaluation-readiness-program-quality-and-outcomes-in-mens-behaviour-change-programs>>.
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- 41 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 2, 220 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
- 42 Antonia Quadara et al, Australian Institute of Family Studies (Cth), *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, June 2015) 17–18. <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>; *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 2, 219, 221 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
- 43 Antonia Quadara et al, Australian Institute of Family Studies (Cth), *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, June 2015) 17 <<https://aifs.gov.au/publications/conceptualising-prevention-child-sexual-abuse>>; Antonia Quadara et al, *Good Practice in Delivering and Evaluating Interventions for Young People with Harmful Sexual Behaviours* (ANROWS Research Report No 18, June 2020) 8 <<https://www.anrows.org.au/project/good-practice-in-delivering-and-evaluating-interventions-for-young-people-with-harmful-sexual-behaviours/>>; *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 2, 221 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
- 44 Victorian Government, *Annual Report 2018—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, February 2019) 10 <<https://apo.org.au/node/223711>>.
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Issues Paper G

Sexual Offences: Restorative and Alternative Justice Models



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Issues Paper G

Sexual Offences: Restorative and Alternative Justice Models

Introduction

- 1 This paper is for people who:
 - work in, or have experience of, the criminal justice system in relation to sexual harm
 - have experienced sexual harm, whether or not they reported it to police or participated in a criminal trial
 - have experience of, or ideas about, alternative justice models.
- 2 People who have been sexually harmed have various needs, such as to be acknowledged or to explain the effects of the harm.¹ Criminal trials may be able to meet some of these needs by holding the person responsible to account and officially acknowledging and denouncing sexual harm.²
- 3 But a trial is not designed to meet all these needs. In a trial, there are limits to the evidence that can be considered. The evidence of the person who reported the harm must be tested. For there to be a conviction, the evidence must put the case beyond reasonable doubt.
- 4 These rules make it difficult for a person who has experienced sexual harm to:
 - tell their story in full
 - have their experience heard and believed
 - have their experience officially acknowledged.³
- 5 Some alternative justice models may meet these needs better than the criminal justice system. They may also help people who are responsible for sexual harm take responsibility for their actions and get support to avoid offending again.
- 6 In this paper the Victorian Law Reform Commission asks if restorative, inquisitorial, or other alternative models should be adopted or extended in Victoria. If so, we want to hear about what these models should look like, and how they should work with the criminal justice system.

Issues Paper G is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

Restorative justice

What is restorative justice?

- 7 Restorative justice allows the people affected by or involved in a crime to come together to repair its harms and 'to heal and put things as right as possible'.⁴
- 8 As part of restorative justice, someone who has experienced sexual harm can explain how it affected them and how they want the person responsible to make amends. Other people who were affected and the person responsible also have a voice in the process. The person responsible has an opportunity to take responsibility for what they have done, express regret, and commit to making amends.
- 9 Restorative justice can take different forms, including:
- victim impact panels (discussed below)
 - facilitated conversations between the person harmed and the person responsible
 - group conferences.
- 10 This section focuses on group conferences.
- 11 Successful conferences often have:
- a highly skilled facilitator or convenor
 - careful preparation
 - participant screening
 - the flexibility to respond to the circumstances of each case
 - variable formats, such as face-to-face or an exchange of letters.⁵

Table 1: Examples of restorative justice programs

Program	Description of program	Conduct covered	Relationship with criminal justice system
Department of Justice and Community Safety, Victoria, Youth Justice Group Conferencing	Following early pilots, established in legislation in 2005 and available state-wide in 2006. ⁶	Offending by people aged 10 to 18 years; not available for homicide, manslaughter or sexual offences.	Available after guilty verdict and before sentencing as part of the criminal jurisdiction of the Children's Court. Court must take participation in conference and outcome plan into consideration when sentencing. ⁷
Department of Justice and Community Safety, Victoria, Family Violence Restorative Justice Service	Pilot program established in 2017 in response to Royal Commission into Family Violence. ⁸	Family violence	Available alongside the criminal justice system. Cannot be used instead of a criminal prosecution or other civil justice processes. ⁹

(Table 1 continues next page)

(Continued from previous page)

Program	Description of program	Conduct covered	Relationship with criminal justice system
South Eastern Centre Against Sexual Assault and Family Violence (SECASA), Victoria	Service available to SECASA clients for over 20 years. Program has no formal legal status. People who have experienced sexual harm or family violence can ask to be involved.	Sexual harm and family violence	No interaction with the criminal justice system. May occur even if there has not been a report to police. ¹⁰
Restorative Justice Unit, Australian Capital Territory	Following early pilots, established in legislation in 2004. The Restorative Justice Unit is a part of the ACT Department of Justice.	Initially limited to young people and less serious offences. Since 2016, includes adults and more serious crimes. Since 2018, includes sexual harm and family violence.	Available alongside the criminal justice system. In the most serious cases, restorative justice can only occur after the person responsible has been charged and has pleaded or been found guilty. Outcomes may be considered in sentencing. ¹¹ In less serious cases, if the person responsible participates in restorative justice, the police may decide not to file charges. ¹²
Project Restore, Auckland, New Zealand	Launched in 2005 as a community-based program. Project Restore is now governed by a charitable trust and is an official provider of restorative justice, receiving referrals from the courts.	Any sexual harm or harmful sexual behaviour	Any case can be referred for restorative justice following a guilty plea or finding; all District Court cases are referred for restorative justice after a guilty plea or finding if restorative justice has not already occurred. ¹³ Outcomes must be considered in sentencing. ¹⁴

- 12 Before a conference, the facilitator meets with all participants separately—sometimes many times—so that participants understand what is involved and can explain what they want from the process. This also allows the facilitator to exclude anyone who may abuse the process.
- 13 The person responsible for the harm must accept some responsibility before they can participate. However, they do not have to admit they are guilty of a crime.¹⁵
- 14 The aim is for participants to reach an agreement on what steps should be taken to prevent future harm and support healing, such as the person responsible providing reparation or addressing the causes of their behaviour.¹⁶

The value of restorative justice

- 15 Evaluations suggest that restorative justice can empower people and reduce the effects of trauma.¹⁷ The person harmed is encouraged to communicate their experience and needs in their own way and 'on their own terms'.¹⁸ This can restore their sense of agency and control.¹⁹
- 16 The Royal Commission into Family Violence supported restorative justice for family violence alongside the existing justice system.²⁰ This led to a pilot program (see Table 1). The Centre for Innovative Justice has trialled restorative justice in diverse contexts and supports its use for sexual offences.²¹ In its 2016 report, *The Role of Victims of Crime in the Criminal Trial Process*, the Victorian Law Reform Commission recommended introducing a staged restorative justice program, including for sexual offences in the later stages.²²
- 17 However, there are concerns about using restorative justice processes in relation to sexual harm:
- Sexual harm should be treated as a public rather than a private matter.²³
 - Protecting the rights of both the person harmed and the person responsible for sexual harm is a challenge.²⁴
 - The dynamics of the original harm may be repeated.²⁵
 - Restorative justice is difficult to manage in a context of cultural and linguistic diversity.²⁶
 - Restorative justice may not suit all cases.

Would restorative justice work for these kinds of sexual harm?

Historical child sexual abuse: The Royal Commission into Institutional Responses to Child Sexual Abuse recommended against introducing restorative justice for cases of institutional child sexual abuse.²⁷

Children who have been harmed: In the Australian Capital Territory, victims and eligible family members must be at least ten years old to participate in restorative justice.²⁸

Serious offences: In the Australian Capital Territory, restorative justice is only available for the most serious sexual offences if the person responsible has pleaded or been found guilty. The informal program run by SECASA in Victoria does not limit who can participate.

- 18 We want to hear if restorative justice should be available more widely, and if there are cases where it is not appropriate.

Question

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

You might want to think about:

- the value of these processes
- the challenges involved in ensuring the safety of those who participate
- cases where restorative justice would or would not be of value.

What should a restorative justice model look like in practice?

- 19 We would need to consider some key issues if a restorative justice model is introduced. These include:
- its relationship with the criminal justice system
 - who should run it
 - its guiding principles
 - how to make sure it works in practice.
- 20 Restorative justice processes can happen where there is no criminal justice process. They can also happen before, alongside, or after a criminal justice process (see Table 1).
- 21 The influence of restorative justice on the criminal justice process varies. In the Australian Capital Territory, a person may avoid a charge or receive a reduced sentence if they complete actions agreed at a restorative justice conference.²⁹
- 22 People have different views about whether restorative justice outcomes should influence the criminal justice process. Some believe that a person responsible for sexual harm should not receive an incentive to participate in restorative justice.³⁰ The person responsible may not engage meaningfully if they are motivated by the reward of a better criminal justice outcome.³¹ Others support taking participation in restorative justice into account in the criminal process.³²
- 23 Another question is where restorative justice should be located within government, and who should run it. Participants need to think of restorative justice as neutral, so it may not be appropriate for victim or offender program providers to manage restorative justice.
- 24 There may be benefits to having an independent organisation manage a restorative justice program, such as a Commission. On the other hand, there may be benefits to building on well-run programs that are already available.
- 25 Any model needs to be guided by principles. Best practice principles for restorative justice include that participation is voluntary, and everyone's safety and wellbeing are protected. In cases involving sexual harm or family violence, the concerns of the person harmed are at the centre of the process.³³ Table 2 sets out some best practice principles for use in cases involving sexual harm.

Table 2: Best practice principles for restorative justice in cases involving sexual harm

Best practice principles
Voluntary participation—no one is obliged or pressured to participate. ³⁴
All participants are protected from further harm—their safety is ensured.
The process centres on the needs and interests of the person harmed.
The person responsible accepts responsibility at the outset, at least to some degree.
Power imbalances are redressed. The dignity and equality of all participants is respected. ³⁵
The process is supported by appropriate resources and highly trained and skilled personnel, including people with specialist expertise in sexual harm.
The process is flexible and responsive to diverse needs and experiences.
A restorative justice outcome agreement is fair and reasonable, and the person responsible is able to carry it out. ³⁶
What is said and done during restorative justice is confidential, potentially with some exceptions such as where a participant indicates an intention to offend in the future. ³⁷
Transparency: participants are fully informed about all aspects of the process and potential outcomes; de-identified results are publicised to contribute to continuous program improvement. ³⁸
The process is part of ‘an integrated justice response’—it is not a stand-alone response; other criminal and civil justice options are available, as well as therapeutic treatment programs that the person responsible can be referred to as a condition of the restorative justice outcome agreement.
The process is supported by a legislative framework that sets out guiding principles, provides for implementation, and explains how restorative justice interacts with the criminal justice system and how restorative justice agreements will be monitored. ³⁹

- 26 Finally, there are practical concerns about how to implement restorative justice. It can be difficult to implement on a large scale. As each case is unique, it can be hard to manage the flow of cases.⁴⁰

Question

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

You might think about:

- when restorative justice can occur (for example, before, during or after a criminal prosecution; or at any stage in the criminal justice process)
- who should run it (for example, an independent Commission, a government department, or another agency)
- what best practice principles should apply
- how data on restorative justice outcomes should be collected to improve our understanding of sexual offending
- how referral processes should work (for example, should people harmed be able to request restorative justice? Should the police, the prosecution, or the courts be required to consider referring cases for restorative justice?).

Inquisitorial models

What is inquisitorial justice?

- 27 Unlike Australia and other jurisdictions based on the British system, most European countries have inquisitorial criminal justice systems.
- 28 In these systems, the prosecution and sometimes the judge participate in the investigation of the case. The judge is responsible for examining witnesses and determining the facts in a trial.⁴¹ There is no cross-examination. However, the parties or their lawyers can usually question witnesses after the judge has examined them.⁴²
- 29 Victims have a different role in inquisitorial systems. In some places, they can ask for issues they see as important to be investigated. During trials, victims have independent standing: they do not appear just as a witness for the prosecution.⁴³
- 30 In Germany, victims of serious offences, including sexual assault, can act as ‘auxiliary prosecutors’. A lawyer funded by the state can represent them and they can view the evidence before a trial. During the trial, they can question witnesses, object to questions, and make closing statements.⁴⁴ They can be present throughout the trial, even before they have given evidence.⁴⁵
- 31 Victoria’s criminal justice system is adversarial, but the Coroners Court has inquisitorial features. Coroners undertake investigations and may hold inquests into fires or deaths where, for example, the cause of death is unknown. They can compel people to attend a public hearing and provide information or evidence. Coroners do not judge criminal guilt but make findings and recommendations to prevent similar deaths.⁴⁶ Family members of the person who died may prefer this process to a trial, although they do not have an active role.

The value of an inquisitorial process

- 32 Inquisitorial systems may provide the person who has been harmed with more agency and influence over the investigation and prosecution of a case than adversarial systems. The New Zealand Law Commission found that it may also be easier in inquisitorial systems for the court to protect the interests of people harmed because the judge’s role is more active and less neutral.⁴⁷
- 33 However, others have criticised such systems as inefficient and bureaucratic. Some fear that inquisitorial systems do not give enough weight to the presumption of innocence.⁴⁸
- 34 The Royal Commission into Institutional Responses to Child Sexual Abuse received some submissions supporting an inquisitorial justice model for responding to the sexual abuse of children.⁴⁹ However, it did not support creating a separate criminal process for sexual abuse. Instead, it recommended reforming the adversarial system.⁵⁰

Question

- 3 Is there a role for an inquisitorial model or features for sexual offences? If so, what should this look like?

You might think about:

- its relationship with the criminal justice system
- the strengths and weaknesses of an inquisitorial model.

Speaking and being heard

- 35 We may need other ways for people to tell their story and be heard.⁵¹ In some countries, a person who has experienced or witnessed sexual harm can share their story through a 'victim impact panel'. The audience can include community members, organisational representatives and people responsible for sexual harm in other cases.⁵²
- 36 These processes do not need to include the person responsible for the sexual harm. Instead, they focus on the relationship between the person who experienced sexual harm and an institution or the broader community.⁵³

Question

- 4 Is there a role for new initiatives to enable people who have experienced sexual harm to tell their stories and have them acknowledged? Why or why not?

Aboriginal justice models

- 37 Recent research into violence against Aboriginal women calls for a move away from the adversarial criminal justice model towards 'collective processes of community healing'.⁵⁴ These collective processes might use some restorative justice principles, although whether they do so would need to be worked out within the Aboriginal community itself.⁵⁵
- 38 Victoria's Aboriginal family violence partnership is based on the principle of Aboriginal self-determination. It embraces collective and holistic healing processes.⁵⁶
- 39 Ways to respond to sexual harm against Aboriginal people include:
- culturally appropriate community avenues for reporting
 - a dedicated Aboriginal sexual assault legal service⁵⁷
 - the creation of Aboriginal-led sexual offence investigation units
 - alternative justice options other than, or in addition to, Koori court and the criminal justice system.
- 40 We want to hear your views on what works well with Aboriginal justice models, and what can be improved.

Question

- 5 Are there Aboriginal justice models that you think should be considered for sexual offences? If so, what are their strengths and weaknesses?

You might think about:

- programs or pilots that work well
- how to improve support or recognition for Aboriginal justice models
- any lessons from such models that could apply in other contexts
- what else is needed to respond effectively to sexual harm against Aboriginal people.

Other views

- 41 There may be other justice models that you would like us to consider. We encourage you to tell us how the model you support should work.

Question

- 6 Do you support another alternative justice model for sexual offences? How should it work?

You might think about:

- the strengths and weaknesses of the model
- which types of case the model is appropriate for
- when someone might participate (for example, where there is no criminal process or only after a criminal process has ended)
- what best practice principles should apply (for example, whether participation should be voluntary)
- who should run it.

Endnotes

- 1 Kathleen Daly, 'Reconceptualizing Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge, 2014) 378, 388; Haley Clark, "'What Is the Justice System Willing to Offer?'" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28.
- 2 On victim-survivor expectations of the justice system, see Haley Clark, "'What Is the Justice System Willing to Offer?'" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 85 *Family Matters* 28, 29–30.
- 3 Ibid 32–34.
- 4 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 4, 137 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; citing Howard Zehr, *The Little Book of Restorative Justice* (Good Books, 2002) 37.
- 5 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 4 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>. See also *Crimes (Restorative Justice) Act 2004* (ACT) s 46. Some commentators have expressed a preference for the term 'innovative justice process' because of the multiplicity of definitions of 'restorative justice' and the range of practices to which the label is applied. See Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report, July 2019) 2 <<http://www.naj2017.com/1729>>.
- 6 Masahiro Suzuki and William R Wood, 'Co-Option, Coercion and Compromise: Challenges of Restorative Justice in Victoria, Australia' (2017) 20(2) *Contemporary Justice Review* 274, 280; *Children, Youth and Families Act 2005* (Vic) ss 414, 415.
- 7 *Children, Youth and Families Act 2005* (Vic) s 416.
- 8 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 3 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>; see also *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 4, 145 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
- 9 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 3 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.
- 10 In some cases, restorative justice has been deferred at the request of police, to allow a criminal prosecution to be completed before restorative justice occurs: Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report, July 2019) 8 <<http://www.naj2017.com/1729>>.
- 11 *Crimes (Restorative Justice) Act 2004* (ACT) ss 6(d), 7(2), 16(3), 25(f)(i), 33(2).
- 12 ACT policing explain on their website that a potential advantage of restorative justice for offenders is that successful participation may lead to a decision not to file charges at all: Australian Federal Police, 'Restorative Justice Conferencing', *Australian Capital Territory Policing* (Web Page, 2016) <<https://police.act.gov.au/about-us/programs-and-partners/restorative-justice-conferencing>>.
- 13 *Sentencing Act 2002* (NZ) ss 24A, 25.
- 14 Ibid s 8(j).
- 15 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 7 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.
- 16 Ibid 4. In the Australian Capital Territory, the enabling legislation for restorative justice specifies that 'a primary object' of a restorative justice conference is the formation of an agreement between the person harmed and the person responsible. The agreement must include 'measures intended to repair the harm caused by the offence': *Crimes (Restorative Justice) Act 2004* (ACT) ss 50, 51. For a different, process-oriented account of the aim of restorative justice, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 176 [7.244].
- 17 Centre for Innovative Justice, RMIT University, *It's Healing to Hear Another Person's Story and Also to Tell Your Own Story: Report on the CIJ's Restorative Justice Conferencing Pilot Program* (Report, October 2019) 3 <https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf>; Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report, July 2019) <<http://www.naj2017.com/1729>>; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) xxvii, 178 [7.252].
- 18 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 7 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.
- 19 Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report, July 2019) 48 <<http://www.naj2017.com/1729>>.
- 20 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 4, 135 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
- 21 Centre for Innovative Justice, RMIT University, *It's Healing to Hear Another Person's Story and Also to Tell Your Own Story: Report on the CIJ's Restorative Justice Conferencing Pilot Program* (Report, October 2019) <https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf>; Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) <<https://cij.org.au/research-projects/sexual-offences/>>.
- 22 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 174–94, 189–94. In its report, the Commission said that restorative justice should only be available following a finding or plea of guilt, or following a decision by the DPP to discontinue a prosecution: 183 [7.283].
- 23 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 177 [7.249], 190 [7.320]. In relation to family violence, see: *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 4, 135 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
- 24 Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report, July 2019) 5 <<http://www.naj2017.com/1729>>.
- 25 Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 67 <<https://cij.org.au/research-projects/sexual-offences/>>; 'History and Purpose', *Project Restore NZ* (Web Page, 1 October 2016) <<https://projectrestore.nz/history-and-purpose/>>; Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report, July 2019) 5 <<http://www.naj2017.com/1729>>; *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 4 138 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) xxvi.
- 26 Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report, July 2019) 5 <<http://www.naj2017.com/1729>>.
- 27 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 189 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 28 *Crimes (Restorative Justice) Act 2004* (ACT) s 17.
- 29 In relation to charging decisions and restorative justice, see: Australian Federal Police, 'Restorative Justice Conferencing', *Australian Capital Territory Policing* (Web Page, 2016) <<https://police.act.gov.au/about-us/programs-and-partners/restorative-justice-conferencing>>. In relation to the effect of participation in restorative justice on sentencing, see *Crimes (Restorative Justice) Act 2004* (ACT) s 25(f)(i), (ii).
- 30 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 8 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.
- 31 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 185 [7.296].
- 32 Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 67–8 <<https://cij.org.au/research-projects/sexual-offences/>>.
- 33 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 4 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 183 [7.278].

- 34 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) s 9.
- 35 *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2000/14, UN Doc E/2000/INF/2/Add.2 (15 August 2000) <<https://www.undocs.org/E/2000/INF/2/Add.2>>.
- 36 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 174 [7.244]. This principle is also a feature of the ACT legislation: *Crimes (Restorative Justice) Act 2004* (ACT) s 51(3), (4).
- 37 For an example of how confidentiality is applied in practice – and the limits on it, see *Crimes (Restorative Justice) Act 2004* (ACT) div 8.6, ss 59, 60. For a general discussion of confidentiality, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 184 [7.287]–[7.288].
- 38 Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 6 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.
- 39 See, eg, Centre for Innovative Justice, RMIT University, *It's Healing to Hear Another Person's Story and Also to Tell Your Own Story: Report on the CIJ's Restorative Justice Conferencing Pilot Program* (Report, October 2019) 10 <https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf>.
- 40 Bebe Loff, Liz Bishop and Bronwyn Naylor, *Community-Based, Victim-Centred Restorative Justice for Sexual Violence—A Pilot* (Report, July 2019) 5 <<http://www.naj2017.com/1729>>.
- 41 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 181 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 42 Law Commission (New Zealand), *Alternative Pre-Trial and Trial Processes: Possible Reforms* (Issues Paper No 30, 14 February 2012) 55 <<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP30.pdf>>.
- 43 Ibid.
- 44 Ibid 69.
- 45 While it is lawful in Victoria for victims to be present in court before giving evidence (*Criminal Procedure Act 2009* (Vic) s 336A), in practice the defence generally applies for all witnesses to be excluded until required to attend to give evidence, and courts order accordingly. For discussion of the court's power to exclude witnesses, see: Judicial College of Victoria, '13.3 Ordering Witnesses out of Court', *Victorian Criminal Proceedings Manual* (Online Manual, 1 November 2019) <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27692.htm>>.
- 46 'Inquests & Findings', *Coroners Court of Victoria* (Web Page) <<https://www.coronerscourt.vic.gov.au/inquests-findings>>.
- 47 The New Zealand Law Commission noted, however, that the ability of judges to direct the process is not unfettered. Law Commission (New Zealand), *Alternative Pre-Trial and Trial Processes: Possible Reforms* (Issues Paper No 30, 14 February 2012) 67 <<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP30.pdf>>.
- 48 Ibid 54.
- 49 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 182 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 50 Ibid.
- 51 This might also be referred to as truth-telling, see: Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 86–91 <<https://cij.org.au/research-projects/sexual-offences/>>; *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 4, 141 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
- 52 For international examples, see 'Restorative Justice', *Montana Department of Corrections* (Web Page, 25 August 2020) <<https://cor.mt.gov/Victims/Restorative>>; State of Texas, 'Victim Impact Panel', *Brazoria County* (Web Page, 26 August 2020) <<https://www.brazoriacountytx.gov/departments/adult-probation/victim-impact-panel>>. See also Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 4 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>. See also *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 4, 141 <<http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>>.
- 53 Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 86–8 <<https://cij.org.au/research-projects/sexual-offences/>>; Department of Justice and Regulation (Vic), *Restorative Justice for Victim Survivors of Family Violence* (Framework, August 2017) 4 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>. On the potential role of community-based forums see Leigh Goodmark, "'Law and Justice Are Not Always the Same": Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse' (2015) 42(3) *Florida State University Law Review* 707, 732–46.
- 54 Harry Blagg et al, *Innovative Models in Addressing Violence against Indigenous Women* (ANROWS Horizons Research Report No 1/2018, January 2018) 6 <<https://www.anrows.org.au/publication/innovative-models-in-addressing-violence-against-indigenous-women-final-report/>>. This report is based on research into violence in remote Aboriginal communities but many of the report's conclusions are applicable in urban and regional settings.
- 55 The Centre for Innovative Justice cites Daly's criticism of the 'essentialist' nature of claims that restorative justice has 'indigenous roots': Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 68 <<https://cij.org.au/research-projects/sexual-offences/>>. See also the discussion in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 193 [7.331].
- 56 Department of Health and Human Services (Vic), *Dhelk Dja: Safe Our Way—Strong Culture, Strong Peoples, Strong Families* (Agreement, October 2018) <<http://www.vic.gov.au/dhelk-dja-partnership-aboriginal-communities-address-family-violence>>; Department of Health and Human Services (Vic), 'Nargneit Birrang—Aboriginal Holistic Healing Framework for Family Violence', *VIC.GOV.AU* (Web Page, December 2019) <<http://www.vic.gov.au/nargneit-birrang-aboriginal-holistic-healing-framework-family-violence>>.
- 57 Djirra, Submission No 106 to House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Family, Domestic and Sexual Violence* (July 2020) <<https://www.aph.gov.au/DocumentStore.ashx?id=186ba985-fdc8-4df9-a58c-bec3b2a6bf02&subid=690999>>.

Issues Paper H

Sexual Offences: Civil Law and Other Non-Criminal Responses



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Issues Paper H

Sexual Offences: Civil Law and Other Non-Criminal Responses

Introduction

- 1 This paper is about responses to sexual harm through justice processes other than the criminal process (other justice processes). It covers:
 - civil law
 - laws targeting sexual harassment
 - the Victims of Crime Assistance Tribunal
 - redress schemes
 - regulations and codes of conduct, and service provider policies and obligations.
- 2 The paper is for:
 - people who have used other justice processes to deal with sexual harm
 - people who work in other justice processes or in criminal justice
 - researchers and others interested in the subject.
- 3 The criminal justice system may not meet all the needs of people who have been sexually harmed.¹ Other justice processes may better meet some of their needs, such as to explain the impact of the harm and have their experience acknowledged.²
- 4 In this paper, we ask:
 - if there are best practice examples from other justice processes that could be used in the criminal justice system to improve support for people who have been sexually harmed
 - how the interaction between other justice processes and the criminal justice system could be improved.

Issues Paper H is one of eight papers.
View them at https://lawreform.vic.gov.au/sex_offences_2020/issues_papers.
We encourage you to tell us your views on all the issues you are interested in.

Civil law

- 5 A person who has been sexually harmed can sue the person who harmed them or a related institution ('the defendant') for their injuries. In civil law, the person bringing the case ('the plaintiff') must prove that the defendant committed a wrong ('tort').
- 6 The type of tort depends on who is being sued. An individual can be sued for 'battery'. This is intentional contact with another person's body that is harmful or offensive. Sexual assault is a form of battery.³ If the defendant is an institution, the relevant tort is negligence.
- 7 The Royal Commission into Institutional Responses to Child Sexual Abuse found that the civil justice system had failed people harmed by child sexual abuse.⁴ In response,⁵ Victoria:
 - removed time limits for suing for child sexual abuse⁶
 - introduced legislation to make it easier to sue institutions with complex legal structures⁷
 - imposed a duty on organisations to take reasonable steps to prevent the sexual abuse of children under their care (the 'organisational duty of care').⁸

Relationship between civil and criminal justice

- 8 There are differences and similarities between the civil and criminal justice systems (see Table 1). A difference is the lower burden of proof in civil proceedings. A similarity is that plaintiffs often find it traumatic to give evidence and be cross-examined during the trial.⁹
- 9 Regardless of how civil cases are finalised, the outcome of civil litigation is not included in sexual harm statistics or data gathering.

Table 1: Differences between the criminal justice system and the civil system

Feature	Criminal justice system	Civil system
Standard of proof to establish wrongdoing	Beyond reasonable doubt	Balance of probabilities (a lower standard than 'beyond reasonable doubt')
Role of person harmed by the wrongdoing	A witness for the prosecution (the police or the Office of Public Prosecutions prosecute criminal charges on behalf of the state). The person harmed is not represented by a lawyer.	A party to the proceeding, who sues on their own behalf and usually has their own lawyer to represent them.
Outcome	Verdict of guilty or not guilty (and if guilty a sentence might be served). Potential for public acknowledgement of the crime.	If there was assault or breach of duty of care: financial compensation. Potential for public acknowledgement of the wrong.

- 10 The civil and criminal justice systems interact with each other. For example, before a criminal verdict, the prosecution may apply to the court for a civil order ('a restraining order') to prevent an accused disposing of their property.

- 11 The person harmed may apply to the sentencing court for compensation or restitution after the accused has been found guilty.¹⁰ A compensation order made by a sentencing court is a civil debt owed by the person responsible to the person harmed. This means that if the person responsible refuses to pay, the person harmed must take civil action to have the order enforced.¹¹

Responding to sexual harassment

- 12 Sexual harassment is unwelcome sexual behaviour that is offensive, humiliating, or intimidating (for example, a sexual advance or request for sexual favours).¹² Usually this behaviour is not criminal. However, federal and state laws ban sexual harassment in many places, including schools, clubs, and workplaces.¹³
- 13 Victorian law imposes a duty on employers and others, such as schools, to take steps to prevent sexual harassment.¹⁴ It is also against the law to victimise someone because they have complained about sexual harassment, or because they supported someone who did.¹⁵
- 14 Compensation for sexual harassment can be claimed under either federal or state laws, but not both.¹⁶

Table 2: Federal and state responses to sexual harassment

Level	Description
Federal	The Australian Human Rights Commission can investigate and try to resolve complaints through conciliation. If a complaint cannot be resolved, the matter can be decided by a federal court.
Victoria	The Victorian Equal Opportunity and Human Rights Commission can investigate and try to resolve complaints through conciliation. Applications can also be made directly to the Victorian Civil and Administrative Tribunal. The Tribunal can order compensation or other action to redress loss, damage or injury, and to prevent further harassment. ¹⁷

- 15 A recent Australian Human Rights Commission (AHRC) inquiry found women, young people, Aboriginal people, LGBTIQ people, and those from culturally and linguistically diverse backgrounds are more likely to be sexually harassed. It identified various barriers to reporting sexual harassment and finding justice.¹⁸
- 16 The AHRC's recommendations included:
- taking action to promote gender equality¹⁹
 - ensuring damages reflect current understandings about the effects of sexual harassment²⁰
 - educating and training police and judicial officers²¹
 - creating a best practice guideline on non-disclosure agreements that could require, for example, de-identified reporting of all sexual harassment cases²²
 - imposing a positive legal duty on employers to establish good workplace cultures.²³
- 17 Employers and some other entities in Victoria, such as schools, already have a duty to take reasonable and proportionate measures to eliminate sexual harassment, discrimination and victimisation.²⁴
- 18 There are several technology-assisted responses designed to make it easier to report sexual harassment (see box).

Technology-assisted responses to sexual harassment

Victorian Equal Opportunity and Human Rights Commission interactive online sexual harassment response tool

This 'chatbot' allows employers, people who have been harassed, and bystanders to identify what sexual harassment is and how to respond, including connecting them to support and referral services. The technology is automated, providing standardised responses to the information and choices entered by the user.²⁵

Online reporting tools for sexual harassment on campus

Some universities and colleges, such as Ormond College, provide tools to let students who have been harassed or assaulted, or who know someone who has, to report it online, without identifying themselves. This allows students to report sexual harm without exposing themselves or engaging in a formal justice process. The tool can direct them to support services. It may also help the college or university understand the problem better.

The Victims of Crime Assistance Tribunal

- 19 Victims of any violent crime in Victoria, including sexual offences, can apply for financial assistance or compensation to the Victims of Crime Assistance Tribunal (VOCAT). The crime must have been reported to police and have directly resulted in injury or death.²⁶
- 20 VOCAT can make compensation orders if it is satisfied, on the balance of probabilities, that the harm is a result of the crime.²⁷ A finding of guilt in a criminal court is not needed although, in some cases, the Tribunal will wait for any criminal process to finish first. The Tribunal can also allow the person responsible for the harm to contest the application, but this is rare.²⁸
- 21 VOCAT provides a low cost and relatively informal setting for people who have been harmed to tell their story.²⁹ For some, an award by VOCAT publicly acknowledges their harm and validates their experience.³⁰
- 22 We have previously recommended that VOCAT should be replaced by a more flexible compensation scheme. This would be administered by the Victims of Crime Commissioner. As well as financial assistance, it would provide a forum for acknowledgement and recognition of the harms suffered.³¹

Redress schemes

- 23 Redress schemes are set up in an institution or sector to compensate people who have experienced sexual harm. Some are run by a single institution. Others are run by government, with institutions covering some of the costs.
- 24 The standard of proof required under redress schemes is usually lower than either the criminal or civil burden of proof (Table 3). Most redress schemes provide for restorative engagement processes, such as allowing the person harmed to explain the effects of the harm to a senior representative of the institution.

Table 3: Examples of redress schemes

Features	National Redress Scheme	Victoria Police’s Restorative Engagement and Redress Scheme
Target group	People who experienced child sexual abuse while in the care of an institution or organisation before 1 July 2018 ³²	Former and current Victoria Police employees who experienced sex discrimination, sexual harassment, or other forms of sexual harm in the workplace before 12 December 2019 ³³
Administration	The Commonwealth Department of Social Services	The Department of Justice and Community Safety
Standard of proof	‘Reasonable likelihood’; interpreted to mean ‘more than merely plausible’, and not ‘fanciful’ or ‘remote’ ³⁴	Account is ‘plausible’; there is ‘enough information to reasonably satisfy a person undertaking an assessment that the behaviour occurred’ ³⁵
Core elements	Direct personal response, such as an apology from the institution Provision of counselling and psychological care Financial payments (capped at \$150,000)	Restorative engagement process Provision of counselling Financial payments

Other regulatory regimes

- 25 Some regulatory regimes also protect against and provide measures to respond to sexual harm. These include regulations and codes of conduct, such as in community clubs or in a sector or profession (see box).³⁶ Government departments also require that service providers or contractors comply with relevant policy.³⁷

The Victorian Disability Worker Commission (VDWC)

The VDWC upholds safety standards through a code of conduct that currently applies to all disability workers in Victoria. The code imposes a duty on disability workers to ‘take all reasonable steps to prevent and respond to sexual misconduct’.³⁸

The VDWC can investigate any breach and take action against workers. In serious cases, it can order them to stop providing disability services.³⁹ If there are allegations of criminal conduct, it may refer the matter to the police.⁴⁰

- 26 The Royal Commission into Institutional Responses to Child Sexual Abuse noted that ‘an effective response to institutional child sexual abuse will often require both a criminal justice response and a regulatory response’.⁴¹

Please tell us your views

- 27 We are interested to know if any of the justice processes discussed here, or others you wish to draw to our attention, provide best practice examples for how the criminal justice system should support people who have been sexually harmed. We would also like your views on how other justice processes interact with the criminal justice system.

Questions

- 1 What aspects of other justice processes provide best practice examples for supporting people who have experienced sexual harm?
- 2 How can the interaction between other justice processes and the criminal justice system be improved?

You might think about:

- what is best practice for responding to sexual harm
- how other justice processes meet the needs of those who have been sexually harmed
- any problems that arise from the interaction between criminal and other justice responses to sexual harm
- how data on outcomes from other justice processes could be collected to improve our understanding of sexual offending.

Endnotes

- 1 See Issues Paper G. The limited focus of the criminal justice system and the varied justice needs of people harmed by sexual offending are discussed in Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 9 <<https://cij.org.au/research-projects/sexual-offences/>>; Centre for Innovative Justice, RMIT University, *It's Healing to Hear Another Person's Story and Also to Tell Your Own Story: Report on the CJ's Restorative Justice Conferencing Pilot Program* (Report, October 2019) 3 <https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf>.
- 2 Note that other justice processes should also ensure procedural fairness and respect the rights of people who are accused of sexual offending and related behaviours such as sexual harassment.
- 3 Judicial College of Victoria, '2.2.3 Intentional Torts— Sexual Assault', *Civil Juries Charge Book* (Online Manual, 14 April 2014) <<https://www.judicialcollege.vic.edu.au/eManuals/CJCB/45338.htm>>.
- 4 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, September 2015) 5 <<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>>.
- 5 The changes listed here were also made in response to the earlier findings in Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (Parliamentary Paper No 275, 2013) <<https://www.parliament.vic.gov.au/58th-parliament/fcdc/inquiries/article/1788>>.
- 6 *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic); Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse Are Less Helpful than They Appear' (2020) 43(2) *University of New South Wales Law Journal* 452, 455. Victoria has also legislated to allow courts to set aside past judgments concluded after a limitation period had expired, and settlements reached while a limitation period applied, where the court finds it is just and reasonable to do so. See Victorian Government, *Annual Report 2019—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2019) 15 <<http://www.vic.gov.au/victorian-government-annual-report-2019-royal-commission-institutional-responses-child-sexual-abuse/redress-civil-litigation-report-2015>>.
- 7 *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic); Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse Are Less Helpful than They Appear' (2020) 43(2) *University of New South Wales Law Journal* 452, 455. The Funding Guideline for Services to Children, which commenced on 1 July 2019, requires nongovernment organisations that receive government funding to provide services to children to be incorporated and insured against child abuse: Victorian Government, *Annual Report 2019—Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, December 2019) 15 <<http://www.vic.gov.au/victorian-government-annual-report-2019-royal-commission-institutional-responses-child-sexual-abuse/redress-civil-litigation-report-2015>>.
- 8 *Wrongs Act 1958* (Vic) s 91(2), (3). A criminal offence of 'failure to protect' was also created. It applies to people within organisations who knew of a substantial risk of child sexual abuse by someone in the organisation in relation to a child under its care and who had the authority to reduce or remove the risk, but negligently failed to do so: Victorian Government, *Failure to Protect: A New Criminal Offence to Protect Children from Sexual Abuse* (Factsheet, 2017) <https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/e0/4460c5147/failure_to_protect_betrayal_of_trust_factsheet_2017.pdf>. This offence is discussed in Issues Paper C. In addition, Victoria now has a 'reportable conduct' scheme administered by the Commission for Children and Young People. 'The scheme ... require[s] organisations that have a high level of responsibility for children to report allegations of child abuse and child related misconduct to the Commission for Children and Young People. Certain community service organisations funded by the Department of Health and Human Services [are] covered by the scheme.' *Ibid* 6.
- 9 This was emphasised in submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse. See, eg, Centre for Excellence in Child and Family Welfare Inc, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5—Civil Litigation* (2015) 4 <<https://www.cfecfw.asn.au/wp-content/uploads/2015/05/Royal%20Commission%20-%20Issues%20Paper%205%20-%20Civil%20Litigation.pdf>>; Knowmore, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5—Civil Litigation* (17 March 2014) 20 <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%205%20-%20Submission%20-%202017%20Knowmore.pdf>>.
- 10 Office of Public Prosecutions (Vic), *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (Booklet, 2013) 5–7 <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/December-2013/c-Financial-assistance-brochure-for-victims>>.
- 11 Office of Public Prosecutions (Vic), *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (Booklet, 2013) <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/December-2013/c-Financial-assistance-brochure-for-victims>>. Office of Public Prosecutions (Vic), 'Proceeds of Crime', *Our Work* (Web Page, 2016) <<https://www.opp.vic.gov.au/Our-Work/Proceeds-of-Crime>>.
- 12 *Equal Opportunity Act 2010* (Vic) s 92(1). The Act specifies that 'a reasonable person would have anticipated [the behaviour] would cause someone to feel offended, humiliated or intimidated'. In federal law, sexual harassment is defined along similar lines: *Sex Discrimination Act 1984* (Cth) s 28A.
- 13 Including the *Sex Discrimination Act 1984* (Cth); *Equal Opportunity Act 2010* (Vic), fair work laws, and workplace health and safety provisions.
- 14 *Equal Opportunity Act 2010* (Vic) s 15 (this obligation also applies to discrimination and victimisation).
- 15 *Ibid* ss 103, 104.
- 16 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment* (Report, 2020) 451 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.
- 17 *Equal Opportunity Act 2010* (Vic) s 122.
- 18 Such as insecure work and temporary visa status: Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment* (Report, 2020) 75, 192–7 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.
- 19 The AHRC characterises sexual harassment as a form of sexual violence and argues that policies to redress gendered power imbalances are necessary to combat it: *Ibid* 18, 23, 25, 34, recommendations 6, 7.
- 20 *Ibid* 29, 505–6.
- 21 *Ibid* 34, 506, 584, 589–90, recommendations 24, 40.
- 22 *Ibid* 443, 559–60, 563–4, recommendation 38.
- 23 *Ibid* 28, 34–5.
- 24 *Equal Opportunity Act 2010* (Vic) s 15. In 2020, the Victorian Equal Opportunity and Human Rights Commission produced an updated 'Guideline' to assist employers to meet this duty, including six minimum standards designed 'to tackle the underlying drivers of sexual harassment, break down barriers that deter victims from reporting and build safe, respectful workplaces': Victorian Equal Opportunity and Human Rights Commission, *Preventing and Responding to Workplace Sexual Harassment—Complying with the Equal Opportunity Act 2010* (Guideline, August 2020) <<https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/>>.
- 25 'Sexual Harassment Support and Response Tool', *Victorian Equal Opportunity & Human Rights Commission* (Web Page, 2020) <<https://www.humanrights.vic.gov.au/resources/respond-to-sexual-harassment/>>.
- 26 'Frequently Asked Questions', *Victims of Crime Assistance Tribunal* (Web Page, 2016) <<https://www.vocat.vic.gov.au/how-apply/frequently-asked-questions>>; Office of Public Prosecutions (Vic), *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (Booklet, 2013) <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/December-2013/c-Financial-assistance-brochure-for-victims>>.
- 27 The orders can be made for physical injury or emotional distress, medical expenses, counselling, and loss of earnings. Office of Public Prosecutions (Vic), *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (Booklet, 2013) <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/December-2013/c-Financial-assistance-brochure-for-victims>>.
- 28 'Frequently Asked Questions', *Victims of Crime Assistance Tribunal* (Web Page, 2016) <<https://www.vocat.vic.gov.au/how-apply/frequently-asked-questions>>.

- 29 There are no fees associated with filing a VOCAT application, and an applicant need not be legally represented: Ibid.
- 30 Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014) 90–91 <<https://cij.org.au/research-projects/sexual-offences/>>; 'Frequently Asked Questions', *Victims of Crime Assistance Tribunal* (Web Page, 2016) <<https://www.vocat.vic.gov.au/how-apply/frequently-asked-questions>>; *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 192 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.
- 31 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 29, July 2018).
- 32 The Scheme started on 1 July 2018 and will run for 10 years. All Victorian Government institutions are covered by the scheme. See *National Redress Scheme* (Web Page) <<https://www.nationalredress.gov.au/>>.
- 33 The discrimination/harassment/violence must have been committed by a Victoria Police employee and must have occurred while the person subjected to it was working: 'Restorative Engagement and Redress Scheme', *Victorian Government* (Web Page, 24 April 2020) <<http://www.vic.gov.au/redress-police-employees>>.
- 34 Australian Government, '3.2.1 What Does "Reasonable Likelihood" Mean?', *National Redress Guide* (Online Guides to Social Policy Law Version 1.03, 1 July 2019) <<https://guides.dss.gov.au/national-redress-guide>>.
- 35 'Restorative Engagement and Redress Scheme', *Victorian Government* (Web Page, 24 April 2020) <<http://www.vic.gov.au/redress-police-employees>>.
- 36 In relation to the regulation of community and sporting organisations, see the resources available at 'Safeguarding Children and Young People in Sport, Everybody's Responsibility', *Vicsport* (Web Page, 2020) <<https://vicsport.com.au/blog/1244/safeguarding-children-and-young-people-in-sport-everybodys-responsibility>>. An example of professional regulation is the Australian Health Practitioner Regulation Agency (Ahpra), which sets standards that must be met by all registered health practitioners in Australia. Ahpra and its National Boards, which have oversight of different areas of practice, can take disciplinary action for breaches of professional standards, including in relation to sexual misconduct. See Australian Health Practitioner Regulation Agency, 'Ahpra & National Boards', *Home* (Web Page, 2020) <<https://www.ahpra.gov.au/>>.
- 37 For example, government departments impose obligations on staff and service providers to 'be aware of, and comply with, relevant standards, screening requirements, program requirements and policies on preventing, reporting and responding to child sexual abuse'. See 'Children, Youth and Families—Sexual Assault', *Children, Youth and Families* (Web Page, 2019) <<https://providers.dhhs.vic.gov.au/criminal-offences-improve-responses-child-sex-abuse>>.
- 38 'Disability Service Safeguards—Code of Conduct', *Victorian Disability Worker Commission* (Web Page, 2020) <<https://www.vdwc.vic.gov.au/rights-and-responsibilities/disability-worker-code-of-conduct>>.
- 39 Ibid.
- 40 Ibid.
- 41 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 112 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.

